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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JUN 2 4 2020

AmerisourceBergen Corporation
Attn: Tax Dept.
P.O. Box 959
Valley Forge, PA 19482

Re: Assessment No. 17201402299063
Commercial Activity Tax – 01/01/2009-09/30/2011

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

Tax	Interest	Late Payment Penalty	Total
$1,676,718.00	$190,934.00	$83,834.00	$1,951,486.00

I. BACKGROUND

The petitioner is the reporting member of a consolidated elected taxpayer group that includes over one hundred separate entities. The petitioner is a distribution company offering a full range of generic and brand-name pharmaceuticals, over-the-counter products, and home health care supplies and equipment. The petitioner's customers include hospitals, health systems, physicians, physician groups, retail and mail order pharmacies, medical clinics, and long-term care facilities throughout North America.

The Department of Taxation audited the petitioner's commercial activity tax ("CAT") returns for calendar years 2009 and 2010, and for the first three calendar quarters of 2011. The audit resulted in adjustments to petitioner's CAT liability. Ultimately, the petitioner was assessed for failing to fully remit its CAT liability for the periods at issue. The petitioner filed a petition for reassessment objecting to the assessment on several grounds. The petitioner requested a hearing on this matter, which was held via telephone. This matter is now decided based on the information currently available to the Tax Commissioner.

II. THE PETITIONER'S CONTENTIONS

The petitioner contends that the assessment incorrectly includes amounts that should be excluded from gross receipts and amounts that should be sitused outside Ohio. The petitioner identifies four main categories of receipts that contributed to the assessment:

A. Taxable gross receipts from the sale of tangible personal property that were completely omitted from the original returns;
B. Taxable gross receipts from the sale of tangible personal property that were underreported by certain entities on the original returns;
C. Taxable gross receipts from the sale of services that were completely omitted from the original returns; and

D. Taxable gross receipts that resulted from certain rebates and fees for service.

The petitioner concedes that it underpaid its CAT to some extent. However, it asserts that the assessment is overstated as further described below.[1] The petitioner requests that the Commissioner adjust the assessment in light of these various concessions and contentions.

III. AUTHORITY & ANALYSIS

The CAT is imposed on the privilege of doing business in Ohio and is measured by a person's gross receipts. R.C. 5751.01(F) 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 over a tax period, it must then "situs" those gross receipts to the appropriate location pursuant to section 5751.033 of the Revised Code. That section provides, in pertinent part, situsing requirements for gross receipts from the sale of tangible personal property ("TPP") and for gross receipts from the sale of services. R.C. 5751.033(E) and (I), respectively.

A. GROSS RECEIPTS FROM SALES OF TANGIBLE PERSONAL PROPERTY OMITTED FROM RETURNS

The Department's audit staff identified entities in the petitioner's consolidated elected taxpayer group that sold tangible personal property ("TPP") to purchasers in Ohio that were not included in the petitioner's taxable gross receipts when it prepared its CAT returns. R.C. 5751.01(F)(1) provides examples of amounts that are "gross receipts" for purposes of the CAT. "Gross receipts" includes, in pertinent part, "[a]mounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another."

Pursuant to R.C. 5751.033(E), gross receipts from the sale of TPP are generally sitused to Ohio, and therefore taxable under the CAT, if the property is received in Ohio by the purchaser or the purchaser's designee. The petitioner's audited records and federal apportionment schedules indicated that these entities made sales of TPP to purchasers that received such property in Ohio.

The petitioner acknowledges that it omitted these taxable gross receipts from its CAT returns and does not contest their inclusion in the amount assessed. Likewise, the Commissioner finds that the assessment properly includes these taxable gross receipts and no adjustment to the assessment is warranted for this issue.

B. UNDERREPORTED GROSS RECEIPTS, INTERMEMBER GROSS RECEIPTS, AND SALES TO A Q.D.C.

During the audit, the Department's audit staff attempted to reconcile amounts reported on the petitioner's CAT returns with the petitioner's state sales apportionment schedules. The auditor requested information explaining the difference between the petitioner's Ohio sales apportionment amounts and the amounts reported on the petitioner's CAT returns. However, the petitioner failed to adequately explain the difference prior to the conclusion of the audit. As a result, to the extent that the petitioner's Ohio-

[1] Each category of taxable gross receipts described above is discussed in turn under the corresponding lettered section of the "Authority & Analysis."

apportioned sales exceeded the amounts reported on the petitioner's CAT returns, the difference was assessed. The petitioner identifies three issues that contributed to this adjustment.

First, the petitioner states that a portion of the assessed amounts relate to a "mechanical error" in how it calculated its taxable gross receipts for the CAT. The petitioner concedes that this error resulted in the underreporting of taxable gross receipts for several entities. The Commissioner finds that the assessment properly reflects these taxable gross receipts and no adjustment to the assessment is warranted for this issue.

Second, the petitioner contends that some of the difference between the amounts reflected on its state sales apportionment schedules and the CAT returns filed for the periods in question is attributable to excludable sales among members of the petitioner's consolidated elected taxpayer group.[2] The petitioner explains that it prepares its state apportionment schedules without adjusting for intermember sales. So, if one of petitioner's entities sold 50% of its goods to members of its taxpayer group in Ohio and 50% of its goods to unrelated parties in Ohio, the entire 100% was used to determine its Ohio sales apportionment. Alternatively, when it determined each company's taxable gross receipts for filing CAT returns, the intermember sales were excluded, leaving only the 50% that was sold to purchasers outside the consolidated elected taxpayer group. The petitioner contends that these intermember sales are responsible for a significant amount of the taxable gross receipts that it asserts were incorrectly included in the assessment. To support this contention, the petitioner provided documents reflecting the sales by state by company amounts that it used to prepare its state apportionment schedules as well as documents related to the intermember sales that it used to prepare its CAT returns. During the audit, the Department's audit staff questioned why these supporting documents showed significantly different intermember sales amounts for some of the same periods. The petitioner was unable to provide a satisfactory explanation, so what the petitioner purports to have been intermember sales were included in the assessment. Upon petitioning for reassessment, the petitioner provided additional explanation and support for its intermember sales amounts but acknowledges that it is unable to entirely explain the differing intermember sales figures in the supporting documents. The petitioner concedes that it cannot support the exclusion of all the amounts of intermember sales originally used to prepare its CAT returns and that the difference should be included in taxable gross receipts.[3] Therefore, the petitioner's contention, only with respect to the amounts of intermember gross receipts that it was able to document and support, is well taken. Accordingly, the Commissioner finds that an adjustment to the assessment is warranted for this issue.

Third, the petitioner contends that some of the CAT assessed relates to gross receipts from sales of TPP to a qualified distribution center ("QDC") and should be reduced to reflect the QDC's Ohio delivery percentage. R.C. 5751.01(F)(2)(z) provides an exclusion from gross receipts that allows the suppliers to a QDC to exclude all but a specified percentage of their total gross receipts from the QDC, the QDC's "Ohio delivery percentage." The petitioner asserts that the audit adjustment included gross receipts that one if its entities, Amerisource Health Services Corporation, realized from sales to a QDC. The petitioner requests

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[2] The petitioner elected to file as a consolidated elected taxpayer group pursuant to R.C. 5751.011. As such, it is entitled to exclude gross receipts among members of its taxpayer group. The Commissioner does not take issue with the validity of the petitioner's election or its entitlement to the exclusion of gross receipts among members of its taxpayer group. The only question raised during the audit was the amount of gross receipts that are properly excludable as intermember gross receipts under such election.

[3] On April 30, 2020, the petitioner submitted an additional objection to the assessment based on the inclusion in TGR (by both the petitioner and the Commissioner) of purported intermember gross receipts that had, until that time, been undiscovered. However, the petitioner did not provide any documentation to support this new objection. Therefore, the new objection is not well taken for the same reason that the Commissioner must reject the unproven intermember receipts that are the subject of this paragraph.

that such amounts be reduced to the QDC's Ohio delivery percentage. The petitioner provided summary sales reports to show that some of its gross receipts resulted from sales to a QDC. The sales reports submitted to the Commissioner support this contention. Therefore, the Commissioner finds that the contention is well taken, and an adjustment to the assessment is warranted for this issue.

C. SITUSING GROSS RECEIPTS FROM SERVICES

During the audit, the Department identified that International Physicians Network, LLC ("IPN") and The Lash Group Inc. ("Lash"), both members of the petitioner's consolidated elected taxpayer group, were incorrectly situsing gross receipts from the sale of services. The petitioner situsing both companies' service revenue to the state in which the "income producing activity occur[ed]." At audit, the petitioner did not provide information to properly situs the gross receipts of these two entities. In the absence of such information, the Department estimated Ohio's share of these gross receipts based on AmerisourceBergen Drug Corporation's Ohio sales apportionment ratio.

The petitioner asserts that the auditor incorrectly included gross receipts from services performed by IPN and Lash. Specifically, the petitioner disagrees with the estimate the auditor made that resulted in some of the entities' gross receipts being situsing to Ohio. The petitioner describes IPN's and Lash's activities as follows:

> IPN operates as a GPO [Group Purchasing Organization] which partners with drug manufacturers and practitioners to leverage buying power and obtain pricing advantages for products. ABC sources IPN revenue 100% to Texas as this is where the operations are located and the income producing activity occurs. ABC had submitted along with its petition for reassessment sales by state schedules for IPN based on the location of its manufacturer business partners. Unfortunately, due to system conversion problems, ABC was only able to obtain sales by state data by business partner location for FYE 9/30/2009 and FYE 9/30/2012.
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> * * *
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> Lash provides patient support services including reimbursement support, co-pay assistance programs and patient assistance consulting programs. For state apportionment purposes, ABC apportions Lash's service revenue based on cost of performance. ABC has received sales data based on customer location and has submitted this information * * * for fiscal year end 9/30/2011. Unfortunately, this was the only year that Lash was able to provide due to system conversions and limitations.

R.C. 5751.033(I) is the statutory provision that governs the situsing of receipts from services, and states:

> Gross receipts from the sale of all other services, and all other gross receipts not otherwise situsing under this section, shall be situsing to this state in the proportion that the purchaser's benefit in this state with respect to what was purchased bears to the purchaser's benefit everywhere with respect to what was purchased. The physical location where the purchaser ultimately uses or receives the benefit of what was purchased shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere. If a taxpayer's records do not allow the taxpayer to determine that location, the taxpayer may use an alternative method to situs gross receipts under this division if the alternative method is reasonable, is consistently and uniformly applied, and is supported by the taxpayer's

> records as the records exist when the service is provided or within a reasonable period of time thereafter.

R.C. 5751.033(I) requires an inquiry focused on where the petitioner's purchasers ultimately receive the benefit of its services. See *Defender Security, v. Testa,* 10th Dist. Franklin No. 18AP-238, 2019-Ohio-725, *appeal allowed sub nom. Defender Security. v. Testa*, 156 Ohio St.3d 1444, 2019-Ohio-2498, 125 N.E.3d 913 (2019).

Ohio Adm.Code 5703-29-17 amplifies R.C. 5751.033(I) and provides multiple examples regarding how certain services should be sitused for CAT purposes. Ohio Adm.Code 5703-29-17(C) states that the list of services identified:

> is not meant to be comprehensive, but provides guidance on how to source each service listed. If a service is not specifically listed in this rule, the situsing provisions for a similar service may provide guidance. Situations which arise that do not match the examples provided may need to be handled on a case by case basis. The department of taxation reserves the right to review and adjust any apportionment of gross receipts made by a taxpayer.

While the services that Lash and IPN claim to provide are not specifically described in that regulation, some of those situsing rules provide helpful guidance and context to support the Department's position.

1. International Physicians Network, LLC

It should be noted at the outset that IPN's services are not directed toward, or intended to benefit, the manufacturer business partners ("vendors") with which it negotiates pricing agreements. International Physicians Network, as the name implies, offers services and benefits to its member physicians, medical practice groups, and hospitals ("members" or "member practitioners"). As part of the services and benefits offered to its members, IPN maintains contracts with various vendors that leverage the members' collective purchasing power to achieve bulk pricing, incentives, and other consideration from the vendors. However, the services IPN offers and the benefits attendant to those services are performed for and received by the member practitioners. Examples of some of the additional service offerings from IPN include: Advanced Practice Provider Program, Practice Business Optimization, Practice Growth Advisory, Practice Management Optimization, Smart Rx Processing, Smart Rx Fill, Practice Marketing Tools, and Practice Business Analytics.[4] All of these offerings promise improvements to, efficiencies for, and benefits realized by the member practitioners and the patients they serve. According to its website page titled "Who We Serve," IPN currently serves 4,033 practice groups, 6,364 practices, and 10,899 physicians across the United States.[5] There is no indication that IPN receives the gross receipts at issue from providing services to or on behalf of manufacturers or vendors.

First, the petitioner contends that the audit staff's estimate is improper because few or none of its vendors are in Ohio. This contention incorrectly presumes that the vendors are the purchasers of IPN's services; that the vendors are the persons receiving the benefit of those services; and that the benefit is received where the vendors are physically located. This contention ignores the determinative fact that the services

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[4] International Physicians Network, LLC, *What We Offer* (2020), https://www.ipnonline.com/Pages/What-We-Offer, (accessed February 12, 2020).

[5] International Physicians Network, LLC, *Who We Serve* (2020), https://www.ipnonline.com/Pages/Who-We-Serve, (accessed February 12, 2020).

IPN provides are directed at, and the benefits are received by, its member practitioners. IPN engages with vendors for the purpose of negotiating bulk pricing agreements and other incentives based on the collective purchasing potential of its members. IPN is not negotiating these preferential prices for the benefit of the vendors with whom they seek such incentives. Rather, the benefits of these dealings are directed at IPN's member practitioners. In fact, IPN and the vendors are adverse parties to the negotiations that result in the preferential prices and incentives. A negotiated benefit to one is a detriment to the other. However, the interests of IPN and its member practitioners are aligned in these negotiations. That is because the benefit of IPN's services with regard to negotiating for lower prices and increased incentives from its vendors is received by its members. It would make very little sense for a vendor to pay IPN to negotiate against it for lower prices. Moreover, IPN's ancillary services mentioned above are not offered to vendors, but to its members. By all accounts, IPN's services are meant for and directed toward the benefit of its member practitioners.[6]

The petitioner points to the fact that IPN's administrative fee is paid out of the margins it obtains from these preferential pricing agreements to support its contention that it should situs these gross receipts to the vendors' locations. Because IPN's administrative fee is paid out of these margins by the vendors, the petitioner asserts, the manufacturer is the purchaser of the services. This assertion is without merit. First, R.C. 5751.033(I) primarily looks to where the benefit of a service is received, not the source of the funds, to situs gross receipts from the sale of services. Second, the petitioner's suggestion that the vendor constitutes the source of their gross receipts ignores the fact that the contractual discounts are valueless until the subject goods or services are purchased by its members. For example, IPN may negotiate for a 7% discount on its members' purchases from a specific vendor but further agree that the vendor will extend 5% of that discount to its members and pay IPN the 2% remainder as its "administrative fee." That administrative fee, though paid by the vendor, is earned solely as a result of member purchases and comes out of the discount that IPN was able to negotiate solely as a result of its representation of its membership. IPN does not provide its services to the vendors, so the benefits of the services are not received by the vendors. It is the members' purchases alone that generate value from the vendor agreements for IPN and trigger IPN's claim to its administrative fee. Although the members are not directly paying IPN for these services, they are effectively deferring a portion of the cost savings that IPN negotiated on their behalf as consideration for IPN's services and as an indirect cost of membership.

In sum, the benefit of IPN's services is that its members enjoy lower prices on the products they purchase. As a GPO (Group Purchasing Organization), IPN's purpose is to extend bulk purchasing benefits to the members of its group. Those benefits are received where the lower prices are realized, i.e., at the member practitioners' locations. Based on the documents submitted by the petitioner and the publicly available information published by IPN, the Commissioner finds no basis for the petitioner's assertion that it is providing services to the vendors with whom it maintains pricing agreements.

Next, the petitioner contends that it is unable to situs IPN's service receipts to its vendors' locations for all of the audit periods due "system conversion problems." As a result, the petitioner seeks an alternative method to situs and estimate the taxable gross receipts for IPN. The petitioner further contends that the Commissioner should not use sales apportionment data from AmerisourceBergen Drug Corporation to

[6] International Physicians Network, LLC, *Why IPN Solutions? – Benefits* (2020), https://www.ipnonline.com/Pages/Why-IPN-Solutions/Benefits, (accessed February 12, 2020). "Benefits: Members of IPN's GPO network receive substantial cost savings on many pharmaceutical products, preferred access to educational opportunities and technology solutions, contract performance analysis, and practice support to maximize rebates and discounts. IPN capitalizes on the depth of its membership network, over 7,700 total physicians, to secure industry-leading pharmaceutical and equipment contracts. Additionally, IPN provides practice consultation and efficiency-increasing technology to improve operational performance."

estimate IPN's taxable gross receipts from the sale of its services. These contentions are without merit.

As explained above, the location of the vendors is not the appropriate situs for IPN's gross receipts. Therefore, any system problems related to providing such locations has no bearing on the petitioner's ability to use an alternative situsing method or estimate. Noticeably absent from the petitioner's responses with regard to situsing IPN's gross receipts is information regarding the location of its member practitioners. As the recipients of the benefit of IPN's services, the member practitioners' location data would provide a means of appropriately measuring or estimating the extent of IPN's business privilege in Ohio with respect to the services it offers those members. That information, although collected by and presumably maintained by IPN[7], was not provided to the Commissioner. Accordingly, the petitioner's contention in this regard is not well taken and the Commissioner rejects the petitioners' suggested situsing method for IPN's gross receipts.

The petitioner also contends that the Commissioner's estimate of IPN's taxable gross receipts is inappropriate because the Ohio proportion of sales of goods by AmerisourceBergen Drug Corporation has no relation to the services provided by IPN. As explained above, R.C. 5751.033(I) requires the petitioner to situs IPN's gross receipts from the sale of its services based on where its member practitioners receive the benefit of those services. Moreover, R.C. 5751.033(I) and Ohio Adm.Code 5703-29-17(A) both identify that a taxpayer's method for situsing services must be supported by their business records as they existed at the time of the performance of the service or within a reasonable time thereafter.

The estimated taxable gross receipts for IPN are based on the Ohio sales of goods made by other entities in the petitioner's taxpayer group. Because the Commissioner finds that the benefit of IPN's services is received where its members are making discounted purchases of goods from vendors, AmerisourceBergen Drug Corporation's sales of similar goods to a similar customer base offers a reasonable proxy for apportioning IPN's gross receipts to Ohio. In the absence of data from the petitioner regarding IPN's members' locations, the Commissioner finds that the petitioner has failed to demonstrate error in the estimated taxable gross receipts for IPN and has failed to establish that its proposed method is reasonable, consistent, and uniform based on its records as required by R.C. 5751.033(I) and Ohio Adm.Code 5703-29-17(A).

2. The Lash Group Inc.

The petitioner contends that the taxable gross receipts the audit staff estimated for Lash are overstated. In support of this contention, the petitioner provides information that it claims reflects the amount of gross receipts Lash received from Ohio customers. The information provided relates only to the periods included in Lash's fiscal year ending 9/30/2011. The petitioner does not indicate what records it relied on to determine these amounts. However, it appears from the petitioner's responses regarding Lash that, as is the case with IPN, the petitioner has proposed situsing these gross receipts based on where the fee payments came from. The information provided for Lash refers to the physical locations of pharmaceutical and molecular diagnostic manufacturers as the "source of the revenue." As explained above, the pertinent location for situsing gross receipts from the sale of services is where the benefit of the services is received and not where the payment for those services originates. In fact, R.C. 5751.033(I) states that "[t]he physical location where the purchaser ultimately uses or receives the benefit of what was purchased *shall be paramount* in determining the proportion of the benefit in this state to the benefit everywhere." (Emphasis added) Again, Lash provides "patient support services including reimbursement support, co-

[7] International Physicians Network, LLC, *Membership Application Agreement,* https://www.ipnonline.com/IPN/media/IPN-MediaLibrary/Documents/IPN_Membership _Forms-Application_W9_RebateInfo.pdf (accessed February 12, 2020).

pay assistance programs and patient assistance consulting programs." These services are provided to and used by practitioners and their patients. The Lash Group website states: "we have continued to lead the industry by implementing innovative support services that impact the lives of *the patients we serve.*" (Emphasis added)[8] The benefits of Lash's services, by their own account, are received by the practitioners that use them and their patients.

Nevertheless, the petitioner urges the Commissioner to accept the payment source as the appropriate situs for these gross receipts. This approach ignores both the practitioners that use Lash's services and the patients with whom they directly engage. As is the case with the proposed situsing method for IPN, the petitioner's proposed method is at odds with the statute's requirement to situs gross receipts from services to the location where the benefit is used or received. To illustrate this incongruity, under the petitioner's proposed situsing method, an Ohio doctor's office that is providing healthcare services to an Ohio patient in Ohio should situs the gross receipts from those services to the patient's health insurance company's headquarters because that constitutes the "source of the revenue." This method incorrectly affords the payor's location primacy over the location where the benefit of the service is used or received, which defies the express mandate of R.C. 5751.033(I).

The estimated taxable gross receipts for Lash are based on the Ohio sales of goods made by another AmerisourceBergen Drug Corporation entity. Because the Commissioner finds that Lash's services should be sitused based on the location where the practitioners and patients receiving the benefit of the services are located, the related entity's sales of goods to a similar market of medical services providers offers a reasonable proxy for apportioning Lash's gross receipts to Ohio. In the absence of data from the petitioner regarding where the benefit of Lash's services is being used or received, the Commissioner finds that the petitioner has failed to demonstrate error in the estimated taxable gross receipts for Lash. Further, the petitioner's suggested method conflicts with the requirements of R.C. Ohio Adm.Code 5703-29-17(A) and R.C. 5751.033(I) that a proposed methodology for situsing services be reasonable, consistent, and uniform supported by the taxpayer's business records.

In conclusion, the Commissioner finds that the petitioner's contentions with regard to IPN and Lash are not well taken and no adjustment to the assessment is warranted.

D. REBATES, FEES FOR SERVICE AND OTHER AMOUNTS RECEIVED

The petitioner contends that the assessment incorrectly includes amounts it realized primarily from pharmaceutical manufacturers that were characterized as rebates, fees, and other similar promotional revenue. The petitioner offers the following description of how it earns these amounts:

> When ABDC or ASD enter into a purchase contract with a supplier to buy the supplier's products, the purchase contract sets forth an initial purchase price for those products and a mechanism for the supplier to adjust the purchase price based on subsequent events. ABDC and ASD record the initial purchase price in their respective books and records as a component of their respective cost of goods sold. At some point thereafter when the events contemplated in the contracts are complete, ABDC, ASD, and their respective suppliers adjust the purchase price that ABDC and ASD paid in accordance with the terms of the initial contract. In some instances the subsequent events mandate the supplier return to ABDC or ASD (as the case may be) a portion of the purchase price that ABDC or ASD

[8] AmerisourceBergen Corporation, *The Lash Group – The Last Thing a Patient Should Have to Worry About is Access to Treatment* (2020), https://www.lashgroup.com, (accessed February 12, 2020).

paid.

As an initial matter, this category of receipts covers approximately 50 separate accounts with varying labels and descriptions including "rebate," "fee for service," and "marketing fee." The petitioner asserts that the amounts realized are treated as downward adjustments to their cost of goods sold for purposes of generally accepted accounting principle ("GAAP") financial statement presentation and federal income tax. These amounts, the petitioner asserts, are not gross receipts for purposes of the CAT because, for GAAP financial statements and federal income tax purposes, the petitioner accounts for them as reductions of cost rather than increases to sales. Therefore, the petitioner contends, these amounts cannot be CAT gross receipts because they only result in *net* income for the petitioner, not *gross* income. To arrive at this position, the petitioner relies on a winding analysis that begins with the definition of "gross receipts" in R.C. 5751.01(F) and ultimately concludes that the amounts it receives are not technically included in federal "gross receipts from sales," so they cannot be federal "gross income" or CAT "gross receipts." The petitioner further claims that R.C. 5751.01(F)(4) requires the Commissioner to abide by the federal tax *treatment*, not just the definition, for these amounts. In the alternative, the petitioner contends that these amounts are excluded from gross receipts as "cash discounts allowed and taken." As another alternative, the petitioner contends that these amounts are excluded from gross receipts as "returns and allowances." As yet another alternative, the petitioner contends that these amounts, if they are gross receipts, are not situsted to Ohio under R.C. 5751.033.

First, the petitioner contends that these amounts are not "gross receipts" for purposes of the CAT. R.C. 5751.01(F) 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." In concluding that these amounts are not gross receipts, the petitioner looks past the substantive portions of the definition and focuses solely on the inclusion of the term "gross income" within the definition. Because the term "gross income" is not defined under section 5751.01 of the Revised Code, the petitioner points out that R.C. 5751.01(K) is required to fill in the meaning of that term.

R.C. 5751.01(K) states, in relevant part, that "[a]ny term used in this chapter that is not otherwise defined has the same meaning as when used in a comparable context in the laws of United States relating to federal income taxes unless a different meaning is clearly required." Internal Revenue Code ("I.R.C.") section 61 states, in relevant part, that "gross income" means "all income from whatever source derived, including (but not limited to) the following items: * * * (2) Gross income derived from business; Gains derived from dealings in property; * * *." When supplemented with the I.R.C. definition of "gross income," R.C. 5751.01(F) 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 [all income from whatever source derived]." The petitioner fails to describe how incorporating the definition of the term "gross income" into the definition of "gross receipts" cuts against the inclusion of these amounts in the petitioner's CAT gross receipts. In fact, the definition of "gross income" in I.R.C. 61 is, much like the definition of "gross receipts," very broad and meant to encompass all sources of income that are not specifically excluded from the definition. The petitioner admits that it relies on the amounts at issue to generate net income and profit, putting petitioner's own contention in clear conflict with itself. This is because petitioner does not seek to supplement the definition of "gross receipts" for the CAT with the definition of "gross income" from federal income tax law as appropriate under R.C. 5751.01(K). Instead, petitioner seeks to bootstrap federal tax accounting and GAAP financial presentation concepts to the otherwise unremarkable use of the term "gross income" in the definition of "gross receipts." Furthermore,

the definition of "gross receipts" is necessarily broader than the I.R.C. definition of "gross income," because gross receipts are amounts "that contribute to the production of gross income." R.C. 5751.01(F). This phrase suggests that "gross receipts" includes amounts that are not ultimately considered "gross income" so long as they contribute to the ability of a person to produce gross income. If the General Assembly intended to define "gross receipts" to include only items that are "gross income" under federal income tax principles, they would have explicitly done so. The petitioner incorrectly reads R.C. 5751.01(K), not as a means to supplement the definitions of undefined terms, but as an operative statute that requires the Commissioner to apply federal income tax accounting principles to any term whose definition is supplemented by a federal counterpart. This interpretation of the statute patently exceeds the scope and intent of the CAT "definitions" statute. Accordingly, the Commissioner finds that the amounts at issue are "gross receipts" for purposes of the CAT.

Second, the petitioner contends that the amounts at issue are excludable cash discounts. R.C. 5751.01(F)(2) provides a number of exclusions from CAT "gross receipts." In particular, that section provides an exclusion for "cash discounts allowed and taken." R.C. 5751.01(F)(2)(bb). The Commissioner promulgated Ohio Administrative Code ("Ohio Adm.Code") 5703-29-14 to define "cash discounts" and provide examples of the application of this exclusion.[9] Ohio Adm.Code 5703-29-14 provides, in relevant part:

> (2) For purposes of this rule, "cash discounts" include the following, provided they are only based on making timely payments or volume purchases:
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> (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;
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> (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.

Division (B) of the Ohio Adm.Code 5703-29-14 provides examples of transactions that would qualify for the cash discounts exclusion. Of particular relevance are the following:

> (2)(a) As another example, for promotional purposes and in order to boost its sales, a car manufacturer announces that it will provide an incentive-based rebate of one thousand dollars per "Model A" car to all dealers that sell at least one hundred "Model A" cars in a given quarter. A car dealer located in Columbus, Ohio sells two hundred "Model A" cars in the first quarter of 2006. In accordance with its incentive program, the manufacturer sends the dealer a check for two hundred thousand dollars. The two hundred thousand dollar incentive-based rebate does not have to be included in the dealer's gross receipts for purposes of the commercial activity tax and the manufacturer can reduce its gross receipts by such amount as a deduction.
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> (b) In contrast, assume a manufacturer provides an incentive-based rebate to the car dealer's customers and that the customer, whether required to or not, signs the rebate over to the car dealer. This incentive-based rebate may not be deducted by the manufacturer or the car dealer as a cash discount, as such rebate was paid to the purchaser's customer and not to

[9] Ohio Adm.Code 5703-29-14 was amended effective 6/20/2019. The prior version of the rule was effective during all the periods at issue in this petition. Even if the amended rule was in effect at the time of the audit, the Commissioner's determination of this issue would be unchanged.

the purchaser.

(3)(a) As another example, a hardware store accepts a manufacturer's coupon for a one dollar discount of two boxes of "X Brand" nails. The hardware store remits the coupon to "X Brand" manufacturer and "X Brand" manufacturer reimburses the hardware store the one dollar discount taken, plus the eight-cent handling fee. When the hardware store receives the one dollar and eight cent rebate from the manufacturer, it must include that amount in its gross receipts for purposes of the commercial activity tax. "X Brand" manufacturer may not claim any reduction (i.e., deduction) from its gross receipts for such reimbursement because the reimbursement goes to the retailer that accepted a coupon from its customer and not a reimbursement directly to the retailer. It is also not a reimbursement to the purchaser based on timely payment or volume purchases.

(b) Assume, however, that the Ohio hardware store advertises a one dollar discount on two boxes of "X Brand" nails, and provides a store coupon for a one dollar discount on purchase of the two boxes of "X Brand" nails. The store is not reimbursed by "X Brand" manufacturer for any such coupons tendered. When the customer purchases the nails and is given a one dollar discount, the hardware store is not required to include that one dollar in its calculation of gross receipts for purposes of the commercial activity tax.

Examples (2) and (3) from the rule provide descriptions of discounts and rebates that are excluded and discounts and rebates that are not excluded from gross receipts. The petitioner argues that all of the amounts at issue constitute excluded "cash discounts." However, the examples above illustrate that not all rebates, discounts, or other amounts that reduce cost of goods sold for GAAP and federal income tax constitute exclusions from gross receipts for purposes of the CAT. As mentioned above, these accounts track varied types of receipts, including "rebate," "fee for service," and "marketing fee" receipts. To determine the extent to which the exclusion for "cash discounts" might apply to these accounts, the Department's audit staff requested detailed descriptions of the various rebate and fee-for-service accounts in question. The petitioner provided detailed descriptions for some of the accounts in question but not for all the accounts. Where the Department's audit staff was able to determine that a specific account met the definition of an excludable cash discount, the account was removed from the petitioner's gross receipts. For accounts that did not meet the definition of "cash discount," or where the description for the account was not provided or was insufficient to support exclusion, the auditor included such amounts in the petitioner's gross receipts. It is worth noting that the Department's audit staff requested descriptions and information for about 71 such accounts and determined that 21 of the accounts were "cash discounts" pursuant to Adm.Code 5703-29-14. The receipts related to those 21 accounts were not included as taxable gross receipts for purposes of the assessment. The petitioner did not provide descriptions or evidence during the audit or the administrative appeal period sufficient to show that the remaining 50 accounts related to receipts that can be excluded as cash discounts. It is also worth noting that the petitioner similarly concluded at some point that several of these accounts contained taxable gross receipts and had included them in their original CAT returns. The petitioner now attempts to lump all of these varied revenue sources into one category in order to apply a one-size-fits-all analysis in the hopes of achieving a wholesale disposal of these amounts from the assessment. However, the Department's audit staff already removed amounts determined to be excluded from gross receipts and included only the amounts that were determined to be properly included in the CAT base. Accordingly, the Commissioner finds that the amounts at issue remaining in the assessment are not excludable "cash discounts" within the meaning of R.C. 5751.01(F)(2)(bb) or Ohio Adm.Code 5703-29-14.

Third, the petitioner contends that the amounts at issue are excludable returns and allowances. R.C. 5751.01(F)(2)(cc) provides for an exclusion from gross receipts for "returns and allowances." The petitioner offers no explanation or description for why these amounts constitute "returns and allowances" for purposes of the CAT. Further, the Commissioner cannot readily deduce from the evidence supplied by the petition or the broader facts and circumstances that these amounts are excludable returns and allowances. Accordingly, the petitioner has not established that these amounts are excludable "returns and allowances" within the meaning of R.C. 5751.01(F)(2)(cc).

Fourth, the petitioner contends that the amounts at issue "are not 'taxable gross receipts' as that term is defined by R.C. 5751.033." As an initial matter, the term "taxable gross receipts" is defined by R.C. 5751.01(G). R.C. 5751.033 provides the requirements for situsing gross receipts. Gross receipts that are sitused to Ohio pursuant to R.C. 5751.033 are "taxable gross receipts" for purposes of the CAT. The petitioner offers no explanation or description for why these amounts are not "taxable gross receipts" as contemplated by the CAT statute. Further, the Commissioner cannot readily deduce from the facts and circumstances that the amounts are not taxable gross receipts. Accordingly, the Commissioner finds that these amounts are properly sitused to Ohio and are "taxable gross receipts" pursuant to R.C. 5751.01(G).

E. Penalty Abatement

The Tax Commissioner may abate penalties imposed for the failure to file a return and the failure to pay the full amount of tax due. R.C. 5751.06(F). Based on the facts and circumstances, the Commissioner shall abate the penalty related to this issue in full.

F. Constitutional Objections

To the extent that the petitioner raises constitutional objections, the Tax Commissioner is without jurisdiction to adjudicate the constitutionality of any provision in Title 57 of the Revised Code. However, the laws of Ohio are presumed to be constitutional. See State ex rel. *Swetland v. Kinney*, 69 Ohio St.2d 567 (1982).

IV. Conclusion

For the foregoing reasons, the audit assessment is affirmed in part and modified in part. Additionally, the penalty amount is fully abated.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Late Payment Penalty	Total
$1,338,666.00	$152,439.00	$0.00	$1,491,105.00

Current records indicate that no payment of has been made on this assessment, leaving the adjusted balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law**. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, P.O. Box 1090, Columbus, OH 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 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
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUN 2 4 2020

APRO International, Inc.
9081 Best Bower Ct.
Vienna, VA 22182 - 2170

Re: Ohio Tax Account #: 96220250
Tax Type: Commercial Activity Tax
Assessment No. 100001118183
Reporting Period: 12/31/2014 – 12/31/2017

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

Tax	AMT	Interest	Penalty	Payment	Amount Owed
$5,832.00	$4,000.00	$640.95	$737.39	($9,832.00)	$1,378.34

The Ohio Department of Taxation assessed the petitioner after conducting an audit of its CAT account for the period in question. Through that audit, the Department's audit staff identified that the petitioner had substantial nexus with the State of Ohio through the bright-line presence in accordance with R.C. 5751.01(H)(3) and R.C. 5751.01(I) and had taxable gross receipt of at least five hundred thousand dollars for the calendar year(s). The audit staff also determined that the petitioner underreported its taxable gross receipts per R.C. 5751.01(G). Based on the findings of the audit, the Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner does not contest the CAT liability assessed, but requests an abatement of the penalty and interest assessed. The petitioner contends that its initial failure to comply with its CAT obligations was due to its unfamiliarity with Ohio CAT. The petitioner did not request a hearing on the matter; therefore, this matter is decided based upon information available to the Tax Commissioner.

As to penalty abatement, R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The evidence and circumstances, including the petitioner's payment of tax amount assessed, total payment of interest assessed, and its compliance with its CAT obligation following the assessment support a full abatement of the penalty. However, the interest assessed cannot be abated, as the accrual of interest is mandatory pursuant to R.C. 5751.06(G).

Accordingly, the assessment is adjusted as follows:

Tax	AMT	Interest	Penalty	Payment	Total Due
$5,832.00	$4,000.00	$640.95	$0.00	($9,832.00)	$1,378.34

Current records indicate that a payment of $1,378.34 has been made on this assessment, resulting in a refund in the amount of $737.39. If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the 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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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000352

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FINAL DETERMINATION

Date:

JUN 2 4 2020

Batanian Tree Service Inc.
6129 Winterhaven Dr.
Sylvania, OH 43560-9596

Re: Refund Claim No. 95034790
Commercial Activity Tax – 10/01/2015 – 12/31/2015

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

Refund Claim No.	Refund Claimed
95034790	$431.00

Batanian Tree Service, Inc. (hereinafter "BTS") filed a claim for refund pursuant to R.C. 5751.08. The claimant did not request a hearing, so the matter is decided based on the evidence contained within the refund claim and upon Department records.

BTS contends that during the Fourth Quarter of 2015 its filings "were overstated" and it had inadvertently included exempt sales receipts in tabulating its taxable gross receipts. It claims further that the exempt sales receipts should be excluded from its taxable gross receipts and its CAT should be reduced in proportion to the overpayment for the period at issue. In its refund claim, BTS did not provide evidence sufficient to specify which sales tax exemptions it should be entitled to or why sales tax exemptions entitle it to a refund on its CAT. The CAT is a tax on gross receipts governed by Chapter 5751, and refunds on sales taxes are governed under R.C. 5739.07. Despite Department requests, the claimant did not provide evidence demonstrating which CAT exclusion or exemption it is entitled to pursuant under Chapter 5751. Furthermore, the claimant did not specify which sales tax exemption it is entitled to under R.C. 5739.07, and it did not file an amended return or other documentation specifying how the sales exemption should affect its taxable gross receipts.

For the foregoing reasons, BTS's claim for refund is denied in full.

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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FINAL DETERMINATION

Date:

JUN 2 4 2020

Brines Refrigeration Heating & Cooling, Inc.
26400 Southfield Rd.
Lathrup Village, MI 48076

Re: Ohio Tax Account #: 96219886
Tax Type: Commercial Activity Tax
Assessment No. 100001062423
Reporting Period: 01/01/2011 – 12/31/2017

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

Tax	Interest	Penalty	Total
$66,052.00	$7,350.23	$9,907.80	$83,310.03

The Ohio Department of Taxation assessed the petitioner after conducting an audit of its CAT account for the period in question. Through that audit, the Department's audit staff identified that the petitioner had substantial nexus with the State of Ohio through the bright-line presence in accordance with R.C. 5751.01(H)(3) and R.C. 5751.01(I) and had taxable gross receipt of at least five hundred thousand dollars for the calendar year(s). Based on the findings of the audit, the Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner does not contest the CAT liability assessed but requests an abatement of the penalty and interest assessed. The petitioner did not request a hearing on the matter; therefore, this matter is decided based upon information available to the Tax Commissioner.

As to penalty abatement, R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The evidence and circumstances, including the petitioner's payment of tax amount assessed, total payment of interest assessed, and its compliance with its CAT obligation following the assessment support a full abatement of the penalty. However, the interest assessed cannot be abated, as the accrual of interest is mandatory pursuant to R.C. 5751.06(G).

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$66,052.00	$7,350.23	$0.00	$73,402.23

Current records indicate that a payment of $83,310.83 has been made on this assessment, resulting in a refund in the amount of $9,907.80. If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the 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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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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0000000273

FINAL DETERMINATION

Date: JUN 17 2020

C & T Coal, Inc.
507 Main St.
P.O. Box 940
Coshocton, OH 43812

Re: Refund Claim No. 036021254728
Commercial Activity Tax

This is the final determination of the Tax Commissioner with respect to an application for commercial activity tax (CAT) refund filed pursuant to R.C. 5751.08. The refund amount sought is as follows:

Period	Refund
01/01/2017 – 03/31/2017	$268.42

I. BACKGROUND & CLAIMANT'S CONTENTIONS

In January 2018, the claimant filed an application for refund for the period at issue. Specifically, the claimant contends it was not in business during the period at issue and, therefore, requests a refund of all payments remitted to the Department for 2017. Thereafter, the Department requested that the claimant submit any documentation necessary to support the overpayment request for the period at issue. Upon initial review, the Department denied the refund claim because the claimant failed to provide any supporting documentation for the overpayment amount.

The claimant objects to the denial and requests an administrative review of the initial refund denial in accordance with R.C. 5703.70. The claimant did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim.

II. AUTHORITY

A. APPLICATIONS FOR CAT REFUNDS

R.C. 5751.08(A) governs CAT applications for refund and provides that:

> An application for refund to the taxpayer of the amount of taxes imposed under this chapter that are overpaid, paid illegally or erroneously, or paid on any illegal or erroneous assessment shall be filed by the reporting person 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 (F) of section 5751.09 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.*

(Emphasis added.)

B. A Tax Measured By Gross Receipts

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

III. Analysis

The Department has reviewed the documentation submitted by the claimant with its refund claim as well as the additional documentation that the claimant later submitted during the administrative review period. After reviewing the documents originally submitted by the claimant, the Department requested that the claimant provide proof that the payment it alleged was remitted to the Department was received by the Department. However, the claimant did not provide sufficient documentation to support the issuance of a refund. The claimant submitted a Request to Change Election Status form (CAT ES) to change its filing entity type from a consolidated elective taxpayer group (CET) to a single entity. The claimant also submitted a Request to Cancel/Reactivate Account form (CAT CR) to close its account due to its taxable gross receipts being less than $150,000. The claimant's CAT account was closed effective December 31, 2017.

Refunds are available for overpaid, illegal, or erroneously assessed taxes, but the applicant shall provide documentation to support the refund amount requested. R. C. 5751.08(A). In this case, the claimant has failed to provide sufficient evidence to prove that the payment it alleges it remitted was received by the Department or that a replacement payment was subsequently remitted to the Department. Department records indicate that on December 5, 2017 the claimant attempted to remit $218.42 to the Department but the payment was canceled due to the claimant's bank account being closed. However, "even if the [CET's] total taxable receipts are below one hundred fifty thousand dollars * * * the group must still pay the flat (minimum) tax. Ohio Adm.Code 5703-29-04. While the claimant's taxable receipts were below $150,000 in tax year 2017, the claimant was a member of a CET group and, therefore, must still pay the annual minimum tax (AMT).

IV. Conclusion

In the case at hand, the claimant has failed to meet its burden of proof of showing that the payment it alleges it remitted was received by the Department. The information submitted by the claimant is too speculative to support the claimant's contention that the Department received the claimant's payment without providing sufficient supporting documentation.

Accordingly, the refund claim is denied.

JUN 17 2020

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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FINAL DETERMINATION

Date:

JUN 24 2020

Cadence Premier Cargo, Inc.
2250 S. Chicago St.
Joliet, IL 60436 - 3126

Re: Ohio Tax Account #: 96221486
Tax Type: Commercial Activity Tax
Assessment No. 100001118222
Reporting Period: 01/01/2012 – 12/31/2017

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

Tax	Interest	Penalty	Payment	Amount Owed
$60,551.00	$5,503.55	$4,541.30	($65,994.83)	$4,601.02

The Ohio Department of Taxation assessed the petitioner after conducting an audit of its CAT account for the period in question. Through that audit, the Department's audit staff identified that the petitioner had substantial nexus with the State of Ohio through the bright-line presence in accordance with R.C. 5751.01(H)(3) and further that it had gross receipts and it was situsable to Ohio pursuant to R.C. 5751.033(G). Based on the findings of the audit, the Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment.

The petitioner does not contest the underlying tax and interest amounts assessed but contends that its initial failure to comply with its CAT obligations was due to its unfamiliarity with Ohio's taxes. R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The evidence and circumstances, including the petitioner's payment of tax amount assessed, fraction payment of interest assessed, and its part compliance with its CAT obligation following the assessment support a partial abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Payment	Total Due
$60,551.00	$5,503.55	$2,270.65	($65,994.83)	$2,330.37

Current records indicate that no additional payments have been made on this assessment, leaving the adjusted balance due. However, due to processing and posting time lags, other payments may have been

made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total**. Payments shall be made payable to the "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

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

Central Florida Restaurants Inc.
3550 Mowry Ave Ste 301
Fremont, CA 94538-1461

Re: Refund Claim No. 377290280498
Commercial Activity Tax

This is the final determination of the Tax Commissioner with respect to an application for commercial activity tax (CAT) refund filed pursuant to R.C. 5751.08. The refund amount sought is as follows:

Period	Refund
10/01/2017 – 12/31/2017	$56,442.00

I. BACKGROUND & CLAIMANT'S CONTENTIONS

In February 2018, the claimant amended its CAT return for the period at issue reporting an overpayment of tax. In its refund application, the claimant contends that its gross receipts for the fourth quarter of 2017 was erroneously reported as $24,120,210.00 instead of $2,412,021.02. Upon initial review, the Department denied the refund claim because the claimant failed to provide sufficient supporting documentation for the overpayment amount.

The claimant objects to the denial and requests an administrative review of the initial refund denial in accordance with R.C. 5703.70. The claimant did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim.

II. AUTHORITY

A. APPLICATIONS FOR CAT REFUNDS

R.C. 5751.08(A) governs CAT applications for refund and provides that:

> An application for refund to the taxpayer of the amount of taxes imposed under this chapter that are overpaid, paid illegally or erroneously, or paid on any illegal or erroneous assessment shall be filed by the reporting person 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 (F) of section 5751.09 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.*

(Emphasis added.)

B. A TAX MEASURED BY GROSS RECEIPTS

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

III. ANALYSIS

The Department has reviewed the documentation submitted by the claimant with its refund claim as well as the additional documentation that the claimant later submitted during the administrative review period. After reviewing the documents originally submitted by the claimant, the Department requested documentation to support the gross receipts reported on the claimant's original and amended returns. In response, the claimant provided Ohio Business Gateway (OBG) printouts, an excel spreadsheet, and quarterly reconciliations for each location of their business.

Refunds are available for overpaid, illegal, or erroneously assessed taxes, but the applicant shall provide documentation to support the refund amount requested. R. C. 5751.08(A). Upon review of the documentation submitted, the gross receipts reported on the reconciliations, less applicable discounts, do not match the amended return filed. The documentation submitted by the claimant also indicates that the claimant is filing their taxable sales amount less than their nontaxable sales for sales tax purposes as their CAT taxable gross receipts. However, the reporting requirements for CAT and sales tax are not the same. As stated above, "gross receipts" for CAT purposes 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). In this case, the claimant has failed to provide sufficient evidence to verify its taxable gross receipts reported on its amended return. Accordingly, the Department has not been able to reconcile the taxable gross receipts reported on the amended return with the documentation submitted by the claimant and the evidence currently available to the Tax Commissioner.

IV. CONCLUSION

In the case at hand, the claimant has failed to meet its burden of proof of showing that the originally filed CAT return was overstated. Accordingly, the evidence currently available to the Tax Commissioner indicates that the taxable gross receipts and CAT liability which were initially remitted and reported were accurate. The information submitted by the claimant is insufficient to support the claimant's contention that the original CAT return was overstated without providing sufficient supporting documentation for its taxable gross receipts reported on its amended return.

Accordingly, the refund claim is denied.

0000000221
JUN 17 2020

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

FINAL DETERMINATION

Date: JUN 24 2020

CS Trucking, LLC
7324 Woodbury Pike
Roaring Spring, PA 16673

Re: Ohio Tax Account #: 96219739
Tax Type: Commercial Activity Tax
Assessment No. 100001115867
Reporting Period: 01/01/2012 – 12/31/2017

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

Tax	Interest	Penalty	Amount Owed
$55,512.00	$6,437.06	$27,756.00	$89,705.06

The Ohio Department of Taxation assessed the petitioner after conducting an audit of its CAT account for the period in question. Through that audit, the Department's audit staff identified that the petitioner had substantial nexus with the State of Ohio through the bright-line presence in accordance with R.C. 5751.01(H)(3) and R.C. 5751.01(I). Based on the findings of the audit, the Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner requests an abatement of the penalty and interest assessed. The petitioner did not request a hearing on the matter; therefore, this matter is decided based upon information available to the Tax Commissioner.

As to penalty abatement, R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The evidence and circumstances, including the petitioner's partial payment of tax amount assessed and its compliance with its CAT obligation following the assessment support a partial reduction of the penalty. However, the interest assessed cannot be abated, as the accrual of interest is mandatory pursuant to R.C. 5751.06(G).

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total Due
$55,512.00	$6,437.06	$23,592.60	$85,541.66

Current records indicate that a $2,044.96 payment has been made on this assessment, leaving an adjusted balance due. However, due to processing and posting time lags, other payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total**. Payments shall be made payable to the "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
30 E. Broad St., 22nd Floor • Columbus, OH 43215

0000000303

FINAL DETERMINATION

Date:

JUN 2 4 2020

Custom Equipment Rental, LLC
DBA Custom Truck & Equipment
ATTN: Ali Shaikh, Director of Tax
7701 Independence Avenue
Kansas City, MO 64125

Re: Assessment No. 100000888589
Commercial Activity Tax: January 1, 2010 through December 31, 2016

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

Tax	Annual Minimum Tax	Preassessment Interest	Penalty	Total
$69,915.00	$7,900.00	$6,321.00	$38,908.00	$123,044.00

I. BACKGROUND

The Department assessed the petitioner, Custom Equipment Rental, LLC (CER), after conducting a field audit of its CAT account for the period in question. CER did business as Custom Truck & Equipment (CTE) during the audit period. It is headquartered in Kansas City, Missouri, and has been licensed to do business in Ohio as a foreign for-profit LLC since 2015.

During the period under audit, CER employed more than 300 people at 14 locations in 9 states. CER sold, rented, fabricated, serviced, modified, and financed equipment and various work truck packages. It provided customers with truck chassis with the necessary equipment mounted, as well as any accessories and custom equipment modifications that were needed to furnish a specific work truck. CER sold, modified, fabricated, serviced, and financed equipment at its primary location in Missouri. CTE's outlying stores sold, modified, and rented heavy duty equipment. During the audit period, approximately 40% of CER's revenues were generated from its leasing operation. CER had locations known as CTE Rail Headquarters and CTE Used Equipment in Kansas City, Missouri, had a facility in Saint Joseph, Missouri, and a Custom Fabrication & Equipment (CFE) location in Sedalia, Missouri. CER had facilities in Wisconsin, Colorado, Georgia, Kansas, Ohio, Florida, and Indiana, and a facility in Canton, Ohio that operated as a Railroad Division.

The Department's audit staff identified that CER had nexus with Ohio and initiated an audit on February 6, 2017. CER stated that it met the requirements to file the CAT as a single entity taxpayer with anticipated annual TGR of less than $1 million. The audit staff helped CER register for the CAT. The taxpayer was not cooperative during the audit process.

CER had not registered for the CAT prior to contact from the Department's audit staff. CER filed Ohio sales tax for years 2012 through 2016 under its Ohio Sales and Use Tax account. Records reflect that CER had business activity in Ohio from truck and equipment sales, rentals, and related services.

The Department's audit staff estimated CAT for the audit period based upon sales and use tax activity and other information available. CER began filing Ohio sales tax returns in 2012 but the audit staff concluded that CER had Ohio sales dating back to the beginning of the audit period. Therefore, the audit staff used 2012 estimated quarterly taxable gross receipts to estimate quarterly taxable gross receipts for 2010 and 2011.

The petitioner requested a telephone hearing. Therefore, a telephone hearing was held on this matter. This matter is now decided based on the evidence currently available to the Tax Commissioner.

II. THE PETITIONER'S CONTENTIONS

The petitioner timely filed a petition for reassessment stating that:

> Custom Equipment Rental LLC and affiliated entities have been through a period of rapid growth and acquisition. Due to expansion, the taxpayer had turnover in the tax function, which caused the Ohio CAT audit not to be addressed. The issue is now in proper hands and the taxpayer is requesting additional time to gather the information necessary to determine the correct amount owed to Ohio.
>
> * * *
>
> The Ohio CAT assessment is for Custom Equipment Rental LLC. However, there are additional entities within the affiliated group that are likely subject to Ohio CAT. Therefore, the assessment, as presented, does not include the proper combined group for Ohio CAT purposes. By providing additional time to gather the necessary information, the Ohio auditor will be allowed to make a proper assessment for the affiliated group of entities.
>
> The Ohio auditor was not provided the information requested to make a proper assessment. Given additional time, the taxpayer will provide the necessary information, in a timely manner. The taxpayer has enclosed some of the preliminary information requested.

In summary, in its petition, the petitioner explains that there are additional related entities that owe CAT and were not assessed. It also describes how the Department's audit staff was not provided with the information necessary for the audit due to turnover in the petitioner's tax department. The petitioner seeks to have the assessment adjusted by providing information to the Department.

III. AUTHORITY

A. A TAX MEASURED BY GROSS RECEIPTS

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

B. SITUSING RECEIPTS RELATED TO SERVICES

Much of the petitioner's receipts are from providing services, and this audit involved situsing a portion of the petitioner's services and equipment sales receipts to Ohio. R. C. 5751.01(G) indicates that "taxable gross receipts" means gross receipts sitused to this state under section 5751.033. R.C. 5751.033(I), which governs the situsing of taxable gross receipts from the sale of services, provides:

> Gross receipts from the sale of all other services, and all other gross receipts not otherwise sitused under this section, shall be sitused to this state in the proportion that the purchaser's benefit in this state with respect to what was purchased bears to the purchaser's benefit everywhere with respect to what was purchased. The physical location where the purchaser ultimately uses or receives the benefit of what was purchased shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere. If a taxpayer's records do not allow the taxpayer to determine that location, the taxpayer may use an alternative method to situs gross receipts under this division if the alternative method is reasonable, in consistently and uniformly applied, and is supported by the taxpayer's records as the records exist when the service is provided or within a reasonable period of time thereafter.

R.C. 5751.033(I) requires an inquiry focused on where the petitioner's purchasers ultimately receive the benefit of its services. *See*, *Defender Security v. Testa* (February 28, 2019), 10th Dist. Franklin No. 18AP-238. The relevant provisions of Ohio Adm.Code 5703-29-17(C) provide that if services relate to various locations both within and without Ohio, the gross receipts may be sitused to Ohio using any reasonable, consistent, and uniform method of apportionment that is supported by the service provider's business records as they existed at the time of the performance of the service or within a reasonable time thereafter.

C. IMPORTANCE OF SUPPORTING BUSINESS RECORDS AND DOCUMENTATION

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

With respect to the situsing of services for CAT, the importance of submitting supporting documentation is clearly identified in both the relevant statute, R.C. 5751.033(I), and the relevant administrative rule, Ohio Adm.Code 5703-29-17(A). Mainly, both provisions identify that a taxpayer's method for situsing services must be supported by their business records as they existed at the time of the performance of the service or within a reasonable time thereafter.

IV. ANALYSIS

Following the telephone hearing, the Department's hearing examiner requested the following information:

- An organizational chart as of January 1, 2010 with ownership percentages of all investments at least 50% owned, including specific voting rights of each person and any changes to the organizational chart for each tax period under audit; a brief business description of each person and the federal employer identification number for each person.
- The amount of the gross receipts and taxable gross receipts for each person indicated in the organizational chart.
- Monthly Trial Balances for each person indicated in the organizational chart for each tax period under audit.
- Chart of accounts in existence for the audit period for each person identified in the organizational chart.
- A complete copy of all federal tax returns (original and amended) filed by or on behalf of any persons included in the CAT registration. Complete tax returns for CTEC Holdings including Schedule K-1 forms for years 2010 through 2016.
- All documentation (including electronic files) necessary to reconcile the taxpayer's books and records through the work papers to the Ohio taxable gross receipts for the audit period.

In response to this request for information, the petitioner submitted the following: partial federal tax returns from 2010 through 2013; trial balances for entities that have Ohio receipts, and the petitioner's estimates of Ohio gross receipts for 2010 through 2016.

The information submitted by the petitioner was incomplete and did not provide the information that the Department requested both on audit and during the administrative appeal period. The petitioner provided partial federal tax returns from 2010 through 2013. The Department needed complete federal tax returns from 2010 through 2016, including all attached statements, schedules, and Schedule K-1s. The petitioner failed to provide a breakdown of each entity's gross receipts that are included in the CTEC Holdings partnership tax returns. The Department needed a complete CER organizational chart as of January 1, 2010 and needed 2010 through 2016 sales apportionment schedules by state for CER and a description of the situsing method(s) used to situs gross receipts to Ohio. However, the petitioner did not provide information sufficient for the Department to compute Ohio taxable gross receipts for the periods at issue. Trial balances were provided on behalf of CER for 2010 through 2012, while the Department needed trial balances through 2016.

The petitioner submitted some of the information requested but did not submitted sufficient documentation in support of its petition. The information submitted is insufficient to support a reduction in the assessment. The Department needed the workpapers used by the petitioner to calculate its 2010 through 2016 taxable gross receipts in order to determine if the Ohio taxable gross receipts schedule submitted by the petitioner is accurate. Regarding the petitioner's equipment sales, rental income and service income revenues, the Department needed a detailed breakout and supporting schedules for these receipts, in order to determine Ohio taxable gross receipts.

V. CONCLUSION

As explained above, the petitioner submitted some information, but that information was neither complete nor sufficient for the Department to be able to recalculate Ohio taxable gross receipts and CAT owed. Therefore, the petitioner has not provided the Tax Commissioner with sufficient concrete evidence supporting a reduction.

The Department has explained the assessment to the petitioner in correspondence. Furthermore, the evidence available to the Tax Commissioner indicates that the CAT, interest, and penalty amounts assessed have been prepared with the best available information and are accurate.

For the reasons stated above, the assessment is affirmed.

Current records indicate that the petitioner has made no payments on the above-referenced 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 should be made 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

0000000296

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JUN 24 2020

Delmar International, Inc.
10636 Chemin de-la Cote-de-Liesse
Lachine, QC H8T 1A5
Canada

Re: Assessment No. 100000902068
Commercial Activity Tax – 01/01/2010 – 12/31/2016

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

Tax	Annual Minimum Tax (AMT	Interest	Penalty	Total
$97,976.00	$8,400.00	$14,336.00	$53,188.00	$173,900.00

I. BACKGROUND

The Department assessed the petitioner, Delmar International, Inc. (hereinafter "Delmar" or "petitioner"), following a field audit that revealed that the petitioner failed to fully to remit its CAT for the above tax period. Delmar is a customs broker headquartered in Lachine, Quebec, Canada. The petitioner contends that it does not have any Ohio warehouses, facilities, or employees. It provides cargo management and supply chain services that include international freight forwarding by air and ocean, custom brokerage services, trucking and ground services, and warehousing and distribution services. While Delmar is in the business of freight transportation and logistics, Department records indicate that it does not own a fleet of trucks and does not directly engage in the transportation of property.

The Department assessed the petitioner for gross receipts from Delmar's sales to Ohio customers in excess of $500,000 during the period assessed. The Department conducted an office audit on Delmar and concluded that it had substantial nexus with the State of Ohio pursuant to R.C. 5751.01(H)(3), and specifically has bright-line presence pursuant to R.C. 5751.01(I), making it subject to the CAT. Prior to being contacted by the Department, Delmar had not registered for the CAT.

Delmar did not request a hearing, so the case is decided based on the evidence contained in the petition for reassessment and Department records.

II. PETITIONER'S CONTENTIONS

While the petitioner concedes that it "may" have substantial nexus with the state of Ohio because it generated gross receipts in the state in excess of $500,000, it disputes the tabulations used by the Department in arriving at the specific amount assessed. To support its contention that the amount assessed does not reflect its actual CAT liability for the period in question, the petitioner provided

documentation that it contends contains an accurate depiction of taxable gross receipts ("TGR") that are situsable to Ohio. The spreadsheet contains gross receipts that the firm generated during the 2010-2016 tax years in chronological order. It lists customer names, Ohio destination cities, file numbers, invoice descriptions, dollar amounts, and conversions from Canadian to U.S. dollars.

The petitioner contends that gross receipts for its brokerage services, arrangement of transportation service, and logistics services should be situsable to Ohio if the property was shipped to Ohio, or the customer received the benefit of Delmar's services in Ohio. However, records reflect that Delmar engages exclusively in the sale of services. It does not sell tangible personal property; it does not own a transportation fleet or property associated with one; and its gross receipts received in Ohio were received in association with the sale of services only.

Moreover, the petitioner contends that its initial delay in responding to the Department was because it is a Canadian business that does not have the resources and personnel necessary to register for and remit the taxes of every individual state in which it does business.

III. AUTHORITY AND ANALYSIS OF FACTS AND CIRCUMSTANCES

A. A TAX MEASURED BY GROSS RECEIPTS

The CAT is a tax imposed on the privilege of doing business in Ohio and is measured by gross receipts. R.C. 5751.02(A) levies the commercial activity tax:

> * * * on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state.

"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".

B. SUBSTANTIAL NEXUS & BRIGHT-LINE PRESENCE

The petitioner had substantial nexus with Ohio because it has a bright line presence in the state. Pursuant to R.C. 5751.01(H), a person has substantial nexus with Ohio if the person meets any of the following conditions:

(1) Owns or uses a part or all of its capital in this state;
(2) Holds a certificate of compliance with the laws of this state authorizing the person to do business in this state;
(3) Has bright-line presence in this state;
(4) Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States.

It must be noted that the Ohio Supreme Court ruled on the substantial nexus issue as it relates to CAT in *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278 (2016). In *Crutchfield*, the taxpayer was a seller of consumer electronics through the internet from locations entirely outside of Ohio. The court found that the taxpayer had nexus with Ohio under R.C. 5751.01(I), and that a physical presence of a business within Ohio is not necessary for imposing Ohio's CAT upon a taxpayer. The Ohio Supreme Court held "the statutory threshold of $500,000 of Ohio sales constitutes a sufficient guarantee of the substantiality of an Ohio nexus for purposes of the dormant Commerce Clause." The Ohio Supreme Court issued similar decisions in *Newegg, Inc. v. Testa*, 149 Ohio St.3d 289 (2016), and *Mason Cos., Inc. v. Testa*, 149 Ohio St.3d 299 (2016). Notably, Ohio's Tenth District Court of Appeals stated that "(i)f there was any doubt after *Crutchfield* that a physical presence was not required under the Commerce Clause for imposing a tax obligation under the CAT, the Supreme Court of the United States put that to rest in *South Dakota v. Wayfair*, 585 U.S.__ , 138 S.Ct. 2080 (2018)." *Greenscapes Home and Garden Products, Inc., v. Testa*, 10th Dist. Franklin No. 17AP-593 (February 7, 2019).

During the audit period, Delmar failed to provide the Department with tabulations representing its taxable gross receipts situsable to its Ohio customers. Delmar was initially selected for audit after the Department discovered that it was not registered for the CAT even though information obtained from its Ohio customers, its company website, and other public records showed that Delmar likely had gross receipts situsable to Ohio in excess of $500,000. Despite extensive communications during the audit period between the petitioner and the Department, Delmar did not provide tabulations of gross receipts generated from Ohio customers. Because the petitioner did not provide calculations for its gross receipts, the Department was not able to calculate and situs gross receipts. Accordingly, the Department's audit staff estimated the petitioner's TGR pursuant to R.C. 5703.36. Moreover, the Department doubled the amount of the reported TGR in its records to account to for other potential Ohio sales to other customers.

Following the assessment, however, the petitioner submitted records of its Ohio taxable gross receipts for the period at issue. Its records included entries dating back from January 2010 to December 2016 and contained the Ohio destination cities, Canadian and American dollar amounts, and the names of Ohio customers for each transaction rendered within that time. The invoices included classifications for "Truck Freight" "Freight Fuel Surcharge" and "Destination Handling," among others. They did not contain warehouse service fees.

Upon further review, the relevant tax periods are the 2014, 2015, and 2016 tax years because they were the years when Delmar established substantial nexus and a bright-line presence with the State of Ohio manifested under R.C. 5751.01(H)(3) and (I)(3), respectively. Delmar's Ohio TGR for 2014, 2015, and 2016 total $3,066,910.30. During the administrative appeal period, the Department has been able to verify that the total petitioner's TGR should be adjusted for the reasons laid out below.

Department records now reflect that gross receipts generated from Delmar's services amounted to more than $500,000.00 in taxable gross receipts in Ohio for the 2014, 2015, and 2016 tax years. Pursuant to R.C. 5751.01(I)(3), Delmar has bright-line presence in Ohio beginning in 2014. Delmar confirmed that it exceeded the $500,000 annual thresholds for the 2014, 2015, and 2016 tax periods in in its petition for reassessment.

Conversely, Department records reflect that it did not generate the requisite $500,000 in TGR during the 2010-2013 tax years.[1] Thus, its bright-line presence only began when it generated $1,077,717.14 in Ohio

[1] Department records reflect that the petitioner realized Ohio taxable gross receipts in the following amounts for the corresponding tax periods: $30,981.29 in Ohio TGR in 2010, $103,680.03 in Ohio TGR in 2011, $191,346.68 in Ohio TGR in 2012, and $322,174.57 in Ohio TGR in 2013.

TGR during the 2014 tax year. Accordingly, the petitioner is not subject to the CAT for any of the above tax periods before 2014.

C. SITUSING CARGO MANAGEMENT AND SUPPLY CHAIN SERVICES FOR CAT PURPOSES

R.C. 5751.01(G) indicates that "taxable gross receipts" means gross receipts situsedto this state under section 5751.033. R.C. 5751.033(I), which governs the situsing of taxable gross receipts from the sale of services, provides:

> Gross receipts from the sale of all other services, and all other gross receipts not otherwise situsedunder this section, shall be situsedto this state in the proportion that the purchaser's benefit in this state with respect to what was purchased bears to the purchaser's benefit everywhere with respect to what was purchased. The physical location where the purchaser ultimately uses or receives the benefit of what was purchased shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere. If a taxpayer's records do not allow the taxpayer to determine that location, the taxpayer may use an alternative method to situs gross receipts under this division if the alternative method is reasonable, in consistently and uniformly applied, and is supported by the taxpayer's records as the records exist when the service is provided or within a reasonable period of time thereafter.

R.C. 5751.033(I) requires an inquiry focused on where the petitioner's purchasers ultimately receive the benefit of its services. *See*, *Defender Security v. Testa* (February 28, 2019), 10th Dist. Franklin No. 18AP-238. The relevant provisions of Ohio Adm.Code 5703-29-17(C) provide that if services relate to various locations both within and without Ohio, the gross receipts may be situsedto Ohio using any reasonable, consistent, and uniform method of apportionment that is supported by the service provider's business records as they existed at the time of the performance of the service or within a reasonable time thereafter.

With respect to the situsing of services for CAT purposes, the importance of submitting supporting documentation is clearly identified in both the relevant statute, R.C. 5751.033(I), and the relevant administrative rule, Ohio Adm.Code 5703-29-17(A). Mainly, both provisions identify that a taxpayer's method for situsing services must be supported by their business records as they existed at the time of the performance of the service or within a reasonable time thereafter. Taxpayers must provide the Tax Commissioner with concrete evidence supporting its request for exclusions and refunds, and mere speculation is not sufficient. See, *Greenscapes Home and Garden Products, Inc. v. Testa* (July 19, 2017), BTA No. 2026-350, citing *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15.[2]

Moreover, Ohio Adm.Code 5703-29-17 amplifies R.C. 5751.033(I) and provides multiple examples regarding how certain services should be situsedfor CAT purposes. Even so, Ohio Adm.Code 5703-29-17(C) states that the list of fifty-four services identified:

> is not meant to be comprehensive, but provides guidance on how to source each service listed. If a service is not specifically listed in this rule, the situsing provisions for a similar service may provide guidance. Situations which arise that do not match the examples

[2] 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.

provided may need to be handled on a case by case basis. The department of taxation reserves the right to review and adjust any apportionment of gross receipts made by a taxpayer.

The petitioner is a customs broker that provides cargo management and supply chain services that include international freight forwarding by air and ocean, custom brokerage services, trucking and ground services, and warehousing and distribution services. Although Delmar states that its services include "trucking and ground services," the firm specifies that it neither owns a transportation fleet nor directly transports property. In documentation provided by the petitioner during the administrative appeal period, Delmar's services are categorized as "…brokerage services, arrangement or transportation services, and logistics services…". Accordingly, the petitioner is seemingly performing services exclusively involving arranging trucking and ground services, rather than directly engaging in transporting products. Because it does not own a fleet, it does not generate mileage, and without tabulations of Ohio mileage contrasted against mileage generated elsewhere, its gross receipts are not subject to R.C. 5751.033(G), which apportions CAT based on mileage within and without Ohio. Thus, where the petitioner does not directly provide transportation services, gross receipts generated in conjunction with its services are governed under R.C. 5751.033(I) and are situsedwhere the benefit of those services is ultimately received or pursuant to specific examples provided in Ohio Adm.Code 5703-29-17.

D. SITUSING GROSS RECEIPTS GENERATED BY TRANSPORTATION SERVICES, BROKERS, AND LOGISTICS

Ohio Adm.Code 5703-29-17(C)(51) governs the situsing of gross receipts generated from transportation services as well as services by brokers and logistics companies in the business of providing transportation services. Delmar is a customs broker that provides cargo management and supply chain services that include international freight forwarding by air and ocean, custom brokerage services, trucking and ground services, and warehousing and distribution services. As such, the generation of its gross receipts is governed under Ohio Adm.Code 5703-29-17(C)(51).

1. BROKERAGE SERVICES

Department records and the petitioner's contentions reflect that Delmar operates as a broker of transportation services. Ohio Adm.Code 5703-29-17(C)(51)(b)(i) defines "broker" as a person who, for compensation, arranges or offers to arrange the transportation of property by an authorized motor carrier; and "brokerage" or "brokerage services" are defined as arranging of the transportation of a motor vehicle or of property. Department records reflect that the petitioner does not own a fleet of vehicles that engages in transportation services, it makes arrangements and facilitates the transportation of property by authorized motor carriers. As such, it is a broker within the meaning of Ohio Adm.Code 5703-29-17(C)(51)(b). Moreover, the petitioner's "custom brokerage" and "trucking and ground services" fall within the code section's "brokerage services" definition because the petitioner is in the business of arranging freight, logistics, and the transportation of property for its customers.

Because the petitioner operates as a broker, its gross receipts are properly situsedwhere they are shipped. Under Ohio Adm.Code 5703-29-17(C)(51)(b)(ii), gross receipts received by a broker not providing any transportation services of the tangible personal property in question, but arranging solely for the provision of transportation services shall be situsedto the location where the property is shipped. Accordingly, gross receipts the petitioner generates in its capacity as a broker for property shipped to Ohio during the relevant tax periods are properly situsedto Ohio. During the audit, the petitioner did not

provide the Department with records evidencing the shipping destination of property for which it brokered transportation services. As such, the Department was forced to estimate the amount of the petitioner's taxable gross receipts based on Department records. However, following the assessment, the petitioner provided tabulations and invoices demonstrating the proportion of shipments made to Ohio during the relevant tax periods and shipments to other locations. The petitioner's tabulations are well-taken.

2. LOGISTICS AND WAREHOUSE SERVICES

Ohio Adm.Code 5703-29-17(C)(51)(c) states that "logistics" includes all process required to go from raw materials to end customer delivery, including purchasing inventory management, warehousing, shipping, and customer returns, but does not include transportation or brokerage services. Additionally, where logistics services relate to shipping operations, gross receipts are situsted based on the location where the product is shipped. In the petitioner's case, its logistics and distribution services are performed in service of its overall transportation and shipping services. As such, gross receipts generated pursuant to its logistics and distribution services are situsted to the location where property is shipped. Accordingly, the petitioner's CAT apportionment with respect to its distribution services are situsted to the locations where they are shipped based on the petitioner's business records.

The petitioner's "warehousing" services are situsted at the physical locations of the warehouse where property is stored pursuant to Ohio Adm.Code 5703-29-17(C)(51)(c). Warehousing services are governed by Ohio Adm.Code 5703-29-17(C)(51)(c)(ii) of the Code, which dictates that gross receipts generated from logistics services related to inventory management and/or warehousing operations are situsted based on the location of the inventory and/or warehouse. In this case, while the petitioner has seven United States locations, none of its facilities or warehouses are in located in Ohio, and the petitioner contends that it does not utilize the warehouses of non-customer third parties in administering its services. As such, because gross receipts from the petitioner's warehousing services are situsted to the states where it retains warehouses and because it does not retain any warehouses in the State of Ohio, gross receipts from the warehousing services are not situsted to Ohio pursuant to Ohio Adm.Code 5703-29-17(C)(51)(c)(ii).

IV. CONCLUSION

The petitioner is subject to CAT for gross receipts generated from its services where the benefits are ultimately received in Ohio and for transportation brokerage services for property shipped to Ohio customers. Records submitted by the petitioner provide sufficient evidence to adjust the estimated taxable gross receipts that the Department estimated on audit pursuant to R.C. 5703.36.

Accordingly, the assessment is adjusted as follows:

Tax	Annual Minimum Tax (AMT)	Interest	Penalty	Total
$7,973.97	$1,750.00	$1,314.16	$3,986.99	$15,025.12

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

FINAL DETERMINATION

Date:

JUN 2 4 2020

Dr. James D. Egbert Optometrist Inc.
6557 Brandt Pike
Dayton, OH 45424

Re: Commercial Activity Tax
Assessment No. 100000935759
Reporting Period: 01/01/2014 – 09/30/2017

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

Tax	Interest	Penalty	Total
$22,575.00	$1,464.00	$1,693.00	$25,732.00

Dr. James D. Egbert Optometrist Inc., doing business as Gemini Eye Care (hereinafter "Gemini Eye Care" or "petitioner") is an eye care center providing comprehensive vision exams, contact lens fittings, Lasik refractive surgery co-management, designer eyewear and same day contacts. On March 23, 2018, the Department assessed the petitioner after performing an office audit for the periods at issue. The Department increased the petitioner's taxable gross receipts due to unreported professional and lab fees and situsted the receipts to Ohio in accordance with R.C. 5751.033(I). Due to the increase in the petitioner's taxable gross receipts, the annual minimum tax (AMT) for tax years 2015 through 2017 was increased from $800.00 to $2,100.00 per R.C. 5751.03(B)(2).

The petitioner does not object to the Department increasing its taxable gross receipts due to its unreported professional and lab fees or increasing its AMT for the periods at issue. However, the petitioner contends that the Department erred in its calculation of its taxable gross receipts by not giving it credit for taxes previously remitted and paid. The petitioner did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the petition.

The Department has been able to verify this contention, and the petitioner's request is well taken.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$20,632.00	$1,437.00	$1,547.00	$23,616.00

Current records indicate that $0.00 has been made on this assessment, leaving a balance due of $23,616.00. 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 (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: JUN 3 0 2020

Evapco Inc.
5151 Allendale Lane
Taneytown, MD 21787

Re: Assessment No. 100001002759
Commercial Activity Tax: 01/01/2014 – 09/30/2017

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

Tax	Interest	Penalty	Payments	Total
$77,339.00	$5,934.00	$5,800.00	$83,370.00	$5,703.00

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 a full abatement of the penalty assessed. Upon initial review, the Department reduced the penalty to 7.5%. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition. A review of the record indicates that the petitioner has remitted the tax and interest amounts assessed in this matter and has timely filed and remitted its commercial activity tax for the periods subsequent to the assessment. Therefore, the evidence and circumstances in this matter support a partial abatement of the penalty.

Accordingly, the assessment shall be adjusted as follows:

Tax	Interest	Penalty	Payments	Total
$77,339.00	$5,934.00	$2,900.00	$83,370.00	$2,803.00

Current records indicate that $83,370.00 has been applied towards this assessment, resulting in a balance due of $2,803.00. 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 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

0000000378

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

JUN 24 2020

Freeman Expositions, LLC.
1600 Viceroy Drive, Suite 100
Dallas, TX 75235

Re: Assessment No. 100001073967
Commercial Activity Tax
Reporting Period: 01/01/2016 – 12/31/2017

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

Tax	Interest	Penalties	Payment	Total
$37,191.00	$2,761.64	$5,578.65	($45,531.29)	$0.00

The Ohio Department of Taxation assessed Freeman Expositions, LLC. (hereinafter referred to as "the petitioner") after conducting an audit for the period in question. The petitioner is a brand experience company that helps clients to design, plan, and deliver various brand experiences for their audiences. Its solutions include strategy, creative, logistics, digital and event technology. The petitioner has a registered CAT account since 2005. The petitioner has its principal place of business outside the State of Ohio and does not maintain any locations in Ohio; however, as described below, records reflect that the petitioner conducted business activity in the State.

During the audit, the Department identified that the petitioner failed to report taxable gross receipts ("TGR") from the sale of services to Ohio customers during the period at issue. The unreported TGR was situsedin accordance with R.C. 5751.033(I). The audit staff made adjustments to reflect TGRs related to sale of services in Ohio. The adjustment resulted in an increase of the TGRs and CAT liability due for the petitioner. The corresponding interest was assessed pursuant to R.C. 5751.06(G). Additionally, the petitioner was assessed penalties pursuant to R.C. 5751.06(B)(1) and (D). In response to the assessment, the petitioner filed a timely petition for reassessment. The petitioner does not contest the CAT liability as assessed and has paid the tax due amount, interest, and penalties but requests an abatement of the penalties assessed. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

The petitioner seeks an abatement of the penalty assessed. R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The information available to the Tax Commissioner, including the petitioner's payment of tax and interest assessed and cooperation during the audit process, support a partial reduction of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalties	Payment	Refund Due
$37,191.00	$2,761.64	$1,394.66	($45,531.29)	$(4,183.99)

Current records indicate that a payment of $45,531.29 reflected above has been made on this assessment, resulting in an overpayment of $4,183.99. This overpayment will be refunded to the petitioner. However, if the petitioner has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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: JUN 30 2020

Guidesoft Inc. d.b.a. Knowledge Services
5875 Castle Creek Parkway North, Suite 400
Indianapolis, IN 46250

Re: Two Assessments
Commercial Activity Tax – Multiple Periods

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

Assessment No.	Tax Period	Tax Due	Interest	Penalty	Total
100000936273	1/1/2014–12/31/2016	$207,189.00	$12,329.00	$31,078.00	$250,596.00
100001538833	1/1/2017-12/31/2018	$426,406.00	$36,094.33	$63,960.90	$526,461.23

The Department assessed the petitioner for the periods and amounts above after performing two separate audits. Specifically, the Department's audit staff identified lower-than-expected taxable gross receipts reported on the petitioner's CAT returns when compared to various other sources of information, including the petitioner's own accounting records and other Ohio tax filings. The petitioner was, in fact, excluding from its CAT returns most of the receipts that it received from its primary Ohio customer. The petitioner could not sufficiently justify this large exclusion to the Department's audit staff. Therefore, the exclusion was disallowed, and the amounts were assessed. The petitioner objects to both assessments in their entirety.

A hearing was held on both petitions for reassessment. Prior to the hearing, the petitioner submitted additional documentation to support the large amounts excluded from their original CAT returns. In particular, a complete initial request for proposal ("RFP") that included all attachments and supplements was provided. The petitioner also provided a detailed description of the nature and activities of its business and how the terms of the RFP and resulting contract translate into actual dealings between it and its Ohio customer. Upon review, and in light of the additional information and explanations provided, the petitioner's contention is well taken.

Accordingly, the assessments are cancelled.

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

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JUN 3 0 2020

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

0000000321

FINAL DETERMINATION

Date:

JUN 24 2020

Hyundai Capital America f/k/a Hyundai Motor Finance Company
Attn: Keun Bae Hong, CFO
10550 Talbert Ave
Fountain Valley, CA 92708-6031

Re: Assessment Nos.: 17201311920241, 100000889759, 100001212253
Commercial Activity Tax: Multiple Periods

This is the final determination of the Tax Commissioner with regard to petitions for reassessment pursuant to R.C. 5751.09 concerning commercial activity tax assessment numbers 100000889759 and 100001212253. This is also the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2015-785, dated February 6, 2020, concerning assessment number 17201311920241.

In resolution of these matters, the Tax Commissioner and the petitioner have reached an agreement to modify the assessments.

Current records reflect that the modified amounts have been paid in full.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000294

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 2 4 2020

Marc Glassman Inc
5841 W 130th St
Cleveland, OH 44130

Re: Assessment No. 100000916065
Commercial Activity Tax
Reporting Period: 01/01/2014 – 12/31/2015

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

Tax	Interest	Penalty	Total
$145,947.00	$11,327.00	$21,892.00	$179,166.00

During the period at issue, the petitioner did business as "Marc's", and was headquartered in Middleburg Heights, Ohio. The petitioner operated over 60 discount grocery stores throughout Ohio with locations in Cleveland, Akron, Canton, Youngstown, and Columbus. The Department conducted a field audit of the petitioner's CAT account which identified that the petitioner underreported taxable gross receipts for the period at issue. The Department made multiple adjustments to the petitioner's CAT account which resulted in the assessment currently considered.

The petitioner filed a timely petition for reassessment raising three one-sentence objections to the assessment, which were: 1) "Not all wholesale sales were in Ohio"; 2) "Management fee is an internal adjustment; no cash changes hands"; and 3) "Most of sales accounts are terms discounts and volume rebates". The petitioner did not submit any supporting evidence with its petition. However, during the administrative appeal period, the petitioner did submit additional evidence regarding its wholesale sales and intercompany rebates which it believes should be removed or excluded from its calculation of taxable gross receipts. The petitioner did not submit additional information or elaborate upon its objection to the audit adjustment relating to management fees.

During the audit, the petitioner claimed that none of its wholesale sales were ultimately received in Ohio. The petitioner did not submit documentation to support this assertion on audit, and the Department's audit staff therefore sitused 100% of the sales to Ohio based on the evidence available at the time. During the administrative appeal period, the petitioner submitted documentation showing 77.58% of its wholesale sales were ultimately received in Ohio, and therefore situsable to this State pursuant to R.C. 5751.033(E). The petitioner also submitted documentation demonstrating that certain rebates should be

excluded from its calculation of taxable gross receipts. As a result and based on the evidence submitted during the administrative appeal period, the tax and interest amounts assessed will be adjusted.

R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The evidence and circumstances, including the cooperation during the administrative appeal period and payment of the adjusted tax and interest amounts, support a full abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$47,918.00	$5,224.00	$0.00	$53,142.00

Current records indicate that a payment of $53,142.00 has been made on this assessment, leaving no additional 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. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL CONCLUDED AND THE FILE APPOPRIATELY 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

0000000280

FINAL DETERMINATION

Date: JUN 17 2020

Marubeni America Corporation
375 Lexington Avenue, 6th Floor
New York, NY 10017

Re: Assessment No. 100000630430
Commercial Activity Tax – 01/01/2014 – 12/31/2015

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

Tax Amount	Interest	Penalty	Total
$8,091.00	$275.00	$1,214.00	$9,580.00

I. BACKGROUND

The Ohio Department of Taxation assessed the petitioner, Marubeni America Corporation ("MAC"), after an audit revealed that it failed to fully remit CAT on gross receipts situsable to Ohio ("TGR"). Specifically, the assessment arose from the petitioner's submission of two apportionment schedules that contained conflicting sales sourcing data. MAC is a U.S. subsidiary of the Japanese manufacturing and trading company, Marubeni Corporation ("Marubeni"). MAC acts as an independent trader, importer-exporter, and broker for agricultural goods commodities, consumer and energy products, and natural resources. Marubeni is a "sōgō shōsha", a Japanese company that trades in a wide range of products, services, logistics, plant developments, and materials. MAC is headquartered in New York City, New York. It has several other U.S. locations and approximately 40 subsidiaries and affiliated companies in the U.S., Canada, and Mexico.

With respect to its CAT liability, MAC was registered and filed CAT as a member combined taxpayer group ("combined group") pursuant to R.C. 5751.012 for the period in question. The combined group consisted of 13 persons—all of which have nexus with the State of Ohio. According to its Federal Schedule 851 Affiliations Schedule, there are 15 entities within the federal income tax affiliated group. The Department identified that the 2 remaining entities reported on MAC's Federal Schedule 851 but were not included in the combined group, Columbia Grain and North Pacific Seafoods, because they lacked nexus with the State of Ohio. Accordingly, the members of combined group for the period in question are listed as follows:

- Marubeni America Corporation ("MAC")
- Marubeni Specialty Chemicals, Inc. ("MSC")
- Helena Chemical Company, Inc.
- MAC Trailer Leasing, Inc.
- Advantage Funding Commercial Capital Corp.
- AAHC, Inc.
- Marubeni Citizen-Cincom, Inc.
- Gavilon Grain, LLC ("GG")

- Gavilon Ingredients, LLC ("GI")
- Gavilon Fertilizer, LLC ("GF")
- All State Belting, LLC
- Mieco, Inc.
- Eastern Fish Company, LLC

Prior to the audit period, the Department contacted MAC to address irregularities in its apportionment schedule for the 2014 and 2015 tax years. In response, MAC submitted a second apportionment schedule. However, the second apportionment schedule contained data about the 2014 and 2015 TGR that contradicted information contained within the first apportionment schedule submitted to the Department prior to the audit period. Pursuant to R.C. 5703.36, the Department attempted to reconcile the inconsistencies, by examining sales tax gross receipts the petitioner submitted to the Ohio Business Gateway ("OBG"). The audit staff identified that MAC's initial CAT filings contained amounts that were somewhat higher than those found on the OBG. The subsequent filing contained receipts that were somewhat lower than on the OBG. Accordingly, the Department assessed the petitioner for failure to reconcile its TGR with the data contained in the OBG and for submitting inconsistent apportionment information.

The petitioner did not request a hearing, so the matter is decided based on the evidence available to the Tax Commissioner and the evidence supplied with the petition.

II. Petitioners' Contentions

The petitioner concedes that there was a discrepancy between its apportionment schedules. It contends that the discrepancy occurred because it had erroneously provided the Department with a "workpaper" version of the second apportionment schedule. The petitioner contends that the amounts for the entities are correct; however, the totals for Gavilon Ingredients' ("GI") and Gavilon Fertilizer's ("GF") third quarter 2015 gross receipts were inadvertently transposed in the workpaper resulting in a transactional error. That is, the $4.5 million for GI should have been apportioned to GF, and the $7.7 million for GF should have been apportioned to GI. Ultimately, the 2015 gross receipts for GI should have totaled $14,995,324.00, and not $18,181,145.00 as originally reported.

In its petition for reassessment, MAC provided the Department with amended copies of its apportionment schedule and state-by-state tabulations of its TGR wherein it accounts for and corrects the erroneous Q3 2015 sales amount. Accordingly, it asserts its Ohio taxable gross receipts should total $198,937,782.00, $3,262,773.00 less than the TGR on file. Moreover, the petitioner contends that where the Department accepts amendments, it will be in compliance with its CAT for the periods at issue, and the assessed amount should be canceled.

III. Authority and Analysis

A. A Tax Measured by Gross Receipts

The CAT is a tax imposed on the privilege of doing business in Ohio and is measured by gross receipts. "Gross receipt" 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." R.C. 5751.02(A) levies the commercial activity tax

> * * * on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state.

The petitioner does not dispute that it or the 13 other members of its combined group had nexus with the State of Ohio or that it should be subject to the CAT for the period at issue.

B. COMBINED TAXPAYER GROUP

For CAT purposes, a group of entities, with a common owner with 50% ownership or control, that chooses not to be a consolidated elected taxpayer must register as a combined taxpayer. R.C. 5751.012. R.C. 5751.012(A) governs combined taxpayer groups for CAT purposes and states, in pertinent part, that:

> All persons *** having more than fifty per cent of the value of their ownership interest owned or controlled, directly or constructively through related interests, by common owners during all or any portion of the tax period, together with the common owners, shall be members of a combined taxpayer group if those persons are not members of a consolidated elected taxpayer group pursuant to an election under section of the Revised Code.

As mentioned, the petitioner is a member of a combined taxpayer group with the other entities identified above as provided for in R.C. 5751.012.

C. THE PETITIONER'S AMENDED SCHEDULES

The primary concern driving the assessment is verifying the proper of the of the combined group's taxable gross receipts. The petitioner was audited because the Department could not discern based on filings submitted which of the combined group's accounts contained an accurate depiction of its TGR. In response, MAC submitted amended documents to reconcile inconsistencies amongst group members' filings.

Amongst the documentation provided during the administrative appeal period, the petitioner submitted several adjustments affecting the TGRs of Gavilon Grain, Gavilon Fertilizer, and Gavilon Ingredients. Each Gavilon company reported adjustments to its gross receipts based on the apportionment data provided on audit and Ohio in accordance with R.C. 5751.033(E). The adjustments resulted in an increase in Gavilon Grain's 2014 and 2015 TGR of $11,643,081 and $379,195 respectively; a decrease in Gavilon Fertilizer's 2014 TGR of $19,176,258; an increase in Gavilon Fertilizer's 2015 TGR of $3,341,408; and an increase in Gavilon Ingredients' 2014 TGR of $6,156,254. However, even accounting for these adjustments, inconsistencies remained between apportionment schedules and gross sales receipts of the combined group.

To reconcile the conflicting apportionment schedules, the Department referred to the petitioner's gross sales receipts pursuant to R.C. 5703.36 to generate its taxable gross receipts. The Department examined the petitioner's gross sales receipts, the petitioner's original apportionment schedule, and the subsequent schedule submitted during the audit. The Department used the highest amounts

reported for each entity in arriving at the petitioner's TGR. The Department assessed the petitioner for the unreported and unpaid TGR generated pursuant to R.C. 5703.36. The petitioner disputed the amount and offered alternative tabulations to account for the discrepancies.

During the initial audit, the petitioner did not provide state-by-state destination sales apportionment schedules, and when compared to the total amounts of Ohio gross sales on the petitioner's use account, it was determined that the Ohio gross sales figure was materially higher than reported on the combined group's TGR. In response to the assessment, the petitioner did submit a schedule that demonstrates the reason for the conflicting apportionment schedules. The petitioner had transposed TGR for GI and GF for the third quarter of 2015, which resulted in the erroneous report. The petitioner provided documentation containing its corrected amounts versus those submitted in association with the audit for each relevant quarter, for each member of the combined group, and specific quarterly calculations for the three Gavilon entities that account for the transposition. Moreover, the petitioner provided both Ohio and state-by-state schedules identifying the erroneous transposition, and it provided alternative apportionments that correct it.

Additionally, it submitted state-by-state monthly invoice receipts to further demonstrate that the error had occurred only on the workpaper and that its internal records were unaffected by it. The subsequent documentation accounts for a decrease in MAC's 2015 TGR of $3,262,773, which would lower its original TGR from $202,200,555 to $198,937,782.

IV. Conclusion

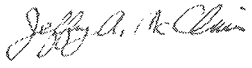
In its initial assessment, the Department used all available evidence to reasonably estimate the petitioner's taxable gross receipts for the period in question pursuant to R.C. 5703.36. However, with its petition for reassessment, MAC provided thorough and sufficient documentation to demonstrate its records had been erroneously submitted and submitted amended tabulations that account for and correct the errors. The Department accepts the amended TGR as filed. Based on the information currently available to the Tax Commissioner, the petitioner had an overpayment of CAT of $392.00 during the periods in question.

Therefore, the assessment shall be adjusted, and the petitioner will be issued a refund of $392.00.

In addition, current records indicate that the petitioner made a payment of $9,580.00 payment on the above-referenced assessment, resulting in a total refund due the petitioner of $9,972.00. 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. 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

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:

JUN 2 4 2020

Paper Resources LLC
1200 High Ridge Rd STE 3
Stamford, CT 06905-1202

Re: Assessment No. 100000965434
Commercial Activity Tax
Reporting Period: 12/31/2017 – 12/31/2017

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

Tax	AMT	Interest	Penalties	Total
$0.00	$75.00	$0.88	$57.50	$133.38

The Ohio Department of Taxation assessed Paper Resources LLC (hereinafter referred to as "the petitioner") for failing to pay the first annual minimum tax ("AMT") of $75.00 owed for the initial period in which it was registered for the CAT. Consequently, the petitioner was assessed a late penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner objects to the assessment and filed a petition for reassessment. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Ohio law requires annual CAT taxpayers (those taxpayers with taxable gross receipts of more than $150,000.00, but not more than $1 million in a calendar year) to file an annual return and pay an AMT of $150.00. R.C. 5751.051. For taxpayers who become subject to and register for the CAT after May 1st, R.C. 5751.051(B) allows the amount of the first year's AMT to be reduced by one half. Generally, the AMT is due on May 10th of the current tax year and must be paid with the filing of the previous year's annual return. R.C. 5751.051(A). However, pursuant to R.C. 5751.051(B), when a taxpayer first becomes subject to and registers for the CAT after May 1st of that year, the AMT for the first year is due on or before its first quarterly return is due (even if the taxpayer is an annual filing CAT taxpayer). For example, a taxpayer that first becomes subject to the CAT and registers on December 1st of 2017, must pay the first year's AMT on or before February 10, 2018. Then, when filing the 2017 annual return (due May 10, 2018), the taxpayer reports the taxable gross receipts for the 2017 calendar year activity and pays the 2018 AMT.

Records show that the petitioner first registered for the CAT on December of 2017 with taxable gross receipts of more than $150,000.00 but with less than $1 million for the calendar year. Since the petitioner registered for the CAT on December of 2017, its first AMT payment was reduced by one half. Therefore, its first AMT payment of $75.00 was due on or before February 10, 2018. The petitioner claims that it paid the AMT for calendar year 2017 with a payment made through the Ohio's Business Gateway on

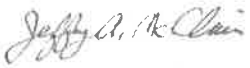
January 30, 2018, in the amount of $2,176.00. Departmental records show, however, that the referenced payment of $2,176.00 was made in conjunction with the filing of the 2017 CAT 12 quarterly return that was due on or before February 10, 2018, and it did not include the first time 2017 AMT payment. Furthermore, records also show that the AMT payment of $800.00 paid on May 4, 2018, was made in conjunction with the filing of the 2018 CAT 12 quarterly return and corresponded with the 2018 AMT's (as described in the example above), not the 2017 AMT. Pursuant to R.C. 5751.051(B)(1), the first time 2017 AMT payment was due on or before February 10, 2018, corresponding with the first quarterly return of the calendar year in which the petitioner first registered for the CAT. The petitioner has only provided evidence that it filed the 2017 CAT 12 return and paid the total tax liability based on its total taxable gross receipts. Thus, the 2017 first time AMT amount of $75.00, and accompanying interest and penalty assessed herein, have not been paid by the petitioner.

Accordingly, the assessment is affirmed, and it 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 (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

0000000276

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

Strongfit LLC
3665 Erie Ave
Cincinnati, OH 45208-1982

Re: Assessment No. 100001014714
Commercial Activity Tax
Reporting Period: 01/01/2015 – 01/31/2015

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

Tax	AMT	Interest	Penalties	Total
$0.00	$150.00	$17.47	$65.00	$232.47

The Ohio Department of Taxation assessed Strongfit LLC. (hereinafter referred to as "the petitioner") for failing to pay the first annual minimum tax ("AMT") of $150.00 owed for the initial period in which it was registered for the CAT. Consequently, the petitioner was assessed a late penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner objects to the assessment and filed a petition for reassessment. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Ohio law requires annual CAT taxpayers (those taxpayers with taxable gross receipts of more than $150,000.00, but not more than $1 million in a calendar year) to file an annual return and pay an AMT of $150.00. R.C. 5751.051. Generally, the AMT is due on May 10th of the current tax year and must be paid with the filing of the previous year's annual return. R.C. 5751.051(A). However, pursuant to R.C. 5751.051(B), when a taxpayer first becomes subject to and registers for the CAT, the AMT for the first year is due on or before May 10th of the same year in which the taxpayer registers for the CAT. For example, a taxpayer that first becomes subject to the CAT and registers on January 1st of 2015, must pay the first year's AMT on or before May 10, 2015. Then, when filing the 2015 annual return (due May 10, 2016), the taxpayer reports the taxable gross receipts for the 2015 calendar year activity and pays the 2016 AMT.

Records show that the petitioner first registered for the CAT in 2015 with taxable gross receipts of more than $150,000.00 but with less than $1 million for the calendar year. Therefore, its first AMT payment of $150.00 was due on or before May 10, 2015. The petitioner claims that it paid the AMT for calendar year 2015 with a check written on February 15, 2018, and cleared by the bank on March 6, 2018, in the amount of $307.10. However, Departmental records show that the referenced payment of $307.10 was made in conjunction with the filing of the 2015 and 2016 CAT 12 returns that were due on or before May 10, 2016, and May 10, 2017, respectively, and corresponded with the 2016 and 2017 AMT's (as described in the example above), not the 2015 AMT. Pursuant to R.C. 5751.051(B)(1), the first time

2015 AMT payment was due on or before May 10th of the calendar year in which the petitioner first registered for the CAT. The petitioner has only provided evidence that it filed the 2015 and 2016 CAT 12 returns and paid the 2016 and 2017 AMT amounts. Thus, the 2015 first time AMT amount of $150.00, and accompanying interest and penalty assessed herein, have not been paid by the petitioner.

Accordingly, the assessment is affirmed, and it 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 (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

0000000342

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

FINAL DETERMINATION

Date: JUN 2 4 2020

Warren First Homes Corporation
333 Harmon Ave NW
Warren, OH 44483

Re: Assessment No. 100000587037
Commercial Activity Tax
Reporting Period: 01/01/2015 – 12/31/2015

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5751.09 concerning the following Commercial Activity Tax (CAT) assessment:

Tax Due	2017 AMT	Interest	Penalty	Total
$500.00	$2,600.00	$73.42	$620.00	$3,793.42

The Department of Taxation assessed Warren First Homes Corporation (hereinafter referred to as "the petitioner") for failing to file its CAT return for the period above referenced. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment and requested a hearing on the matter. The hearing was conducted via telephone with the petitioner on April 2, 2020.

Records show that the petitioner filed the required CAT return during the pendency of the petition period. As the petitioner has filed its CAT return, the Department shall adjust this assessment to reflect the information reported on the petitioner's untimely filed CAT return.

Therefore, the assessment shall be adjusted as follows:

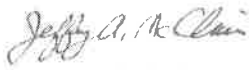
Tax Due	2017 AMT	Interest	Penalty	Total
$0.00	$150.00	$24.95	$65.00	$239.95

Current records indicate that a payment of $239.95 has 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. 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

000000340

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

FINAL DETERMINATION

Date: JUN 24 2020

Warren Homes II Corporation
333 Harmon Ave NW
Warren, OH 44483

Re: Assessment No. 100000576396
Commercial Activity Tax
Reporting Period: 01/01/2015 – 12/31/2015

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

Tax Due	2017 AMT	Interest	Penalties	Total
$500.00	$2,600.00	$72.40	$620.00	$3,792.40

The Ohio Department of Taxation assessed Warren Homes II Corporation (hereinafter referred to as "the petitioner") for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment and requested a hearing on the matter. The hearing was conducted via telephone with the petitioner on April 2, 2020.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] The petitioner's 2015 annual CAT return and 2016 annual minimum tax ("AMT") payment were due by May 10, 2016. Current records indicate that no CAT return has been filed for the 2015 annual tax period and no payment has been received for the 2016 AMT. The petitioner was required under R.C. 5751.051(A)(5) to file a 2015 CAT return reporting its taxable gross receipts regardless of whether or not it incurred $150,000.00 or more of gross receipts for the calendar year. Information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

Accordingly, the assessment is affirmed as issued.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2015 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

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 post assessment interest will be added to the assessment as provided by law.** 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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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000338

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

JUN 24 2020

Warren Homes III Corporation
333 Harmon Ave NW
Warren, OH 44483

Re: Assessment No. 100000604203
Commercial Activity Tax
Reporting Period: 01/01/2015 – 12/31/2015

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

Tax Due	2017 AMT	Interest	Penalties	Total
$500.00	$2,600.00	$75.12	$620.00	$3,795.12

The Ohio Department of Taxation assessed Warren Homes III Corporation (hereinafter referred to as "the petitioner") for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment and requested a hearing on the matter. The hearing was conducted via telephone with the petitioner on April 2, 2020.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] The petitioner's 2015 annual CAT return and 2016 annual minimum tax ("AMT") payment were due by May 10, 2016. Current records indicate that no CAT return has been filed for the 2015 annual tax period and no payment has been received for the 2016 AMT. The petitioner was required under R.C. 5751.051(A)(5) to file a 2015 CAT return reporting its taxable gross receipts regardless of whether or not it incurred $150,000.00 or more of gross receipts for the calendar year. Information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

Accordingly, the assessment is affirmed as issued.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2015 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

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 post assessment interest will be added to the assessment as provided by law.** 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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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

0000000322

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

JUN 24 2020

Zhejiang Wanfeng Auto Wheel Co., Ltd.
c/o Buckingham, Doolittle and Burroughs, LLC
ATTN: Richard Fry, Esq.
3800 Embassy Parkway, Suite 300
Akron, OH 44333-8398

Re:

Assessment No. 100000733992
Commercial Activity Tax: January 1, 2009 through December 31, 2016

The final determination of the Tax Commissioner issued on April 29, 2020 pertaining to this taxpayer is hereby vacated and is replaced by the following:

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

Tax	Annual Minimum Tax (AMT)	Preassessment. Interest	Penalty	Total
$130,143.00	$8,550.00	$18,531.00	$69,347.00	$226,571.00

The petitioner is a China-based company engaged in the manufacturing and sale of alloy wheels for automobiles and motorcycles. Records reflect that it has subsidiary which operates out of Michigan.

The Department assessed the petitioner after conducting an audit of it for the period in question. That audit revealed that the petitioner had taxable gross receipts, but it did not file any CAT returns for the period at issue. Specifically, the Department's audit staff reviewed customs import shipping data and identified that the petitioner had substantial nexus with Ohio pursuant to R.C. 5751.01(H) and a bright-line presence within Ohio pursuant to R.C. 5751.01(I). The audit staff prepared the estimated assessment currently considered based upon the best available information at the time. The petitioner filed a timely petition for reassessment objecting to the assessment. In addition, the petitioner requested a hearing on this matter, which was held via telephone.

The petitioner concedes that it was subject to CAT for the period in question but contends that the assessment overstates the petitioner's taxable gross receipts. To support this contention, the petitioner submitted information and records relating to its Ohio sales activity for the period at issue that were not submitted to the Department's audit staff prior to the assessment. The new documentation and records have been reviewed and the amounts assessed will be reduced accordingly. It should be noted that the petitioner also provided computations regarding the reduction in tax it believes is due based upon the new information submitted. The petitioner's computation is approximately $6,000.00 lower than the Department's revised CAT amount due. The differences between the computations stem from the petitioner's misapplication of the annual exclusions permissible under R.C. 5751.03(C) and miscalculation of its annual minimum tax under R.C. 5751.03(B). Ultimately, the evidence currently

available to the Tax Commissioner indicates that the new documentation submitted by the petitioner warrants the adjustments to tax and interest laid out in table below.

R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. Based upon the information available to the Tax Commissioner, the penalty shall be abated in part. Accordingly, the assessment shall be adjusted as follows:

Tax	Annual Minimum Tax (AMT)	Preassessment Interest	Penalty	Total
$63,550.00	$6,750.00	$6,266.00	$18,187.50	$94,753.50

Current records indicate that the petitioner has not made any payments to this assessment. 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 assessment as provided by law.** Payments shall be made payable to "Ohio Treasurer Josh Mandel." Payments should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio, 43216-1090.

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

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

JUN 11 2020

American Mechanical Contractor Corp.
6826 Metro Park Dr.
Mayfield Village, OH 44143-1513

Re: Assessment No. 100000583410
Employer Withholding Tax 1/1/2007 through 12/31/2008

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-646, dated May 7, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration pursuant to the parties' joint request.

In resolution of this matter, the assessment is modified as follows:

	Total
Tax	$ 35,097.82
Pre-Assessment Interest	$ 11,457.66
Post-Assessment Interest	$ 1,839.93
Total	$ 48,395.41

Payments and credits totaling $48.395.41 have been received in complete satisfaction of this assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Office of the Tax Commissioner
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0000000150

FINAL DETERMINATION

Date:

JUN 11 2020

Bobby Summers, Jr.
2711 Ellsworth Hill Drive
Hudson, Ohio 44236-1562

Re: Bobby Summers, Jr.
Assessment No. 100000613527
Employer Withholding Tax – Responsible Party

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2019-646, dated May 7, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration pursuant to the parties' joint request.

In resolution of this matter, assessment number 100000613527 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
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUN 2 4 2020

Innovision Automation, Ltd.
1170 Harlan Rd.,
Lucas, OH 44843

Re: Ohio Tax Account #: 52541642
Assessment #: 100000962760
Tax Type: Employer Withholding
Reporting Period: 01/01/2012 – 12/31/2012

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5747.13.

Tax	Interest	Penalty	Payment	Amount Owed
$13,424.38	$2,383.62	$6,712.20	($15,802.12)	$6,718.08

The Ohio Department of Taxation assessed Innovision Automation, Ltd. ("the petitioner") for failing to fully remit Ohio's employer income tax withheld. Through a field audit, the Department identified that Ohio income tax was withheld from the petitioner's employees' wages, but the petitioner failed to fully remit the income tax withheld for the tax period in question. The petitioner states that it failed to remit the employer withholding tax for the tax period in question because they relied on their accountant to make timely employer withholding payments, but the accountant failed to do so. The petitioner does not object to the tax and interest amounts assessed, but request an abatement of the penalty assessed. The petitioner did not request a hearing on the matter; therefore, this matter is decided upon information available to the Tax Commissioner and the evidence supplied with the petition for reassessment.

Former R.C. 5747.07 requires every employer who is obligated to deduct and withhold an amount under R.C. 5747.06 to pay that amount to the State of Ohio. Former R.C. 5747.07(F)(4) and (5) require the Tax Commissioner to assess interest if remittances of the withheld amounts are not paid to the state in a timely manner. Further, R.C. 5747.15(A)(4)(a) imposes a penalty of up to 50% of the delinquent payment upon an employer if that employer fails to remit the taxes withheld.

The Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The evidence and circumstances, including the petitioner's payment of tax amount assessed, total payment of interest assessed and its compliance with its employer withholding obligation following the assessment warrant a full abatement of the penalty.

Therefore, the assessment is adjusted as follows:

Tax	Interest	Penalty	Payment	Total Due
$13,424.38	$2,383.62	$0.00	($15,802.12)	$5.88

Current records indicate that payment of $15,802.12 has 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 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.

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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
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0000000149

FINAL DETERMINATION

Date:

JUN 11 2020

The Estate of Bobby Summers, Sr.
2711 Ellsworth Hill Drive
Hudson, Ohio 44236-1562

Re: Bobby Summers, Sr.
Assessment No. 100000613510
Employer Withholding Tax – Responsible Party

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2019-646, dated May 7, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration pursuant to the parties' joint request.

In resolution of this matter, assessment number 100000613510 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

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

FINAL DETERMINATION

Date: JUN 2 4 2020

Ronnie's Marathon Inc.
3106 Fulton Rd.
Cleveland, OH 44109

Re: Refund Claim No. 559859233568
Motor Vehicle Fuel Tax

This is the final determination of the Tax Commissioner with respect to an application for motor fuel shrinkage refund filed pursuant to R.C. 5735.141. The refund amount sought is as follows:

Period	Refund
07/01/2017 – 12/31/2017	$784.00

I. BACKGROUND & CLAIMANT'S CONTENTIONS

In February 2018, the claimant filed an application for refund for motor fuel taxes paid based on shrinkage. Upon initial review, the Department denied the refund claim because the claim was not received by the Department within 120 days after the June 30th or December 31st deadline as required per R.C. 5735.141.

The claimant objects to the denial and requests an administrative review of the initial refund denial in accordance with R.C. 5703.70. The claimant did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim.

II. AUTHORITY

R.C. 5735.141 governs applications for motor fuel shrinkage refunds which provides in pertinent part that:

> In order to receive a refund the retail dealer shall file with the tax commissioner, within one hundred twenty days after the thirtieth day of June and the thirty-first day of December of each year, an application for a refund stating the quantity of motor fuel that was purchased for resale by the applicant during the preceding semiannual period ending the thirtieth day of June or the thirty-first day of December and upon which the motor fuel tax has been paid.

R.C. 5703.053 provides what constitutes timely filing and states that an application for a tax refund under R.C. 5735.141 that is received after the last day for filing under such section shall be considered to have been filed in a timely manner if:

> (A) The application is delivered by the postal service and the earliest postal service postmark on the cover in which the application is enclosed is not later than the last day for filing the application[.]

For a refund claim to be timely, R.C. 5735.141 requires that the claimant file the motor fuel shrinkage allowance refund claim within 120 days of the period ending date of either June 30th or December 31st. R.C. 5703.053 provides that refunds claims under R.C. 5735.141 are considered to be filed on the date of the earliest postmark date. Reading these two sections together requires that the envelope in which the refund claim was sent to the Department must be postmarked on or before April 30, which is 120 days after the end of the December 31st semiannual date.

III. Analysis

In this matter, the envelope in which the refund claim form was submitted had a postmark date of June 22, 2018, which is after the April 30, 2018 deadline for filing the R.C. 5735.141 refund claim. Additionally, the refund claim form was dated May 5, 2018, which is also after the April 30, 2018 filing deadline. Although the claimant contends that the Department should accept this late filing date, the Department is required by statute to follow the envelope postmark date, which controls as the filing date. As stated above, the refund application for motor fuel shrinkage must be received by the Department 120 days after the June 30th or December 31st deadline. R.C. 5735.141. Accordingly, since the envelope was postmarked after the April 30, 2018 deadline, the claimant did not timely file a refund claim as it was filed outside the 120-day filling period.

IV. Conclusion

In the case at hand, the claimant has failed to meet its burden of proof of showing that it timely filed its refund application. Furthermore, the evidence currently available to the Tax Commissioner indicates that the claimant filed this refund claim outside the 120-day filing period as required per R.C. 5735.141. Therefore, the Tax Commissioner has no jurisdiction to consider the claim since it was not filed within the time required by R.C. 5735.141.

Accordingly, the refund claim is dismissed.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: JUN 2 4 2020

David R. & Jan C. Baird
1219 Garth Dr.
Kent, OH 44240

Re: Assessment No. 02201720052815
Individual Income Tax - 2016

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

Tax	Interest	Penalty	Total
$4,399.00	$42.80	$85.60	$4,527.40

The Ohio Department of Taxation assessed the petitioners after making an adjustment to the individual income tax return that they filed for tax year 2016. Specifically, the Department disallowed a business income deduction ("BID")[1] that the petitioners claimed for patronage dividends received during the period in question. The petitioners did not raised specific objections relating to this assessment, but rather requested a reassessment based on the "outcome of a formal appeal hearing" relating to applications for refund that they previously filed relating to tax years 2013 and 2014. The petitioners did not explicitly request a hearing on this matter; therefore, it will be decided based on the evidence currently available to the Tax Commissioner.

The Tax Commissioner issued a Final Determination in September 2017 on applications for refund that the petitioners previously filed for tax year 2013 and 2014. That determination examined whether patronage dividends were deductible under the Ohio small business investor income deduction. The Tax Commissioner denied the applications for refund finding that:

> Patronage dividends from a non-exempt manufacturing cooperative do not qualify for deduction permitted under former R.C. 5747.01(A)(31) because they are not apportioned or allocated to this state under sections 5747.21 and 5747.22. The patronage dividends in question did not come from a pass-through entity, or another qualifying entity, and therefore were not apportioned or allocated pursuant to R.C. 5747.21 or 5747.22. As such, the dividends are not eligible for calculation in the Small Business Income Deduction and the claimants' contention to the contrary is not well taken.

[1] Authorized under former R.C. 5747.01(A)(31), effective for tax year 2016.

Again, in this matter, the petitioners did not raise any specific objections to the assessment for tax year 2016. Moreover, the petitioners have not presented any evidence or arguments during the administrative appeal period which would support their filing position that patronage dividends were deductible under the BID. Ultimately, the evidence currently to the Tax Commissioner reflects that the tax and interest amounts assessed are accurate.

However, the Tax Commissioner may abate a penalty when taxpayers demonstrate that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The facts and circumstances in this matter support a full abatement of the penalty assessed.

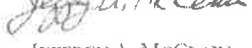
Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$4,399.00	$42.80	$0.00	$4,441.80

Current records indicate that a payment of $4,399.16 has been made on this assessment, resulting in a balance of $42.64 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 assessments as provided by law.** 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 CONCLUDED AND THE FILE APPROPRAITELY CLOSED.

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

Christopher V. Bombeck
468 Cleveland Street
Masury, OH 44438

Re: Assessment No. 02201828958345
Individual Income Tax - 2017

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

Tax	Interest	Penalty	Total
$1,049.00	$20.58	$41.16	$1,110.74

I. BACKGROUND & THE PETITIONER'S CONTENTION

The Ohio Department of Taxation assessed Christopher Bombeck ("the petitioner") after making corrections to his Ohio individual income tax return for tax year 2017. Specifically, the Department disallowed the Business Income Deduction ("BID") for the capital gains reported on his Schedule D which resulted in the assessment currently considered. The petitioner contend that the Department incorrectly identified the capital gains as nonbusiness income. Accordingly, the petitioner objects to the denial, but did not request a hearing. Therefore, this matter is decided upon information available to the Tax Commissioner and the evidence supplied with the petition for reassessment.

II. RELEVANT AUTHORITY

A. THE OHIO BUSINESS INCOME DEDUCTION AND BUSINESS INCOME TAX RATE

For the period in question, former R.C. 5747.01(A)(31) allowed individuals jointly filing the Ohio IT 1040 to deduct up to $250,000 of business income, to the extent such income is included in federal adjusted gross income. Any remaining business income is taxed at a flat 3% rate.

B. BUSINESS INCOME – FUNCTIONAL & TRANSACTIONAL TESTS

Ohio's income tax distinguishes between "business income" and "nonbusiness income." As a general matter, business income is defined as income from "the regular course of a trade or business" and is apportioned to Ohio according to the percentage of the business's property, payroll, and receipts located in Ohio. *See* R.C. 5747.01(B) (definition of business income) and 5747.21(B) (providing for

apportionment of business income by reference to apportionment statutes of the former corporate franchise tax, R.C. Chapter 5733).

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 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), nonbusiness income is defined 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.

Nonbusiness income is allocated to the state depending on the type of income. *See* R.C. 5747.20(B) (allocating, for example, compensation to the place where it is earned, rents to the location of the property, and capital gains from the sale of intangible property to the taxpayer's state of domicile). The definition of nonbusiness income necessarily excludes business income, and only "may include" the listed items. As such, the statute provides potential examples of nonbusiness income, but does not provide definitive types of nonbusiness income. The determination of whether income is business or nonbusiness income rests on tests derived from case law in addition to whether the income was from the liquidation of a business.

In *Corrigan v. Testa,* the Supreme Court of Ohio reviewed the applicability of R.C. 5747.212 to nonresident taxpayers and ultimately found that "the ordinary treatment of capital gains derived from intangible property" (e.g. an ownership interest in an entity), is nonbusiness income. *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶3 (2016). Additionally, while the Court has found that income generated by a pass-through entity is business income to the entity's investors, it has declined to extend such treatment to income from an investor's sale of the pass-through entity. *Id.* ¶36-37; *see also Agley v. Tracy,* 87 Ohio St.3d 265, 719 N.E.2d 951 (1999). Furthermore, the Court has declined to rely on "form-over-substance" arguments when determining the proper classification of income derived from the sale of an interest in a business, instead relying on the actual facts of the transaction giving rise to income. *Corrigan* at ¶62-67.

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). The tests analyze only the first sentence of the business income definition under R.C. 5747.01(B) and separate it into two parts:

> "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 described the transactional test, which "considers the statute as a whole and emphasizes Part I of the definition." *Id.* 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. Under the functional test, the extraordinary nature or infrequency of the transaction is irrelevant." *Id.* The Court found that a liquidation followed by a dissolution fit neither test nor was it nonbusiness income. *Id.*

III. ANALYSIS

In the instant case, the petitioner failed to substantiate his contention that his capital gains were business income with any supporting evidence. Although the petitioner provided the Ohio IT-BUS, the petitioner failed to provide his Federal Schedule D (Form 1040). Even if the petitioner did provide his Schedule D, a federal Schedule D alone is insufficient to demonstrate that capital gains are business income under Ohio law. In order for the petitioner to prevail, he must show that the income (1) meets the transactional test or (2) meets the functional test. R.C. 5747.01(B).

As stated above, income is classified as business income under the "transactional test" only if it is derived from a transaction in which the taxpayer regularly engages. *Kemppel* at 422. Here, the Department records show that petitioner failed to present any supporting evidence for his capital gains on his Schedule D. Since there was no evidence as to the petitioner's capital gains arose from a transaction or activity that occurred in the regular course of the business in which the petitioner engaged in, or that it was in the regular course of a trade or business, the petitioner's capital gains are considered to be nonbusiness income under the transactional test.

Income is business income under the "functional test" only "if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." R.C. 5747.01(B) and *Kemppel* at 423. Additionally, gains satisfying the functional test generally arise from the sale of an asset which produces business income while it was owned by the taxpayer. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Commonwealth, Bd. Of Fin. & Revenue,* 537 Pa. 205, 210 (1994). As mentioned above, the petitioner failed to show absolute any evidence regarding his capital gains. Due to the insufficiency of the evidence or lack thereof, the petitioner failed to verify and prove the capital gains he received was an integral part of his regular trade or business. Without any evidence, the Department is not able to verify, what, if any regarding the substance of his capital gains. Therefore, the petitioner's capital gains does not meet the functional test.

IV. CONCLUSION

The evidence available to the Tax Commissioner indicates that there was no evidence as to what business the petitioner was involved in. Ultimately, the petitioner has not demonstrated that his capital gains were

business income under the relevant authority. Therefore, the petitioner's capital gains are nonbusiness income and does not qualify for Ohio's business income deduction.

V. CREDIT FOR INCOME TAX WITHHELD

R.C. 5747.08(H) states that "amounts withheld by an employer pursuant to section 5747.06 of the Revised Code *** shall be allowed *** as credits against payment of the appropriate taxes imposed on the recipient by section 5747.02 *** of the Revised Code." During the administrative appeal period, the petitioner provided the Department with a Form W-2 showing that he had Ohio income tax withheld from his wages for the period in question. Therefore, the Department shall credit the Ohio income tax that the petitioner had withheld from his wages against the tax and interest amounts assessed and adjust the assessment accordingly.

VI. PENALTY ABATEMENT

The Tax Commissioner may abate a penalty when the taxpayers demonstrate that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the evidence and circumstances support a partial abatement of the penalty.

For the reasons discussed above, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$155.00	$9.14	$20.50	$184.64

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.

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

FINAL DETERMINATION

Date: JUN 17 2020

David E. & Kimberly R. Dick
7445 Cummins Ct.
New Albany, OH 43054

Re: Assessment No. 02201902474172
Individual Income Tax - 2016

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

Tax	Interest	Penalty	Total
$2,515.00	$179.69	$359.38	$3,054.07

The Ohio Department of Taxation assessed David and Kimberly Dick ("the petitioners") after making adjustments to the individual income tax return that they filed for the tax year at issue. Specifically, the petitioners appear to have overstated their Business Income Deduction ("BID") on their Ohio 2016 individual income tax return. The petitioners did not include and report their negative loss (capital loss) within the BID calculation for Ohio purposes. However, the petitioners contend that they correctly computed their BID on their 2016 Ohio IT-1040. The petitioners object to the assessment and did not request a hearing on the matter. Therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

For the period in question, former R.C. 5747.01(A)(31) allowed individuals jointly filing the Ohio IT 1040 to deduct up to $250,000 of business income, to the extent such income is included in federal adjusted gross income. Any remaining business income is taxed at a flat 3% rate. Former R.C. 5747.01(B) and (C) define business income and nonbusiness income as follows:

> (B) "Business income" means income, 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. (Emphasis added).
>
> (C) "Nonbusiness income" means all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or tangible personal

property, capital gains, interest, dividends and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards.

While not determinative for the purposes of identifying and reporting business income under Ohio law, the Department will often look to taxpayer's federal forms to see how income was reported for federal income tax purposes. In the present case, the Department records indicate that the petitioners reported a negative loss on their federal return for Federal Schedule E (Form 1040). However, the petitioners did not report that same negative loss (capital loss) on their Ohio 2016 Schedule IT-BUS for Federal Schedule E. The petitioners were not only required to report and include their capital gains in the business income deduction, but to also include their capital loss. *See* Former R.C. 5747.01(B); *See also Sapadin v. McClain*, BTA No. 2018-1254, 2019 WL 4453430 (Sept. 5, 2019). In *Sapadin*, the Ohio Board of Tax Appeals ("BTA") examined the taxpayer's calculation for the Small Business Deduction ("SBD") because the taxpayer failed include his capital loss in the business income calculation. The BTA held that the taxpayer was mandated to include and calculate the capital loss within the business income deduction. Likewise, to the taxpayer in *Sapadin*, the petitioners also failed to calculate and report their capital loss for the BID calculation. Because the petitioners failed to report the capital loss for the business income calculation, it overstated their Ohio Adjusted Gross Income ("OAGI") for the tax period in question. Therefore, the petitioners were required to include their capital loss within the business income calculation.

The Tax Commissioner may abate a penalty when the taxpayers demonstrate that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the evidence and circumstances support a partial abatement of the penalty.

For the reasons discussed above, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$2,515.00	$179.69	$179.69	$2,874.38

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 APPROPRAITELY 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

0000000269

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

James C. & Mary Beth Dicorpo
33411 Cedar Rd
Mayfield Heights, OH 44124

Re: Assessment No. 02201828959707
Individual Income Tax – 2016

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

Tax	Interest	Penalties	Total
$1,496.00	$89.18	$178.36	$1,763.54

I. BACKGROUND

The Department assessed James C. & Mary Beth Dicorpo (hereinafter referred to as "the petitioners") after making adjustments to their amended individual income tax returns filed for the period at issue. Specifically, the Department disallowed the petitioners' Ohio Business Income Deduction ("BID") for capital gains earned from the sale of stocks for tax year 2016. The petitioners object to the adjustment and timely filed a petition for reassessment. The petitioners contend that the Department incorrectly identified the capital gains as nonbusiness income and denied the corresponding BID. The petitioners did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with their petition for reassessment.

II. RELEVANT AUTHORITY

A. THE OHIO BUSINESS INCOME DEDUCTION ("BID")

R.C. 5747.01(A)(31) allows individuals jointly filing the Ohio IT 1040 to claim a deduction for the taxpayer's Ohio business income up to $250,000.00, to the extent it is included in federal adjusted gross income. Any remaining business income above this amount is then taxed at a flat 3% rate. Additionally, taxpayers are required to complete and file an Ohio Schedule IT BUS ("IT BUS") in order to claim the BID. The IT BUS is used in determining taxable business income and business income tax liability for purposes of completing the Ohio IT-1040 individual income tax return. *See* R.C. 5747.01(A)(31), 5747.01(B), and 5747.01(HH).

B. BUSINESS & NONBUSINESS INCOME

Ohio's income tax distinguishes "business income" from "nonbusiness income." As a general matter, business income is defined as income from "the regular course of a trade or business" and is apportioned to Ohio according to the percentage of the business's property, payroll, and receipts located in Ohio. *See* R.C. 5747.01(B) (definition of business income) and 5747.21(B) (providing for

the apportionment of business income by reference to the apportionment statutes of the former corporate franchise tax, R.C. Chapter 5733). *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶ 21 (2016).

Under 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 an integral part 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.

In *Kemppel v. Zaino*, the Supreme Court of Ohio reviewed the "transactional" and "functional" test used to classify income. *Kemppel v. Zaino*, 91 Ohio St.3d 420, 2001-Ohio-92, 746 N.E.2d 1073 (2001). The tests focus on the first sentence of R.C 5747.01(B)'s definition of "business income" and split the sentence into two parts:

> 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 first described the transactional test, which "considers the statute as a whole and emphasizes Part I of the definition." *Id.* 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 the "use of the property constituted an integral part of the regular course of a trade or business operation." *Id.* at 423. Under the functional test, the extraordinary nature or infrequency of the transaction is irrelevant." *Id.*

By contrast, nonbusiness income is defined as "all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or intangible personal property, *capital gains, interest, dividends, and distributions*, patent or copyright royalties, or lottery winnings, prizes, and awards." R.C. 5747.20. (Emphasis added). Nonbusiness income is allocated to the state depending on the type of income. *See* R.C. 5747.20(B) (allocating, for example, compensation to the place where it is earned, rents to the location of the property, and capital gains from the sale of intangible property to the taxpayer's state of domicile). The definition of nonbusiness income necessarily excludes business income, and only "may include" the listed items. As such, the status provides potential examples of nonbusiness income, and the examples serve as only a non-exhaustive list of types of nonbusiness income. The determination of whether income is business income or

nonbusiness income rests on the test derived from the case law in addition to whether the income was from a liquidation of a business.

III. ANALYSIS

The petitioners filed a 2016 Ohio IT BUS with their amended return claiming their business income in Schedules B and D of their IT BUS return. However, there is no indication that the petitioners operated a business for the tax year in question. On March 12, 2020, the Department's hearing officer sent a letter to the petitioners requesting additional information related to their business, particularly, detailed information related to Schedules B and D of their 2016 Ohio IT BUS return and Schedule D of their 2016 IRS return. This information was requested to be submitted by April 2, 2020. The petitioners, however, did not respond to the letter or provided the additional information requested.

Furthermore, records do not reflect that the petitioners have registered a business entity with the Ohio Secretary of State or any other state. Therefore, any business they conduct would be done in the form of a sole proprietorship. A sole proprietorship is the "default" business type for income tax purposes. A sole proprietorship is a business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity. Black's Law Dictionary 1427 (8th.Ed. 2004). An individual is considered a sole proprietorship if he or she begins a business and counts their business expenses and income separately from personal expenses and income and they do nothing to register a business with the State. *See Premier Therapy, LLC v Childs*, 2016-Ohio-7934, 75 N.E.3d 692, ¶ 81 (2016). A sole proprietorship has no legal identity separate from that of the individual who owns it. *Id.*

The petitioners did not claim or report the capital gains earned from their sale of stocks on: (1) a federal Schedule K-1; (2) a federal schedule C; (3) a federal Schedule SE; or (4) on line 12 of the federal Form 1040. While not determinative for state tax purposes, these federal reporting documents are of particular importance because a federal Schedule C shows the income and deductible expenses of a sole proprietorship for that tax year. The resulting net profit or loss of the sole proprietorship, as found on line 31 of the 2016 federal Schedule C, is then reported on line 12 of the 2016 federal Form 1040 ("Business Income or Loss"). The net profit or loss is also entered on line 2 of the 2016 federal Schedule SE (Self-Employment Tax) to determine the taxpayer's self-employment tax liability. As noted above, the petitioners did not report their capital gains or federal schedule C, a federal Schedule SE, or on line 12 of their federal Form 1040.

Records do indicate that the petitioners reported certain capital gains on federal Schedule D; however, reporting the gains on federal Schedule D alone is not sufficient to demonstrate that capital gains are business income under Ohio law. Rather, to qualify as business income under Ohio law, gains or losses reported on federal Schedule D must be generated in the ordinary course of business, from assets integral to the taxpayer's business operation, or from working capital that is reinvested into the business. *See, Kemppel & Corrigan, supra.*

IV. CONCLUSION

The totality of the evidence available to the Tax Commissioner shows that the petitioners did not own or operate a business or that they were in the busines of trading stocks or securities. Ultimately, the petitioners have not demonstrated that their capital gains were business income under the relevant

authority described above. Therefore, the petitioners' capital gain income is nonbusiness income and does not qualify for Ohio's business income deduction

V. PENALTY ABATEMENT

The Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.05(B). The petitioners assert that his failure to comply was due to reasonable cause and the evidence and circumstances support a partial reduction of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalties	Total
$1,496.00	$89.18	$44.59	$1,629.77

Current records indicate that no payments have 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.

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

0000000365

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

FINAL DETERMINATION

Date:

JUN 24 2020

Louis W & Joanne M Di Donato
1021 W Milton St
Alliance, OH 44601

Re: Assessment No. 02201834561125
Individual Income Tax – 2016

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

Tax	Interest	Penalties	Total
$8,681.00	$559.15	$1,118.30	$10,358.45

I. BACKGROUND

The Department assessed Louis W. and Joanne M. Di Donato (hereinafter referred to as "the petitioners") after making adjustments to their 2016 individual income tax return. Specifically, the Department disallowed the petitioners' Ohio Business Income Deduction ("BID") for income received from a pass-through entity ("PTE"). The petitioners object to the assessment and contend that the Department incorrectly identified the compensation received by the PTE as nonbusiness income and denied the corresponding BID. The petitioners did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with their petition for reassessment.

II. RELEVANT AUTHORITY

A. THE OHIO BUSINESS INCOME DEDUCTION ("BID")

R.C. 5747.01(A)(31) allows individuals jointly filing the Ohio IT 1040 to claim a deduction for the taxpayer's Ohio business income up to $250,000.00, to the extent it is included in federal adjusted gross income. Any remaining business income above this amount is then taxed at a flat 3% rate. Additionally, taxpayers are required to complete and file an Ohio Schedule IT BUS ("IT BUS") in order to claim the BID. The IT BUS is used in determining taxable business income and business income tax liability for purposes of completing the Ohio IT-1040 individual income tax return. *See* R.C. 5747.01(A)(31), 5747.01(B), and 5747.01(HH).

B. THE DEDUCTIBILITY OF COMPENSATION PAID TO AN INVESTOR

Wages, guaranteed payments, and other compensation paid by a PTE to an investor that directly or indirectly holds a 20% or greater interest in the entity are generally considered to be a distributive

share of business income. R.C. 5733.40(A)(7). As business income, such wages, guaranteed payments and other compensation may be deductible in accordance with either the small business deduction or BID. R.C. 5747.01(A)(31). PTEs include partnerships, Subchapter S corporations (S-Corps), and Limited Liability Companies (LLCs). R.C. 5733.04(O). R.C. 5733.40(A)(7) states, in pertinent part, that:

> For the purposes of Chapters 5733 and 5747 of the Revised Code, guaranteed payments or compensation paid to investors by a qualifying entity ... shall be considered a distributive share of income of the qualifying entity. [This division] applies only to such payments or such compensation paid to an investor who at any time during the qualifying entity's taxable year holds at least a twenty per cent direct or indirect interest in the profits or capital of the qualifying entity.

It must be noted that, under R.C. 5733.40(A)(7), guaranteed payments or compensation must be paid to an "investor" to be qualified as a distributive share of income. "Investor," as defined in R.C. 5733.40(H), means any person that, during any portion of a taxable year of a qualifying PTE, is a partner, member, shareholder, or investor in that qualifying PTE.

III. ANALYSIS

The petitioners filed a 2016 Ohio IT BUS with their individual tax return claiming their business income in Schedule E of their IT BUS return. The petitioners assert the income was received as compensation paid by a PTE named J&B Fleet-Industrial Supply, Inc. ("J&B").[1] The Department initially disallowed the petitioners' BID for income received by J&B. Subsequently, the petitioners submitted to the Tax Commissioner copies of their Schedule K-1 forms filed with their 2016 federal income tax return. Records show that J&B is a S-Corp and that Mr. Di Donato held a 75% equity interest in J&B during the tax year at issue. Records also show that Mrs. Di Donato held a 25% equity interest in J&B during the tax year at issue. Upon further review, the petitioners' contentions regarding their compensation from J&B are well taken.

IV. CONCLUSION

The petitioners have provided evidence sufficient to demonstrate that they are investors who directly held, individually, 75% and 25% equity interest on a qualified PTE during the 2016 tax year; therefore, their income received from that qualified PTE is considered to be a distributive share of business income under R.C. 5733.40(A)(7) and entitled to a BID claim.

Accordingly, the assessment is cancelled.

Current records indicate that a payment of $10,358.45 has been made on this assessment, resulting in an overpayment. This overpayment will be refunded to the petitioners. However, if the petitioners have an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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

[1] Records reflect that J&B is a "qualifying entity" as contemplated in R.C. 5733.40(L).

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: JUN 17 2020

Musheerah A Holmes
3292 W 110th St
Cleveland, OH 44111

Re: Two Assessments
Individual Income Tax – Multiple Periods

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

Assessment Number	Period	Tax	Interest	Penalty	Total
02201819278502	01/01/2016-12/31/2016	$1,076.00	$52.71	$105.42	$1,234.13
02201819278501	01/01/2017-12/31/2017	$1,231.00	$11.06	$22.12	$1,264.18

The Department assessed Musheerah A. Holmes (hereinafter referred to as "the petitioner") after making adjustments to the individual income tax returns that were filed for the tax years in question. The petitioner subsequently filed a petition for reassessment objecting to the assessments. For the Tax Commissioner to exercise jurisdiction over this matter, the petitioner was required, pursuant to R.C. 5747.13(B), to file a petition for reassessment within sixty days of the service of the notice of assessment. According to Departmental records, the notice of assessments was served on July 21, 2018, in accordance with R.C. 5703.37. Records further reflect that the petitioner's petition for reassessment was postmarked October 5, 2018, which was more than sixty days after service of the assessments. Therefore, the Tax Commissioner must dismiss the petition. See *Hafiz v. Levin*, 120 Ohio St.3d 331, 2008-Ohio-6788 (2008).

Accordingly, the matter is dismissed for lack of jurisdiction, and the assessments stand as issued.

Current records indicate that no payment has been applied on 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 post assessment interest will be added to the assessments as provided by law.** 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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FINAL DETERMINATION

Date: JUN 17 2020

Brandon M Jordan
4425 E 144th St
Cleveland, OH 44128

Re: Assessment No. 02201819278649
Individual Income Tax – 2017

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

Tax	Interest	Penalty	Total
$1,268.00	$11.40	$22.80	$1,302.20

The Department assessed Brandon M. Jordan (hereinafter referred to as "the petitioner") after making adjustments to the individual income tax return that he filed for the tax year in question. The petitioner subsequently filed a petition for reassessment objecting to the assessment. For the Tax Commissioner to exercise jurisdiction over this matter, the petitioner was required, pursuant to R.C. 5747.13(B), to file a petition for reassessment within sixty days of the service of the notice of assessment. According to Departmental records, the notice of assessment was served on July 26, 2018, in accordance with R.C. 5703.37. Records further reflect that the petitioner's petition for reassessment was postmarked October 5, 2018, which was more than sixty days after service of the assessment. Therefore, the Tax Commissioner must dismiss the petition. See *Hafiz v. Levin*, 120 Ohio St.3d 331, 2008-Ohio-6788 (2008).

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

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 post assessment interest will be added to the assessment as provided by law.** 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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FINAL DETERMINATION

Date: JUN 17 2020

Howard Juntoff
13763 Kathleen Dr
Brookpark, OH 44142

Re: Assessment No. 02202003704171
Individual Income Tax - 2017

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

Tax	Interest	Penalty	Total
$1,172.00	$84.22	$500.00	$1,756.22

The Ohio Department of Taxation assessed the petitioner based on the unrebutted presumption that he was an Ohio resident who failed to file an individual income tax return for tax year 2017. The petitioner filed a timely petition for reassessment requesting that the Tax Commissioner adjust the assessment. To support his request for reassessment, the petitioner filed an untimely 2017 individual income tax return. The petitioner also indicated that he had "filed for Chapter 13 bankruptcy protection which is currently pending in the US Bankruptcy Court, Northern District of Ohio Case No 19-17032." The petitioner did not request a hearing on this matter; therefore, it will be decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the petition.

Every taxpayer must make an annual return for any taxable year for which he or she is liable for the Ohio personal income tax or a school district income tax. R.C. 5747.08. The return must be filed on or before April 15 on forms prescribed by the Tax Commissioner together with a remittance payable to the State Treasurer for the combined amount of state and school district income taxes due.[1] In this matter, both the petitioner's income tax return and remittance payable for individual income tax were due on April 15, 2018.

Records reflect that the petitioner filed a 2017 individual income tax return on or around April 21, 2020. The petitioner also submitted a Form W-2 Wage & Income Statement showing that he had $1,383.00 in Ohio income tax withheld from his wages in 2017. R.C. 5747.08(H) states that "amounts withheld by an employer pursuant to section 5747.06 of the Revised Code *** shall be allowed *** as credits against payment of the appropriate taxes imposed on the recipient by section 5747.02 *** of the Revised Code."

[1] Authorized by former R.C. 5747.08(G), which was effective for tax year 2017.

The Tax Commissioner has reviewed the petitioner's untimely income tax return and Form W-2, and will adjust the tax and interest amounts assessed to reflect the information reported on the return. Regarding statutory interest, the petitioner's income tax withheld is a pre-paid tax which is deemed to have been remitted on April 15, 2018; therefore, no interest shall be imposed. R.C. 5747.08(G).

Finally, the Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The facts and circumstances in this matter, including the petitioner's untimely filing of the required return, support a partial abatement of the penalty assessed.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Withholding Credit	2017 Refund Issued[2]	Balance Due
$1,171.00	$0.00	$50.00	$(1,383.00)	$212.00	$50.00

Current records indicate that no additional payments have been 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 assessments as provided by law.** 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 CONCLUDED AND THE FILE APPROPRAITELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

[2] Records reflect that, after reviewing the untimely return, the Department issued a 2017 income tax refund to the petitioner on June 3, 2020 in the amount $212.00. As of the date of this Determination, the refund is outstanding.

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

Sohan D. Manek
1610 Belmont Avenue, Apt 605
Seattle, WA 98122

Re: Assessment No. 02201832551046
Individual Income Tax – 2016

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

Tax	Interest	Penalties	Total
$9,452.00	$599.74	$3,308.20	$13,359.94

I. BACKGROUND

The Department assessed Sohan D. Manek (hereinafter referred to as "the petitioner") based on the unrebutted presumption that he was an Ohio resident who failed to fully remit his Ohio income tax for the 2016 tax year. The petitioner filed a petition for reassessment and requested a hearing on the matter. In his petition, the petitioner contends that he was not a resident of Ohio for the 2016 tax year and, therefore, not required to file an Ohio income tax return. Specifically, the petitioner contends that he lived in London, United Kingdom, for all of 2016 and that prior to that he lived in the State of New York. The petitioner also contends that he did not file a non-Ohio domicile affidavit for 2016 because he was not an Ohio resident in 2015 and that he used his parents' Ohio mailing address on his federal and New York tax returns for "convenience purposes." The petitioner further contends that he did not change his driver's license because he was attending law school and he expected to work abroad after law school. The hearing was conducted via telephone with the petitioner and his authorized representative on April 16, 2020.

II. RELEVANT AUTHORITY

A. OHIO RESIDENTS ARE ALWAYS SUBJECT TO INDIVIDUAL INCOME TAX

For Ohio income tax purposes, the starting tax base is Ohio adjusted gross income which is federal adjusted gross income as adjusted pursuant to R.C. 5747.01(A). A resident of Ohio is always subject to the individual income tax, regardless of where the individual earns or receives income.[1] R.C. 5747.01(I) 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).

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

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 that taxable year. R.C. 5747.24(A)(1) indicates that a person has a contact period if the person is away overnight from their abode located outside Ohio and while away spends at least some portion, however minimal, of two consecutive days in Ohio. R.C. 5747.24(E) indicates that an individual is presumed to have a contact period for any period the individual does not prove by a preponderance of the evidence that they had no such contact period.

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

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

If the individual timely files the Affidavit of Non-Ohio Residency/Domicile as required, and the affidavit does not contain any false statements, the presumption that the individual was not domiciled in this state is irrebuttable. In the case at hand, the petitioner did not timely file an Affidavit of Non-Ohio Residency/Domicile for the tax year in question and, therefore, he is not entitled to an irrebuttable presumption of non-domicile under R.C. 5747.24(B).

Under Divisions (C) and (D) of R.C. 5747.24, the burden then shifts to the individual to prove that they were not domiciled in Ohio during the taxable year. Former Division (C) of R.C. 5747.24, applicable for the tax period at issue, stated that an individual who has less than 212 contact periods with Ohio and does not qualify for the irrebuttable presumption under division (B) of this section 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 the evidence to the contrary. The preponderance of the evidence standard has been described as the quantum of proof which produces in the mind of the trier of fact belief that what is sought to be proved is more likely true than not true. *In re Agler*, 19 Ohio St. 2d 70, 249 N.E.2d 808 (1969).

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 (1978), 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." *Surgeon 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).

Notably, the Ohio Board of Tax Appeals recently examined the notion of individuals working overseas in *Valore v. McClain*, BTA No. 2018-2248 (September 5, 2019). The Board of Tax Appeals ("BTA") held that, despite a claim of foreign residency, the appellant's connections to Ohio in the form of an Ohio driver's license, voting in Ohio, maintenance of an Ohio abode, and filing federal income tax returns from an Ohio address were collectively sufficient indicia of common law domicile. *Id.* The BTA further noted that "common law domicile is not the same as residence" and that "the essential feature of domicile [is] an intent to return to a place even if one is away from it for a long time." *Id.* citing *Krehnbrink v. Testa*, 148 Ohio St.3d 129, 2016-Ohio-3391, ¶28.

III. FACTS & CIRCUMSTANCES:

The petitioner did not submit an Affidavit of Non-Ohio Residency/Domicile for the tax year at issue and had fewer than 212 contact periods with Ohio in 2016; therefore, the petitioner must rebut the presumption of domicile with a preponderance of the evidence to the contrary under R.C. 5747.24(C). Department records reflect that the petitioner maintained abodes in both Ohio and the United Kingdom for tax year 2016, and he had less than 212 contact periods with Ohio. The petitioner claims to have

severed his Ohio domicile prior to tax year 2016 and established residency in the United Kingdom in the fall of 2015.

In support of his claim of not being domiciled in Ohio, the petitioner provided the Tax Commissioner with a copy of his United Kingdom 2016 tax return, copies of his 2016 federal individual income tax return, and his 2016 New York individual income tax return. The petitioner contends that he was a resident of New York prior to tax year 2016 and before he established residency in the United Kingdom. However, the petitioner has failed to provide the Department with sufficient documentation to demonstrate that he was domiciled in New York prior to his move to the United Kingdom. The petitioner filed his 2016 New York personal income tax return as a nonresident and identified his Ohio address of 678 Columbia Road, Valley City, OH 44280, as his mailing address on that return. Additionally, the petitioner filed his 2016 federal personal income tax return using his Ohio address as his home address. Furthermore, prior to and through 2016, the petitioner maintained his Ohio driver's license and his Ohio vehicle's registration. The petitioner's continuance of maintaining his connections with Ohio shows an intent to remain domiciled in the state.

Although the petitioner contends that he abandoned his Ohio domicile and affirmatively established a domicile in the United Kingdom, his actions and availments during 2016 not only show that he maintained significant connections with Ohio, but moreover, that he reinforced them and continued to enjoy the rights and privileges afforded to Ohio residents. As was discussed in *Davis* and *Cleveland*, 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. Here, records demonstrate that the petitioner used his Ohio address to file his federal and New York income tax returns for 2016 and also maintained his Ohio driver's license and his Ohio vehicle's registration. Records further show that in 2017, the petitioner returned to Ohio to work and he registered as a voter in Cuyahoga County, Ohio. The totality of the evidence demonstrates that the petitioner did not have the intention to remain and establish domicile in the United Kingdom.

Notwithstanding the contention that the petitioner spent the majority or all of the year in question in the United Kingdom, physical presence is not, in and of itself, a determinative factor for the purpose of determining domicile. Just as was discussed in *Valore* and *Krehnbrink*, here, the petitioner's actions demonstrate that he had the intent to return to Ohio despite establishing a residency in United Kingdom, and thus, he never abandoned his Ohio domicile. Additionally, the fact that the petitioner's income may have been subject to taxation by the United Kingdom is also not indicative of or impactful on common law domicile.[2] Rather, as discussed above, residents of Ohio are subject to the individual income tax, regardless of where the individual earns or receives income. Even though R.C. 5747.05(B) does provide residents with a credit for income taxed by or paid to other states, the credit is not available for income earned or taxed by a foreign jurisdiction.[3] While the petitioner may have received

[2] The United States taxes its citizens on their world-wide income irrespective of where they reside subject only to credits or exclusions that they are permitted to claim under the Internal Revenue Code. *Cook v. Tait*, 265 U.S. 47 (1924); see generally IRS Publication 54, Tax Guide for U.S. Citizens and Resident Aliens Abroad, http://irs.gov/pub/irs-pdf/p54.pdf. Although Ohio law does not provide for a similar exclusion, the Federal Foreign Income Exclusion affects the starting point of Ohio's income tax ("FAGI") calculation to the extent that it reduces it.

[3] The resident credit under R.C. 5747.05(B) is granted in order to comport with the dormant Commerce Clause and avoid an individual's income being subjected to taxation by multiple states, which is often referred to as "double taxation." The U.S. Supreme Court has repeatedly held that a State may not "impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the

foreign tax credit in his IRS tax return for the tax year at issue, that in and of itself, it is not indicative of common law domicile.

IV. CONCLUSION

The totality of the evidence available to the Tax Commissioner shows that the petitioner's actions during 2016 are consistent with those of an individual maintaining an Ohio domicile while working abroad. Even though the petitioner has provided evidence of his physical presence in the United Kingdom, he has not provided any evidence indicating that he took affirmative steps to establish a new domicile somewhere other than Ohio nor has he demonstrated the intent to permanently reside in the United Kingdom. As discussed above, the petitioner maintained and renewed significant ties to Ohio in the form of retaining an Ohio driver's license, maintaining an Ohio vehicle's registration, and filing his 2016 federal personal income tax return using his Ohio address as his home address. Additionally, the petitioner filed his 2016 New York personal income tax return as a nonresident and identified his Ohio address as his home address on that return.

Therefore, the petitioner has failed to rebut the presumption that he was not domiciled in Ohio for the entirety of tax year 2016 by a preponderance of the evidence as required by R.C. 5747.24(C). Based on Ohio law and the authority discussed above, the facts require the conclusion that the petitioner continued to be domiciled in Ohio despite the petitioner's overseas work in the United Kingdom.[4] Consequently, despite the petitioner's contention, the petitioner is presumed to have been domiciled in Ohio for the tax year at issue.

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burden of 'multiple taxation.'" *Comptroller of Treasury of Maryland v Wynne*, 135 S.Ct. 1787, 1790, 191 L.Ed.2d 813 (2015), citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357, 3 L. Ed. 2d 421 (1959).

[4] This conclusion is consistent with Ohio law, but is also consistent with caselaw from other states that have addressed the issue of U.S. residents working abroad. See, e.g., *Georgia Tax Tribunal pointed out in Petitioners F-1 and Petitioners F-2 v. MacGinnitie*, 2014 Ga Tax LEXIS 77 (Georgia Tax Tribunal 2014); *Whetstone v. Dep't of Revenue*, 434 So.2d 796 (Ala. Ct. App. 1983) (citizens of Alabama temporarily in Nigeria failed to overcome presumption that their domicile remained in Alabama for income tax purposes); *Comptroller of Treasury v. Mollard*, 455 A.2d 72 (Md. Ct. Spec. App. 1983) (Maryland residents who went to Belgium without the intent of returning to Maryland were still subject to Maryland income tax because they did not intend to stay permanently in Belgium); *Mlady v. Dir. Of Revenue*, 108 S.W.3d 12 (Mo. Ct. App. 2003) (Missouri domicile retained despite extensive travel); *Bodfish v. Gallman*, 378 N.Y.S.2d 138 (N.Y. App. Div. 1976) (New York taxpayer held not to have changed his domicile to Pakistan); *Reiersen v. Comm'r of Revenue*, 1987 Mass. Tax LEXIS 56 (Mass. App. Tax Bd. 1987) (Massachusetts resident employed in the Philippines retained his Massachusetts domicile for Massachusetts tax purposes); *Larson v. Comm'r of Revenue*, 1988 Minn. Tax LEXIS 104 (Minn. Tax Ct. 1988) (Minnesota resident who took a temporary position in West Germany retained his Minnesota domicile for Minnesota tax purposes); *Hoover v. Comm'r of Revenue*, 1982 Minn. Tax LEXIS 79 (Minn. Tax Ct. 1982) (Minnesota resident remained domiciled in Minnesota for Minnesota tax purposes although he took position in India and testified that he did not intend to return to Minnesota); *McGarvey v. Dir. Of Revenue*, 1985 Mo. Tax LEXIS 45 (Mo. Admin. Comm'n 1985) (Missouri domicile not abandoned because taxpayers did not intend to move to Saudi Arabia permanently, even though the taxpayer did not intend to return to Missouri); *Quick v. Dir. Of Div. of Taxation*, 9 N.J. Tax 288, 1987 N.J. Tax LEXIS 14 (N.J. Tax Ct. 1987) (New Hersey taxpayer held not to have established a domicile in Saudi Arabia); *Currier v. Dep't of Revenue*, 1986 Wis. Tax LEXIS 18 (Wis. Tax App. Comm'n 1986) (Wisconsin taxpayer did not abandon Wisconsin domicile when he went to Australia).

JUN 17 2020

V. RESIDENT CREDIT

As stated above, however, residents of the state of Ohio are entitled to a resident credit of a percentage of income not subject to Ohio tax or taxes paid to other states, whichever is less. R.C. 5747.05(B). Here, the petitioner paid $403.00 in taxes to the state of New York for tax year 2016. Therefore, the petitioner is entitled to a resident credit for taxes paid to New York.

VI. PENALTY ABATEMENT

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

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalties	Total
$8,962.00	$581.80	$0.00	$9,543.80

Current records indicate that no payments have 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.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 24 2020

Daniel McGuire
Linda McGuire
17108 Riverside Dr.
Lakewood, OH 44107

Re: Assessment No. 02201729807354
Individual Income Tax - 2016

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2019-2806, dated June 23, 2020 In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, assessment number 02201729807354 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

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:

JUN 3 0 2020

Gregory McNeil & Lori A. Barber
987 Silverberry Lane
Hudson, OH, 44236

Re: Multiple Assessments
Individual Income Tax – Multiple Periods
Reporting Period: 2014 - 2016

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

Assessment No.	Tax Year	Tax	Interest	Penalty	Total
02201820180400	2014	$1,399.70	$159.80	$319.60	$1,879.10
02201820480423	2015	$351.99	$29.51	$59.02	$440.52
02201820180401	2016	$925.00	$47.13	$94.26	$1,066.39

I. BACKGROUND

The Ohio Department of Taxation assessed Gregory McNeil and Lori A. Barber (hereinafter referred to as "the petitioners") based on adjustments to their Ohio individual income tax returns for the above tax years. Specifically, the Department disallowed the Small Business Investor Deduction ("SBD")[1] claimed on the petitioners' 2014 individual income tax return. The Department also disallowed the Business Income Deduction ("BID")[2] on their 2015 and 2016 individual income tax returns. For these tax years, Ms. Lori A. Barber (hereinafter referred to as "Ms. Barber") attempted to deduct compensation she received as a statutory employee. Department records indicate that Ms. Barber was a statutory employee of Brown and Bigelow Inc. (hereinafter referred to as "the Company"). The Company is based out of Saint Paul, Minnesota, and performs marketing, advertising, and promotional services.[3] The Company distributes and sells promotional items while maintaining relationships with customers.[4]

The petitioners requested a hearing on these matters, which was conducted via telephone. The matters are now decided based on the evidence currently available to the Tax Commissioner.

[1] Authorized by former R.C. 5747.01(A)(31) which was effective for tax year 2014.
[2] Authorized by former R.C. 5747.01(A)(31) which was effective for tax years 2015 & 2016.
[3] Barber, L. *Brown & Bigelow Inc., Business Profile.* https://www.linkedin.com/company/brownandbigelow (accessed on May 21, 2020)
[4] Brown & Bigelow Inc., *Our Team.* https://www.brownandbigelow.com/our-team/ (accessed on May 21, 2020)

II. PETITIONERS' CONTENTIONS

The petitioners assert that Ms. Barber should be permitted to deduct the wages she received from the Company as business income because, as a statutory employee, she reported the wages on her Schedule C (federal 1040). Thus, since the wages from the Company are treated like "business income" for federal tax purposes, they should also be considered business income under Ohio law. The petitioners also assert that Ms. Barber was 100% owner of a Schedule C "business", and thus her wages are business income under R.C. 5733.40(A)(7).

III. RELEVANT AUTHORITY

A. THE OHIO SMALL BUSINESS INVESTOR DEDUCTION & BUSINESS INCOME DEDUCTION

The SBD (effective for tax years 2013 and 2014) was available against a taxpayer's apportioned Ohio business net income. Former R.C. 5747.01(A)(31), provided that a taxpayer's SBD income means "the portion of the taxpayer's adjusted gross income that is business income reduced by deductions from business income and apportioned or allocated to" Ohio "to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year." For tax year 2014, the SBD was available for 75% of the first $250,000 of apportioned business income (up to $187,500).

For tax year 2015, the BID[5] allowed taxpayers who filed jointly to deduct 75% of the first $250,000 of business income, to the extent such income was included in federal adjusted gross income. For tax year 2016 the BID allowed taxpayers who filed jointly to deduct up to $250,000 of business income, to the extent such income is included in federal adjusted gross income. Any remaining business income for each tax year was then taxed at a flat 3% rate.

B. BUSINESS & NONBUSINESS INCOME

Ohio's income tax distinguishes between "business income" and "nonbusiness income." As a general matter, business income is defined as income from "the regular course of a trade or business" and is apportioned to Ohio according to the percentage of the business's property, payroll, and receipts located in Ohio. See R.C. 5747.01(B) (definition of business income) and 5747.21(B) (providing for apportionment of business income by reference to apportionment statutes of the former corporate franchise tax, R.C. Chapter 5733).

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

[5] Found in former R.C. 5747.01(A)(31). The BID is now found in R.C. 5747.01(A)(28). *See* Am. Sub. H.B. 197 of the 133rd Ohio General Assembly.

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 personal property, capital gains, interest, dividends and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards.

For Ohio personal income tax purposes, compensation is defined as "any form of remuneration paid to an employee for personal services." R.C. 5747.01(D). The fact that compensation is included in the definition of nonbusiness income is indicative of the fact that it is generally considered nonbusiness income. Nonbusiness income is allocated to the state depending on the type of income. *See* R.C. 5747.20(B) (allocating, for example, compensation to the place where it is earned, rents to the location of the property, and capital gains from the sale of intangible property to the taxpayer's state of domicile). The determination of whether income is business or nonbusiness income rests on tests derived from case law.

In *Kemppel v. Zaino*, the Supreme Court of Ohio reviewed the "transactional" and "functional" test used to classify income. *Kemppel v. Zaino*, 91 Ohio St.3d 420, 2001-Ohio-92, 746 N.E.2d 1073 (2001). The tests focus on the first sentence of R.C. 5747.01(B)'s definition of "business income" and split the sentence into two parts:

> 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 first described the transactional test, which "considers the statute as a whole and emphasizes Part I of the definition." *Id.* 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 the "use of the property constituted an integral part of the regular course of a trade or business operation." *Id.* at 423. Under the functional test, the extraordinary nature or infrequency of the transaction is irrelevant." *Id.*

C. R.C. 5733.40 & 5733.40(A)(7) Guaranteed Payments to Investors Holding Twenty-Percent-Plus Interests

Wages, guaranteed payments, and other compensation paid by a pass-through entity to an investor that directly or indirectly holds a 20% or greater interest in the entity are generally reclassified as a

distributive share of business income. R.C. 5733.40(A)(7). As business income, such wages, guaranteed payments, and other compensation may be subject to the BID.

R.C. 5733.40(A)(7) states, in pertinent part, that:

> For the purposes of Chapters 5733. and 5747. of the Revised Code, guaranteed payments or compensation paid to investors by a qualifying entity that is not subject to the tax imposed by section 5733.06 of the Revised Code shall be considered a distributive share of income of the qualifying entity. Division (A)(7) of this section applies only to such payments or such compensation paid to an investor who at any time during the qualifying entity's taxable year holds at least a

R.C. 5733.40(L) states that a "qualifying entity" means a qualifying pass-through entity or a qualifying trust. Additionally, R.C. 5733.40(N) defines "[q]ualifying pass-through entity", in pertinent part, as:

> "a pass-through entity as defined in section 5733.04 of the Revised Code, excluding: a person described in section 501(c) of the Internal Revenue Code; a partnership with equity securities registered with the United States securities and exchange commission under section 12 of the Securities Exchange Act of 1934, as amended; or a person described in division (C) of section 5733.09 of the Revised Code."

Further, R.C. 5733.04(O) defines "pass-through entity", in pertinent part, as:

> "a corporation that has made an election under subchapter S of Chapter 1 of Subtitle A of the Internal Revenue Code for its taxable year under that code, or a partnership, limited liability company, or any other person, other than an individual, trust, estate, if the partnership, limited liability company, or other person is not classified for federal income tax purposes as an association taxed as a corporation."

It must be noted that, under R.C. 5733.40(A)(7), guaranteed payments or compensation must be paid to an "investor" to qualify as a distributive share of income. "Investor" means any person that is a partner, member, shareholder, or investor in a qualifying pass-through entity. R.C. 5733.40(H).

D. INTERNAL REVENUE SERVICE ("IRS") – STATUTORY EMPLOYEE & COMPENSATION IN THE STATE OF OHIO

Federal law requires employers to classify their workers for the purposes of withholding employment taxes that fund Social Security or Medicare.[6] Specifically, for federal tax purposes, employers are generally required to withhold and pay employment taxes for employees, but not for independent contractors. An individual is an employee "if the relationship between him and the person for whom he performs service is the legal relationship of employer and employee." 26 CFR 31.3306(i)-1. However, an individual is a "independent contractor if the payer has the right to control or direct only the result of

[6] IRS, *Understanding Employee vs. Contractor Designation*, https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation (accessed May 21, 2020).

the work and not what will be done and how it will be done."[7] Independent contractors are subject to self-employment tax.[8]

Important to this matter is that statutory employees, like Ms. Barber, are those who would typically be independent contractors under common law, but are specifically classified as employees under laws of the United States relating to federal income taxes. 26 U.S. Code §3121(d)(3). As such, employers must withhold Social Security or Medicare taxes for statutory employees.[9] Because a statutory employee's Social Security or Medicare taxes are withheld through an employer, the employee does not pay self-employment tax.[10] However, the statutory employee reports their wages on Federal Schedule C.

Division (D) of R.C. 5747.01 defines compensation as "any form of remuneration paid to an *employee* for personal services." (emphasis added). Wages are a form of remuneration. *See* 26 U.S.C. §3401(a).

IV. ANALYSIS

A. THE INCOME IS NOT BUSINESS INCOME UNDER R.C. 5747.01(B)

Ohio has its own definition of "business income." *See* R.C. 5747.01(B). Thus, not all amounts reported on a Federal Schedule C will necessarily be business income on the Ohio IT 1040. Rather, only income that meets Ohio's definition of business income can be deducted under Ohio's BID. *See* former R.C. 5747.01(A)(31). In *Young v. McClain*, the Ohio Board of Tax Appeals (the "BTA") found that a taxpayer failed to prove that income reported on a federal Schedule C was business income under Ohio law. *Young v. McClain* BTA No. 2019-189, 2019 WL 4645200 (Sept. 17, 2019). Specifically, the BTA examined the income at issue in *Young* under the transactional and functional tests of R.C. 5747.01(B) as outlined by the Ohio Supreme Court in *Kemppel*. Based on this analysis, the BTA found that the taxpayer's income did not meet these tests, and thus was not business income under R.C. 5747.01(B).

For income to be classified as business income under Ohio law, a taxpayer must show that the income is business income under either the transaction or functional tests of R.C. 5747.01(B), is reclassified as a distributive share of business income under R.C. 5733.40(A)(7), or is income from the partial or complete liquidation of business. *See* R.C. 5747.01(B) or 5733.40(A)(7). *See also Kemppel*, 2001-Ohio-92. However, the petitioners have not demonstrated that Ms. Barber was engaged in a trade or business, let alone that her wages arose from a transaction or activity that occurred in the regular course of a trade or business in which she was engaged. Instead, her wages were paid to her as a statutory employee of the Company for personal services she provided to the Company.

In short, this was not income from a business that Ms. Barber operated, and the petitioners did not provide any specific information showing that such a "business" exists. In fact, the petitioners listed

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[7] IRS, Independent Contractor Defined, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined (accessed May 21, 2020).

[8] IRS, *Understanding Employee vs. Contractor Designation*, https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation (accessed May 21, 2020).

[9] IRS, Statutory Employee, https://www.irs.gov/businesses/small-businesses-self-employed/statutory-employees, (accessed May 21, 2020).

[10] IRS, Publication 15-A (2020), Employer's Supplemental Tax Guide, https://www.irs.gov/publications/p15a#en_US_2020_publink1000169476 (accessed May 21, 2020).

"Sales" as the business name on Line C of their federal Schedule C. Instead, Ms. Barber performed services for the Company as an employee. Since the petitioners did not prove that Ms. Barber operated a trade or business, and failed to present any evidence to substantiate that the petitioners satisfied the transactional or functional tests under R.C. 5747.01(B), Ms. Barber's income cannot be considered business income this statute. Thus, this contention is not well taken.

B. R.C. 5733.40 & 5733.40(A)(7) GUARANTEED PAYMENTS TO INVESTORS HOLDING TWENTY PERCENT-PLUS INTERESTS

Although, as noted above, compensation is generally nonbusiness income, R.C. 5733.40(A)(7) reclassifies compensation as a distributive share of business income in certain circumstances. For this reclassification to occur, the compensation must be paid by a qualifying entity to an investor who owns at least 20% of the pass-through entity.

Ms. Barber does not meet the requirements of R.C. 5733.40(A)(7) for several reasons. First, the Company from which Ms. Barber received her compensation is a C corporation. A C corporation is not a "qualifying entity" under R.C. 5733.40(L). *See* R.C. 5733.40(M) and (N). Second, even if the Company was a qualifying entity, the petitioners have not provided any evidence that Ms. Barber was an "investor" in the Company as defined in R.C. 5733.40(H). Finally, even if the Company is a "qualifying entity", and even if Ms. Barber is an "investor", the petitioners certainly have not shown that Ms. Barber directly or indirectly owns at least 20% of the Company. Therefore, the petitioners' income cannot be reclassified as a distribute share of income pursuant to R.C. 5733.40(A)(7). Thus, this contention is not well taken.

C. THE INCOME IS COMPENSATION & NONBUSINESS INCOME UNDER OHIO LAW

The commissioner and the petitioners agree that Ms. Barber was a statutory employee of the Company for federal income tax purposes. As a result, Ms. Barber was required to report her statutory wages from the Company, for personal services she provided to the Company, on Federal Schedule C. The petitioners contend that they should be allowed to deduct this income as business income for Ohio tax purposes because the IRS has treated Ms. Barber's compensation as business income. However, as described below, federal tax treatment of income is not determinative when examining what constitutes business income for Ohio income tax purposes.

In fact, Ohio law treats remuneration for services rendered by an employee as compensation; compensation is generally nonbusiness income. R.C. 5747.01(C) and (D). As explained above, Ms. Barber was considered a statutory employee of the Company under 26 U.S. Code §3401(a). Ohio law does not define "employee" and thus for Ohio income tax purposes, employee must have "the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes...." *See* R.C. 5747.01(A). Thus, since Ms. Barber is an employee (albeit a "statutory employee") for federal purposes, she is likewise an employee for Ohio purposes. The Company paid Ms. Barber, an employee, remuneration for personal services she provided; without rendering those personal services to the Company as a statutory employee, Ms. Barber would not have generated any income from this endeavor. Thus, Ms. Barber is an employee, and thus her remuneration satisfies the meaning of compensation under R.C. 5747.01(D) and the meaning of nonbusiness income under R.C. 5747.01(C).

V. CONCLUSION

JUN 3 0 2020

For the reasons outlined above, the petitioners failed to establish that Ms. Barber's wages, which she earned as a statutory employee, are business income. The petitioners have not established that Ms. Barber operated a trade or business, and regardless, the statutory wages do not qualify as business income under the transactional or functional tests of R.C. 5747.01(B). See *Kemppel*, 2001-Ohio-92, at ¶ 422-23. Ms. Barber was an employee under federal tax law, and thus was likewise an employee for Ohio income tax purposes. Additionally, the petitioners have not shown that Ms. Barber was an investor in the Company, and even if she was an investor in the Company, it is not considered a qualifying entity under R.C. 5733.40(L). As a result, Ms. Barber's income also cannot be reclassified as distributive share of business income under R.C. 5733.40(A)(7). Instead, the remuneration Ms. Barber received from her employer is nonbusiness compensation. Therefore, based on the forgoing, the petitioners cannot claim the SBD or BID on Ms. Barber's wages for the tax years at issue.

VI. PENALTY ABATEMENT

The Tax Commissioner may abate a penalty when taxpayers demonstrate that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The petitioners assert that the failure to comply in these matters was due to reasonable cause. The evidence and circumstances presented support a full abatement of the penalties assessed.

Accordingly, the assessments are adjusted as follows:

Assessment No.	Tax Year	Tax	Interest	Penalty	Total
02201820180400	2014	$1,399.70	$159.80	$0.00	$1,559.50
02201820480423	2015	$351.99	$29.51	$0.00	$381.50
02201820180401	2016	$925.00	$47.13	$0.00	$972.13

Current records indicate that a $3,386.01 payment have been made on these assessments, resulting in a $472.88 overpayment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. The overpayment will be refunded to the petitioners. Nevertheless, if the petitioner has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the 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.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

Gene A. & Karen L. Nixon
2492 Fawn Chase
Richfield, OH 44286

Re: Refund Claim No. 1900415
Refund Batch No. 8312376035
Individual Income Tax – 2016

This is the final determination of the Tax Commissioner with regard to the following application for refund filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2016	$1,156.00

I. BACKGROUND

Gene A. & Karen L. Nixon (hereinafter referred to as "the claimants") initially filed a timely 2016 Ohio individual income tax return reporting Mr. Nixon was a nonresident of the State of Ohio. Subsequently, the claimants file an amended 2016 individual income tax return claiming a nonresident credit for Mr. Nixon's income from 2016, and requesting a refund of $1,156.00.[1] With their amended return, the claimants included a 2016 Form IT RE – Reason and Explanation of Corrections, indicating that the adjustments to the federal adjusted gross income ("FAGI") were done in error and that the claimants were entitled to a nonresident credit. Specifically, the claimants contend that for the tax year at issue, Mr. Nixon was living and working in Mongolia. The Department disallowed the nonresident credit that they claimed on the 2016 individual income tax return based on the unrebutted presumption that Mr. Nixon was an Ohio resident for the 2016 tax year. Subsequently, the claimants filed a separate application for refund for the same amount at issue in this matter.

Upon initial review, the Department disallowed the credit and denied the claimants' refund request for tax year 2016. The claimants object to the denial of their full refund claim reported on their amended return for tax year 2016. The claimants requested an administrative review of the refund claim denial in accordance with R.C. 5703.70. The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim.

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

II. RELEVANT AUTHORITY

A. STATUTORY AUTHORITY ON RESIDENCY & DOMICILE

For Ohio income tax purposes, the starting tax base is Ohio adjusted gross income which is federal adjusted gross income as adjusted pursuant to R.C. 5747.01(A). A resident of Ohio is always subject to the individual income tax, regardless of where the individual earns or receives income.[2] R.C. 5747.01(I) 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 that taxable year. R.C. 5747.24(A)(1) indicates that a person has a contact period if the person is away overnight from their abode located outside Ohio and while away spends at least some portion, however minimal, of two consecutive days in Ohio. R.C. 5747.24(E) indicates that an individual is presumed to have a contact period for any period the individual does not prove by a preponderance of the evidence that they had no such contact period.

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

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

If the individual timely files the Affidavit of Non-Ohio Residency/Domicile as required, and the affidavit does not contain any false statements, the presumption that the individual was not domiciled in this state is irrebuttable. In the case at hand, the claimants did not timely file an Affidavit of Non-Ohio Residency/Domicile for the tax year in question and, therefore, they are not entitled to an irrebuttable presumption of non-domicile under R.C. 5747.24(B).

Under Divisions (C) and (D) of R.C. 5747.24, the burden then shifts to the individual to prove that they were not domiciled in Ohio during the taxable year. Former Division (C) of R.C. 5747.24, applicable for the tax period at issue, stated that an individual who has less than 212 contact periods with Ohio and does not qualify for the irrebuttable presumption under division (B) of this section 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 the evidence to the contrary. The preponderance of the evidence standard has been described as the quantum of proof which produces in the mind of the trier of fact belief that what is sought to be proved is more likely true than not true. *In re Agler*, 19 Ohio St. 2d 70, 249 N.E.2d 808 (1969).

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[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 of a resident taxpayer that is taxed by other states or (2) the actual amount of income tax paid to other states.

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 (1978), 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." *Surgeon 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).

Notably, the Ohio Board of Tax Appeals recently examined the notion of individuals working overseas in *Valore v. McClain*, BTA No. 2018-2248 (September 5, 2019). The Board of Tax Appeals ("BTA") held that, despite a claim of foreign residency, the appellant's connections to Ohio in the form of an Ohio driver's license, voting in Ohio, maintenance of an Ohio abode, and filing federal income tax

returns from an Ohio address were collectively sufficient indicia of common law domicile. *Id.* The BTA further noted that "common law domicile is not the same as residence" and that "the essential feature of domicile [is] an intent to return to a place even if one is away from it for a long time." *Id.* citing *Krehnbrink v. Testa*, 148 Ohio St.3d 129, 2016-Ohio-3391, ¶28.

III. ANALYSIS

The claimants did not submit an Affidavit of Non-Ohio Residency/Domicile for the tax year at issue and Mr. Nixon had fewer than 212 contact periods with Ohio in 2016; therefore, the claimants must rebut the presumption of domicile with a preponderance of the evidence to the contrary under R.C. 5747.24(C). Department records reflect that the claimants maintained abodes in both Ohio and Mongolia for tax year 2016, and Mr. Nixon had less than 212 contact periods with Ohio. The claimants assert that Mr. Nixon moved overseas sometime in November of 2015.

In support of their claim of Mr. Nixon not being domiciled in Ohio, the claimants provided the Tax Commissioner with a copy of Notification of Personnel Action from his employer concerning his overseas work assignment and a written statement, signed by Mrs. Nixon, stating that Mr. Nixon worked in Mongolia from November of 2015 through August of 2018. This evidence, however, is not indicative of the claimants' intention to remain in Mongolia indefinitely and abandon their Ohio abode in favor of the abode in Mongolia. Rather, the temporary duration of the work assignment is, in and of itself, evidence of Mr. Nixon's intent to return to his Ohio domicile. Departmental records show that the claimants filed their 2016 federal and Ohio personal income tax returns identifying their Ohio address of 2492 Fawn Chase, Richfield, OH 44286, as their home address. Additionally, records also show that the claimants filed their 2017 federal personal income tax return using their Ohio address as their home address. Moreover, prior to and through 2016, Mr. Nixon maintained his Ohio driver's license, his Ohio vehicle's registration, and he exercised his right to vote in Ohio. The claimants' continuance of maintaining their connections with Ohio shows an intent to remain domiciled in the state.

Furthermore, as indicated by the Summit County Auditor's records, the claimants have owned a home in Richfield, Ohio, located at 2492 Fawn Chase, Richfield, OH 44286, since 2000 and during the tax year at issue. Information obtained from the Summit County Auditor shows that the claimants claimed an owner-occupancy tax reduction on their Richfield, Ohio property. 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." R.C. 323.151(A)(1). Notably, the Ohio Supreme Court's decision in *Cunningham* found that the appellees' verification of non-Ohio domicile was false in light of a contradictory statement made under penalty of perjury on a homestead exemption application for Ohio property occupied as their principal place of residence. *Cunningham*, *supra*, at ¶ 29-30. Therefore, the fact that the claimants received the owner-occupancy tax reduction during 2016 is a substantial basis for a finding that the claimants were domiciled in Ohio for the tax year at issue.

Although the claimants contend that Mr. Nixon abandoned his Ohio domicile and affirmatively established a domicile in Mongolia, his actions and availments during 2016 not only show that he maintained significant connections with Ohio, but moreover, that he reinforced them and continued to enjoy the rights and privileges afforded to Ohio residents. As was discussed in *Davis* and *Cleveland*, 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. Here, records demonstrate that the claimants used their Ohio address to file their federal and Ohio income tax returns for 2016 and Mr. Nixon also maintained his Ohio driver's license, his Ohio vehicle's registration, and voted in Ohio.

Notwithstanding the contention that Mr. Nixon spent the majority or all of the year in question in Mongolia, physical presence is not, in and of itself, a determinative factor for the purpose of determining domicile. Just as was discussed in *Valore* and *Krehnbrink*, *supra*, here, Mr. Nixon's actions demonstrate that he had the intent to return to Ohio despite establishing a residency in Mongolia, and thus, he never abandoned his Ohio domicile. Additionally, the fact that Mr. Nixon's income may have been subject to taxation by Mongolia is also not indicative of or impactful on common law domicile.[3] Rather, as discussed above, residents of Ohio are subject to the individual income tax, regardless of where the individual earns or receives income. Even though R.C. 5747.05(B) does provide residents with a credit for income taxed by or paid to other states, the credit is not available for income earned or taxed by a foreign jurisdiction.[4] While the claimants may have filed IRS Form 2555 for the tax year at issue, which is used to report the foreign earned income exclusion at the federal level, that in and of itself, it is not indicative of common law domicile.

IV. CONCLUSION

The totality of the evidence available to the Tax Commissioner shows that the claimants' actions during 2016 are consistent with those of an individual maintaining an Ohio domicile while working abroad. Even though Mr. Nixon has provided evidence of his physical presence in Mongolia, he has not provided any evidence indicating that he took affirmative steps to establish a new domicile somewhere other than Ohio nor has he demonstrated the intent to permanently reside in Mongolia. As discussed above, Mr. Nixon maintained and renewed significant ties to Ohio in the form of receiving the benefit of the owner-occupancy property tax reduction, retaining an Ohio driver's license, maintaining an Ohio vehicle's registration, voting in Ohio, and filing his 2016 and 2017 federal personal income tax return using his Ohio address as his home address.

Therefore, the claimants have failed to rebut the presumption that Mr. Nixon was not domiciled in Ohio for the entirety of tax year 2016 by a preponderance of the evidence as required by R.C. 5747.24(C). Based on Ohio law and the authority discussed above, the facts require the conclusion that Mr. Nixon continued to be domiciled in Ohio despite his overseas work in Mongolia.[5] Consequently,

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[3] The United States taxes its citizens on their world-wide income irrespective of where they reside subject only to credits or exclusions they are permitted to claim under the Internal Revenue Code. *Cook v. Tait*, 265 U.S. 47 (1924); see generally IRS Publication 54, Tax Guide for U.S. Citizens and Resident Aliens Abroad, http://irs.gov/pub/irs-pdf/p54.pdf. Although Ohio law does not provide for a similar exclusion, the Federal Foreign Income Exclusion affects the starting point of Ohio's income tax ("FAGI") calculation to the extent that it reduces it.

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

[5] This conclusion is consistent with Ohio law, but is also consistent with caselaw from other states that have addressed the issue of U.S. residents working abroad. See, e.g., *Georgia Tax Tribunal pointed out in Petitioners F-1 and Petitioners F-2*

JUN 17 2020

despite the claimants' contention, Mr. Nixon is presumed to have been domiciled in Ohio for the tax year at issue.

Accordingly, the refund claim is denied in full.

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

v. MacGinnitie, 2014 Ga Tax LEXIS 77 (Georgia Tax Tribunal 2014); *Whetstone v. Dep't of Revenue*, 434 So.2d 796 (Ala. Ct. App. 1983) (citizens of Alabama temporarily in Nigeria failed to overcome presumption that their domicile remained in Alabama for income tax purposes); *Comptroller of Treasury v. Mollard*, 455 A.2d 72 (Md. Ct. Spec. App. 1983) (Maryland residents who went to Belgium without the intent of returning to Maryland were still subject to Maryland income tax because they did not intend to stay permanently in Belgium); *Mlady v. Dir. Of Revenue*, 108 S.W.3d 12 (Mo. Ct. App. 2003) (Missouri domicile retained despite extensive travel); *Bodfish v. Gallman*, 378 N.Y.S.2d 138 (N.Y. App. Div. 1976) (New York taxpayer held not to have changed his domicile to Pakistan); *Reiersen v. Comm'r of Revenue*, 1987 Mass. Tax LEXIS 56 (Mass. App. Tax Bd. 1987) (Massachusetts resident employed in the Philippines retained his Massachusetts domicile for Massachusetts tax purposes); *Larson v. Comm'r of Revenue*, 1988 Minn. Tax LEXIS 104 (Minn. Tax Ct. 1988) (Minnesota resident who took a temporary position in West Germany retained his Minnesota domicile for Minnesota tax purposes); *Hoover v. Comm'r of Revenue*, 1982 Minn. Tax LEXIS 79 (Minn. Tax Ct. 1982) (Minnesota resident remained domiciled in Minnesota for Minnesota tax purposes although he took position in India and testified that he did not intend to return to Minnesota); *McGarvey v. Dir. Of Revenue*, 1985 Mo. Tax LEXIS 45 (Mo. Admin. Comm'n 1985) (Missouri domicile not abandoned because taxpayers did not intend to move to Saudi Arabia permanently, even though the taxpayer did not intend to return to Missouri); *Quick v. Dir. Of Div. of Taxation*, 9 N.J. Tax 288, 1987 N.J. Tax LEXIS 14 (N.J. Tax Ct. 1987) (New Hersey taxpayer held not to have established a domicile in Saudi Arabia); *Currier v. Dep't of Revenue*, 1986 Wis. Tax LEXIS 18 (Wis. Tax App. Comm'n 1986) (Wisconsin taxpayer did not abandon Wisconsin domicile when he went to Australia).

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

Alan W. & Pauline Pachinger
14632 SR 511
Oberlin, OH 44074

Re: Refund Claim No. 8191300313
Individual Income Tax - 2017

This is the final determination of the Tax Commissioner with regard to the following application for refund filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2017	$8,006.00

I. BACKGROUND

Alan and Pauline Pachinger ("the claimants") initially timely filed their 2017 Ohio individual income tax return. However, on June 20, 2018, the claimants filed an application for refund on their amended 2017 Ohio individual income tax return for tax period in question[1] along with the 2017 Form IT RE – Reason and Explanation of Corrections. The claimants entered into an agreement with Nexus Gas Transmission, LLC ("the company") in January 2017 granting the company an easement onto their home property and/or farmland– 14632 SR 511, Oberlin, Ohio. In exchange for the easement, the company paid the claimants. More specifically, the claimants received $192,090.96 in damages payment ("the damages payment"). The claimants indicated on their 2017 Ohio IT RE that they should be allowed to deduct the damages payment under the Business Income Deduction ("BID"). As a result, on their amended tax return, the claimants reported a higher deduction for Line 2A – Ohio Schedule A. However, the Department disallowed the BID because the claimants did not demonstrate that damages payment was business income; therefore, upon initial review, the claimants' refund request was denied. The claimants object to the denial of their refund claim and request an administrative review of the denial in accordance with R.C. 5703.70. The claimants did not request a hearing on the matter; therefore, this matter is decided upon information available to the Tax Commissioner and the evidence supplied with the application.

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

II. THE CLAIMANTS' CONTENTIONS

The claimants contend that their damages payment should be eligible for BID because the payment was received in exchange for the grant of the easement to the company on their property.

III. AUTHORITY

A. THE OHIO BUSINESS INCOME DEDUCTION AND BUSINESS INCOME TAX RATE

For the period in question, former R.C. 5747.01(A)(31) allowed individuals jointly filing the Ohio IT 1040 to deduct up to $250,000 of business income, to the extent such income is included in federal adjusted gross income. Any remaining business income is taxed at a flat 3% rate.

B. BUSINESS INCOME – FUNCTIONAL & TRANSACTIONAL TESTS

Ohio's income tax distinguishes between "business income" and "nonbusiness income." As a general matter, business income is defined as income from "the regular course of a trade or business" and is apportioned to Ohio according to the percentage of the business's property, payroll, and receipts located in Ohio. *See* R.C. 5747.01(B) (definition of business income) and 5747.21(B) (providing for apportionment of business income by reference to apportionment statutes of the former corporate franchise tax, R.C. Chapter 5733).

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 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), nonbusiness income is defined 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.

Nonbusiness income is allocated to the state depending on the type of income. *See* R.C. 5747.20(B) (allocating, for example, compensation to the place where it is earned, rents to the location of the property, and capital gains from the sale of intangible property to the taxpayer's state of domicile). The definition of nonbusiness income necessarily excludes business income, and only "may include" the listed items. As such, the statute provides potential examples of nonbusiness income, but does not provide definitive types of nonbusiness income. The determination of whether income is business or nonbusiness income rests on tests derived from case law in addition to whether the income was from the liquidation of a business.

In *Corrigan v. Testa,* the Supreme Court of Ohio reviewed the applicability of R.C. 5747.212 to nonresident taxpayers and ultimately found that "the ordinary treatment of capital gains derived from intangible property" (e.g. an ownership interest in an entity), is nonbusiness income. *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶3 (2016). Additionally, while the Court has found that income generated by a pass-through entity is business income to the entity's investors, it has declined to extend such treatment to income from an investor's sale of the pass-through entity. *Id.* ¶36-37; *see also Agley v. Tracy,* 87 Ohio St.3d 265, 719 N.E.2d 951 (1999). Furthermore, the Court has declined to rely on "form-over-substance" arguments when determining the proper classification of income derived from the sale of an interest in a business, instead relying on the actual facts of the transaction giving rise to income. *Corrigan* at ¶62-67.

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). The tests analyze only the first sentence of the business income definition under R.C. 5747.01(B) and separate it into two parts:

> "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 described the transactional test, which "considers the statute as a whole and emphasizes Part I of the definition." *Id.* 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. Under the functional test, the extraordinary nature or infrequency of the transaction is irrelevant." *Id.* The Court found that a liquidation followed by a dissolution fit neither test nor was it nonbusiness income. *Id.*

C. INCOME FROM THE LIQUIDATION OF A BUSINESS

Subsequent to *Kemppel*, the Ohio General Assembly passed Senate Bill 261, which amended R.C. 5747.01(B) to include income from the partial or complete liquidation of a business.[2] *See,* Am. Sub. Senate Bill 261 (Effective Date, June 5, 2002). This is critical, as the legislative history shows the General Assembly relied on the facts in *Kemppel* when enacting this amendment to R.C. 5747.01(B).[3] The Legislative Service Commission's ("LSC") "Final Analysis" for Senate Bill 261, which is an explanation of permanent law, directly references the *Kemppel* case when explaining the change to R.C. 5747.01(B).[4]

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[2] The amendment did not, however, define "partial or complete liquidation of a business."

[3] Pursuant to R.C. 1.49, if a statute is ambiguous, the court may consider, among other things, the "object sought to be attained," the "circumstances under which the statute was enacted," and the "legislative history."

[4] *See* Ohio Legislative Service Commission Final Bill Analysis for Am. Sub, Senate Bill 261 at 4 (2003) (stating "In a recent case, gains from the liquidation of an Ohio pass-through entity * * *." *See Kemppel v. Zaino*, 91 Ohio St.3d 420 (2001).

In *Kemppel*, corporation sold all its assets and ceased the business. *Kemppel* at 420. The link between liquidation and cessation of operations was reiterated several times throughout the *Kemppel* decision. The Court cited out-of-state cases that differentiate between the sale of assets as part of the cessation of the business (a "true liquidation") versus the sale of assets to another who continue the business. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Com., Bd. Of Fin. & Revenue,* 537 Pa, 205, 209, 642 A.2d 472, 474-75 (1994) and *Polaroid Corp. v. Offerman,*349 N.C. 290, 307, 507 S.E.2d 284, 296 (1998). Taken together, this is a clear indication that the cessation of business operation is a material fact in determining what can be considered liquidation under R.C. 5747.01(B). The converse implication is that the sale of an ownership interest in an entity that continues to operate after the sale is not a liquidation under Ohio law, but rather is simply the sale of an intangible asset.

Furthermore, the Court in *Corrigan,* differentiated between gains from the sale of an ownership interest in an entity, and gains from a liquidation of a business through an asset sale and ceasing operations. *Corrigan,* 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶ 65-66. While acknowledging the two sale structures may involve the same "economic substance," the Court noted that each structure has unique tax implications, which demonstrate a material difference in between an asset sale and cessation of a business, and a sale of an ownership interest in the business. *Id.* at 65.

IV. ANALYSIS

In the instant case, the claimants can only deduct the damages payment if such payments are business income. Although the claimants granted an easement to the company on their home property and/or farmland, the fact that the transaction may have been a business transaction is not determinative for the purposes of addressing whether the damages payment is business income. Instead, for the claimants to prevail, they must show that the income (1) meets the transactional test, (2) meets the functional test or (3) is related to a "partial or complete liquidation of a business." R.C. 5747.01(B).

Income is business income under the "transactional test" only if it is derived from a transaction in which the taxpayer regularly engages. *Kemppel* at 422. Here, the claimants have presented no evidence that they regularly enter into transactions with different companies to grant easements on their properties. The record reflects that the grant of the easement to the company was a one-time occurrence and therefore, did not arise from transaction or activities in the normal course of the claimants' trade or business. As such, the damages payment from this extraordinary and unusual event does not meet the transactional test.

Income is business income under the "functional test" only "if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." R.C. 5747.01(B) and *Kemppel* at 423. Additionally, gains satisfying the functional test generally arise from the sale of an asset which produces business income while it was owned by the taxpayer. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Commonwealth, Bd. Of Fin. & Revenue,* 537 Pa. 205, 210 (1994). In the present case, the evidence shows that claimants were in the business of renting their own home and/or farmland at 14632 SR 511, Oberlin, OH 44074 and one other property, located at 7041 Murray Ridge Road, Elyria, OH 44035. On the Federal Schedule E (Form 1040) for the tax period in question, the claimants did not report any rental income for 14632 SR 511 Oberlin address, but only reported the rental income for the Elyria address. The claimants also failed to present any evidence that indicates that claimants were in the business of granting easements on their properties as a part of

their regular trade or business. In actuality, the evidence reveals the complete opposite. While not determinative for state tax purposes, it is worth noting that on the claimants' 2017 federal individual income tax return, they did not report the damages payment on Line 17, "rental real estate, royalties, partnerships, S Corporation, trust, etc. [a]ttach Schedule E." Rather, the claimants reported the damages payment on Line 21 "other income – miscellaneous." In short, a review of the facts and circumstances reveals that the claimants' damages payment is not "integral" to the "regular course of a trade or business operation" conducted by the claimants. Accordingly, the damages payment from the granting of the easement to the company does not meet the functional test.

Income is also business income if it is generated from the "partial or complete liquidation of a business * * *." R.C. 5747.01(B). Based on prior case law and the legislative intent which led to the amendment of R.C. 5747.01(B), a "partial or complete liquidation of a business" requires a complete asset sale followed by the actual cessation of all business operations (a complete liquidation), or the sale of certain assets followed by the actual cessation of the line of business relating to those assets (a partial liquidation). In contrast, the sale of an intangible asset such as an ownership interest in an entity, is not a liquidation. Instead, it is merely a transactional sale which results in a capital gain to the investor. Here, there is nothing in the record that indicates there was any partial or complete liquidation of a business. Rather, it was the claimants merely granting an easement to the company, so that the company may use the claimants' property. Irrespective of the easement, the claimants continued and continues to use their own property. Therefore, the granting of an easement was not a partial or complete liquidation of a business.

V. CONCLUSION

Therefore, the damages payment that the claimants received in exchange for the granting of the easement to the company is not business income under either the transactional or functional tests under R.C. 5747.01(B). Additionally, there was no evidence that the claimants liquidated partially or completely their home property or other rental property. As such, the damages payment is nonbusiness income and does not qualify for Ohio's BID or business income tax rate.

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 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

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

Jeffrey Pittman
373 Rockhouse Rd., E #15
Cordele, GA 31015

Re: Refund Claim No. 8086361129
Individual Income Refund Tax - 2016

This is the final determination of the Tax Commissioner with regard to an application for individual income tax refund pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2016	$681.00

I. BACKGROUND

Jeffrey Pittman ("the claimant") initially filed an Ohio and Georgia individual income tax return for the tax period in question. However, on January 17, 2018, the claimant filed an application for refund on an amended Ohio individual income tax return for tax year 2016.[1] On the amended tax return, the claimant reported an amount on the federal miscellaneous income deduction line and reported a higher amount for the personal and dependent exemption. The claimant also filed the 2016 Form IT RE – Reason and Explanation of Corrections. On the 2016 Ohio IT RE – the claimant indicated that he filed the amended return in question because his exemptions increased and his nonrefundable credit increased since he worked in a different state. The claimant also filed an amended Georgia return on January 17, 2018. Therefore, he contends that he should be entitled to the resident credit and is now seeking a refund of $681.00. The claimant did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim pursuant to R.C. 5703.70.

II. RELEVANT AUTHORITY

A. APPLICABLE STATUTORY LAW:

For Ohio income tax purposes, the starting tax base is Ohio adjusted gross income, which is federal adjusted gross income as adjusted pursuant to R.C. 5747.01(A). A resident of Ohio is always subject to the individual income tax, regardless of where the individual earns or receives income.[2] Division (I) of

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

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

R.C. 5747.01 defines a "resident" as an individual who is domiciled in this state, subject to R.C. 5747.24. Under R.C. 5747.01(J), a "nonresident" is an individual who is not a resident.

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

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

> (i) The individual has less than 183 contact periods in Ohio during the taxable year,
> (ii) The individual has at least one abode outside this state during the entire taxable year, and
> (iii) The individual files an affidavit of non-Ohio domicile on or before the fifteenth day of the fourth month following the close of the taxable year.

If the individual timely files the Affidavit of Non-Ohio Residency/Domicile as required, and the affidavit does not contain any false statements, the presumption that the individual was not domiciled in this state is irrebuttable. In the present case, the claimant did not file an Affidavit of Non-Ohio Residency/Domicile for the tax year in question. Therefore, he is not entitled to an irrebuttable presumption of non-domicile under former R.C. 5747.24(B).

If an individual fails to timely file the Affidavit or makes a false statement, the burden shifts to the individual to prove that they were not domiciled in Ohio during the taxable year. Former R.C. 5724.24(C) & (D). Former Division (C) of R.C. 5747.24, applicable for the tax period at issue, states that an individual who has less than 183 contact periods with Ohio and who is not irrebuttably presumed under division (B) of this section to be not domiciled in this state 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 the evidence to the contrary. The preponderance of the evidence standard has been described as that quantum of proof which produces in the mind of the trier of fact belief that what is sought to be proved is more likely true than not true. *In re Agler*, 19 Ohio St. 2d 70 (1969).

B. COMMON-LAW DOMICILE & RESIDENT CREDIT:

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

The Ohio Supreme Court has held that the "domicile of a person [is] where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." *Sturgeon v. Korte*, 34 Ohio St. 525, 535 (1878), citing Story, Conflict of Laws, Section 41. The Court in *Cunningham* reiterated that domicile is "the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined." *Cunningham*, 2015-Ohio-2744, ¶ 12, citing *Schill v. Cincinnati Ins. Co.*, 141 Ohio St.3d 382, 2014-Ohio-4527, 24 N.E.3d 1138, ¶ 24, quoting *Williamson v. Osenton*, 232 U.S. 619, 625, 34 S.Ct. 442, 58 L.Ed. 758 (1914). Generally, domicile is defined as "a legal relationship between a person and a particular place which contemplates two factors: first, residence, at least for some period of time and, second, the intent to reside in that place permanently or at least indefinitely." *Id.*, quoting *Shill,* ¶ 24. Therefore, Ohio Courts have held that "a person can have multiple residences, but can have only one domicile." *Schill*, ¶ 25, citing *Grant v. Jones*, 39 Ohio St. 506, 515 (1883).

At common law, "the issue of domicile is one of intent determined by the facts of the individual case," including "the acts and declarations of the person" and the totality of "accompanying circumstances." *Davis v. Limbach*, BTA No. 89–C–267, 1992 WL 275694, *4 (Sept. 25, 1992), citing *State ex rel. Kaplan v. Kuhn*, 8 Ohio N.P. 197, 202, 11 Ohio Dec. 321 (1901). The Ohio Supreme Court has also held that "the law ascribes a domicile to every person, and no person can be without one." *Surgeon 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).

Notably, the Ohio Board of Tax Appeals recently examined the notion of individuals working overseas in *Valore v. McClain*, BTA No. 2018-2248 (September 5, 2019). The Board of Tax Appeals held that, despite a claim of foreign residency, the appellant's connections to Ohio in the form of an Ohio driver's license, voting in Ohio, maintenance of an Ohio abode, and filing federal income tax returns from an Ohio address were collectively sufficient indicia of common law domicile.

Residents of the state of Ohio are entitled to a resident credit of a percentage of income not subject to Ohio tax or taxes paid to other states, whichever is less. R.C. 5747.05(B).

C. MISCELLANEOUS FEDERAL INCOME TAX DEDUCTION & PERSONAL EXEMPTIONS:

The miscellaneous federal income tax deduction on the Ohio Schedule A is for adjustments that are necessary when Ohio law fails to conform with changes made to federal income tax law. Ohio's conformity statute is found in R.C. 5701.11 and division (A) states that any reference in the tax chapters

of the Revised Code to the "Internal Revenue Code" means the Internal Revenue Code as it exists on the effective date of the statute. Revised Code 5701.11(B)(1) further states in pertinent part that:

> "For purposes of applying * * * 5747.01 of the Revised Code to a taxpayer's taxable year ending after March 30, 2017, and before the effective date, a taxpayer may irrevocably elect to incorporate the provisions of the Internal Revenue Code or other laws of the United States that are in effect for federal income tax purposes for that taxable year if those provisions differ from the provisions that, under division (A) of this section, would otherwise apply."

R.C. 5701.11(B)(1).

Additionally, former R.C. 5747.025, applicable for the period in question, allows individuals to take personal exemptions for themselves and their spouse. Former R.C. 5747.025. Additionally, the individuals can take an exemption for their qualified dependent children, but they must report it on their Ohio's Schedule J. The calculation for the exemption amount is simply based on a taxpayer's OAGI. Former R.C. 5747.025(A)(3). For instance, "if the taxpayer's [OAGI] for the taxable year as show on an individual * * * is greater than eighty thousand ($80,000.00) dollars" they can receive in the amount of one thousand seven hundred ($1,700.00) dollars. *Id.*

III. ANALYSIS

A. DOMICILE & RESIDENT CREDIT:

The claimant's actions and availments during 2016 not only show that he maintained significant connections with Ohio, but he also has reinforced them and continued to enjoy the rights and privileges afforded to Ohio residents. The intent to abandon one's domicile is shown by evidentiary factors including where the individual files federal income tax returns, where the individual votes, registers their vehicle, and maintains a driver's license. *Davis*, at *5-7. In the present case, the Department records indicate that the claimant used his Ohio mailing address – 3865 Millers Run Back Run Rd., Lucasville, Ohio when he filed his original Ohio individual income tax return as well as his amended return. The claimant also used that same Ohio mailing address when he filed his original Georgia individual income along with his Georgia amended return. Records further reflect that the claimant retained his driver's license with the previously mentioned Ohio mailing address. The claimant continued to re-register his driver's license after the tax period in question with the Ohio mailing address. Moreover, the Department records demonstrates that the claimant has registered three vehicles with the same Ohio mailing address. Therefore, the evidence indicates that the claimant was domiciled in Ohio for the tax period in question.

As to the resident credit matter, the claimant is not entitled to it because the claimant did not pay taxes to Georgia. The Department records show that the claimant taxes were withheld in Georgia; however, the claimant received that payment in a refund for the tax period in question. So, the claimant did not pay taxes in the state of Georgia and has not submitted evidence showing that he would otherwise be permitted to claim a resident credit under R.C. 5747.05(B). Therefore, the claimant is not entitled to a resident credit.

B. MISCELLANEOUS FEDERAL INCOME TAX DEDUCTION & PERSONAL EXEMPTIONS:

Ohio is in conformity with federal income tax law for tax years 2017 and prior. The most current legislative amendment was effective March 30, 2018. Accordingly, there is no valid amount that can be claimed as a miscellaneous federal income tax deduction on the Ohio Schedule A for the tax year at issue. Additionally, because the miscellaneous federal income tax deduction is for federal conformity adjustments, federal Schedule A adjustments are also disallowed on this line. Therefore, the claimant is prohibited from claiming any amount on Line 23 on Schedule A.

Concerning the personal exemption matter, the claimant is only qualified to claim a personal exemption for himself and his three dependent children. The claimant correctly completed the Ohio Schedule J for his three children. However, he incorrectly calculated the dollar amount on his Ohio amended return. Since the claimant's OAGI for the tax period in question was greater than eighty thousand ($80,000.00) dollars, he was only entitled to take one thousand seven hundred ($1,700.00) dollars per exemption. Since he had a total of four exemptions, the claimant's exemption total should have been seven thousand ($7,000.00) dollars. However, the Department records indicate that the claimant overreported his exemptions by two thousand ($2,000.00) dollars on his amended return. Since he overreported his personal exemptions, it decreased his OAGI on his Ohio amended return. However, his calculation on the amended return was incorrect. Therefore, the claimant is only entitled to report and claim seven thousand ($7,000.00) dollars for personal and dependent exemptions on Line 4.

IV. CONCLUSION:

The totality of the evidence available to the Tax Commissioner shows that the claimant's actions during 2016 are consistent with those of individuals maintaining an Ohio domicile while working in another state. As discussed above, the claimant maintained and renewed significant ties to Ohio in the form of retaining his Ohio driver's license, using his Ohio mailing address on the Ohio and Georgia filings, and registering several vehicles with his Ohio mailing address. The claimant did not pay taxes in the State of Georgia since he was awarded a refund for the taxes that were withheld. As a result, he is not entitled to the resident credit. Additionally, since Ohio was in conformity with federal income tax for the tax period in question, the claimant is unable to claim any amount on the miscellaneous federal income tax deduction line. The claimants also overstated his personal and dependent exemption beyond what the statute afforded him. Consequently, the claimant's contention is not well taken.

Accordingly, the refund claim is denied in full.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:
JUN 30 2020

John P. Riggs
296A Sackett St
Brooklyn, NY 11231

Re: Assessment No. 02201803638866
Individual Income Tax – 2013

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

Tax	Interest	Penalties	Total
$515.00	$64.86	$206.97	$786.83

The Department assessed John P. Riggs (hereinafter referred to as "the petitioner") for failing to remit payment on his 2013 Ohio individual income tax liability. Specifically, the Department made adjustments to the petitioner's credit carryforward reported in his 2013 return which resulted in a balance due for the petitioner. The petitioner objects to the adjustment and timely filed a petition for reassessment. The petitioner contends that the Department incorrectly made adjustments to the petitioner's 2011 Ohio individual income tax return which affected his credit carryforward for tax year's filings in 2012 and 2013. The petitioner did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with his petition for reassessment.

R.C. 5747.12 gives the Tax Commissioner the authority to allow taxpayers to apply a previous year's overpayment as a credit against a subsequent year's tax liability. This application of an overpayment is commonly referred to as a "credit carryforward." Since credit carryforwards affect future tax years and tax liabilities, applying them retroactively can be problematic and have a domino effect on subsequent tax years. The efficient administration of the income tax application of credit carryforwards is reliant upon taxpayer's compliance with filing deadlines and Ohio tax law. Additionally, R.C. 5747.11(B) limits the time a taxpayer can apply for a refund to four years "from the date of the illegal, erroneous, or excessive payment of the tax." R.C. 5747.11(B) also states that applications for refund shall be filed with the tax commissioner "on the form prescribed by the commissioner."

The petitioner contends that the Department erroneously disallowed his resident credit on his 2011 Ohio individual income tax return. That adjustment resulted in an increase on the petitioner's tax liability which decreased his overpayment amount (line 23 of Ohio 2011 IT 1040) from $30,233.00 to $794.95. Records show that the Department notified the petitioner of this change by sending a 2011 Income Tax Refund Notice Variance correspondence on August 20, 2012. The petitioner contends that he responded to the 2011 variance notice in August of 2012, however, the Department shows no record or evidence that the petitioner's response was received nor has the petitioner offered evidence showing his response was faxed or mailed and received by the Department before March of 2018. Furthermore, records also show that the petitioner did not file an amended return to verify the accuracy of his

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original 2011 Ohio individual income tax return. Therefore, pursuant to R.C. 5747.11(B), the petitioner is now barred from applying for a refund on his 2011 Ohio individual income tax return.

The petitioner also contends that the Department erroneously adjusted his 2011 overpayment credited to 2012 (line 20 of Ohio 2012 IT 1040) and credit carryforward to be credited to his 2013 tax return (line 24 of Ohio 2012 IT 1040) reported on his 2012 Ohio individual income tax return. However, for the reasons described above, the Department's adjustment to the petitioner's 2011 Ohio individual income tax return resulted in a 2011 overpayment credited to 2012 in the amount of $794.95 and not $30,233.00 as reported by the petitioner. Furthermore, the petitioner's reported credit carryforward amount of $4,000.00 to be credited to his 2013 Ohio individual income tax return was also adjusted to $0.00 because the $794.95 credit carryforward from 2011 was applied to taxes owed in his 2012 Ohio individual income tax return, which resulted in $0.00 overpayment for 2012.

Finally, the petitioner contends that the Department erroneously adjusted his 2012 overpayment credited to 2013 (line 22 of Ohio 2013 IT 1040) reported on his 2013 Ohio individual income tax return. However, for the reasons described above, the Department adjusted the petitioner's credit carryforward to $0.00 for the 2013 Ohio individual tax return which reduced the total amount of taxes paid (line 24 of Ohio 2013 IT 1040) and thus, resulted in a balance due for the petitioner and subsequently, an assessment for 2013 tax year. The petitioner has not presented evidence sufficient to refute the accuracy of the tax, interest, and penalty amounts assessed in this matter. Furthermore, the evidence currently available to the Tax Commissioner reflects that the tax and interest amounts assessed are accurate and the penalty assessed is reasonable.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payments have 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.

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

FINAL DETERMINATION

Date: JUN 11 2020

Daryl & Kathryn Ross
6270 N. Paseo Valdear
Tucson, AZ 85750

Re: Refund Claim No. 10481
Individual Income Tax

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-1445, dated April 6, 2020. In that order, the Board remanded the case to the Tax Commissioner for further proceedings.

In resolution of this matter, an additional partial refund of $15,724.00 plus applicable statutory interest is hereby authorized.

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

FINAL DETERMINATION

Date: JUN 30 2020

Paul Stiggers III
5601 Central Freeway #1522
Wichita Falls, TX 76305

Re: Two Assessments
Individual Income Tax – Multiple Periods

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

Assessment No.	Tax Year	Tax	Interest	Penalty	Total
02201800923054	2013	$41.00	$5.05	$60.10	$106.15
02201800923053	2014	$1,589.00	$146.49	$531.33	$2,266.82

The Ohio Department of Taxation assessed the petitioner for failing to fully remit his Ohio income tax liability for the tax periods at issue. In response, the petitioner returned the Notice of Assessment with a stamp that states "Accepted for value and honor exempt from levy for my remedy, release of the proceeds, products, accounts, and fixtures in the order(s) to me immediately in the accordance with the public policy HJR-192, UCC 10-104 and UCC 1-104." The petitioner also submitted a UCC Financing Statement. The petitioner contends that he is exempt from paying his individual income tax liabilities. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

After reviewing the petitioner's contentions and documentation submitted with his petitions for reassessment, it appears that his filings "fit into the 'tax protestor' category." *Abraitis v. Testa*, 137 Ohio St.3d 285, 2013-Ohio-4725, ¶ 8, 998 N.E.2d 1149. Tax-protester filings are typically composed of "'a hodgepodge of unsupported assertions, irrelevant platitudes, and legalistic gibberish.'" *Dunham v. Commr. of Internal Revenue*, T.C. Memo. 2003–260, 2003 WL 22073043, *1, 3 (Sept. 8, 2003), quoting *Crain v. Commr. of Internal Revenue*, 737 F.2d 1417, 1418 (5th Cir.1984). Additionally, "[d]isagreement with the law in and of itself does not constitute good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it." *United States v. Miller*, 634 F2d 1134, 1135 (8th Cir. 1980) (quoting the trial court's instructions to the jury). In the case at hand, the petitioner's assertions provide no colorable claims of error and simply include legalistic gibberish. While the petitioner alleges that he is exempt from paying his income tax liabilities for the periods at issue, he has not provided sufficient documentation or evidence to support such claim.

Ultimately, the petitioner has failed to provide sufficient evidence or arguments to refute the accuracy of the tax and interest amounts assessed in this matter. On the contrary, the evidence currently available to the Tax Commissioner, including the 2013 and 2014 Ohio individual income tax returns that the petitioners filed, indicate that the tax and interest amounts assessed are correct. Furthermore, the penalties assessed are reasonable based on the facts and circumstances presented.

Accordingly, the assessments are affirmed.

Current records indicate that no payments have been made 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 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

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 2 4 2020

3C Food & Tobacco Sales Inc.
3725 Karl Rd.
Columbus, OH 43224

RE: Assessment No.: 100001516599
Sales Tax
Account No.: 25-323269

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
$72,164.48	$6,242.49	$36,082.12	$114,489.09

The petitioner operates a convenience store. This assessment is the result of a markup audit of the petitioner's sales from December 21, 2016 through March 31, 2019. The petitioner filed a petition for reassessment and seeks penalty abatement. A hearing was held as requested.

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

Audit Methodology

The petitioner failed to maintain primary records as required by R.C. 5739.11. Accordingly, the Department sent a memorandum of agreement to the petitioner that specified the methodology of the audit. The petitioner signed the memorandum of agreement agreeing to the audit methodology.

The inventory purchase invoices maintained by the petitioner were the primary documents utilized to determine the total taxable inventory purchased for sale during the audit period. The invoice dates were used to determine which inventory purchase transactions occurred within the audit period. In instances where the taxpayer failed to maintain complete inventory purchase

invoices, the amount of taxable inventory purchases was based upon the records, summaries, or other information obtained directly from the distributors. In the instances when confirmation of the amount of the taxable inventory purchases could not be obtained from either the taxpayer or the distributors, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor. Taxable inventory purchase amounts derived from distributor summaries or estimates were divided by the number of months in the calendar year period and recorded as monthly purchase amounts for the audit period.

Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco products, pop & soft drinks, energy drinks, other alcohol products, and other taxable merchandise. Each category was assigned a mark-up percentage derived from the product checklist completed with the petitioner's assistance, industry averages, or state minimum requirements. The purchases allocated to each category were marked up and then totaled to calculate the taxable sales for the audit period. The 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. Credits representing the tax reported and paid through the taxpayer's monthly sales tax returns were subtracted from the gross sales tax liability to determine any unreported sales tax liability by month for the entire audit period.

Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

Inventory

The petitioner contends that the inventory was calculated incorrectly during the audit. The petitioner contends that when it began operations, the inventory was not saleable and had to be destroyed and repurchased. As a result, the petitioner contends that the sale amounts calculated by the auditor are skewed and inflated. The petitioner failed to submit evidence to support their contention. The petitioner did not show error in the assessment. This contention is denied.

Theft

The petitioner contends that it suffered significant theft, approximately $2,500 per month for 23 months, during the audit period. The petitioner contends that, upon discovery, the employee responsible for the theft was immediately terminated, but police were not involved. A generalized description of losses incurred from theft and spoilage does not meet the appellant's burden to prove error in an assessment. *24 Hours, Inc. v. Tracy*, BTA No. 97-M-1389, 1999 WL 349220 (May 21, 1999). The loss must be quantifiable from the evidence presented by the petitioner. *R & K Entertainment, Inc. v. Zaino*, BTA No. 2003-B-103, 2004 WL 1631689 (July 16, 2004) at *5. Therefore, this contention is denied.

Mark-Up Percentages and Sampling Period

The petitioner objects to the mark-up percentages and the sample period used during the audit. The petitioner signed the memorandum of agreement without providing an alternative sample period or different mark-up percentages. The petitioner has submitted no evidence to prove that that audit results were inaccurate. Therefore, the petitioner's objections are denied.

Penalty

The petitioner seeks abatement of the penalty. The surrounding facts and circumstances warrant a partial abatement of the penalty.

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$72,164.48	$6,242.49	$18,041.00	$96,447.97

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

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

FINAL DETERMINATION

Date: JUN 2 4 2020

2768 Stark, LLC
2768 Stark Dr.
Willoughby Hills, OH 44094

RE: Assessment No.: 100000641577
Sales Tax
Account No.: 43-053731

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
$148,524.68	$9,517.41	$74,262.25	$232,304.34

The petitioner operates a bar and restaurant. This assessment is the result of a markup audit of the petitioner's sales from April 1, 2013 through June 30, 2016. The petitioner filed a petition for reassessment seeking penalty abatement. A hearing was held as requested.

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

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$148,524.68	$9,517.41	$22,278.51	$180,320.60

Current records indicate that payments in the amount of $50,000.00 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 unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 3 0 2020

AK Beverage LLC
3312 W. 105th St.
Cleveland, OH 44111

Re: Assessment No. 100001217445
Sales Tax
Account No. 18-805461

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

Tax	Pre-Assessment Interest	Penalty	Total
$24,332.53	$2,164.80	$8,516.19	$35,013.52

The assessment is the result of an audit of the petitioner's sales from June 1, 2015 through April 30, 2018. A hearing was held on April 9, 2020.

This assessment is the result of a mark-up analysis of the petitioner's purchases of inventory. The petitioner is required to maintain primary and secondary records of sales. R.C. 5739.11 and Ohio Adm.Code 5703-9-02. The petitioner did not provide z-tapes or other primary sales records for the period at issue. Audit Remarks, p. 4. Therefore, a mark-up analysis was conducted using inventory purchase invoices supplied by the taxpayer and their suppliers. 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. 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).

Pre-Assessment Interest

The petitioner requests abatement of the interest. 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 seeks abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. See *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The petitioner was already granted a reduced penalty during the audit process. Considering all the

JUN 3 0 2020

surrounding facts and circumstances, further abatement of the penalty is not warranted. The objection is denied.

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments of $3,600.00 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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000292

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 2 4 2020

Edgar Alhajj
233 Mermaids Bight
Naples, Florida 34103

Re: Assessment No.: 100001308367
Tax Type: Sales (Responsible Party)
Spa West Corporation
Reporting Period: 06/01/11 – 05/31/14
Account No.: 18-464124

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
$115,292.51	$48,755.46	$31,829.09	$195,877.06

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

Responsible Party

The petitioner does not object to being the responsible party. The petitioner is listed as the president, sole shareholder, and responsible party on business filings submitted to the State of Ohio.

Underlying Assessment

The petitioner contends that Spa West Corporation entered into a payment plan agreement with Special Counsel to the Attorney General in order to resolve the underlying assessment. The petitioner has presented a letter from Special Counsel that outlines the terms of the payment plan. The petitioner contends that he took out a personal loan to provide a down payment on the

assessment for the corporation, on the condition that a responsible party assessment would not be issued against him. He further contends that the contract states that as long as the petitioner is not in default of the agreement, the State of Ohio agrees to not issue a responsible party assessment, under R.C. 5739.33, for the underlying tax liability. The petitioner has not produced a copy of any such contract. More importantly, the Board of Tax Appeals and the Ohio Supreme Court have both held that payment plan agreements do not estop the Tax Commissioner from collecting unpaid sales tax, in absence of any long-standing administrative practice to exempt the officer from liability. *See Weiss v. Limbach*, 64 Ohio St.3d 79, 591 N.E.2d 1242, 1992-Ohio-141 (June 17, 1992). Additionally, since this is a responsible party assessment, the only issue that can be considered is whether the petitioner is a responsible party, under R.C. 5739.33, for the period listed above. Therefore, these contentions cannot be considered, as they relate to the underlying assessment.

The petitioner failed to present evidence that shows that he is not a responsible party. The petitioner failed to present evidence that the assessment was in error. Therefore, it is determined that the petitioner is a responsible party of Spa West Corporation under R.C. 5739.33.

Accordingly, the assessment shall stand as issued.

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

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

BackTrack, Inc.
8850 Tyler Blvd.
Mentor, OH 44060

Re: Refund Claim No. 201605805
Refund Amount Requested: $53,861.10
Refund Period: April 1, 2013 – February 28, 2016
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund filed pursuant to R.C. 5739.07.

The claimant submitted a request for refund contending that sales tax was erroneously paid on employment and income verification services purchased from a vendor. The claimant's refund request was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

Professional Service

The claimant contends that the transactions at issue are tax exempt because they are professional services. However, the auditor who initially reviewed the claim found these transactions to be taxable electronic information services. Pursuant to R.C. 5739.01(B)(3)(e), electronic information services are included within the definition of a sale and therefore a taxable service unless the electronic information services are incidental to a personal or professional service. Electronic information services means providing access to computer equipment by means of telecommunications equipment in order to examine or acquire data stored in or accessible to the computer equipment *or* placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment. (Emphasis added.) R.C. 5739.01(Y)(1)(c).

The claimant is an employment screening firm that provides employment screening and background checks for their clients. In support of their contention, the claimant submitted a copy of a previous opinion issued by the Tax Commissioner on October 20, 2004 which discussed the taxability of several human resources services including pre-employment services. The Tax Commissioner opinion referenced by the claimant found pre-employment services such as, verifying an applicant's name, address, and education; performing employment and personal reference checks; and reviewing the applicant's credit history, to be tax exempt professional services. However, in that situation, the company that performed the pre-employment services created customized reports for each of their clients by searching several databases to compile information based on their clients' specifications. In other words, the vendor provided personalized reports to each client. Therefore, it was clear that the company in the Tax Commissioner opinion provided a professional service. In contrast, based on

information submitted by the claimant and a review of their vendor's website[1], the claimant accesses a database where the information needed is available instantly. Further, the vendor website describes the service as a database that their customers, such as the claimant, can access at any time. While it appears that the vendor does provide verification services that involve more in-depth research, the agreement provided by the claimant only mentions employment and income verification services, which are both provided instantly. Because the claimant accesses a readymade database to examine data that has been placed there by the vendor, the service is a taxable electronic information service pursuant to R.C. 5739.01(Y)(1)(c). The objection is denied.

Sale for Resale

The claimant also appears to contend that these services are exempt because they were purchased for resale. R.C. 5739.01(E) excepts from taxation "those sales in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person." In order to approve a refund based on the resale exception, the claimant must provide sufficient evidence that supports the claim that the purchases are resold in the same manner that they themselves purchased the item or service. Here, the claimant submitted a copy of a sample verification report intended to be an example of the kind of data they receive from the vendor. However, they have not submitted any proof demonstrating that the product they sell to their customers is sold in the same manner in which it is received from the vendor. No evidence has been provided to support the contention that the purchases qualify for the resale exception. The objection is denied.

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.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

[1] Equifax, *Income and Employment Verification*, https://www.theworknumber.com/solutions/products/income-employment-verification/ (accessed May 28, 2020).

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FINAL DETERMINATION

Date: JUN 11 2020

Bapji, Inc.
1029 Kenmore Blvd.
Akron, OH 44314-2154

Re: Assessment No. 100000939373
Sales Tax
Reporting Period: 08/01/2014 - 03/31/2017

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-226, dated March 11, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration pursuant to the parties' joint request.

In resolution of this matter, the assessment is modified as follows:

	Total
Tax	$ 55,232.49
Pre-Assessment Interest	$ 4,377.31
Post-Assessment Interest	$ 3,382.33
Penalty	$ 7,007.87
Total	$ 70,000.00

Payments and credits totaling $70,000.00 have been received in complete satisfaction of this assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 2 4 2020

Douglas Coughlin
1450 W. Jackson St.
Painesville, OH 44077

Re: Assessment No.: 100001343629
Tax Type: Sales (Responsible Party)
Zion Contracting & Tree Service Inc.
Vendor's License No.: 43-257990
Reporting Period: 01/01/2015 – 02/28/2018

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

Tax	Pre-Assessment Interest	Penalty	Total
$68,880.24	$7,325.82	$6,887.81	$83,093.87

This is a responsible party assessment. Zion Contracting & Tree Service Inc. incurred sales tax liability resulting in a sales tax assessment for the above period. This assessment was never fully satisfied by Zion Contracting & Tree Service Inc. and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amount. Accordingly, the outstanding liability of Zion Contracting & Tree Service Inc. has been derivatively assessed against Douglas Coughlin. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. No hearing was requested.

The petitioner objects to the assessment. The petitioner contends that he was not performing taxable services. Since this is a responsible party assessment, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period listed above. Therefore, this objection cannot be considered as it relates to the underlying assessment.

The petitioner does not make an argument regarding his status as the responsible party. The evidence shows the petitioner is the only signatory on the articles of incorporation for Zion Contracting & Tree Service Inc. The petitioner is also listed as the responsible party on the Responsible Party Questionnaire, signed by the petitioner.

The petitioner failed to demonstrate that the assessments were in error. Therefore, it is determined that the petitioner was a responsible party of Zion Contracting & Tree Service Inc., under R.C. 5739.33.

Accordingly, the assessment is affirmed as issued.

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

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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: JUN 3 0 2020

Hill Country Class 3, LLC
13729 Research Blvd.
Suite 630
Austin, TX 78750

Re: Assessment No. 100001058493
Sales Tax
Account No. 99-107839
Reporting Period: 01/01/2011 – 02/28/2017

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

	Pre-Assessment		
Tax	Interest	Penalty	Total
$34,689.20	$2,206.00	$0.00	$36,895.20

This assessment is the result of an audit of the petitioner's sales for the reporting period shown above. The petitioner is a distributor of firearms suppressors and accessories. A hearing was not requested.

Substantial Nexus

The petitioner contends that the company did not have a substantial nexus with the State of Ohio prior to August 2016. Therefore, they believe that the audit should not include a review of sales made prior to that time. When a seller has substantial nexus with Ohio they are required to collect and remit use tax on sales of tangible personal property or services made to consumers in Ohio. R.C. 5741.01(I)(1). Substantial nexus is presumed to exist when the seller uses any person, other than a common carrier, to facilitate the seller's delivery of tangible personal property to customers in this state by allowing the seller's customers to pick up property sold by the seller at an office, distribution facility, warehouse, storage facility, or similar place of business. R.C. 5741.01(I)(2)(c)(iv).

The petitioner does not deny that they made sales to Ohio residents prior to 2016. However, they believe that those sales did not create substantial nexus because they did not have a physical presence in the state. However, in making those sales, the petitioner used an Ohio based retail dealer to facilitate those sales. During the audit, the petitioner explained that their customers select products via the petitioner's website. Once the customer makes payment, the product is shipped to the location chosen by the customer. The petitioner further explained that customers can only retrieve the products from a retail dealer. Audit Remarks, p. 5. Further, this retail gun dealer is not the same entity as the petitioner; they are a separate business that receives a percentage of the sales based on their relationship as a facilitator of those sales. *Id.* It is clear the business operated by utilizing a retail

dealer to facilitate purchases to Ohio customers. In addition, the petitioner had more than 7 purchases per year for a total of more than $25,000 so they do not qualify for the safe harbor exemption. Therefore, because the petitioner used an entity, other than a common carrier, for their customers to use as a pickup location, substantial nexus existed pursuant to R.C. 5741.01(I)(2)(c)(iv). The objection is denied.

The assessment is affirmed as issued.

Current records indicate that a payment of $6,770.66 has been made towards the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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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: JUN 3 0 2020

David E. Hostetler
5639 Stuber Dr. N.W.
Canton, OH 44718

Re: 9 Assessments
Tax Type: Sales (Responsible Party)
Daytona Motorcars, Inc.
Vendor's License No.: 76-146850

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

Assessment No.	Filing Period	Total
100000650487	06/07/05 – 06/30/05	$578.65
100000650488	01/01/06 – 06/30/06	$770.01
100000650489	07/01/06 – 12/31/06	$770.84
100000650490	01/01/07 – 06/30/07	$860.74
100000650491	07/01/07 – 12/31/07	$779.96
100000650492	01/01/08 – 06/30/08	$766.95
100000650493	07/01/08 – 12/31/08	$1,531.74
100000650494	01/01/09 – 06/30/09	$1,525.97
100000650497	07/01/05 – 12/31/05	$774.07
	Total:	$8,358.93

These are responsible party assessments. Daytona Motorcars, Inc. incurred sales tax liability resulting in sales tax assessments for the above periods. These assessments were never fully satisfied by Daytona Motorcars, Inc. 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 Daytona Motorcars, Inc. has been derivatively assessed against David Hostetler. 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 on the matter was initially requested but was later waived by the petitioner.

The petitioner objects to the assessments. The petitioner contends that he tendered his resignation, on December 1, 2005, for his positions as a member of the board of directors, as vice president, and as secretary for Daytona Motorcars, Inc. The petitioner identifies another party whom he states

should be the responsible party on the assessments. The petitioner contends that after his resignations, all further operations were conducted by Donnie Hahn. These contentions are not well taken.

The evidence indicates that the petitioner was listed as the sole signatory on the articles of incorporation for Daytona Motorcars, Inc., dated March 8, 2005. The petitioner submitted a printed stock certificate from Daytona Motorcars, Inc. that states that, out of 750 authorized shares, David Hostetler owns 50 shares. The petitioner is listed as the president of Daytona Motorcars, Inc. on the application for a vendor's license, and he is the sole signatory on that document as well. The petitioner submitted two typed, single page resignation documents that were signed and dated manually by only the petitioner. There are no counter signatures or any proof that these documents were submitted to the company as proposed. No amended articles of incorporation or any other evidence of a change in ownership were submitted to the State prior to the State's determination to cancel the articles of incorporation for Daytona Motorcars, LLC for failure to pay taxes on April 29, 2009. Therefore, the petitioner has failed to meet his burden of proof, and his contentions are denied.

The petitioner contends another shareholder, Donnie Hahn, is actually the responsible party. However, the fact that one person may be responsible does not absolve another of liability. *Perry v. Tracy*, BTA No. 98-M-8, 1998 WL 741927 (Oct. 16, 1998). R.C. 5739.33 requires personal liability to fall on **any** officer or employee having the requisite indicia of responsibility. *Beck v. Tracy*, BTA No. 96-K-156, 1997 WL 40124 (Jan. 17, 1997). (Emphasis added.)

The petitioner failed to provide sufficient evidence to demonstrate that he was no longer an owner or employee of the company during the assessed periods. The petitioner failed to demonstrate that the assessments were in error. Therefore, it is determined that the petitioner was a responsible party of Daytona Motorcars, Inc., under R.C. 5739.33.

Accordingly, the assessments are affirmed as issued.

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

JUN 3 0 2020

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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: JUN 3 0 2020

Amal Karkar
3495 Perch Dr.
Willits, CA 95490

Re: Assessment No. 100001505857
Sales Tax (Responsible Party)
Account No. 18-805461

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

Tax	Pre-Assessment Interest	Penalty	Total
$22,532.53	$3,123.63	$8,516.19	$34,172.35

This is a responsible party assessment. AK Beverage LLC incurred sales tax liability resulting in an assessment for the period of June 1, 2015 through April 30, 2018. This assessment was never satisfied by AK Beverage LLC and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns and those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of AK Beverage LLC has been derivatively assessed against Amal Karkar. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period of June 1, 2015 through April 30, 2018. Neither the underlying substantive issues nor abatement of the penalty can be considered. A hearing was not requested.

The petitioner objects to the assessment. The petitioner contends they are not the manager of the establishment and, as such, not a responsible party. The petitioner's contention is not well taken. A person is considered a responsible party when they are an officer of an entity and responsible for the entity's fiscal responsibilities. R.C. 5739.33. An officer includes a president. Ohio Adm.Code 5703-9-49(A)(1). When a President of an entity offers no evidence disputing their liability as a responsible party, they are considered a responsible party. *See Blosser v. Zaino*, BTA No. 2002-B-659, 2003 WL 21092386 (May 9, 2003). Additionally, the holder of a liquor permit is a responsible party, even when store locations are managed by others. *SQS Foodstores, Inc. v. Tracy*, 7th Dist. Mahoning No. 00-CA-124, 2002-Ohio-5015. A responsible party cannot escape liability by delegating that responsibility to another. *Spithogianis v. Limbach*, 53 Ohio St.3d 55, 559 N.E.2d 449 (1990). The petitioner is the President of AK Beverage LLC. The petitioner signed as the President and Owner on numerous pieces of paperwork during the audit and is listed as the President on AK Beverage LLC's liquor permit. The petitioner did not submit evidence with their petition for reassessment. Therefore, the petitioner is a responsible party. The petitioner cannot delegate this responsibility to a manager. The objection is denied.

JUN 3 0 2020

The petitioner contends they do not owe the assessed penalty as the underlying assessment has a pending petition for reassessment. The petitioner cannot object to the underlying assessment during an assessment issued under R.C. 5739.33. The only objections which can be considered are those pertaining to the petitioner's membership in one of the classes held responsible under R.C. 5739.33. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976). However, if any changes are made to the underlying assessment or AK Beverage LLC makes any payments, those changes will be reflected on the responsible party liability. The objection is denied.

Therefore, the assessment is affirmed.

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-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: JUN 2 4 2020

KEPS Technologies, Inc.
1800 N. Grand River Ave.
Lansing, MI 48906

Re: Refund Claim No. 201801485
Refund period: 01/01/2015 – 06/30/2015
Account No. 38-2974920

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $115,290.33 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State. A hearing was held.

This refund claim pertains to the tax paid on telecommunications equipment leased to a vendor. The claim was filed on August 24, 2017. The reviewing agent denied the initial claim, and requested additional information including proof of original and amended returns, original invoices and credit memos, and a statement of usage.

The claimant provided additional information on September 27, 2017, consisting of documents they contend constitute proof of original and amended return sales figures, a schedule summarizing the amounts, copies of remittance advice from the vendor, and an email from same providing a statement of usage. The claimant also included a lease route order and purchase order forms for each order. After review, the agent found that the documentation received by the vendor, copies of remittance advice for shipping and prices, did not equal the amounts on the claimant's original sales tax returns. Therefore, the agent denied the claim.

The appeal was forwarded to the hearing officer. A hearing was held and additional information was requested, specifically a signed lease route order, schedules of route pricing, and vendor purchase orders. The only information that was provided was a lease route order. No clarification as to the discrepancies in the original returns, purchase orders, schedules of route pricing or other information was produced. Despite multiple requests, the claimant did not provide information sufficient to support the requested refund amount.

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.

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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: JUN 17 2020

Khuram, Inc.
910 E. Hudson St.
Columbus, OH 43211

RE: Assessment No.: 100000461107
Sales Tax
Account No.: 25-299246

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
$60,176.22	$3,970.15	$30,088.04	$94,234.41

The petitioner operates a convenience store. This assessment is the result of a markup audit of the petitioner's sales from January 1, 2013 through October 31, 2015. The petitioner filed a petition for reassessment. No hearing was requested on the matter.

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

Audit Methodology

The petitioner failed to keep complete and accurate records as required by R.C. 5739.11. Audit Remarks, p. 5. Therefore, a mark-up analysis was conducted using the petitioner's 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 products, pop & soft drinks, energy drinks & other beverages, and other taxable merchandise. Each category was assigned a mark-up percentage based on either the product checklist completed with the taxpayer's assistance, industry standards, or state minimum requirements.

A sample period of January 1, 2014 through December 31, 2014 was used to calculate taxable sales using a mark-up analysis. It was agreed that the taxpayer's activity for the sample period is representative of the business activity for the entire audit period. Inventory purchase invoices maintained by the petitioner were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period.

Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. In the instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon records, summaries, or other information obtained directly from the distributors. In the instances when the confirmation of the amount of taxable inventory purchases could not be obtained from either the taxpayer or the distributors, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor.

The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The taxpayer accepted food stamps throughout the entire audit period. Therefore, the taxable sales calculated from the pop & soft drinks category was reduced by twenty-five percent.

The remaining calculated taxable sales from all categories were totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the taxpayer for the entire sample period. The resulting taxable percentage of reported gross sales, 107.0513 percent, was multiplied by the reported gross sales for each month of the entire audit period to determine the calculated monthly taxable sales for the entire audit period.

The calculated taxable sales by month were then multiplied by the applicable tax rates in effect throughout the audit period to determine the gross sales tax liability by month for the entire audit period. Credits representing the tax reported and paid throughout the taxpayer's monthly sales tax returns were subtracted from the gross sales tax liability to determine any unreported sales tax liability by month for the entire audit period.

Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

Inaccurate Assessment

The petitioner contends that "the method used to arrive at the percentage of taxable sales is faulty, not in accordance with the law and results in the conclusions of this assessment being inaccurate." A request for more information was issued to the petitioner, but the petitioner failed to respond. The petitioner has failed to provide any more detailed objections, and no documentation or evidence has been submitted to substantiate its original claims. The burden is on the petitioner to provide sufficient evidence to warrant adjusting a finalized audit. *Forest*

Hills, *supra* at *4. Therefore, the petitioner has failed to meet its burden, and these contentions are denied.

Penalty

The petitioner seeks abatement of the penalty. The surrounding facts and circumstances warrant a partial abatement of the penalty.

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$60,176.22	$3,970.15	$18,052.71	$82,199.08

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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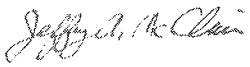

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

JUN 24 2020

Khurram, LLC
1773 E. 5th Ave.
Columbus, OH 43219-2503

Re: Assessment No. 100001117674
Sales Tax 04/25/2016 – 04/30/2018

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-2445, dated June 10, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration pursuant to the parties' joint request.

In resolution of this matter, the assessment is modified as follows:

	Total
Tax	$ 41,637.05
Pre-Assessment Interest	$ 2,665.22
Post-Assessment Interest	$ 994.72
Total	$ 45,296.99

Payments and credits totaling $45,296.99 have been received in complete satisfaction of this assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

JUN 24 2020

Khurram, LLC
1773 E. 5th Ave.
Columbus, OH 43219-2503

Re: Assessment No. 100001117802
Sales Tax 02/21/2017 – 04/30/2018

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-2446, dated June 10, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration pursuant to the parties' joint request.

In resolution of this matter, the assessment is modified as follows:

	Total
Tax	$ 28,413.37
Pre-Assessment Interest	$ 1,464.14
Post-Assessment Interest	$ 613.03
Total	$ 30,490.54

Payments and credits totaling $30,490.54 have been received in complete satisfaction of this assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

Lambert Buick GMC, Inc.
2409 Front St.
Cuyahoga Falls, OH 44221

RE: Refund Claim No.: 201901919
Refund Claim Amount: $2,161.23
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $2,161.23, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

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

The claimant is a motor vehicle dealer. On September 15, 2018, the claimant collected sales tax on the sale of a 2018 GMC Yukon. The purchase price of the vehicle was $73,018.25. The claimant contends that a refund of the entire purchase price was provided to the customer when the vehicle was returned on December 28, 2018. The claimant states that the vehicle was returned after the purchaser passed away shortly after the vehicle was purchased. The claimant filed the application for refund seeking a refund of the sales tax paid on the returned vehicle.

The Department informed the claimant during the initial denial that the Department required additional evidence including a copy of the cancelled check for a refund of the full purchase price provided to the customer, documentation to show title was returned to the dealer, or an explanation of the difference in the purchase price and documentation to show title was returned on the trade-in. The Department informed the claimant that the reason for denial was because no evidence of a refund of the full purchase price was submitted.

The claimant provided documentation in the form of a cancelled check in the amount of $61,000.00, which showed a refund of less than the purchase price of $73,018.25 to the purchaser's spouse who received title to the vehicle through a probate transfer. The claimant also provided two Ohio Certificates of Title evidencing the original sale and the return buy-back by

the claimant, the original buyer's order, a vehicle inventory printout of the returned vehicle, the purchaser's obituary, and a tax receipt issued by the Clerk of Courts containing a purchase price of $73,018.25.

The claimant failed to elaborate on the difference between the refund provided and the purchase price. The claimant failed to provide evidence of other refund payments, such as a refund from a lienholder or a financing company. Additionally, the claimant failed to provide evidence that the original trade-in was returned to the customer. The evidence submitted is insufficient to warrant a refund of the sales tax. The claimant failed to demonstrate it provided a refund of the full purchase price and sales tax as required by Ohio Adm.Code 5703-9-11.

Therefore, the claim for a refund is denied.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 2 4 2020

Mercy Health North LLC
Attn: Tax
1701 Mercy Health Pl.
Cincinnati, OH 45237

RE: Refund Claim No.: 201707092
Tax Type: Sales
Tax Period: January 1, 2014 – February 28, 2017

This is the final determination of the Tax Commissioner on an application for refund in the amount of $143,832.80, plus applicable interest in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. The claimant revised its refund request to $142,754.03 to account for a vendor's discount. A hearing was held in this matter on July 10, 2019.

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

The claimant contends that it erroneously paid sales tax for supplies purchased by a separate, affiliated entity. The claimant also contends that the amount of tax owed by its affiliate was incorrectly calculated resulting in an overpayment by the claimant.

Background

Mercy Health North LLC is a tax-exempt, I.R.C. 501(c)(3) organization. The claimant is a regional parent holding company for several tax-exempt hospitals and other affiliated organizations in the Toledo area. The claimant purchases laboratory supplies and testing from an affiliated entity. The purchases are tax-exempt pursuant to R.C. 5739.02(B)(12), which provides a tax exemption for sales of tangible personal property or services to organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code, including sales to one or more hospital facilities exempt under R.C. 140.08. The claimant states that during an internal review, it discovered that it erroneously remitted sales tax on its tax returns by including use tax owed by its affiliate. Specifically, the claimant contends that it erroneously reported and remitted sales tax returns for purchases made by its affiliated entity that exclusively used the items and that its affiliate remitted use tax on the purchases and the claimant also remitted tax for the same transactions in error through its sales tax returns, which resulted in some transactions being taxed twice. Finally, the claimant contends that the original tax calculation for the purchases was overstated as it included items that were tax-exempt pursuant to R.C. 5739.02(B)(12).

The affiliate at issue is a separate legal entity. The claimant states that most of its affiliate's supplies are used to perform laboratory testing for affiliated tax-exempt organizations and are exempt from sales and use tax. However, its affiliate provides a small percentage of testing and supplies to unrelated, non-exempt third parties.

The Department informed the claimant in the initial denial letter that the Department required additional evidence to support the sales tax liability, such as sales journals, cash register receipts, summary reports used to prepare the tax return, or other documentation. The Department also requested amended and original sales tax returns for the affiliated entity and the claimant to prove sales tax was twice remitted on the same transactions by both entities, and an itemized list showing taxable sales and purchases during the audit period for both entities.

The claimant submitted amended sales tax returns for both entities, an explanation of how the claimant calculated tax for the period, and spreadsheets and cancelled checks for transactions. The claimant provided a statement explaining the contentions submitted previously of an accounting error, which processed and included the cost of supplies utilized by its affiliate as transactions on the claimant's sales tax returns. The objections are addressed below.

Calculation Methodology for Testing

The claimant states that its affiliate does not track monthly supplies by type or category of lab tests performed for patients (i.e., tax-exempt versus tests performed for non-patients), but that its affiliate is able to identify and track the percentage of taxable tests performed by utilizing revenue data. The claimant contends that its affiliate, "…calculates an 'Outreach Percentage' by dividing the Relative Value Units ('RVUs') or costs as determined by Medicare reimbursement, of laboratory specimens drawn by non-Mercy patients (termed 'Outreach (IL) RVUs') by the total number of RVUs for the month." Claimant's response, July 8, 2019. The claimant further explains that the calculated outreach percentage is then applied against the total supplies expense to calculate the taxable supplies used. The claimant states that the calculation is based on a ratio of transactions used for unrelated purposes.

The claimant contends that exempt testing numbers were erroneously included in the tax calculation for taxable outreach testing supplies. The claimant states that its affiliate remitted use tax, which incorporated a revised calculation. The claimant contends it erroneously remitted the original tax calculation amount of $142,754.03.

During the Department's review, it determined the calculation of tax was based on a ratio of transactions and estimates rather than actual tax liability. The claimant confirms that this is accurate, but requests that the Department consider this a reasonable estimate of the amount of taxable supplies. The Department was unable to verify the information provided by the claimant because the claimant did not provide documentation in the form of primary records to support the tax liability. Therefore, this objection is denied.

Transactions Allegedly Taxed Twice

The claimant contends that it erroneously paid tax on transactions in which it was not a party. The claimant also contends that tax was already paid by the party to the transaction, an affiliate, who purchased and exclusively used the items. The claimant provides that while use tax was remitted from its affiliate, the claimant also remitted sales tax on its sales tax returns for the same transactions, which resulted in transactions that were taxed twice. The claimant submitted its affiliate's proof of payment and summary documentation in the form of monthly spreadsheets with estimated tax liability.

The claimant states that the affiliate paid use tax on the transactions. However, the affiliate's proof of payment was for a different period than the refund period at issue. Additionally, the affiliate's tax payment does not match the sales tax amount remitted by the claimant. Because the affiliate's tax payment was for a different period and different amount than the claimant's refund request, the Department was unable to verify that payments were made for the same transactions. Further, the claimant submitted this documentation without proof of invoices, cash register receipts, accrual sheets, or other documentation to verify the actual sales tax liability. This information does not show error in the sales tax liability remitted by the claimant as the claimant merely provided a ratio of sales tax liability. Additionally, this information does not support the claimant's contention that the transactions were taxed twice.

Accordingly, this objection is denied.

Therefore, 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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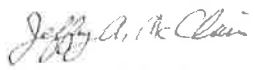

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date:
JUN 17 2020

MS Auto Sales
1713 Woodman Dr.
Dayton, OH 45420

RE: Refund Claim No.: 919351077938
Refund Claim Amount: $572.56
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $572.56, 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 scheduled for Wednesday, December 4, 2019, but the claimant did not call or appear for the scheduled time.

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

The claimant is a motor vehicle dealer. On or about July 2, 2016, the claimant collected sales tax on the sale of a 2006 Dodge Dakota. The claimant contends that a refund of the entire purchase price was returned to the customer when the deal was cancelled. The claimant filed the application for refund on behalf of the customer seeking a refund of the sales tax paid on the returned vehicle.

The claimant is requesting a refund of the original sales tax price, which was discounted to allow for the vendor's discount for timely filing as provided by R.C. 5739.12(B)(1). The claimant provided documentation in the form of an Ohio Certificate of Title which reported the sales tax amount as $568.26, rather than the requested refund amount of $572.56. Additionally, the claimant provided a statement detailing the status of the returned vehicle and the difference between the refunded deposit and the purchase price. The claimant contends that the customer received a refund of less than the purchase price because the customer did not pay the lender the full price of the vehicle; however, the claimant settled the final loan payoff and "...the customer was made whole." The claimant states that the lender must cancel ancillary products, such as gap insurance purchased with the vehicle to ensure the customer is not charged. The claimant did not provide evidence that the lender provided the customer with a refund or credit of the full purchase price.

Further, there are discrepancies between the figures the claimant submitted as evidence of the purchase price. The claimant states the purchase price was $8,485.00; however, this is contrary to other evidence the claimant submitted, such as the Ohio Certificate of Title which listed the purchase price as $7,897.44 and the Installment and Security Agreement which listed the purchase price as $7,775.00. The evidence submitted is insufficient to warrant a refund of the sales tax as the claimant failed to demonstrate the customer received a refund or credit for the full purchase price of the vehicle.

Therefore, the claim for a refund is denied.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

JUN 24 2020

Napoleon Biogas, LLC
30 Lakewood Cir. N.
Greenwich, CT 06830

RE: Refund Claim No.: 201602884
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $1,599.41, plus applicable interest in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was not requested.

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

The claimant is seeking a refund for an overpayment of sales tax paid in the amount of $1,599.41 plus applicable interest for the period from April 2, 2014 through January 21, 2015. The claimant contends that it erroneously paid sales tax for purchases exempt pursuant to R.C. 5739.02(B)(40) as sales of tangible personal property and services used directly and primarily in generating electricity. The claimant's contention is addressed in detail below.

Background

Napoleon Biogas, LLC is one of three CH4 Biogas facilities in the United States which produce renewable energy by anaerobically digesting livestock manure and food-grade organic wastes.[1] Napoleon Biogas, LLC is located in Napoleon, Ohio directly across the street from a Campbell's soup plant. *Id.* This plant receives waste from the Campbell's plant as well as area food processors, waste recyclers, and local dairy farms. *Id.*

Generators of Electricity

The claimant contends that transactions from Wyse Equipment, Inc. are exempt as items used to generate, transmit, or distribute electricity for use by others. The claimant contends that the purchases were for repairs to its JCB520 telehandler and rentals to replace the telehandler while it was being repaired. The claimant contends that the telehandler is used to generate electricity because, "It is the only way to feed waste to the digester."

[1] *http://ch4biogas.com/projects/napoleon-biogas/ (accessed June 11, 2020).*

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). R.C. 5739.02(B)(40) provides an exemption on tax for sales of tangible personal property and services to a provider of electricity used or consumed *directly and primarily* in generating, electricity for use by others and tangible personal property and services used in the repair and maintenance of the production, transmission, or distribution system. (Emphasis added.) 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 claimant provided sufficient evidence to demonstrate that the claimant generates electricity for use by others through its digester; however, the claimant failed to demonstrate that the telehandler and its repairs and rentals were used directly and primarily in generating electricity. The Department informed the claimant during the initial denial that the Department required additional evidence to support the sales tax exemption claimed on the refund application, and proof that sales tax was paid on the transactions. The claimant submitted proof of payment for the transactions and provided a statement explaining the previously submitted contention that the "Telehandler is used to feed organic waste to the digester."

The claimant submitted information describing the telehandler as a hybrid crane and forklift. However, the claimant failed to provide evidence that the telehandler is *directly and primarily* used in generating electricity as required by R.C. 5739.02(B)(40). Further, the claimant failed to provide any information to verify the use of the telehandler. Based on information provided, it cannot be determined that the telehandler is directly or primarily used in generating electricity, as a forklift can be used for both exempt and non-exempt activities.

Although the claimant was given an opportunity to provide proof that the purchases in question qualified under R.C. 5739.02(B)(40), no additional information was provided. Since the claimant did not provide evidence of usage, the exempt nature of the transactions cannot be established. The evidence submitted is insufficient to warrant a refund of the sales tax. The claimant has not satisfied its burden that the claimant is entitled to a refund. Accordingly, this objection is denied.

Therefore, the claim for refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE 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: JUN 2 4 2020

Tatyana Shin
34996 N. Turtle Trl., Apt. C
Willoughby, OH 44094

Re: Assessment No.: 100001253347
Tax Type: Sales (Responsible Party)
Tatyana Shin Inc.
Reporting Period: 11/01/15 – 11/30/15
Account No.: 18-500651

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
$2,000.00	$31.38	$970.00	$3,001.38

This is a responsible party assessment. Tatyana Shin Inc. incurred sales tax liability resulting in sales tax assessment for the period listed above. This assessment was never satisfied by Tatyana Shin Inc. and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns, those in charge of, or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amount. Accordingly, the outstanding liability of Tatyana Shin Inc. has been derivatively assessed against Tatyana Shin. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 during the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was not requested.

Responsible Party

The petitioner contends that she paid the above-mentioned assessment through the Ohio Gateway. The petitioner does not make an argument regarding her status as a responsible party. The evidence indicates that the petitioner is the president of Tatyana Shin Inc. based on its business filings and the petition for reassessment. The petitioner is the sole signatory, and is listed as president, on Tatyana Shin Inc.'s vendor's license. The petitioner is also the sole signatory on the articles of incorporation and named the company after herself. Therefore, it is determined that the petitioner is a responsible party of Tatyana Shin Inc. under R.C. 5739.33.

The petitioner failed to present evidence that shows that she paid this assessment or the underlying assessment in full. A return has been filed for the underlying corporation, but the evidence

available to the Department shows that payments have not been made in full satisfaction of either the responsible party assessment nor the original, underlying assessment. Therefore, the petitioner's contention is denied. Because the filing of the return has adjusted the underlying corporate liability, the responsible party liability will also be adjusted.

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$185.32	$2.91	$132.36	$320.59

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 THESE MATTERS. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THESE MATTERS WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 3 0 2020

Richard J. Szekelyi
3092 Euclid Heights Blvd.
Cleveland Heights, OH 44118

Re: 10 Assessments
Tax Type: Sales (Responsible Party)
Horton Manufacturing Company, LLC
Vendor's License No.: 77-999987

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

Assessment No.	Filing Period	Total
100001278657	12/01/08 – 12/31/08	$276.39
100001278658	03/01/09 – 03/31/09	$156.82
100001278659	04/01/09 – 04/30/09	$3,008.87
100001278660	08/01/09 – 08/31/09	$3,122.12
100001278661	09/01/09 – 09/30/09	$3,119.62
100001278662	12/01/09 – 12/31/09	$3,140.98
100001278667	01/01/09 – 01/31/09	$188.17
100001278668	02/01/09 – 02/28/09	$277.83
100001278669	10/01/09 – 10/31/09	$3,121.14
100001278670	11/01/09 – 11/30/09	$3,150.34
	Total:	$19,562.28

These are responsible party assessments. Horton Manufacturing Company, LLC incurred sales tax liability resulting in sales tax assessments for the above periods. These assessments were never fully satisfied by Horton Manufacturing Company, 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 liabilities of Horton Manufacturing Company, LLC have been derivatively assessed against Richard Szekelyi. 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 originally requested but was waived by the taxpayer.

The petitioner objects to the assessments. The petitioner contends that he was no longer an officer or member of the company during the assessment periods. The petitioner states that he was

terminated as CEO and left the company in December 2008. The petitioner contends that Horton Manufacturing Company, LLC entered into receivership on January 30, 2009. The petitioner states that Terry Humphrey was appointed receiver to assist Comerica Bank in collecting on Horton's debt obligations; therefore, any further attempts to collect sales taxes should be directed toward him. However, the fact that one person may be responsible does not absolve another of liability. *Perry v. Tracy*, BTA No. 98-M-8, 1998 WL 741927 (Oct. 16, 1998). R.C. 5739.33 requires personal liability to fall on **any** officer or employee having the requisite indicia of responsibility. *Beck v. Tracy*, BTA No. 96-K-156, 1997 WL 40124 (Jan. 17, 1997). (Emphasis added.)

The evidence submitted indicates that the petitioner was the CEO and a member of Horton Manufacturing Company, LLC. The petitioner was listed as a member of Horton Manufacturing Company, LLC and as a responsible party for the company on its vendor's license. An IRS Form 4180 lists the petitioner as the person responsible for authorizing tax deposits and directing payments for bills and creditors. Horton intra-company emails show that the petitioner had the authority to direct how and when bills were paid, with the latest email dated December 11, 2008.

However, the petitioner demonstrated that the appointment of Terry Humphrey as receiver removed the requisite indicia of responsibility from himself. Therefore, he was no longer a responsible party under R.C. 5739.33, after February 3, 2009. The sales tax return filing deadline for January 2009 was February 23, 2009, which means the petitioner did not possess the requisite indicia for the return periods of January 2009 through December 2009.

However, the petitioner failed to demonstrate that he was no longer CEO of the company during December 2008. The petitioner provided no proof that he was fired or terminated in December 2008. An email evidences that the petitioner was still controlling the company's funds and financial obligations on December 11, 2008. The receivership did not begin until February 3, 2009, and the filing deadline for December 2008 was January 23, 2009. Therefore, it is determined that the petitioner was a responsible party, under R.C. 5739.33, of Horton Manufacturing Company, LLC for the assessment period of December 1, 2008 through December 31, 2008.

Accordingly, assessment number 100001278657 is affirmed as issued and the remainder of the assessments are cancelled.

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.

JUN 3 0 2020

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THESE MATTERS. UPON EXPIRATION OF THE SIXTY (60) 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
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUN 3 0 2020

TOSS, Inc.
303 Longspur Rd.
Highland Heights, OH 44122

Re: Refund Claim No. 201806227
Filed on March 7, 2018
Sales Tax
Account No. 18-808402

This is the final determination of the Tax Commissioner on an application for refund in the amount of $39,680.49 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and provided additional information. A hearing was held on December 12, 2019.

The claimant remitted lump payments for back sales tax. The claimant contends they did not charge sales tax to their customers during this period and the payment was erroneous because they provided a non-taxable service.

All sales made in Ohio are presumed taxable until an exemption is established. R.C. 5739.02(C). Therefore, in order to justify a refund of remitted sales tax, a claimant must affirmatively demonstrate the transaction is exempt from taxation. The claimant has not met this burden. The transactions in question involve the sale of a mix of tangible personal property and personal services. Mixed transactions involving personal services are considered exempt when the customer's true object of the transaction is obtaining the service. *Emery Industries, Inc. v. Limbach*, 43 Ohio St.3d 134, 539 N.E.2d 608 (1989). The claimant submitted a narrative describing their business, a spreadsheet alleging their sales for 2015, and other supporting documentation. However, this documentation is insufficient to prove their claim. The claimant did not submit evidence, such as invoices or contracts, speaking directly to the nature of each transaction. The claimant must show each transaction is exempt to overcome the presumption of taxability and justify a refund. General evidence about the nature of their business and a summary of sales is insufficient to show the true object of the customer's purchases.

Additionally, without evidence speaking to the individual transactions the Commissioner cannot confirm the claimant's contention that sales tax was not charged to consumers. If sales tax was charged, a vendor must show the sales tax was refunded to the consumer or credited to their account. Ohio Adm.Code 5703-9-07(A)(3)(a). It is worth noting the spreadsheet summarizing sales did show sales tax charged on occasion, reinforcing the need for evidence speaking to each individual transaction.

Therefore, the claim for refund is denied.

JUN 3 0 2020

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

FINAL DETERMINATION

Date: JUN 3 0 2020

TOSS, Inc.
303 Longspur Rd.
Highland Heights, OH 44122

Re: Refund Claim No. 201806318
Filed on March 7, 2018
Sales Tax
Account No. 18-808402

This is the final determination of the Tax Commissioner on an application for refund in the amount of $14,091.00 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and provided additional information. A hearing was held on December 12, 2019.

The claimant remitted lump payments for back sales tax. The claimant contends they did not charge sales tax to their customers during this period and the payment was erroneous because they provided a non-taxable service. The claimant provided sufficient documentation to show a refund is warranted. The claimant also amended the claim to request a total of $15,526.91.

The claimant showed they were performing a non-taxable personal service. However, a refund to a vendor requires the vendor to show proof of tax refunded to the consumer or credited to the consumer's account. Ohio Adm.Code 5703-9-07(A)(3)(a). The claimant contends they did not charge sales tax and so would not need to prove tax was refunded to the customer. The submitted evidence shows this is broadly true. However, certain transactions show sales tax charged to the customer. No evidence was submitted showing this sales tax was refunded to the consumer or credited to their account. Therefore, the refund is reduced by the $552.62 in sales tax charged.

Therefore, a refund in the amount of $14,974.29 with appropriate interest is hereby authorized.

If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

JUN 3 0 2020

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 FILES APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

David A. Wenner
72 Red Oak Dr.
Bucyrus, OH 44820

Re: 3 Assessments
Tax Type: Sales (Responsible Party)
J.A.B.D., Inc.
Vendor's License No.: 17-020454

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

Assessment No.	Filing Period	Total
100001389087	12/01/15 – 12/31/15	$2,966.17
100001389088	01/01/16 – 01/31/16	$3,062.19
100001389046	02/01/16 – 02/29/16	$3,038.43
	Total:	$9,066.79

These are responsible party assessments. J.A.B.D., Inc. incurred sales tax liability resulting in sales tax assessments for the above periods. These assessments were never fully satisfied by J.A.B.D., Inc. 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 liabilities of J.A.B.D., Inc. have been derivatively assessed against David A. Wenner. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalties can be considered. A hearing was held on April 14, 2020.

Responsible Party

The petitioner objects to the assessments. The petitioner contends that he was not a shareholder of or a board member of the underlying corporate entity. He contends that he had no involvement in or control over the company and its finances and he received no financial gain from the company. Additionally, the petitioner contends that he resigned his post as president in 2015. The petitioner identifies other parties whom he states should be the responsible parties on the assessments. He contends that beginning in 2013, J.A.B.D., Inc. and Deborah Werline entered into an agreement for Ms. Werline to operate the establishment known as "The Bistro," using the liquor license granted to J.A.B.D., Inc., as a sole proprietorship without any oversight or management authority

by J.A.B.D., Inc. The petitioner contends that Ms. Werline controlled all aspects of the business: he and J.A.B.D., Inc. had no access to her books, he and J.A.B.D., Inc. did not employ Ms. Werline, and he was never a signatory on her accounts. Therefore, he contends that he cannot be a responsible party for these assessments. The petitioner cited two Supreme Court of Ohio cases[1] and submitted a personal affidavit in support of his contentions. These contentions are not well taken.

The evidence indicates that the petitioner was listed as the president of J.A.B.D., Inc. on its vendor's license application, dated January 21, 1997. The vendor's license application also had the J.A.B.D., Inc.'s liquor permit number displayed on it. The liquor license and vendor's license issued to J.A.B.D., Inc. were used during each assessment period. Monthly sales tax returns were filed under J.A.B.D., Inc.'s vendor's license for the periods immediately preceding the assessment periods. The petitioner admitted that there was an agreement between J.A.B.D., Inc. and Ms. Werline that permitted Ms. Werline to operate under J.A.B.D., Inc.'s licenses.

The petitioner submitted a check from The Bistro, dated October 10, 2007, made out to the Treasurer of the State of Ohio, from The Bistro's checking account, to prove that he was not a signature on the account.[2] However, no further documentation was provided. The signature on the check is illegible, and the presentment of the check itself gives the appearance that the petitioner does indeed have some sort of access to The Bistro's accounts.

The petitioner cited *Weiss v. Porterfield* in support of his contention that, even though he was the president of the company, he did not hold the requisite indicia of responsibility to be a responsible party under R.C. 5739.33. In *Weiss*, the court determined that even though the taxpayer was a director and secretary of the corporation, her duties were in no way connected with the preparation or filing of Ohio sales tax returns.[3] Virginia Weiss was an attorney who filed the papers of incorporation for Mel-Deb Furniture Co. in 1966. Thereafter, she was elected a director and secretary of the corporation. Mel-Deb failed to file and remit any sales tax collected from the time of its inception until it was adjudicated bankrupt, so the Tax Commissioner issued sales tax assessments against all the officers of Mel-Deb. The Supreme Court determined that the personal liability of officers of a corporation for failure of the corporation to file returns or pay Ohio's sales taxes, provided by R.C. 5739.33, is limited to those officers who have control or supervision of or are charged with the responsibility of filing returns and making payments. The Board of Tax Appeals had determined that Ms. Weiss was not a member of the class of officers to which R.C. 5739.33 was applicable. The B.T.A. had found that as a matter of fact, Ms. Weiss's duties, as an officer of the corporation, were in no way connected with the preparation or filing and payment of Ohio sales taxes. As a result, the Supreme Court affirmed the B.T.A.'s determination that Ms. Weiss was not a responsible party, since she was not found to be connected in any way to the filing or payment of Ohio taxes.[4] The petitioner claims that, like in *Weiss*, he was not involved in the preparation of sales tax returns for, nor the remittance of the sales tax collected by, The Bistro. He

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[1] *Weiss v. Porterfield*, 27 Ohio St.2d 117, 271 N.E.2d 792 (1971); *Kihm v. Lindley*, 70 Ohio St.2d 76, 434 N.E.2d 1354 (1982).
[2] Wenner Addendum, Page 3.
[3] *Weiss v. Porterfield*, 27 Ohio St.2d 117, 271 N.E.2d 792 (1971).
[4] *Id.*

states that he also was not a shareholder, did not receive a salary, and had no duties involving the daily operations or filings of the business.[5]

However, the petitioner incorrectly interprets one of the key components in the decision. The petitioner correctly noted that *Weiss* concluded that "the personal liability of officers of a corporation for failure of the corporation to file returns or pay Ohio sales taxes, provided by R.C. 5739.33, is limited to those officers who have control or supervision of or are charged with the responsibility of filing returns and making payments."[6] However, the petitioner incorrectly believes that since Ms. Werline collected and remitted the sales taxes for The Bistro, that she was the only person who was charged with the responsibility of filing returns and making payments. This assumption is incorrect because the petitioner, as J.A.B.D.'s president, signed the application for the vendor's license that was utilized to make the sales attributed to the underlying assessment. The petitioner had the authority to apply for a vendor's license on behalf of the corporation. Holding that license required the corporation to file sales tax returns, even if no revenue was generated during the corresponding period.[7] The fact that the petitioner had the authority to bind the corporation to the requirement to file tax returns demonstrates that he held the indices of responsibility necessary to be a responsible party, which distinguishes the case at hand from *Weiss*.

Next, the petitioner contends that in *Kihm v. Lindley*, the court determined that "liability for unpaid sales taxes, absent any record or evidence of involvement in the preparation or filing of returns, or remittance of taxes collected, could not be individually assessed."[8] Joseph Kihm, as president, and William Ridmann, as treasurer, were assessed as responsible parties of Central Oyster House Inc. Mr. Kihm and Mr. Ridmann, among others, acquired all of the stock in Central Oyster, and appointed themselves as officers in order to guarantee re-cooperation of outstanding business debts owed by Central Oyster to each of them. However, the daily operation of the restaurant was conducted by a general manager, a bookkeeper, and an accountant. The general manager collected the sales tax and filed the necessary sales tax returns. The general manager was the only signatory on the sales tax returns filed during the audit period. The court found that the general manager, as the only signatory, was the responsible party, and not the president or the treasurer. The court determined that because the officers were not involved in the daily operations and did not receive a salary or any other benefit from the restaurant, they were not responsible parties for the tax assessments.[9]

The petitioner believes that the situation in *Kihm* is analogous to these assessments. However, unlike in *Kihm*, the petitioner signed the application for J.A.B.D., Inc.'s vendor's license, thereby demonstrating he was involved in the daily operations of J.A.B.D., Inc. The petitioner has not

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[5] Wenner Addendum, Page 4.

[6] *Id.*

[7] *See* R.C. 5739.12 and 5739.30.

[8] Wenner Addendum, Page 5, citing *Kihm v. Lindley*, 70 Ohio St.2d 76, 434 N.E.2d 1354 (1982). In 1971, appellee Joseph H. Kihm was the president of a general contracting firm, J. B. Schmitt Company, and appellee William Ridmann was the president of Ridmann Electric Company, an electrical contracting firm. Both of appellees' companies performed extensive remodeling work for the Central Oyster House, Inc., a Cincinnati restaurant. After the work was performed, the restaurant defaulted in making payments to its creditors. With a view toward obtaining payment of the amounts due to them, appellees and others acquired all of the stock of Central Oyster House, and the restaurant continued to operate. Appellees finally disposed of their interests in Central Oyster House, Inc., on November 15, 1974.

[9] *Id.*

provided any evidence to substantiate his assertions that he was president in name only and did not receive any benefit from the company.[10] The petitioner has also failed to substantiate his claim that he resigned from his position as president of J.A.B.D., Inc. in 2015.[11]

The petitioner contends that, because of an agreement, Ms. Werline is actually the responsible party. However, the fact that one person may be responsible does not absolve another of liability.[12] R.C. 5739.33 requires personal liability to fall on **any** officer or employee having the requisite indices of responsibility.[13] Ohio Adm.Code 5703-9-49(H) states that "if more than one person is personally liable under section 5739.33 or 5741.25 of the Revised Code for the unpaid liability of a corporation * * * their liability shall be joint and several."

The petitioner submitted conflicting evidence regarding the management agreement with Ms. Werline. In his original petition for reassessment, the petitioner simply stated that Ms. Werline was actually the correct responsible party, but that she left town with all the business records in February 2019. In an addendum to his petition, submitted on April 14, 2020, the petitioner stated that Ms. Werline was the sole person running the business from 2013 – 2016.[14] He went on to state that the business ceased operations prior to March 1, 2016, when Mr. Werline left town with the records.[15] Finally, in an affidavit dated May 12, 2020, the petitioner stated that J.A.B.D., Inc. held a liquor permit for 1530 South Sandusky Ave., Bucyrus, OH 44820, and that Ms. Werline operated the restaurant and bar at this location, under that permit, from July 1, 2007 – February 2016.[16]

Regardless, the management agreement does not shield the petitioner and J.A.B.D., Inc. from sales tax liability. As noted by the Supreme Court, a responsible officer or employee cannot "escape liability by delegating those duties to others."[17] "As a consequence, any side agreement that a taxpayer might enter into with another entity concerning responsibility for payment of sales tax, like the Management Agreement to which appellant refers, is not binding on the Tax Commissioner."[18] In *Painter*, the appellant entered into an agreement to sell the business assets to another entity.[19] It allowed that entity to operate under its liquor license until the license was successfully transferred.[20] The court found that the taxpayer could not avoid tax liability simply by entering into an agreement that stated it was delegating the duty to collect and remit taxes to another person operating under the taxpayer's licenses.[21] As a result, it is well settled that the third-party agreement that J.A.B.D., Inc. entered into is not binding on the Tax Commissioner. Therefore, the petitioner's contentions are denied.

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[10] Wenner Affidavit, Page 3.
[11] Wenner Addendum, Page 1.
[12] *Perry v. Tracy*, BTA No. 98-M-8, 1998 WL 741927 (Oct. 16, 1998).
[13] *Beck v. Tracy*, BTA No. 96-K-156, 1997 WL 40124 (Jan. 17, 1997). (Emphasis added.)
[14] *Id.* at Page 2.
[15] *Id.*
[16] Wenner Affidavit, Page 1.
[17] *Painter v. Testa*, 2017-Ohio-267, 81 N.E.3d 860 (5th Dist.2017), citing *Spithogianis v. Limbach*, 53 Ohio St.3d 55, 559 N.E.2d 449 (1990).
[18] *Id.* citing *Farhan, d.b.a. Hiland Foods v. Tracy*, 10th Dist. No. 97APH10-1410, 1998 WL 48987 (July 21, 1998).
[19] *Painter*, at ¶ 2.
[20] *Id.*
[21] *Id.*; *SQS Foodstores, Inc. v. Tracy*, 7th Dist. Mahoning No. 00-CA-124, 2002-Ohio-5015, 2002 WL 31116698.

Underlying Assessment

JUN 17 2020

The petitioner contends that there has not been a sales tax audit of this account.[22] He contends that these assessments are some type of estimate made by the Ohio Attorney General which appear to be incorrect.[23] Since these are responsible party assessments, the only issues that can be considered are whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Therefore, these objections cannot be considered as they relate to the underlying assessments.

The petitioner failed to provide any evidence to demonstrate that he was not an officer of the company. The petitioner failed to demonstrate that the assessments were in error. Therefore, it is determined that the petitioner was a responsible party of J.A.B.D., Inc. under R.C. 5739.33.

Accordingly, the assessments are affirmed as issued.

Any reduction or credit made to the underlying corporate assessments on appeal or in collection will be applied to the corresponding responsible party assessments. 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 THESE MATTERS. UPON EXPIRATION OF THE SIXTY (60) 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

[22] Wenner Addendum, Page 5.
[23] *Id.*

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 24 2020

Xigent Automation Systems, Inc.
8303 Green Meadows Dr. N
Lewis Center, OH 43035

Re: Assessment No.: 100000577817
Sales Tax
Account No. 20-2922867
Audit Period: 01/01/2010 – 3/31/2016

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13.

In resolution of this matter, the assessment was modified as follows:

Tax	Interest	Penalty	Total
$4,017.58	$1,012.27	$0.00	$5,029.85

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

JUN 24 2020

Robert C. Zember
235 Lowes St.
Dayton, OH 45409

RE: Assessment No.: 100000495068
Sales Tax
Account No.: 57-149942

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

Tax	Pre-Assessment Interest	Penalty	Total
$51,024.05	$3,184.79	$25,511.91	$79,720.75

The petitioner operates a convenience store. This assessment is the result of a markup audit of the petitioner's sales from December 1, 2012 through March 31, 2016. The petitioner filed a petition for reassessment. A hearing was initially requested, but ultimately was waived by the petitioner via email on January 24, 2018. The petitioner's objections are addressed below.

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

Audit Methodology

The petitioner failed to keep complete and accurate records as required by R.C. 5739.11. Therefore, 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, pop & soft drinks, and mixed & low proof alcohol. Each category was assigned a mark-up percentage based on the product checklist completed with the taxpayer's assistance, industry standards, and state minimum requirements.

A sample period of January 1, 2014 through December 31, 2014 was used to calculate taxable sales using a mark-up analysis. It is agreed that the taxpayer's activity for the sample period is representative of the business activity for the entire audit period.

Inventory purchase invoices maintained by the petitioner were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. In the instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon records, summaries, or other information obtained directly from the distributors. In the instances when confirmation of the amount of taxable inventory purchases could not be obtained from either the taxpayer or distributors, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor.

The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The remaining calculated taxable sales from all categories were totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the taxpayer for the entire sample period. The resulting taxable percentage of reported gross sales, 280.9286 percent, was multiplied by the reported adjusted gross sales for each month of the entire audit period to determine the calculated monthly taxable sales for the entire audit period.

The calculated taxable sales by month were then multiplied by the applicable tax rates in effect throughout the audit period to determine the gross sales tax liability by month for the entire audit period. Credits representing the tax reported and paid throughout the taxpayer's monthly sales tax returns were subtracted from the gross sales tax liability to determine any unreported sales tax liability by month for the entire audit period.

Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

Erroneous Methodology and Mark-Up Percentages

The petitioner contends that an erroneous audit methodology was used. The petitioner did not state what was erroneous about the audit methodology. The petitioner contends that the mark-up percentages used to calculate taxable sales for the categories of pop purchases and mixed drinks were too high. The petitioner signed the memorandum of agreement, which detailed both the methodology and the mark-up percentages to be used during the audit and did not submit any alternative methodologies or percentages.

The petitioner believes, based on its own sampling, that industry mark-up averages for those two categories are around 15 percent. The carryout product checklist, signed by the petitioner, states

that the mark-up percentage for those two categories was 35 percent. The petitioner did not provide any supporting records to substantiate these claims that the mark-up percentages were incorrect. The burden is on the petitioner to provide sufficient evidence to warrant adjusting a finalized audit. *Forest Hills*, *supra* at *4. Therefore, these contentions are denied.

Breakage

The petitioner contends that there was not a reduction for breakage in the audit. However, the petitioner failed to quantify an amount of loss or submit proof of its claim. Therefore, this contention is denied.

Cigarette Buydowns

The petitioner contends that the audit failed to properly account for cigarette buydowns during the audit period. However, the petitioner failed to provide any evidence to substantiate its claim. Furthermore, the auditor noted that, during a meeting, the petitioner's representative stated that the petitioner's business was small and very low volume in cigarettes, such that rebates were not used during the audit period. Audit Remarks, p. 5. Therefore, this contention is denied.

Food Items

The petitioner contends that the audit improperly classified non-taxable food items as taxable. The petitioner provided no evidence to substantiate this claim. Therefore, this contention is denied.

Penalty

The petitioner seeks abatement of the penalty. The surrounding facts and circumstances warrant a partial abatement of the penalty.

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$51,024.05	$3,184.79	$15,307.07	$69,515.91

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

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

FINAL DETERMINATION

Date:

JUN 2 4 2020

Zion Contracting & Tree Services, Inc
1450 W. Jackson St.
Painesville, OH 44077

Re: Assessment No. 100001083578
Sales Tax
Account No. 43-257990

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

Tax	Pre-Assessment Interest	Penalty	Total
$68,880.24	$5,126.93	$6,887.81	$80,894.98

This assessment is the result of the petitioner's failure to register for a sales tax account and remit sales tax between January 1, 2015 and February 28, 2018. A hearing was not requested.

The petitioner requests remission of the penalty imposed as a result of the audit. This is the petitioner's first audit. The petitioner was engaged in providing taxable services inside the state of Ohio without being registered to collect tax. As the petitioner did not have a sales tax account, the petitioner failed to remit any tax over the audit period. Further, the petitioner could only provide incomplete sales records for the auditor's review.

The petitioner, however, was forthcoming and cooperative, promptly providing all available documentation. After speaking with the auditor, the petitioner obtained a vendor's license. Based on the totality of the circumstances, a partial penalty reduction is warranted.

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$68,880.24	$5,126.93	$3,443.72	$77,450.89

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

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

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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

0000000216

FINAL DETERMINATION

Date: JUN 17 2020

Zuhair of Toledo, Inc.
932 Huron St.
Toledo, OH 43604

Re: Assessment No: 100000967267
Sales Tax
Account No. 48-172671
Reporting Period: 04/01/2015 – 09/30/2017

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
$58,351.66	$3,932.76	$29,175.69	$91,460.11

This assessment is the result of an audit of the petitioner's purchases for the reporting period shown above. The petitioner operates a convenience store in Toledo, Ohio. A hearing was held on May 1, 2020.

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, pop & soft drinks, energy drinks & other beverages, and other taxable merchandise. Each category was assigned a mark-up percentage based on evidence from the petitioner, industry standards, and state minimum requirements. A sample period of January 1, 2016 through December 31, 2016 was used as a representation of the entire audit period to calculate taxable sales. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. A twenty-five percent reduction was applied to the pop & soft drinks and energy drinks & other beverages taxable sales as an adjustment for food stamp usage. Taxable inventory purchase amounts derived from distributor summaries or estimates were divided by the number of months in the sample period and recorded as monthly purchase amounts. The remaining calculated taxable sales from all categories were summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales (159.1691%). The reported gross sales for each non-sampled month of the audit period were multiplied by that percentage to determine the calculated taxable sales for each non-sampled month. The calculated taxable sales for each non-sampled month were multiplied by the applicable tax rate to determine the sales tax liability for each

non-sampled month. Sales tax liability for sampled months was determined by multiplying the actual calculated monthly taxable sales for each sampled month by the applicable tax rate. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability.

The petition for reassessment states that the petitioner wants to submit additional documentation for consideration. During the hearing, the petitioner disagreed with the amount of the assessment, but did not provide any additional documentation that would support a change in the liability. The petitioner requested and was given additional time to submit information after the hearing. However, no additional information was provided. It should be noted that the assessment is presumptively valid. *RKE Trucking Inc. v. Zaino,* 98 Ohio St.3d 495, 787 N.E. 2d 638 (2003). 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. As no supporting evidence was submitted, the petitioner has not provided sufficient evidence to prove that there is error in the assessment. Therefore, the objection is denied.

Penalty Abatement

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

Therefore, the assessment is modified as follows:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$58,351.66	$3,932.76	$20,422.89	$82,707.31

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

0000000218

JUN 17 2020

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

0000000203

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

AM PM Transportation, Inc.
333 Tallmadge Rd.
Kent, OH 44240

Re: Assessment No. 100001428793
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:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$366.12	$6.37	$54.92	$427.41

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 contends that the vehicle is exempt under R.C. 5739.02(B)(32). The evidence in file supports their contention.

Accordingly, the assessment is cancelled.

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

0000000154

FINAL DETERMINATION

Date: JUN 11 2020

J. C. Penney Corporation Inc.
PO Box 45057
Salt Lake City, UT 84145-0057

Re: Ohio Tax Account #: 97108475
Tax Type: Use
Assessment #: 100000417387
Reporting Period: 01/01/2011-12/31/2013

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2019-46, dated June 8, 2020. 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 is modified as follows:

	Total
Tax	$200,000.00
Interest	$54,530.44
Penalty	$0.00
Total	$254,530.44

Payments and credits totaling $254,530.44 have been made in full satisfaction of this assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000196

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

Wesley T. Karr
45215 Vinegar St.
Racine, OH 45771

Re: Assessment No.: 100000432309
Tax Type: Use

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
$4,821.25	$35.64	$723.19	$5,580.08

This assessment was issued based upon an office audit of a truck title transfer. The petitioner purchased a 2005 Peterbilt 379 Truck on April 19, 2016 without the payment of tax. Instead, an exemption was claimed as "Highway Transportation for Hire." The exempt use of the vehicle could not be verified and, therefore, this assessment was issued. The petitioner objects to the assessment. A hearing was not requested.

The issue is whether the petitioner qualifies for the exemption. 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 sales tax. R.C. 5739.02(B)(32). Accordingly, to qualify for the exemption, the petitioner must be licensed by the Public Utility Commission of Ohio or the United States Department of Transportation authorizing it to transport personal property belonging to others for consideration and the equipment for which the exemption is claimed must be "primarily used for transporting tangible personal property belonging to others." It is the primary use of the equipment that will determine whether the exemption applies. R.C. 5739.01(Z).

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 objects to the assessment contending that the vehicle is exempt as highway transportation for hire. The petitioner submitted a motor vehicle lease agreement between the

petitioner and his company, Karr Contracting, Inc.[1] The petitioner also submitted screenshots of the United States Department of Transportation's website referencing leasing requirements pursuant to 49 C.F.R. 376. R.C. 5739.02(B)(32) exempts leased motor vehicles that are *primarily used* for transporting tangible personal property by a person engaged in highway transportation for hire. (Emphasis added.) Therefore, the primary use of the leased vehicle will determine whether the exemption applies.

The petitioner submitted a completed usage questionnaire from the Ohio Department of Taxation that requested a percentage breakdown of the use of the vehicle, which should add up to 100 percent. The completed questionnaire indicates that 100 percent of the usage of the vehicle is for hauling goods, products, supplies, and equipment for others. The petitioner also submitted ten invoices dated May 2016 through July 2016. Eight of the invoices contained different descriptions that included language such as haul, delivery, or transport; however, two invoices lacked a description referencing transportation of property and merely included machinery names. One invoice, Invoice 7222016, contained a more detailed description with the following, "Mulch, Mulch Manufacturing, Delivery." Based on this description, it appears the petitioner is transporting his own property. Further, this transaction contains a single line item fee. Previous cases have held that, unless the customer invoices provide a separate fee for transportation, a taxpayer is not entitled to the transportation for hire exemption. *Kurtz Bros., Inc. v. Tracy,* BTA No. 1994-P-614, et seq., 1995 WL 752290 (December 15, 1995). There is no language within the remaining invoices to specify ownership of the property or whether title of the property is intended to pass. Accordingly, it is unclear whether the petitioner is hauling personal property belonging to others or transporting his own equipment as the petitioner provided minimal invoices that lacked descriptions containing the ownership of the transported property.

The petitioner also submitted his company's motor carrier number and two Public Utilities Commission of Ohio tax receipts which expired on July 15, 2016. However, the petitioner's United States Department of Transportation Federal Motor Carrier Safety Administration registration contains an operation classification listing of "Private (Property)." This classification is for motor carrier highway transportation activities that are incidental to, and in furtherance of, its primary business activity. This classification does not authorize the petitioner to transport personal property belonging to others for consideration. Further, the petitioner is not classified as an operator authorized for hire or exempt for hire according to the petitioner's United States Department of Transportation Federal Motor Carrier Safety Administration registration.

The petitioner failed to provide evidence to demonstrate the vehicle is primarily used for transporting tangible personal property belonging to others. Due to the conflicting information regarding the vehicle operation registration and lack of documentation, the Tax Commissioner cannot conclude that the primary use of the vehicle is hauling tangible personal property for others. Based on the available evidence, the petitioner has failed to meet his burden. Therefore, this objection is denied.

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[1] The petitioner is listed as Vice President of Karr Contracting, Inc. on business filings with the Ohio Secretary of State. *https://bizimage.ohiosos.gov/api/image/pdf/200605801478 (accessed May 29, 2020).* Additionally, Karr Contracting Inc's facebook page lists the petitioner as Vice President and son of the principal owners. *https://www.facebook.com/pg/Karr-Contracting-Inc-512635338804055/about/?ref=page_internal (accessed June 1, 2020).*

0000000198

JUN 17 2020

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 post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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:

JUN 2 4 2020

Robert C Meyer
50575 Boltz Hill Road
Clarington, OH 43915-9613

Re: Assessment No. 100000889194
Consumer's Use Tax

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the following consumer's use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total	Payment	Balance
$884.98	$21.77	$19.65	$926.40	$754.00	$172.40

This assessment is the result of the petitioner's purchase of a 2007 Goldwing motorcycle on April 4, 2017. The purchase price was listed as $500 and the petitioner paid $36.25 in tax.

Due to the discrepancy of the average selling price of $12,706.75 and the $500 purchase price listed by the petitioner, the Ohio Department of Taxation conducted a review of the purchase. The Department sent a questionnaire to the petitioner. The Department also sent a questionnaire to the seller. Both the seller and the petitioner completed the questionnaires, listing the actual purchase price as $10,900. In response to the questionnaire, the petitioner acknowledged that he owed additional tax. The petitioner paid additional tax of $754.00 on November 6, 2017.

This assessment was issued on January 10, 2018, showing that the petitioner owes a balance of $172.40. The petitioner maintains that he has paid the correct amount of tax. As noted below, the petitioner's contention is well taken.

The tax shown due on the assessment is based the average selling price of $12,706.75, rather than the actual selling price of $10,900. The evidence demonstrates that the petitioner paid $10,900 for the motorcycle. The petitioner provides a bill of sale and a copy of the check used to pay for the motorcycle in support of its position. Additionally, the seller responded to the Department's questionnaire and listed the sale price of $10,900. Accordingly, the petitioner paid the correct amount of tax based on the actual price paid for the motorcycle. Moreover, it is noted that the petitioner paid the tax before the assessment was issued. Therefore, the petitioner's objection is granted.

Accordingly, the assessment is paid in full.

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

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

0000000202

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

Oren Rexroad
879 State Rt. 46 S.
Jefferson, OH 44047-9596

Re: Assessment No. 100001517506
Consumer's Use Tax

This is the final determination of the Tax Commissioner regarding petitions for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$925.96	$32.07	$138.89	$1,096.92

This assessment was issued based upon the conduct of a special audit of a motor vehicle purchase. The petitioner obtained a motor vehicle on April 20, 2019. The petitioner stated he paid $100 for the vehicle and paid tax on that amount to the title office. The Ohio Department of Taxation was unable to verify the purchase price. Accordingly, this assessment was issued.

The claimant contends that as the vehicle purchased has no power train and is only a rolling chassis to be restored and the $100 consideration claimed at the time of titling is accurate. The evidence on file supports their contention.

Accordingly, the assessment is cancelled.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 24 2020

Sitetech, Inc.
35700 Royalton Rd.
Grafton, OH 44044

RE: Assessment No.: 100000309758
Use Tax
Account No.: 97-301107

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$206,653.10	$22,895.09	$10,327.98	$239,786.17

The petitioner operates as a construction contractor. This assessment is the result of an audit of the petitioner's purchases for the period from January 1, 2009 through December 31, 2014. The petitioner filed a petition for reassessment and requested abatement of the interest and penalty. A hearing was not requested. The petitioner's objections are addressed below.

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).

Audit Methodology

The audit consisted of a review of the petitioner's capital asset purchases and expense invoices. Capital asset purchases were listed individually for the entire audit period when they appeared to be tax deficient. The capital worksheets were based upon actual purchases and were not projected.

Since there were numerous expense invoices to examine, a projection method was agreed upon to review expense invoices. The taxpayer indicated that its purchases are not seasonal in nature; therefore, the period of January 1, 2013 through December 31, 2013 was mutually agreed upon

perimeter of the site and inside the storm water retention pond. The petitioner contends that, given the significant slope and elevation changes along the perimeter and retention pond, the installation of trees was critical to meeting the erosion control objectives on the project. As indicated by the landscape plan, shrubs and trees were also installed in the parking lot area, but the petitioner contends that the shrubs and trees were inconsequential to the overall scope of the work performed by Down to Earth. *Id.*

The petitioner objects to the Department's inclusion of the Down to Earth invoices as taxable landscaping services, as set forth in R.C. 5739.01(B)(3)(g). The petitioner contends that R.C. 5739.01(DD) defines "landscaping and lawn care services" as "the services of planting, seeding, sodding, removing, cutting, trimming, pruning, mulching, aerating, applying chemicals, watering, fertilizing, and providing similar services to establish, promote, or control the growth of trees, shrubs, flowers, grass, ground cover, and other flora, or otherwise maintaining a lawn or landscape grown or maintained by the owner for ornamentation or other nonagricultural purposes." (Emphasis sic.) The petitioner contends that, while the statute defining landscaping and lawn care services includes the services of planting trees and shrubs, mulching, and seeding, the statute refers to the listed services as those performed for ornamentation purposes, while the services provided by Down to Earth were different in scope.

The petitioner believes that the services subcontracted to Down to Earth were necessary to meet the primary construction objectives of erosion control and storm water management. The petitioner contends that, while there were aspects of Down to Earth's scope of work that were to enhance the appearance of the property, those items were limited to the parking lot beds. Accordingly, the petitioner contends that was an inconsequential portion of their overall work performed. The petitioner believes that the surface area covered in the site specifications and landscape plan is evidence that it was inconsequential. Furthermore, the petitioner believes that the predominant amount of services performed were not provided to achieve the ornamental objectives of the owner (i.e., enhance the aesthetics or create curb appeal). Petition for Reassessment, p. 3.

The petitioner interprets R.C. 5739.01(DD) incorrectly. As underlined by the petitioner above, R.C. 5739.01(DD) defines what constitutes landscaping and lawn care services for ornamentation *or other nonagricultural purposes*. (Emphasis added.) The statute includes a catch-all for other nonagricultural purposes, not simply ornamentation. Tax Information Release ST 2003-02, issued January 1, 2004, defines a nonagricultural purpose as "the raising of plants for purposes other than for sale." Planting trees for erosion preservation is not raising plants for sale, and, therefore, it falls into the scope of "other nonagricultural purposes."

The Down to Earth invoice describes the work to be performed as "installation of lawn area (approx. 100,000 SF), installation of trees, installation of shrubs, installation of topsoil and mulch for planting beds, and storm management area seeding (approx. 37,185 SF)." Petition for Reassessment, p. 143. Those descriptions are listed as taxable landscaping services in R.C. 5739.01(DD), Ohio Adm.Code 5703-9-14(C)(4), and Tax Information Release ST 2003-02. The amount of square feet for the installation of lawn areas and seeding stated in the contract does not appear inconsequential. Furthermore, the descriptions of work on the Down to Earth invoice

contain no references to anything being planted for erosion control. Petition for Reassessment, p. 143.

The petitioner contends that the BTA ruled that similar services recited under R.C. 5739.01(DD) did not constitute taxable landscaping services since they were utilized for construction rather than ornamental purposes. *Maintenance Unlimited v. Zaino*, BTA No. 2000-N-1861, 2002 WL 1840504 (Aug. 9, 2002); *Inverness Club v. Wilkins*, BTA No. 2004-R-338, 2007 WL 1453730 (May 11, 2007). In *Maintenance Unlimited*, the BTA ruled that trees and shrubs that were ground and removed for excavating purposes, prior to the commencement of construction, were non-taxable construction services. *Maintenance Unlimited*, at *4. The Board also removed an invoice from the assessment because it expressly excluded "seeding and landscaping" from its contracted services. *Id.* These facts are distinguishable from the facts at hand. Here, it is undisputed that part of the contract with Down to Earth is for seeding, mulching, and planting trees and shrubbery. In addition, the auditor noted that "construction at the job site began long before the landscaping services were performed." Audit Remarks, p. 12.

In *Inverness Club v. Wilkins*, a golf course reconstruction project was determined to be a construction service instead of a landscaping service. The Board found that the activities involved with reconstructing a golf course go far beyond the statutory definition for landscaping. After the reconstruction was completed, the course was longer, its tee boxes were new, and bunkers existed where none were before. *Inverness Club*, at *4. The project resulted in a vastly different golf course than the one that existed before, not just a prettier or more ornamental golf course. *Id.* In the case at hand, the petitioner repeatedly admits that Down to Earth simply performed seeding, mulching, and tree and shrubbery installations. At no time has the petitioner contended that Down to Earth altered the underlying property in any impactful way, in order to accomplish those tasks. The facts at hand are not analogous to the facts that led the Board to conclude that the reconstruction in *Inverness* was a construction service.

Next, the petitioner contends that the Department provided administrative guidance in Tax Information Release No. ST 2003-02 that sets forth a distinction between pre-site and post-site preparation services by indicating that work done after the site is complete constitutes landscaping services (i.e. ornamental), whereas work done prior to the site being ready for "development" would not constitute a landscaping service (i.e. construction service). The petitioner again contends that the scope of the work performed on the Giant Eagle project is analogous, in that the primary scope of work performed by Down to Earth was performed in conjunction with the overall site preparation work required under the Echo contract. Petition for Reassessment, p. 3.

The petitioner correctly noted that the tax information release distinguished between services provided prior to construction commencing, and services provided after site preparation is completed. The audit remarks and evidence provided by the petitioner illustrate that Down to Earth's services fall into the latter category. The auditor noted "construction at the job site began long before the landscaping services were performed, which the information release states makes the services taxable. Audit Remarks, p. 12. "If, however, the work entails enhancement or change (i.e. removing dead trees) after the site preparation is complete, this is a taxable

landscaping service." Tax Information Release, No. ST 2003-02. The descriptions listed on the invoice describe enhancements and changes that were made after the site preparation was completed. Further, "[t]he sale and installation of the following items is never a construction contract and such transactions are to be treated as the sale and installation of tangible personal property for sales tax purposes: trees, shrubs, sod, seed, fertilizer, mulch, and other tangible personal property transferred as part of a landscaping and lawn care service as defined in division (DD) of section 5739.01 of the Revised Code." Ohio Adm.Code 5703-9-14(C)(4). The Ohio Administrative Code explicitly states that the services provided by Down to Earth in this manner are never part of a construction contract.

Finally, the petitioner contends that "Ohio has long applied the true object test when determining the taxability of mixed or bundled transactions where a separate price is not stated. *See Accountant's Computer Services, Inc. v. Kosydar*, 35 Ohio St.2d 120, 298 N.E.2d 519 (1973)." Petition for Reassessment, p. 4. The petitioner states that its total contract to prepare the site for construction was $4,782,150. The petitioner entered into a subcontract with Down to Earth totaling $112,406 to perform seeding, mulching, and tree installation. The petitioner contends that even if the work performed by Down to Earth in the parking lot area constitutes landscaping services, it is not the dominant purpose as to why the petitioner hired Down to Earth for the project. Consistent with the scope of work agreed to and the site specifications for the project, the petitioner contends that it needed to provide the necessary vegetation, soil stabilization, and erosion control measures to complete the contract. The petitioner contends that the true object of the subcontract was to complete the site construction services required under their contract and not to purchase taxable landscaping services. Petition for Reassessment, p. 4.

Accountant's Computer Services appealed a BTA ruling that held certain transactions by data processing companies and market research organizations to be subject to sales and use taxes in their entirety. *Accountant's Computer Services*, at *122. The Supreme Court held that where there is an inconsequential transfer of tangible personal property in connection with a consequential professional, insurance or personal service, none of the consideration paid is taxable, but if the service rendered is inconsequential, the entire transaction is taxable. *Id.* The true object test employed in this decision is not analogous to the case at hand. In this case, the landscaping service is not an exempt professional service. It is defined as a taxable service by operation of R.C. 5739.01(B)(3)(g). There is no need to determine the true object of purchasing a taxable service.

The petitioner has failed to prove that Down to Earth did not provide taxable landscaping services. Therefore, the petitioner's contentions are denied.

Interest Abatement

The request for remission of preassessment interest cannot be considered. The Tax Commissioner lacks jurisdiction to abate preassessment interest added to an assessment pursuant to R.C. 5739.133(B). The request for interest remission is denied.

Penalty

The petitioner requested a penalty abatement. The facts and circumstances do not warrant reduction of the penalty.

Accordingly, the assessment is affirmed.

Current records indicate that payments in the amount of $239,786.17 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 (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: JUN 3 0 2020

Superior Hardwoods of Ohio Inc.
134 Wellston Industrial Park Rd.
Wellston, OH 45640

RE: Assessment No.: 100000498369
Use Tax
Account No.: 97-303809

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
$198,791.48	$22,334.80	$29,818.07	$250,944.35

The petitioner operates as a sawmill and lumber manufacturer. The petitioner maintains four facilities in Ohio which process over 50 million board feet of hardwood lumber annually. This assessment is the result of a field audit of the petitioner's purchases from January 1, 2010 through March 31, 2016. The petitioner filed a petition for reassessment stating objections to the inclusion of some of its equipment in the assessment and also requested abatement of the penalty. A hearing was requested and held in this matter. The petitioner's objections are addressed below.

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

Audit Methodology

A purchase audit was conducted using the petitioner's capital asset purchase records. It was agreed that capital assets would be reviewed on a comprehensive basis. However, a projection method was agreed upon to review expense invoices. A sample period of July 1, 2015 through December 31, 2015 was used as a representation of the entire audit period purchases. It was

agreed that the sample period was representative of the petitioner's business activity. Audit Remarks, p. 5. Tax deficient expenses were projected over the entire audit period. The total tax deficient expense purchases for each account were divided by the total purchase activity in the same accounts for the sample period to determine the percentage of error on untaxed purchases. Each percentage of error was then applied to the corresponding account's total audit period purchases to determine untaxed taxable purchases for the audit period. The appropriate tax rate was then applied to the untaxed purchases for the audit period to determine the amount of tax due. Tax rate changes that occurred during the audit period were prorated by the number of months that each rate was in effect.

Manufacturing – Point of Commitment and Materials Handling

The petitioner contends that twenty-one machines are exempt from use tax as items used primarily within a continuous manufacturing operation pursuant to R.C. 5739.02(B)(42)(g). The petitioner states that the auditor misunderstood when the manufacturing process began. The auditor determined that the manufacturing process began once logs were moved from the storage yard after being tagged and moved to the debarker. Audit Remarks, p. 9.

The petitioner's main contention is that that the point of commitment in the manufacturing process begins when its trees are measured, graded, identified by species, and sorted. Specifically, the petitioner emphasizes the inclusion of the word "measured" in Ohio Adm.Code 5703-9-21(B)(1), which the petitioner cites as support for the commencement of its manufacturing operation. The petitioner also contends that its loaders are used directly in the work commenced by the log grader (inspector) and that moving the logs to temporary storage queues occurs after commitment to the manufacturing process. The petitioner contends that pursuant to R.C. 5739.02(B)(42)(g), the machinery is exempt as a thing used primarily in a manufacturing operation to produce tangible personal property for sale. Whether or not the purchased items qualify for the exemption are addressed below by brand name and similar use.

Fuchs Loaders

The petitioner contends that the Fuchs MHL loaders are exempt as a power source for the bucksaw. The Fuchs loader is a materials handling machine. It is advertised as "* * *the first choice for feeding stationary shredders and for loading and unloading smaller bulk carriers."[1] During the hearing, the petitioner described the use of the Fuchs loaders. The petitioner contends that the Fuchs loaders are used primarily to cut the logs to the desired length and physically change the product within the continuous manufacturing operation.

During the audit, it was noted that the Fuchs loader is used to pick up larger logs that cannot be handled by the other loaders. Audit Remarks, p. 3. The petitioner maintains one Fuchs loader at the McArthur Sawmill and one Fuchs loader at the Cambridge Sawmill; both loaders function in the same fashion at each facility. *Id.* The petitioner states that the loader picks up the logs with the grappler and moves the logs to the sawbuck. The sawbuck is a device used to hold wood so that it may be cut into pieces. The petitioner contends that the bucksaw is plugged into part of the

[1] *https://www.terex-fuchs.com/us/machines/mhl360.html (accessed May 28, 2020).*

Fuchs loader and that the loader is the bucksaw's source of power. The petitioner contends that the auditor's statements that the bucksaw and the loader are separate is misleading because the loader cuts the logs by providing hydraulic power to the bucksaw. The petitioner cites Ohio Adm.Code 5703-9-21(C)(8) to support its contention that the Fuchs loader is not taxable as a power source for the machinery (bucksaw) used in the manufacturing operation.

Ohio Adm.Code 5703-9-21(C)(8) provides in relevant part that anything that is a fuel or a source of power for machinery used in the manufacturing operation or that provides energy for the manufacturing process, itself, is not taxable. The petitioner does not primarily use the Fuchs loader for this purpose. The petitioner contends that ninety percent of the loader's usage is to feed the bucksaw and move the log to and from the bucksaw. However, during the hearing, the petitioner stated that less than fifty percent of logs go through the bucksaw. The petitioner stated that less than fifty percent of the timber is owned by the petitioner, as trees are cut in the forest by loggers who are instructed to cut logs in different lengths prior to delivery to the petitioner's facilities.

During the hearing, the petitioner stated that the loggers are independent of the petitioner. Additionally, the petitioner contends that each loader spends more than fifty percent of its time being used in the measurement and grading process, the movement to and from storage, and transportation to the dry kilns. Superior Response dated August 11, 2016, p. 1. The petitioner does not contest the portion of the audit remarks that states that the Fuchs loader is primarily used to pick up larger logs that cannot be handled by its other loaders. Audit Remarks, p. 3. Further, it was noted in the audit that only in "…*some* instances the grapple is used to hold the logs as they are sawn by a 'bucksaw' to fit the debarker." (Emphasis added.) *Id.* Therefore, since the logs are already cut to the desired length in the forest by independent loggers at the instruction of the petitioner, the Fuchs loader is not primarily used for cutting logs in the manufacturing operation, as the primary use of the Fuchs loader is transporting logs (raw material) upon arrival and sorting for initial storage prior to the point of commitment at the debarker.

Alternatively, the petitioner fails to demonstrate that the Fuchs loader's transportation usage during the sorting period, prior to storage, qualifies as materials handling in the continuous manufacturing operation. Ohio Adm.Code 5703-9-21 provides a sales tax exemption for items used primarily in manufacturing. The manufacturing operation is defined, in relevant part, as the process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending or otherwise committing such materials or parts to the manufacturing process. Additionally, R.C. 5739.011(A)(3) provides that materials handling is the movement of the product being or to be manufactured, during which the product is not undergoing any substantial change or alteration in its state or form.

The petitioner relies on the inclusion of the word "measuring" as support for its contention that the log grader's inspection, which includes measurement, prior to storage is the point of commitment. The petitioner also cites R.C. 5739.011(A)(3) as support that the loaders are used in measuring the logs as part of the continuous manufacturing process, regardless of whether the

logs undergo any substantial change or alteration in state or form. The petitioner provides a lengthy examination of Ohio case law on the history and current state of these provisions and contends that *OAMCO v. Lindley*, 27 Ohio St.3d 7, 500 N.E.2d 1379 (1986) should be applied to the matter at hand. In that case, the taxpayer's manufacturing process was determined to commence at the point that the materials were measured, even though the measurement was conducted before a physical change in the materials begins.

The petitioner heavily relies on the audit period in *OAMCO* in distinguishing it from previous cases that have a similar fact pattern to the case at hand, such as *DeNoon and Semac Industries, Inc.*, which found the point of commitment to be at the debarker, rather than the process of unloading and sorting.[2] The petitioner's reliance on *OAMCO* is misplaced. The factual circumstances of the petitioner's sawmill operations are not analogous to the operation in *OAMCO*. *OAMCO* concerned a precise, computerized mixing system that regulated the flow of aggregates and provided a uniform size and weight, which was essential to the standardization of the product. The technical mixing process immediately preceded the transformation in the drum mixer. Here, the raw materials are cut in the forest by a third-party prior to delivery to the petitioner to ensure the appropriate specifications for the debarker. The raw materials are transported by the loader from the delivery truck to the log yard for sorting and inspection, which involves measurement. However, the logs are not transformed or prepped in any manner by measurement as they are not immediately or continuously processed to the debarker, but rather transported to initial storage. The petitioner confirmed that this storage is required because the mill can only saw one species at a time; therefore, each log is stored until it can be cut.

Additionally, timing was a crucial component in *OAMCO*. OAMCO's computerized mixture process was essential to the stabilization of the product, whereas the petitioner does not contend that inspection and sorting the logs prior to initial storage is essential to the product. *Sims Bros., Inc. v. Tracy*, 83 Ohio St.3d 162, 699 N.E.2d 50 (1998) also addressed the issue of timing in relation to inspection and sorting. The Court determined that Sims Bros.' use of cranes to load and unload baling and shearing machines was prior to and after manufacturing. Further, the Court concluded that the scrap metal could have been retrieved and resorted at any point prior to actual operation of the baling and shearing machines. Because the usage of the cranes to sort and load the scrap metal was prior to the materials being committed to the manufacturing operation, the cranes did not qualify for exemption. Here, as with *Sims Bros.*, the petitioner could sort the logs immediately preceding debarking; however, the petitioner sorts, inspects, and measures the logs upon the point of receipt, prior to initial storage. Further, the loader does not measure the logs, but rather acts as materials handling equipment by transporting the logs from delivery trucks to the log yard to initial storage after inspection and sorting.

The loader does not move the product through a continuous manufacturing operation as the use of the loader is prior to the manufacturing operation because the loader merely loads and unloads logs (raw materials) upon initial receipt and does not change, convert, or transform the materials. The petitioner's contention is correct that Ohio Adm.Code 5703-9-21(B)(1) provides that the commitment of materials need not be irrevocable; however, the petitioner fails to address the

[2] *DeNoon v. Limbach*, 42 Ohio St.3d 35, 536 N.E.2d 1161 (1989).
Semac Industries, Inc. v. Collins, 48 Ohio St.2d 4, 354 N.E.2d 922 (1976).

later language of the statute, which states, "...but they must have *reached the point, after materials handling from initial storage has ceased*, where they normally will be utilized within a short period of time." (Emphasis added.) The petitioner contends that the logs are temporarily stored for a short period of time after inspection since the sawmill can only process one species of wood at a time. However, the petitioner fails to provide a timeline of how long each species is stored after inspection. Further, the logs are not stored prior to delivery. Initial storage of the logs begins after delivery and inspection. In accordance with Ohio Adm.Code 5703-9-21, the commitment cannot begin until initial storage has ceased. R.C. 5739.011(A)(6) provides, in relevant part, that materials handling of raw materials from the point of receipt or preproduction storage, to or from storage, is not a part of the continuous manufacturing operation. Therefore, the point of commitment cannot be during pre-production inspection after the point of receipt because the logs are initially stored after this inspection.

The petitioner provides a lengthy review of the case law concerning the continuous manufacturing operation, but the petitioner fails to address the holding in *Sims Bros., Inc.* and merely includes a minor citation to the case. The petitioner instead focuses on *OAMCO* to support its contention that measurement of materials becomes part of the product and constitutes commitment to the manufacturing operation, absent a physical change of the materials or direct use. The Supreme Court of Ohio in *Sims Bros.* addressed this contention. The Court provided a detailed analysis of the current and former versions of the manufacturing exception. The Court also provides the reasoning as to why the petitioner's analysis is misplaced. Here, as with *Sims Bros.*, the petitioner contends that any measuring that occurs in connection with manufacturing falls within the current statutory definition of a "manufacturing operation." The Court explained that the statute was misinterpreted and rejected the contention that measuring alone satisfies the statutory definition. The Court held that property used to mix, measure, or blend raw materials is not exempt unless the measuring is of a nature which results in the materials or parts becoming committed to the manufacturing process.

Most notably, the Supreme Court of Ohio stated in *Sims Bros.*:

> The statute does not provide that a manufacturing operation includes the preparation of raw materials by "mixing, measuring, blending, *or* committing such materials or parts to the manufacturing process." Rather, the statute reads "mixing, measuring, blending, *or otherwise* committing such materials or parts to the manufacturing process." (Emphasis added.) Substituting a dictionary definition of the word "otherwise" for the word itself, the statute may be read: " 'Manufacturing operation' means a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes * * * preparing raw materials and parts by *mixing, measuring, blending or* [*in a different way or manner, under other conditions, or under different circumstances*] committing such materials or parts to the manufacturing process." (Emphasis added.) Webster's Third New International Dictionary (1986) 1598. Inclusion of the phrase "or otherwise" thus modifies and limits the types of mixing, measuring, and blending to be included in the definition of "manufacturing operation.

The Court clarified that the word "commit" in the statute reflects "...a legislative intent that materials be deemed part of the manufacturing process *only* at that point in time at which

constituent materials are changed in such a manner that their original form is altered, such as when a liquid and solid are mixed to create a solution." (Emphasis added.) It is readily apparent that the Supreme Court of Ohio has rejected the petitioner's contention that measurement of raw materials, alone, results in commitment to the manufacturing process because such measuring does not result in the materials being changed, converted, or transformed into a different state or form from which they previously existed. Further, the Fuchs loaders do not contribute to the measurement of the logs, as the loaders are merely used to transport the logs by unloading and loading the logs upon pre-production receipt and initial storage. Therefore, the Fuchs loaders are not primarily used in the manufacturing operation. Accordingly, the objection is denied.

Komatsu and Volvo Loaders

The petitioner contends that the Komatsu, Volvo, and all other loaders are used primarily to move in-process logs after the point of commitment. As with the Fuchs loaders, the petitioner contends that these loaders are used to measure the logs and that such measurement during inspection is the point of commitment. The usage of these loaders is consistent with the usage of the Fuchs loaders. Therefore, for the same reasons outlined above, the petitioner fails to provide sufficient evidence to demonstrate that the loaders are primarily used in the manufacturing operation. Accordingly, the objection is denied.

Volvo 70H Wheel Loader Serial #2124- Barlow Volvo 2015

The petitioner contends that the Volvo loader is used primarily to handle the partially processed lumber between the sawmill and the dry kiln at Barlow. The petitioner states that the agent misunderstood where this item was used. The petitioner contends that the use of the loader is to take the lumber off the green chain and get it to the dry kiln or to air-drying sheds, and such use is part of the manufacturing process in accordance with Ohio Adm.Code 5703-9-21(G), Example 10. The petitioner provided sufficient evidence to support its contention. Therefore, the objection is granted.

Penalty

The petitioner seeks abatement of the penalty and interest associated with the assessment. The petitioner contends that the penalty should be removed because it was cooperative and responsive during the audit. Further, the petitioner provides that it was the first audit of the business. The petitioner provides that it is contesting the assessment in good faith and paid sales tax to its vendors.

The petitioner contends that the penalty should be removed because it is being applied under an invalid rule. The petitioner cites *McLean Trucking Co. v. Lindley*, 70 Ohio St.2d 106, 435 N.E.2d 106 (1982) in support of its position that the guidelines used by the Department in evaluating penalties are not published as administrative rules and therefore it is an invalid guideline, which shall not be applied. The petitioner's contentions are not well taken.

The request for remission of the pre-assessment interest cannot be considered. The Tax Commissioner lacks jurisdiction to abate assessment interest added to an assessment pursuant to R.C. 5739.133(B) and 5741.14. This objection is denied.

While the accrual and assessment of interest is mandatory and cannot be abated, 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 acknowledges that penalty abatement is within the discretion of the Tax Commissioner in its request for removal. Superior's Memorandum in Support, p. 10.

R.C. 5739.133 provides that a penalty may be added to an assessment. The Supreme Court held that "[r]emission of the penalty is discretionary*** Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred." *Jennings & Churella Constr. Co. v. Lindsey*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). In *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985), the Court provided the abuse-of-discretion standard, citing *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), "In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.***"

J.M. Smucker, L.L.C. v. Levin, 113 Ohio St.3d 337, 2007-Ohio-2073, is instructive on this matter because the appellant contested the Tax Commissioner's use of standards not explicitly enumerated in statute. Here, as with *J.M. Smucker, L.L.C.*, the petitioner disagreed with the Tax Commissioner's use of a standard that was not explicitly enumerated in the statute referencing the Tax Commissioner's discretionary abatement power. In *J.M. Smucker, L.L.C.*, the appellant contended that the Tax Commissioner substituted a five-year audit look-back standard with the statutory term "reasonable cause." While the contested applications and guidelines vary between the petitioner and *J.M. Smucker, L.L.C.*, the Court's analysis remains the same that the focus is not on the guideline used, but rather whether the application of discretion had been abused when applying that guideline. Here, as with *J.M. Smucker, L.L.C.*'s five-year audit look-back, the guidelines used by the Department constitute a reasonable exercise of discretion as the petitioner failed to provide evidence to the contrary in elaborating how it constitutes an abuse of discretion.

The petitioner has not elaborated on its failure to properly remit use tax. However, given the totality of the circumstances of this case, a partial penalty abatement is warranted. Therefore, the request for a penalty abatement is granted in part.

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$186,364.18	$21,805.84	$13,976.68	$222,146.70

JUN 3 0 2020

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 post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 24 2020

Triple T Transport, Inc.
704 Radio Dr.
Lewis Center, OH 43035

RE: Assessment No.: 100000385397
Use Tax
Account No.: 97-302680

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
$47,874.78	$7,336.66	$7,181.09	$62,392.53

The petitioner operates as a freight company and truck broker. This assessment is the result of a field audit of the petitioner's purchases from January 1, 2009 through March 31, 2015. 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., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

The petitioner contends that the Department erred in assessing use tax on exempt transactions. Specifically, the petitioner contends that the Department incorrectly assessed transactions as electronic information services. The petitioner also contends that it purchased customized software that is exempt pursuant to R.C. 5739.01(Y)(2)(e). The petitioner contends that a reduction should be given for taxes paid and incorrectly calculated. The petitioner's objections are addressed in detail below.

Electronic Information Services

The petitioner contends that the Department incorrectly assessed various transactions as taxable electronic information services. The petitioner contends that transactions with Transflo Express

do not fit within the definition of electronic information services because Transflo Express provides document scanning and a delivery system in processing file transfer protocols. The petitioner also contends that it does not have access to the Transflo's database, but merely receives images sent through document scanning equipment located at independent truck stops. The petitioner contends that independent contractor truck drivers scan images of proof of delivery and freight invoices through the equipment located in truck stops and the images are sent as file transfer protocols to the petitioner's servers. The petitioner emphasizes that this information is stored and accessed on the petitioner's servers.

During the hearing, the petitioner stated that it did not understand why the auditor thought the services were electronic information services. The petitioner included the definition of electronic information services in R.C. 5739.01(Y)(1)(c) and Ohio Department of Taxation Information Release (IR) ST 1999-04, issued in January 1999, and updated in 2015 and again in September, 2016, to support its contention. The petitioner does not elaborate on how Transflo's services do not qualify as electronic information services; however, it contends that none of the electronic information service examples provided in IR ST 1999-04 are comparable to its transactions with Transflo. The petitioner contends that Transflo is not an online service provider or an internet access provider. The petitioner states, "Finally in *Marc Glassman v. Levin*, 1999 Ohio St.3d 254, 2008-Ohio 2819 the Ohio Supreme Court stated that since Glassman did not have access to the insurance companies database to see whether or not a patient's prescription was covered by insurance, the service provided was not electronic information services." The petitioner does not elaborate on the inclusion of this case; however, the Department understands that the petitioner is contending that it does not have access to Transflo's database.

"Electronic information service" is defined in R.C. 5739.01(Y)(1)(c) as providing access to computer equipment by means of telecommunications equipment for the purpose of *either*: (1) examining or acquiring data stored in or accessible to the computer equipment; *or* (2) placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment. It is understood that the petitioner relies on the first purpose included in R.C. 5739.01(Y)(1)(c)(i) in contending that it does not have access to data stored in Transflo's database so the transaction cannot be taxable electronic services.

The petitioner does not elaborate on why the transactions with Transflo Express do not fit within the definition of electronic information services. The petitioner submitted invoices from Transflo; however, the invoices contained generic descriptions. The petitioner failed to provide any other evidence, such as contracts to support the transactions were for an exempt purpose.

The petitioner contends that it does not access or retrieve documents from Transflo's database because the information is emailed to the petitioner. The petitioner states that it acquires data from its own servers. This contention is not well taken. The petitioner purchased an account as a consumer of Transflo Express to allow the petitioner to examine data (documents) by its drivers sent through Transflo's computer equipment. The data is stored in Transflo's equipment and transmitted to the petitioner's account. Transflo Express's website contains instructions on how the computer system works. Most notably, Step 4 states, "The scanned trip documents are transmitted by Pegasus TransTech's redundant data centers and delivered electronically to the

carrier.[1] Step 5 further explains that the carrier receives the document via its preferred delivery method and documents can be sent into an FTP directory or imaging system, emailed, or sent to a network printer. *Id.*

The petitioner may be able to store the information on its own servers, but this can only occur after the initial use and transfer occurs on Transflo's network. Transflo Express specifically notes in its On-Demand video that a driver will only be able to utilize the Transflo On-Demand service if the carrier has enrolled and enabled the service.[2] The data is extrapolated by Transflo through Transflo's computer equipment before it is provided to the petitioner. Transflo's computer equipment is accessed to scan and send the information. The petitioner would not be able to access the information if it did not have an account with Transflo. Further, if the petitioner did not have access to Transflo's computer system, it would not pay a fee to Transflo merely to receive an email from its drivers. The petitioner paid to acquire data stored and transmitted through Transflo's computer equipment. Therefore, the transactions satisfy the definition of electronic information services.

The petitioner also fails to address the second portion of the definition of electronic information services, which only requires placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment. The petitioner purchased an account with Transflo to provide its independent contractor drivers access to the petitioner's account to scan their documents into Transflo's computer equipment. All scanned images associated with the petitioner's account through Transflo's system are sent directly to the petitioner's account for the petitioner to access and print. The petitioner, as the consumer, is the designated recipient of Transflo's software. The petitioner received a benefit by its use of Transflo's computer equipment to receive data from the petitioner's drivers. The petitioner is the designated recipient as a consumer who is charged a fee to have continued access to this system, which provides instantaneous imaging (data) connected to the petitioner's account.

The Department reviewed Transflo Express's website to ascertain the services it provides to better assist in determining the true object of these transactions. Under the "About" section of Transflo Express's website, Transflo Express describes itself as an innovative software company that helps transportation clients excel.[2] Further, it states it is a leading portfolio of software and business process automation for the transportation industry. *Id.* This information solidifies the fact that the company's services are electronic information services as the true object of its transactions are focused on Transflo's software. Based on this information, it is evident that the company's software is the center of the transactions.

While Transflo does not have a database for the petitioner, it has a computer system in which the petitioner's drivers place data (delivery images) to be retrieved by the petitioner (the designated recipient). Therefore, the transactions also meet the second purpose included in the definition under R.C. 5739.01(Y)(1)(c)(ii). Accordingly, this objection is denied.

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[1] https://transflo.com/ (accessed April 8, 2016).
[2] https://transflo.com/history/why-transflo/ (accessed June 8, 2020).

Pre-written Software

The petitioner contends that the purchase of a hosted transportation management software package from Mercury Gate International is exempt because the software was customized. Prewritten software is software not designed or developed to the specifications of a specific purchaser. R.C. 5739.01(DDD). Prewritten computer software is included in the definition of tangible personal property; therefore, it is presumed taxable. R.C. 5739.01(YY). However, software that is customized is considered an exempt professional service. R.C. 5739.01(Y)(2)(e).

The petitioner contends that it paid Mercury Gate International to customize and prepare the software for its own use and the fees were not installation costs. The petitioner provided the invoice for the software purchase. However, the invoice contains a generic description of the product as an implementation of the software and provides one line item fee of $13,972.80. It is important to note the Information Release referenced by the petitioner. The Release states in part "The new definition provides that where prewritten computer software is modified for a specific consumer, and there is no separation of charges for the modification, the product remains prewritten computer software." Ohio Department of Taxation Information Release (IR) ST 2003-06, issued July 1, 2003.

Invoices are not the only evidence the Department considers in assessing the type of transaction. The Department reviews any information that may be helpful. The Department gave the petitioner an opportunity to provide proof of the exemption by specifically requesting Mercury Gate invoices and contracts; however, the petitioner failed to provide any other evidence, such as a contract to support that the transaction was for the purpose of professional services. Additionally, no proof has been submitted supporting the contention that the original software application was customized for the petitioner. Prewritten software that is modified to any degree for a specific purchaser is still considered prewritten software and remains taxable unless an invoice is provided separately stating charges for the software and modification. Further, even where an invoice separately stating these charges is provided, only the charges for the modification would be exempt. R.C. 5739.01(DDD). Without a contract or invoice for the original software purchase and further details of the customization, it is not clear that the software was actually customized. The petitioner has provided no additional evidence to support this contention. Therefore, this objection is denied.

Tax Paid

The petitioner contends that the Department erred in assessing use tax on transactions by using an incorrect tax rate on transactions in which the petitioner already paid tax. The petitioner contends that the auditor incorrectly calculated tax owed by using a tax rate of 7.5 percent rather than 7.0 percent, resulting in an underpayment of use tax in the amount of $376.15. The petitioner contends that its address is not within the Delaware Central Ohio Transit Authority (COTA) designation. The petitioner provided sufficient evidence to warrant a refund of tax paid on transactions assessed using an incorrect tax rate. Therefore, this objection is granted.

The petitioner also contends that tax was assessed in error regarding two transactions from Transflo Express in the amount of $4,100.49. The petitioner contends that the transactions were recorded in error and were reversed in the general ledger on the same day. The petitioner provided sufficient evidence to warrant a refund of tax paid on transactions assessed in error. Therefore, this objection is granted.

Penalty

The petitioner seeks remission of the penalty associated with the assessment. The evidence and circumstances support abatement of the penalty. The request for a penalty abatement is granted.

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$47,282.99	$7,263.49	$0.00	$54,546.48

Current records indicate that $62,392.53 has been paid, resulting in a refund due of $7,846.05 plus applicable interest.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JUN 17 2020

Vancrest of Urbana, Inc.
120 W. Main St., Ste. 200
Van Wert, OH 45891

RE: Assessment No.: 100000228486
Use Tax
Account No.: 97-301571

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5741.14 concerning the following use tax assessment:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$14,749.83	$1,528.35	$737.47	$17,015.65

The petitioner operates as a construction contractor. This assessment is the result of an audit of the petitioner's records from January 1, 2009 through March 31, 2015. The petitioner filed a petition for reassessment and requested abatement of the interest and penalty. A hearing was not requested. The petitioner's objections are addressed below.

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).

Audit Methodology

The audit consisted of a review of the petitioner's fixed asset purchases and expense invoices. The petitioner agreed to the audit methodology when the petitioner signed the Purchase Audit Letter of Agreement. Capital asset purchases were listed individually for the entire audit period when they appeared to be tax deficient. The capital worksheets were based upon actual purchases and were not projected. A projection method of audit procedure was used to review expense invoices. The taxpayer indicated that their purchases were not seasonal in nature; therefore, the 2013 calendar year was mutually agreed upon as representative of the taxpayer's business

activity. The tax deficient expenses were projected over the period January 1, 2009 through March 31, 2015 based upon the sample period findings.

After the worksheet listings were compiled for the sample period, the auditor reviewed the listings with the petitioner to determine all taxable purchases for all accounts remaining in the audit. Account purchase totals for the remaining accounts were provided by the petitioner for the audit period and the sample period. The auditor verified the totals. The total tax deficient expense purchases for each account were divided by the total purchase activity in the same accounts for the sample period to determine the percentage of error on untaxed purchases. Each percentage of error was then applied to the corresponding account's total audit period purchases to determine untaxed taxable purchases for the audit period. The appropriate tax rate was applied to the untaxed purchases for the audit period to determine the amount of tax due. Tax rate changes occurring during the audit period were prorated by the number of months that each rate was in effect.

Brian Clark Invoices

The petitioner contends that the sample period contained invoices relating to janitorial work performed by Brian Clark that are not representative of the whole audit period. The petitioner discussed with the auditor how the year of 2013 was representative of the whole audit period. Audit Remarks, p. 5. The petitioner signed the purchase audit letter of agreement, agreeing to the audit methodology. The agreement states that "the calendar year 2013 has been mutually agreed upon as representative of the taxpayer's business activity." The petitioner did not have fault with the sample period or contest the inclusion of transactions with Brian Clark until the review of preliminary audit results. Audit Remarks, p. 5. The petitioner has submitted logs that show that Brian Clark's services were only utilized in 2013. However, the petitioner has not proven that the sample period is not representative of the audit period simply by showing one vendor was only used for a few months during the sample year. The taxpayer agreed multiple times that the year 2013 was representative of the audit period. As a result, the taxpayer has failed to meet its burden to prove error in the assessment. Therefore, this contention is denied.

Further, the sample methodology inherently incorporates situations such as vendor changes during the sample year because vendor changes can occur throughout the audit period. It may be true that vendors used during the sample period did not charge taxes while different vendors providing the same services outside of the sample period did charge sales tax. The opposite is also just as likely. The petitioner likely used vendors outside of the audit period who did not charge sales tax, while using different vendors during the audit period who did charge sales tax. Indeed, the purpose of the sample methodology is to project the tax liability of the audit period by using a representative sample of the taxpayer's transactions. The underlying premise is that the purchases audited are representative of similar transactions in the account.

Accordingly, the assessment is affirmed as issued.

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JUN 17 2020

Current records indicate that payments in the amount of $17,015.65 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