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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: MAY 19 2021

Defender Security Company
3750 Priority Way South Drive
Suite #200
Indianapolis, IN 46240

Re: Commercial Activity Tax
Assessment No. 100001012421
Reporting Period: 07/01/2014 – 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) amounts:

Tax	Interest	Penalty	Total
$109,302.00	$6,380.13	$17,123.70	$132,805.83

The Department assessed the petitioner after performing an office audit for the period at issue. Specifically, the Department's audit staff identified that the petitioner underreported its taxable gross receipts compared to its sales tax returns. The petitioner objects to the assessment. Upon further review, and in light of the Ohio Supreme Court's recent decision in *Defender Security Company v. McClain,* 162 Ohio St.3d 473, 2020-Ohio-4594, 165 N.E.3d 1236, the petitioner's contention is well taken.

Accordingly, the assessment is cancelled.

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

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

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: MAY 19 2021

Leonardo DRS, Inc.
200 Campus Dr Ste 410
Florham Park, NJ 07932-1007

Re: Ohio Tax Account No. 95230899
Tax Type: Commercial Activity Tax
Assessment No. 100001327927
Reporting Period: 01/01/2015 – 12/31/2017

This is the final determination of the Tax Commissioner with regard to a petition for reassessment pursuant to R.C. 5751.09 concerning the above-referenced commercial activity tax assessment. In resolution of this matter, the Tax Commissioner and the petitioner have reached an agreement to a modification of the assessment.

Records reflect that the modified assessment has 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

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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: MAY 28 2021

Mazzella Lifting Technologies, Inc.
2100 Aerospace Parkway
Cleveland, OH 44142

Re: Application for Refund No. 333720016432
Commercial Activity Tax – 10/01/2014 – 12/31/2014

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 Requested
10/01/2014 – 12/31/2014	$15,994.00

I. BACKGROUND

On March 3, 2019, Mazzella Lifting Technologies, Inc. (hereinafter referred to as "the claimant") amended its CAT return for the period at issue reporting an overpayment of tax claiming the nonrefundable Qualified Research Expense ("QRE") tax credit. Additionally, on March 3, 2019, the claimant filed an Application for Commercial Activity Tax Refund form ("CAT REF"). The claimant did not claim this credit when it filed its original return. Upon initial review, the Department denied the refund claim. The Department denied the refund claim because the claimant filed the application for refund more than four years after the underlying payment. 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 on this matter; therefore, this matter is decided based upon the information available to the Tax Commissioner.

II. AUTHORITY AND ANALYSIS

R.C. 5751.08(A) governs applications for CAT refunds stating, in pertinent part, that:

"An application for refund to the taxpayer of the amount of taxes imposed under this chapter that are overpaid * * * 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 * * * payment of the tax * * *.*" (Emphasis added).

The claimant requested a refund of $15,994.00 from the last calendar quarter of 2014. The claimant remitted the underlying payment for this period on February 6, 2015. The statute allowed the claimant four years from this date, or until February 6, 2019, to file its refund request. The claimant's refund request was postmarked March 13, 2019 which is outside the four-year statutory limit. Because the refund was requested outside of the statutory limit, the Department does not have jurisdiction to

consider the request. Accordingly, the Department must dismiss this refund claim due to lack of jurisdiction.

III. CONCLUSION

The claimant submitted the refund request beyond the four-year statutory limit. Therefore, the Department must dismiss this refund request due to lack of jurisdiction.

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

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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: MAY 28 2021

Palmer Trucks Inc.
2843 S. Holt Rd.,
Indianapolis, IN 46241

Re: Ohio Tax Account #: 93100668
Assessment No. 100001073951
Commercial Activity Tax
Reporting Period: 01/01/2015 – 06/30/2017

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) assessment:

Tax Due	Interest	Penalty	Total
$69,263.00	$6,093.89	$3,463.15	$78,820.04

The Department of Taxation assessed Palmer Trucks Inc. (hereinafter referred to as "the petitioner") after conducting a field audit for the tax period in question. The petitioner is a full-service Kenworth dealership that services to Ohio, Kentucky, Indiana, and Illinois. The petitioner is headquartered in Indianapolis, Indiana. During the audit period, the audit staff focused on three primary issues. First, the audit staff identified that the petitioner was a consolidated elected taxpayer that failed to include all the entities that it owned by "at least eighty per cent * * * of the value of their ownership interests owned or controlled, directly or constructively through related interests." R.C. 5751.011. Second, the audit staff also examined all the evidence available and concluded that the petitioner failed to report out-of-state sales as taxable gross receipts under R.C. 5751.033(E). Third, the audit staff determined that the petitioner failed to include part sales in its CAT return for the tax period in question.

Based on its review, the Department's audit staff increased the petitioner's taxable gross receipts and issued the assessment currently considered. The petitioner only objects to the second contention of the assessment which relates to the out-of-state sales under R.C. 5751.033(E). The petitioner requested a hearing on this matter, which was conducted via telephone. The matter is now decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

During the administrative appeal period, the petitioner provided additional supporting documentation regarding the out-of-state sales matter. Upon further review of those additional documentation, the petitioner's contention is well-taken. Accordingly, the assessment shall be adjusted.

Therefore, the assessment shall be adjusted as follows:

Tax Due	Interest	Penalty	Total
$1,330.00	$125.16	$66.49	$1,521.65

Current records indicate that no payments have been made on the above-referenced assessment. However, due to payment processing and posting time lags, payments may have been made that are not

MAY 28 2021

reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: MAY 12 2021

Top Flight Franchising, Inc.
DBA Jani-King of Dayton
ATTN: Tax / Accounting Department
85 Rhoads Center Drive
Dayton, OH 45458

Re: Commercial Activity Tax
Assessment No. 100000968628
Commercial Activity Tax – January 1, 2014 through December 31, 2016

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) assessment:

Tax	Alt. Min. Tax	Interest	Penalty	Total
$4,946.00	$1,300.00	$447.00	$937.00	$7,630.00

I. BACKGROUND

Top Flight Franchising issues cleaning franchises to unrelated business owners. These franchisees perform all of the labor and cleaning, and Top Flight Franchising, the petitioner here, performs all accounting functions, including all aspects of billing and collections, in addition to doing all advertising for the cleaning services to be provided. The petitioner also secures commercial cleaning contracts for the franchisees.

The petitioner bills the offices, warehouses, hospitals, and other businesses for the cleaning work performed by the franchisees. The businesses pay the entire amount owed for the cleaning services to the petitioner. The petitioner keeps an amount for billing and advertising fees and a royalty fee and remits a payment to the franchisees for work performed.

The Department's audit staff reviewed the petitioner's previously filed CAT returns in comparison to the previously filed sales tax returns and found that the receipts reported on the sales tax returns were much higher than those reported on the CAT returns. The audit staff examined the petitioner's contractual agreements between the petitioner and franchisees and determined that no agency relationship exists between the parties. Therefore, the audit staff assessed the petitioner for the additional receipts that were not reported on its quarterly CAT returns.

The petitioner timely filed and paid CAT for all quarters throughout the audit period. However, it only computed CAT owed based upon accounting, advertising, royalty, and other fees that it received from the franchisees. The assessment was issued to include the total receipts that were paid to the petitioner by the cleaning customers. In the assessment, the petitioner was given credit for taxable gross receipts that it had previously reported.

The Department issued this assessment to reflect its audit findings. The tax amount assessed was calculated pursuant to R.C. 5751.09(A), annual minimum tax was computed, preassessment interest

was assessed pursuant to R.C. 5751.06(G), and penalty was assessed pursuant to R.C. 5751.06. The assessment reflects CAT payments already made by the petitioner for the periods at issue.

The petitioner filed a timely petition for reassessment raising its objections. A telephone hearing was held on this matter.

II. PETITIONER'S CONTENTIONS

The petitioner contends that the taxable gross receipts of the petitioner are only the accounting, advertising, royalty, and other fees charged by the petitioner to the franchisees. The petitioner contends that it has an agency relationship with its franchisees, arguing that the only taxable gross receipts of the petitioner are the accounting fees, advertising and royalty fees, and other fees for which the petitioner bills the franchisees.

III. ANALYSIS

The petitioner argues that it is an agent for the franchisees, and contends that as an agent only the accounting, advertising, royalties, and other fees for which it bills the franchisees should be considered taxable gross receipts for CAT purposes.

Effective June 30, 2005, 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 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".

R.C. 5751.01(F)(2)(l) provides that "[p]roperty, money, and other amounts received or acquired by an agent on behalf of another in excess of the agent's commission, fee, or other remuneration" are excluded from the definition of "gross receipts."

R.C. 5751.01(P) defines "agent" as a person authorized by another person to act on its behalf to undertake a transaction for the other. The common law principal of actual authority is the standard under which agency is established between entities such that they may be subject to the CAT's agency exception.[1] Actual authority is "an expression of intent by the principal that the agent act on behalf of the principal, along with the understanding of the agent.[2] The primacy of a putative agent's authority to act for another arises by virtue of R.C. 5751.01(P)'s definition of "agent,"

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[1] *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929.
[2] *Id.*, citing 1 Restatement of Law 3d, Agency, Section 3.01.

which uses the term "authorized" to modify "person."[3] Stated differently, where a company is not endowed with actual authority to bind another entity, then no agency relationship is formed, and no exception may be claimed.

An agency relationship does not exist unless the principal actually exerts its control over the agent.[4] An agency relationship "exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks.[5] That is to say, simply having the option or an agreement to exercise an agency relationship or failing to act in a principal-agent capacity despite having the option to do so does not give rise to an agency relationship under Ohio law. In the case at hand, petitioner Top Flight Franchising (Jani-King of Dayton) and its franchisees are independent parties, as stated in the franchise agreement. In the petitioner' argument, the franchisee would be the principal and the petitioner would be the agent. However, the franchise agreement shows many ways in which Jani-King controls the franchisee.

An agent cannot make contracts on the principal's behalf without actual authority to do so.[6] Actual authority is "an expression of intent by the principal that the agent act on behalf of the principal, along with the understanding of the agent."[7]

In a principal-agent relationship, the agent has the legal authority to act on behalf of the principal, and generally the principal is bound by and is liable for those actions.[8] The party asserting the existence of an agency relationship bears the burden of proof in that regard.[9] In determining whether an agency relationship exists, the rules of statutory construction applicable to exemptions from taxation must be followed. Ohio law in this regard is well-established; exemptions from taxation are strictly construed against the claim of exemption and in favor of the taxing authorities.[10] Thus, in determining whether an agency relationship exists, the facts must be determined under a strict, narrow reading of the definition. Absent proof of an agency relationship, the entire gross receipt must be reported by the person receiving the gross receipt for purposes of the commercial activity tax.

Again, "gross receipts" is defined in R.C. 5751.01(F) as "the total amount realized by a person…". It must be noted that the petitioner receives all gross receipts from the commercial customers who receive the cleaning services. Thus, the petitioner has received these receipts from the commercial customers as "gross receipts" pursuant to R.C. 5751.01(F) and these amounts are properly included as taxable gross receipts in the assessment, unless an exclusion from CAT is available.

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[3] *Willoughby Hills Development and Distribution, Inc. v. Testa*, 155 Ohio St.3d 276, 2018 WL 5833000, 2018 -Ohio-4488 (Nov. 7, 2018).
[4] Ohio Adm.Code 5703-29-13(B)(1) citing *Hanson v. Kynast*, 24 Ohio St.3d 171, 173, (1986).
[5] *Id.*
[6] *Willoughby Hills Development and Dist., Inc. v. Testa*, 155 Ohio St.3d 276, 2018 WL 5833000.
[7] *Id.*, citing 1 Restatement of the Law 3d, Agency, Section 3.01.
[8] *N&G Construction, Inc. v. Lindley* (1978), 56 Ohio St.2d 415, 418, citing *Gulf Oil Corp. v. Kosydar* (1975), 44 Ohio St.2d 208 (paragraph two of the syllabus) and *Canton v. Imperial Bowling Lanes, Inc.* (1968), 16 Ohio St.2d 47 (paragraph four of the syllabus).
[9] *Gardner Plumbing, Inc. v. Cottrill* (1975), 44 Ohio St.2d 111, 115, *citing Union Mutual Life Ins. Co. v. McMillen* (1873), 24 Ohio St. 67. Also see *Memorial Park Golf Club, Inc., supra.*
[10] *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, 409; *Beckwith & Assoc. v. Kosydar* (1977), 49 Ohio St.2d 277, 279, and *Canton Malleable Iron Co. v. Porterfield* (1972), 30 Ohio St. 2d 163, 166. Also see *Memorial Park Golf Club, Inc.*, supra.

The petitioner submitted a copy of its Jani-King Franchise Agreement. This agreement is signed by both the petitioner as franchisor and by the franchisee. Section 12.6 of this agreement provides:

> 12.6. The Parties agree and understand that Franchisee will be at all times an independent contractor under this Agreement and will not, at any time, directly or indirectly, hold itself out as an agent, servant, or employee of Franchisor. Nothing in this Agreement may be construed to create a partnership, joint venture, agency, employment or fiduciary relationship of any kind. None of Franchisee's employees will be considered to be Franchisor's employees. Neither Franchisee nor any of Franchisee's employees whose compensation Franchisee pays may in any way, directly or indirectly, expressly or by implication, be construed to be Franchisor's employee for any purpose. Franchisee may not, without our prior written approval, have any power to obligate Franchisor for any expenses, liabilities or other obligations, other than as specifically provided in this Agreement. [Emphasis added.]

Section 12.6 of the Jani-King Franchise Agreement explicitly provides that the franchisee is an independent contractor and not an agent of the petitioner. The agreement provides that the franchisor and franchisee are independent of each other, and neither is an agent of the other.

The petitioner is ignoring this express language in the contract, in an attempt to obtain a reduction in CAT. The petitioner has a contract that states the parties are independent contractors in order to limit its liability from operations, but herein in its petition attempts to ignore this independent contractor language for tax purposes in order to obtain a tax reduction under the CAT's agency exclusion.

Further, the franchise agreement spells out each party's obligations to the other. However, at no point in the performance of the contract is the franchisee in control of the petitioner franchisor (Jani-King), as would be required for the franchisor to be an agent of the franchisee. Rather, a review of the franchise agreement shows that the petitioner controls the franchisee to a great extent, and in that sense if a principal-agent relationship existed between the petitioner and the franchisees, the petitioner would be the party operating as a principal. As shown in the franchise agreement, the petitioner controls the franchisees in the following ways: franchisor controls what name the franchisees may use; franchisor must approve any directory listings, advertising, and letterheads used by the franchisee; the franchisor has developed manuals, procedures and forms which the franchisee must follow; franchisor requires franchisee to keep certain information confidential; franchisee must follow policies, procedures and practices of the franchisor; franchisee's owners are required to take an initial training program; franchisor requires franchisees to use specific supplies and equipment in the business; franchisor requires the franchisees to pay a monthly royalty fee, a monthly advertising fee, a monthly technology fee, and a finder's fee; the franchise agreement sets finder's fees schedules which the franchisees must follow, the franchise agreement requires franchisees to hold certain levels of liability insurance, franchisees are not permitted to have any financial interest in any other cleaning business; the franchise agreement requires the franchisees to pay all taxes owed in operation of their cleaning business, franchisor may suspend franchisee's license for failure to perform the required cleaning services; and other requirements that are too numerous to list. Based upon this extensive control wielded by the franchisor, it is clear that the petitioner is much more like a principal than an agent. Ohio Adm.Code 5703-29-13(B)(1) requires that the principal assert control over the agent for an agency relationship to exist. In the case at hand, the petitioner is asserting much authority over its franchisees, and is clearly more of a

principal than an agent. Further, the petitioner has not met its burden of proof of showing it is an agent, as described above.

VI. CONCLUSION

As explained above, the petitioner's contentions regarding the agency exclusion for CAT are denied.

Accordingly, the assessment is affirmed.

Current records indicate that no payments have been made on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **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
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: MAY 12 2021

Wada Farms Marketing Group, LLC
2155 Providence Way
Idaho Falls, ID 83404

Re: Ohio Tax Account #: 96218596
Assessment No. 100001013383
Commercial Activity Tax
Reporting Period: 01/01/2008 – 12/31/2015

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
$242,597.00	$57,368.00	$121,299.00	$421,264.00

I. BACKGROUND

Wada Farms Marketing Group, LLC (hereinafter "the petitioner") is in the business of farming. The petitioner grows, packages, and supplies potatoes, sweet potatoes, and onions ("the produce") to retail, wholesale, and foodservice entities throughout the United States and Canada. The petitioner is headquartered in Idaho Falls, Idaho. The Department assessed the petitioner for failing to file CAT return and for failing to fully remit its CAT liability for the tax period in question. The Department increased the petitioner's taxable gross receipts to reflect the produce that was shipped into Ohio's distribution centers as well as the produce that was subsequently transported to locations outside the state of Ohio. In addition, the petitioner was assessed a late underpayment penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). Subsequent to the assessment, the petitioner filed a timely petition objecting to the assessment. The petitioner requested a hearing on this matter, which was conducted via telephone. The matter is now decided based on the evidence currently available to the Tax Commissioner.

II. THE PETITIONER'S CONTENTIONS

The petitioner disagrees with the assessment and raises three objections. First, the petitioner contends that its agency fees and other receipts that it received from the purported principals are statutorily excludable by one of the exclusions available in R.C. 5751.01(F)(2) – the agency exclusion. Specifically, the petitioner asserts that it had an agency relationship with Dole, High Country, Moody Creek, and other Marketing Co-Packers that allowed it to exclude those receipts and fees from the CAT. Second, the petitioner asserts that the receipts it received from its own sale of the produce should be sitused outside of Ohio under R.C. 5751.033(E) because the produce was ultimately received outside of Ohio after all transportation has been completed. In support of this contention, the petitioner submitted affidavits from its employees to demonstrate that the produce ended up outside of Ohio. Third, the petitioner argues that applying the CAT to it would violate its rights under the Commerce Clause and

the Equal Protection Clause of the United States Constitution. Finally, the petitioner requests an abatement of the penalty assessed.

III. AUTHORITY & ANALYSIS

A. STATUTE OF LIMITATIONS

Former R.C. 5703.58(A), applicable for the period in question, states in relevant part: "the tax commissioner shall not make or issue an assessment for any tax payable to the state * * * any penalty, interest, or additional charge on such tax, after the expiration of ten years * * * from the date the tax return or report was due when such amount was not reported and paid * * *".

The petitioner's contention regarding the statute of limitations applying for the first two quarters of the assessment, encompassing January 1, 2008 through June 30, 2008, is well-taken. Accordingly, the tax and interest amounts assessed will be adjusted in a manner to remove the amounts assessed relating to these periods.

B. A TAX MEASURED BY GROSS RECEIPTS

The CAT is imposed on the privilege of doing business in Ohio, 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.

C. EXCLUSION FOR AMOUNTS RECEIVED AS AN AGENT – R.C. 5751.01(F)(2)(1)

There is a limited list of exclusions from the CAT that apply to certain receipts of taxpayers. Division (F)(2)(1) of that section provides that "[p]roperty, money, and other amounts received or acquired by an agent on behalf of another in excess of the agent's commission, fee, or other remuneration" are excluded from the definition of "gross receipts."

The starting point for an agency analysis for purposes of the CAT is R.C. 5751.01(P), which defines an "agent" as a person authorized by another person to act on its behalf to undertake a transaction for the other. An agency relationship is defined as a "consensual fiduciary relationship between two persons where the agent has the power to bind the principal by his actions, and the principal has the right to control the actions of the agent."[1] In a principal-agent relationship, the agent has the legal authority to act on behalf of the principal, and generally the principal is bound by and is liable for those actions.[2]

Ohio Administrative Code 5703-29-13 further clarifies the definition of "agent" for CAT purposes, stating that "in determining whether an agency relationship exits, the facts must be determined under a

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[1] See *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 744, citing *Funk v. Hancock* (1985), 26 Ohio App. 3d 107, 110, in turn citing *Haluka v. Baker* (1941), 66 Ohio App. 308, 312.

[2] See *N&G Construction, Inc. v. Lindley* (1978), 56 Ohio St.2d 415, 418, citing *Gulf Oil Corp. v. Kosydar* (1975), 44 Ohio St.2d 208 (paragraph two of the syllabus) and *Canton v. Imperial Bowling Lanes, Inc.* (1968), 16 Ohio St.2d 47 (paragraph four of the syllabus).

strict, narrow reading of the definition. Absent proof of an agency relationship, the entire gross receipt must be reported by the person receiving the gross receipt for purposes of the [CAT]." Ohio Adm.Code 5703-29-13(B)(1). With respect to an agency relationship created by contractual terms, the regulation states the following:

> In the case of a person enumerated in division (P)(2) of section 5751.01 of the Revised Code who retained commission or fee from a transaction performed on behalf of another person, only the fee retained by the agent shall be a gross receipt of the agent pursuant to division of (F)(2)(I) of section 5751.01 of the Revised Code. For purposes of this paragraph and paragraph (B) of this rule, *the agency relationship should be explicitly in a contract that is available to the tax commissioner to inspect. Absent such proof, it will be presumed that no agency relationship exists and the person claiming the agency relationship will include the total amount received in its gross receipts.* (Emphasis added).

Ohio Adm.Code 5703-29-13(C)(2)(a).

Underpinning this statutory definition and administrative authority is the common law principle of actual authority, which is the standard under which agency can be established between entities such that they may be subject to the CAT's agency exclusion.[3] Actual authority is "an expression of intent by the principal that the agent act on behalf of the principal, along with the understanding of the agent."[4] The primacy of a putative agent's authority to act for another arises by virtue of R.C. 5751.01(P)'s definition of "agent," which uses the term "authorized" to modify "person."[5] Stated differently, where a company is not endowed with actual authority to bind another entity, no agency relationship is formed, and no exclusion may be claimed.

An agency relationship also exists where a principal actually exerts its control over its agent.[6] More specifically, an agency relationship "exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks."[7] Simply having the option or an agreement to exercise an agency relationship or failing to act in a principal-agent capacity — despite having the option to do so — does not give rise to an agency relationship under Ohio law. An agent cannot make contracts on the principal's behalf without actual authority to do so.[8] Actual authority is "an expression of intent by the principal that the agent act on behalf of the principal, along with the understanding of the agent."[9] In a principal-agent relationship, the agent has the legal authority to act on behalf of the principal, and, generally, the principal is bound by and is liable for those actions.[10]

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[3] *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929.
[4] *Id.*, citing 1 Restatement of Law 3d, Agency, Section 3.01.
[5] *Willoughby Hills Development and Distribution, Inc. v. Testa*, 155 Ohio St.3d 276, 2018 WL 5833000, 2018 -Ohio- 4488 (Nov. 7, 2018).
[6] Ohio Adm. Code 5703-29-13(B)(1) citing *Hanson v. Kynast*, 24 Ohio St.3d 171, 173, (1986).
[7] *Id.*
[8] *Willoughby Hills Development and Dist., Inc. v. Testa*, 155 Ohio St.3d 276, 2018 WL 5833000.
[9] *Id.*, citing 1 Restatement of the Law 3d, Agency, Section 3.01.
[10] *N&G Construction, Inc. v. Lindley*, 56 Ohio St.2d 415, 418 (1978), citing *Gulf Oil Corp. v. Kosydar*, 44 Ohio St.2d 208 (1975) (paragraph two of the syllabus) and *Canton v. Imperial Bowling Lanes, Inc.*, 16 Ohio St.2d 47 (1968) (paragraph four of the syllabus).

D. THE PETITIONER IS NOT ENTITLED TO THE AGENCY EXCLUSION UNDER R.C. 5751.01(F)(2)(1)

1. The petitioner was not an agent under R.C. 5751.01(P).

The petitioner contends that a portion of its taxable gross receipts should be excluded from the CAT based on the presumption that the petitioner served as the agent for Marketing Co-Packers[11] and Dole during the tax period in question. To show support that High Country, Moody Creek, Dole, and other Marketing Co-Packers gave the petitioner actual authority to be an agent, the petitioner provided copies of the Marketing Co-Packers Agreement and Dole Agreement.[12] The petitioner pointed to specific provisions within each agreement to show that it had express appointment to be an agent, and authority to bind its obligations onto Marketing Co-Packers and Dole. For instance, the petitioner points to the term "marketing agent" within High Country, Moody Creek, and Dole Agreements to illustrate that it had an express authority to be an agent of the purported principals. (*See Exhibit F-H* of the agreements). However, the petitioner's efforts to show that it had express authority is taken out of context. The petitioner disregards the specific language within each agreement that states that the petitioner was an independent contractor and not an agent of High Country, Moody Creek, Dole, and other Marketing Co-Packers. In High County and Moody Creek Agreements, specifically, Section 8 and Section 10 of the Agreements, it states, in pertinent part, as follows:

> Independent Contractor. "*Wada is and shall be an independent contractor*. Nothing herein contained in this Agreement shall be construed so as to create a partnership or joint venture and either party shall be liable for the debts or obligations of the other. No employee of Wada shall be deemed to be an employee of High Country. (Emphasis added).
>
> Independent Contractor. "*Wada is and shall be an independent contractor*. Nothing herein contained in this Agreement shall be construed so as to create a partnership or joint venture, and either party shall be liable for the debts or obligations of the other. No employee of Wada shall be deemed to be an employee of [Moody Creek]. (Emphasis added).

This language mentioned above expressly refutes that the petitioner had actual authority from High Country and Moody Creek to act as its agents. In other words, the petitioner was not endowed with actual authority to bind High Country, Moody Creek, and other Marketing Co-Packers. *Willoughby Hills Development and Distribution, Inc.* at ¶ 27. The petitioner disregards this express language in the Agreements in an attempt to obtain a reduction in the CAT. The language in the Agreements have meaning; it appears that the petitioner is trying to have it both ways by relying on the language in the Agreements that state the parties are independent contractors in order to limit its liability from operations, but ignoring the same language for tax purposes.

Furthermore, in the High Country and Moody Creek Agreements, it spells out each party's obligations to the other. However, the petitioner again alludes to specific provisions in the Agreements that bolster

[11] Marketing Co-Packers consist of the following: High Country, Moody Creek, Magic Valley Produce, Inc., Snake River Plains Potatoes, Inc, Worley & McCullough, Inc, Ball Brothers Produce, LLC, and Pingree.

[12] Within the post-hearing brief, the petitioner's representative stated the following, "Wada Farms' Marketing Agreements with Dole, High Country, and Moody Creek are substantially similar to its remaining Co-Packers, including (1) Magic Valley Produce, Inc.; (2) Snake River Plains Potatoes, Inc.; (3) Worley & McCullough, Inc.; (4) Ball Brothers Produce, LLC; and (5) Pingree.

its claims that it had an open book relationship with High Country and Moody Creek despite evidence to the contrary. For instance, the petitioner points to the following language in High Country Agreement, which states "Wada will review all contracts with High Country and will seek input and approval prior to taking on any new contract for the upcoming season for fresh potatoes." (*See Exhibit F, Section 6*). Once again, the petitioner overlooks other sections in the High Country and Moody Creek Agreements that demonstrate that the petitioner's actions and responsibilities appear to be more in a manner more in line with that of the purported principal rather than a purported agent. For instance, in Section 3 of both the Agreements, High Country and Moody Creek *"shall meet or exceed all of Wada's quality standards for potatoes. * * *"* High Country and Moody Creek *"will also supply Wada daily inventory, production, and quality information.* Wada has the right to inspect the product in the packing facility to ensure and uphold their quality control standards." (Emphasis added). This language seems to demonstrate that the petitioner exerted more control over High Country and Moody Creek than High Country and Moody Creek did over the petitioner which is the complete opposite of Agency law. Therefore, the petitioner is not an agent of Marketing Co-Packers.

Additionally, the independent contractor language that was expressed in High Country and Moody Creek's Agreement is also precisely stated in Dole's Agreement. Section 16 of the Agreement states:

> Separate Business. *The parties each operate independent businesses and they do not, by this Agreement, intend to create a partnership, joint venture or joint business of any kind.* Except as provided in this Agreement, neither party will be responsible for the acts or obligations of the other and *neither party has the authority to bind the other or create any obligations on the part of the other*. (Emphasis added).

This language specifically states that the petitioner is not an agent. Moreover, at no point in the performance of the agreement is either party in control of the other. For instance, the Agreement states that "Wada will use its best production and marketing efforts to sell the products at a premium over the price which it pays for the products." It seems like the petitioner determines the price and not the purported principal. Further, if the petitioner were an agent, Dole should protect the petitioner against third party claims and liabilities. However, the petitioner carries its own public liability insurance to protect itself against third party claims and liabilities. (*See Exhibit H*). The record reflects that the parties are acting on its own rather than as principal-agent. As such, because no agency relationship exists, no agency exclusion can be granted.

2. R.C. 5751.033(I) does not control because the petitioner sold tangible personal property – sale of produce.

In the present case, the primary purpose of the Agreements between Dole, Marketing Co-Packers and the petitioner was for the sale of potatoes, sweet potatoes, and onions. Also, potatoes, sweet potatoes, and onions are considered tangible personal property because they can be seen, weighed, and measured. R.C. 5751.01(J). However, the petitioner contends that its agency fees are considered services under R.C. 5751.033(I) and Ohio Adm. Code 5703-29-17(C)(4) because it acted as a "marketing agent" to Dole and Marketing Co-Packers. The meaning and use of the term "marketing agent" is inconsistent in the petitioner's arguments. In this context, the petitioner attempts to use the term "marketing agent" as someone who advertises and makes sales for their clients. However, in the discussion above, the petitioner attempts to use the same term as someone who acts on behalf of the principal.

The petitioner also asserts that *Defender Security* is analogous to the petitioner's case. The petitioner's reliance on *Defender Security* is misplaced. In *Defender Security,* the Court's analysis focused on the transfer of an intangible contract right itself and the benefit between ADT and Defender Security. *Defender Sec. Co. v. McClain*, Slip Opinion No. 2020-Ohio-4594, ¶ 21-22. Unlike *Defender Security*, the petitioner's case does not involve intangible assets, but contracts with Dole and Marketing Co-Packers for the sale of produce products. In the petitioner's agreement with Dole (the Dole Agreement), the petitioner agreed to sell all Dole-labeled produce in the United States and Canada. (See Exhibit C). Lacking from Dole's agreement was a provision for the petitioner to sell its services or some intangible right as was the case in *Defender Security. Id.* As in *Willoughby Hills,* the agreement at issue "speaks to sales of [produce products], not the sale of services." *Willoughby Hills Development and Distribution, Inc.* at ¶ 20. Thus, the petitioner conflates tangible personal property with contracts associated with the property. Accordingly, the petitioner's contention is not well-taken.

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

R. C. 5751.01(G) indicates that "taxable gross receipts" means gross receipts situsedto this state under R.C. 5751.033. Division (E) of R.C. 5751.033 governs the situsing of gross receipts from the sale of tangible personal property, which states, in pertinent part, that:

> Gross receipts from the sale of tangible personal property shall be situsedto this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property. For purposes of this section, the phrase "delivery of tangible personal property by common carrier or by other means of transportation" includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state.

The Tenth District Court of Appeals affirmed the Board of Tax Appeals' ("Board" or "BTA") decision in *Greenscapes Home and Garden Products, Inc. v. Testa*, BTA No. 2016-350 (July 19, 2017), agreeing that the location where the property was ultimately received after all transportation has been completed controls where the sales are sitused. *Greenscapes*, 2019-Ohio-384 at ¶ 27. In *Greenscapes*, the appellant was a wholesaler of lawn and garden products, and many of its sales went to warehouses and distribution centers within Ohio. *Id.* at ¶ 2. The BTA found that "it may be true that the goods appellant sells may be removed from Ohio, after being shipped from appellant to Ohio, for ultimate sale in one of its customers' retail locations, the lack of information about any such further transportation forecloses appellant's argument." *Greenscapes*, BTA No. 2016-350, p. 3. Therefore, the BTA ended its inquiry in absence of any evidence indicating that the goods were ultimately received elsewhere and noted that "mere speculation is not evidence." *Id.*, quoting *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15. The appellant argued again at the Tenth District Court of Appeals that it had no nexus with Ohio because its transactions with customers occurred outside the state although its retail customers had a presence in Ohio, purchased goods for delivery to their Ohio distribution centers, and the appellant knew that its products were destined for Ohio at the time the orders were placed. *Id.* 2019-Ohio-384 at ¶ 27. The court, like the Board of Tax Appeals, disagreed with the

appellant and held that "R.C. 5751.033 creates nexus with Ohio by situsing gross receipts to this state because the tangible personal property involved was ultimately received in this state." *Id* at ¶ 32.

The BTA also decided *Mia Shoes, Inc. v. McClain*, involving a manufacturer and wholesaler of footwear. BTA No. 2016-282, 2019 WL 4013504 (Aug. 8, 2019). Some of Mia Shoes' sales were sales to customers that owned or used distribution centers within Ohio. *Id.* at 1. Upon audit, the Department picked up receipts from sales to Ohio distribution centers as taxable gross receipts for CAT. *Id.* Mia contended that most of its sales shipped to these Ohio distribution centers were later shipped outside of Ohio by Mia's customers. *Id.* Specifically, Mia argued that the goods shipped to Ohio distribution centers should be apportioned to Ohio based upon the percentage of Mia's customers' retail locations that were located within Ohio during the audit period. *Id.* at 3. The Board, however, affirmed the assessment and explained that like *Greenscapes*, "the evidence shows that Mia Shoes shipped its goods to Ohio, knew it was shipping goods to Ohio, and lost visibility of the goods once they were delivered to the customers in Ohio. The sale of these goods resulted in the taxable gross receipts upon which the CAT was assessed, and Mia Shoes did not affirmatively prove that the goods were then ultimately received elsewhere within the meaning of the statute." *Id.*

Finally, the BTA recently issued an opinion with another fact pattern similar to that presented in these matters in *Henry RAC Holding Corporation v. McClain*, BTA No. 2019-787 (November 10, 2020). Similar to the decisions in *Greenscapes* and *Mia Shoes*, the BTA rejected appellant's arguments "that some products were destined for locations outside of Ohio." The appellant did not prove how many or which products were transported outside of Ohio. *Id.* at 5. The BTA also reaffirmed the Department's authority to estimate a liability "where the party subject to the CAT does not give the commissioner complete records". *Id.*

F. THE PETITIONER HAS FAILED TO PROVE THAT THE SALES OF THE PRODUCE WERE ULTIMATELY RECEIVED OUTSIDE OF OHIO

The petitioner contends that the produce that was initially shipped to Ohio distribution centers was subsequently transported to locations outside Ohio. As a result, the petitioner contends that those receipts should not be sitused to Ohio. The petitioner further asserts that it should be permitted to situs those gross receipts from the sale of the produce to the location where the customer ultimately received the property.

It is worth noting that the petitioner's argument conflates the location where its purchaser ultimately receives the property with where the *ultimate purchaser* receives the property. (Emphasis added). The petitioner has misconstrued R.C. 5751.033(E). The petitioner construes the relevant statute to mean that the receipts must be sitused to the ultimate purchaser's location; that is, where the tangible personal property finally comes to permanent rest. The CAT statute does not allow a seller to "look through" to subsequent sales of their products by their purchaser. Regardless of whether the petitioner knows at the time of sale where its buyer plan to sell the product further, the petitioner must situs receipts from its sales to its purchaser.

The term "purchaser," as used in R.C. 5751.033(E), refers to the buyer in each and every sale. Thus, the situs of gross receipts from the sale of tangible personal property, for CAT purposes, is not contingent on the location of the ultimate purchaser. Rather, the situs depends on where the purchaser, in any given sale, receives the property. Accordingly, when the petitioner sells and ships the produce to an unrelated Ohio distributor, who subsequently sells and ships the property to a retailer in Kentucky, both the

distributor in Ohio and the retailer in Kentucky are purchasers in the first and second sales, respectively. Because the petitioner was a party only to the first sale, the sole issue in this case is where the Ohio distributor received the property pursuant to that sale. In this case, because the petitioner's customer received the property within Ohio, the petitioner's sale and delivery concluded within Ohio.

In order to further support its contention that some of its produce eventually ended up outside of Ohio, the petitioner provided several affidavits from its employees. However, the employees looked at secondary records and not their own, independent records of the company to make their statements. (*See Exhibit J*). Moreover, based on the evidence provided, the affidavits are not contemporaneous at the time of the performance or within a reasonable time thereafter.

The petitioner also asserts that "the benefit of estimation methodology" that is given to "large distribution centers meeting the statutory requirement of at least $500 million in qualified property" applies to them. However, the use of the estimation methodology in this case is misplaced. The statutory provisions and administrative regulations governing the qualified distribution center ("QDC") process lay out multiple requirements which, if met, allow customers of a QDC (not the QDC applicant, itself) to situs receipts from sales to the QDC based on a verified "Ohio delivery percentage", which accounts for sales of tangible personal property shipped to an Ohio distribution center and later shipped out of the state.[13] There is no evidence that the petitioner is an applicant for a QDC designation or that the petitioner makes sales to a QDC. As such, this objection is denied.

G. The Tax Commissioner Lacks Jurisdiction to Determine the Constitutionality of a Statute

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

IV. Conclusion

The petitioner's contention that it should be permitted to exclude its receipts under R.C.5751.01(F)(2)(1) does not withstand scrutiny. As discussed above, the petitioner does not have actual authority to act on behalf of Dole and the Marketing Co-Packers. Since no agency relationship exists, agency exclusion cannot be granted. Moreover, the petitioner's request to situs its own receipts outside of Ohio is not well-taken. As explained above, the petitioner's interpretation of the relevant authority is inconsistent and contrary to the intent and plain language of the statute. Therefore, it cannot be accepted.

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[13] To receive QDC certification, the applicant must substantiate that certain amounts of property initially received at the distribution center are further transported to locations outside Ohio during a 12-month period.[13] The Tax Commissioner also requires the QDC applicant to have an independent certified public accountant certify that the calculation of the minimum thresholds required for a qualified distribution center by the operator of a distribution center has been made in accordance with generally accepted accounting principles. R.C. 5751.01(F)(2)(z)(i)(IV).

Moreover, the petitioner failed to provide evidence regarding its business activities or documentation sufficient to refute the accuracy of the amounts assessed related to the situsing of tangible personal property under R.C. 5751.033(E). The evidence currently available to the Tax Commissioner reflects that the petitioner sold property that was ultimately received in Ohio, and further that the amounts assessed are accurate and reasonable in light of the petitioner's failure to produce evidence to the contrary.

However, the petitioner's contentions regarding the statute of limitations for the first two quarters of the assessment is well-taken. Accordingly, the tax and interest amounts assessed will be adjusted in a manner that is reasonably and accurately reflects the information available.

V. PENALTY ABATEMENT

Finally, the petitioner seeks 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). The evidence and circumstances support a partial reduction of the penalties because of the petitioner's compliance with its CAT filing obligations following the assessment.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$225,858.00	$51,193.00	$97,039.20	$374,090.20

Current records indicate that no payments have been made 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 shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAY 19 2021

Paul Cagle
6218 Holly Springs Drive
Houston, TX 77057

Re: Assessment No. 100001426678
Employer Withholding Tax – Responsible Party: 11/10/2012 – 12/31/2018

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

Tax	Interest	Penalty	Total
$215,559.95	$27,073.70	$107,778.14	$350,408.79

The Ohio Department of Taxation assessed Paul Cagle ("the petitioner") as a responsible party of The Kings Clean, LLC (hereinafter referred to as "the company") under R.C. 5747.07(G). The company failed to fully remit Ohio employer withholding tax for the period identified above. The assessed tax obligation, as well as the penalty and interest, were not satisfied by the company. Under such circumstances, R.C. 5747.07(G) holds officers or employees who are responsible for the filing and payment of employer withholding tax or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. The outstanding liability of the company has been derivatively assessed against the petitioner because, as Chief Executive Officer ("CEO") of the company, he was determined to be a responsible party. The petitioner objects to the assessment and contends that the assessment is based on estimated payment amounts. The petitioner did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner.

To the extent that the petitioner challenges the assessments of the company, such contentions cannot be considered. The only issue that can be considered in this matter is whether the petitioner is a responsible party under R.C. 5747.07(G) for the period assessed. The petitioner may not challenge the merits of the underlying assessment, including penalty amounts imposed, in a proceeding under R.C. 5747.07(G). The objection cannot be considered if it is an attack on the validity of the underlying assessment. *Rowland v. Collins* (1976), 48 Ohio St. 2d 311. Substantive arguments regarding the tax liability assessed against the company can only be raised during the company's assessment proceedings. The only issue that can be considered in this matter is whether the petitioner was a responsible party for the period in question.

Division (B) of R.C. 5747.07 states that every employer required to deduct and withhold any amount under section 5747.06 of the Revised Code shall file a return and pay the amount required by law. If the required returns are not filed or the withholding trust taxes are not timely paid to the state, R.C. 5747.07(G) indicates, in relevant part, that:

> [A]n officer, member, manager, or trustee of [the entity] who is responsible for the execution of the [the entity's] fiscal responsibilities, shall be personally liable for failure to file the report or pay the tax due as required by this section.

Division (A)(1) of Ohio Adm.Code 5703-7-15 clarifies R.C. 5747.07(G) by further defining "officer" or "corporate officer" to mean "the president, vice-president, treasurer, secretary, chief executive officer of a corporation, or any person holding a similar title or position in a corporation or business trust." Records reflect that the petitioner acted as CEO of the company during the periods in question. By acting as CEO, the petitioner was an officer of the company as defined by O.A.C. 5703-7-15(A)(1).

Division (C) of Ohio Adm.Code 5703-7-15 explains that "[A]n officer or trustee is personally liable for the withholding tax liability, including tax, penalty, and interest, of a corporation * * * if the officer or trustee was responsible for the execution of the corporation's * * * fiscal responsibilities on the date on which the return or report for the period is filed or is required to be filed, whichever is earlier." Among other situations, Ohio Adm.Code sections 5703-7-15(C)(3) and (5) indicate that an officer of a corporation has demonstrated responsibility for the execution of the corporation's or trust's fiscal responsibilities if "[T]he officer or trustee exercises management control or authority over employees whose duties include the preparation, signing, or filing of returns or reports," or "[T]he officer or trustee exercises authority to sign checks * * * drawn on the corporation's or trust's accounts, in payment of tax liabilities."

Generally, personal liability for officers of a corporation for failure of a corporation to file returns or pay taxes is limited to those officers who have control or supervision or are charged with the responsibility of filing returns and making payments. *Weiss v. Porterfield* (1971), 27 Ohio St.2d 117; *Spithogianis v. Limbach* (1990), 53 Ohio St.3d 55. However, even if an individual does not actually participate in or supervise the corporation's fiscal operations, if his or her position is one that would be ordinarily be responsible for such duties, then the officer may be found to be responsible to the state. Refer to *Spithogianis*, supra.

Division (A) of R.C. 5747.13 authorizes the Tax Commissioner to make an assessment against any person liable for a tax deficiency based upon any information in the Commissioner's possession. As previously mentioned, the petitioner acted as CEO of the company during the periods at issue. With regard to the payment of employer withholding taxes, a CEO of a corporation has general fiscal responsibilities for that corporation and can therefore is responsible for the payment of such taxes to the state. *Seibenick v. Tracy*, BTA No. 1993-M-1087, unreported.

Records and evidence reflect that the petitioner held himself out to be a responsible party by stating that he was CEO of the company during the periods in question. The company's responsible party questionnaire lists the petitioner as the responsible party. Additionally, the petitioner is listed as CEO on the company website and states that he was CEO of the company during the period in question on his personal LinkedIn page.

According to the information available to the Tax Commissioner, the petitioner acted as CEO and was responsible for fiscal duties at the company during the period assessed. Therefore, the petitioner can be held responsible for the company's failure to file an Ohio income tax withholding return for the periods assessed.

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Accordingly, the assessment is affirmed as issued.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAY 12 2021

First Bancshares Inc
Attn: Dean Miller, President & CEO
120 North Street
Bellevue, OH 44811-1422

Re: Application for Refund Nos. 205477678722 & 205477655763
Financial Institution Tax: Tax Years 2014 & 2015

This is the final determination of the Tax Commissioner regarding the above-referenced financial institution tax refunds which were filed pursuant to R.C. 5726.30.

In resolution of this matter, the applications for refund shall be finalized pursuant to terms agreed to by the Tax Commissioner and the claimant.

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

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FINAL DETERMINATION

Date: MAY 12 2021

FNB Shares Inc.
Attn: John Kearns, President & CEO
86 N. Kennebec Ave
McConnelsville, OH 43756

Re: Application for Refund Nos. 170852297492, 170852271109, and 170852239195
Financial Institution Tax: Tax Years 2014, 2015, and 2016

This is the final determination of the Tax Commissioner regarding the above-referenced financial institution tax refunds which were filed pursuant to R.C. 5726.30.

In resolution of this matter, the applications for refund shall be finalized pursuant to terms agreed to by the Tax Commissioner and the claimant.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAY 26 2021

NZR Retail of Toledo, Inc.
4820 Monroe Street
Toledo, OH 43623-4310

Re: Assessment No. 100001433449
Motor Fuel Tax – 07/01/2019 – 07/31/2019

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5735.12 concerning the following motor fuel tax assessment:

Tax	Interest	Penalty	Total
$253,550.72	$1,318.95	$67,190.94	$322,060.61

The Department of Taxation assessed the petitioner, NZR Retail of Toledo, Inc. (hereinafter "the petitioner" or "NZR"), for failing to remit its motor fuel tax obligation for the tax period identified above. The petitioner objects to the assessment and contends that all taxes have been filed and paid. The petitioner did not request a hearing on this matter; therefore, it is decided based on evidence currently available to the Tax Commissioner.

Division (A) of R.C. 5735.05 levies an excise tax on all motor fuel dealers on the use, distribution, or sale of motor fuel used in the operation of motor vehicles in Ohio. The tax applies to dealers that import motor fuel from another state or foreign country or acquire motor fuel by any means into a terminal in this state, acquire it in bulk for subsequent sale, refine motor fuel within Ohio, acquire motor fuel from a dealer for subsequent sale and distribution in this state, or possess an unrevoked permissive motor fuel license. *See* R.C. 5735.01 and 5735.05. For the period at issue, a consolidated rate of 28 cents per gallon is allocated in specified fractions that correspond with the five prior distinct levies. *See* R.C. 5735.05.

During the tax period in question, the petitioner was a motor fuel seller and distributor with an unrevoked permissive motor fuel license. Accordingly, it was subject to the Ohio motor fuel tax for the period in question. The taxpayer filed a motor fuel dealer's tax return reporting it owed a tax obligation of $253,550.72 for the tax period of July 2019. The petitioner did not provide any records or documentation to show that payments have been made towards the satisfaction of its motor fuel tax liability for the period at issue.

Accordingly, for the foregoing reasons, 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 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 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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FINAL DETERMINATION

Date:

MAY 26 2021

NZR Retail of Toledo, Inc.
4820 Monroe Street
Toledo, OH 43623-4310

Re: Assessment No. 100001456073
Motor Fuel Tax – 06/01/2018 – 06/30/2018

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5735.12 concerning the following motor fuel tax assessment:

Tax	Interest	Penalty	Total
$3,554.88	$0.00	$0.00	$3,554.88

The Department of Taxation assessed the petitioner, NZR Retail of Toledo, Inc. (hereinafter "the petitioner" or "NZR"), after conducting an audit which revealed the petitioner failed to fully report its motor fuel tax obligations for the tax period identified above. The petitioner objects to the assessment and contends that all taxes have been filed and paid. The petitioner did not request a hearing on this matter; therefore, it is decided based on evidence currently available to the Tax Commissioner.

Division (A) of R.C. 5735.05 levies an excise tax on all motor fuel dealers on the use, distribution, or sale of motor fuel used in the operation of motor vehicles in Ohio. The tax applies to dealers that import motor fuel from another state or foreign country or acquire motor fuel by any means into a terminal in this state, acquire it in bulk for subsequent sale, refine motor fuel within Ohio, acquire motor fuel from a dealer for subsequent sale and distribution in this state, or possess an unrevoked permissive motor fuel license. *See* R.C. 5735.01 and 5735.05. For the period at issue, a consolidated rate of 28 cents per gallon is allocated in specified fractions that correspond with the five prior distinct levies. *See* R.C. 5735.05.

During the tax period in question, the petitioner was a motor fuel seller and distributor with an unrevoked permissive motor fuel license. Accordingly, it was subject to the Ohio motor fuel tax for the periods in question. Prior to issuing the assessment, the Department found the petitioner failed to fully report its motor fuel tax liability on its motor fuel dealer tax return for this period. The Department used information obtained via a cross-check to other dealer schedules to calculate and assess the tax liabilities reflected above. The petitioner did not provide any records or documentation to show that payments have been made toward the satisfaction of this motor fuel tax liability, nor did the petitioner present evidence that the assessed amount was erroneously calculated.

Accordingly, for the foregoing reasons, 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 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 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

0000000103

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: MAY 26 2021

NZR Retail of Toledo, Inc.
4820 Monroe Street
Toledo, OH 43623-4310

Re: Assessment No. 100001517591
Motor Fuel Tax – 08/01/2019 – 08/31/2019

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5735.12 concerning the following motor fuel tax assessment:

Tax	Interest	Penalty	Total
$517,661.74	$6,448.63	$137,180.36	$661,290.73

The Department of Taxation assessed the petitioner, NZR Retail of Toledo, Inc. (hereinafter "the petitioner" or "NZR"), for failing to file a motor fuel dealer tax return for the tax period identified above. The petitioner objects to the assessment and contends that the taxes have been filed and paid. The petitioner did not request a hearing on this matter; therefore, it is decided based on evidence currently available to the Tax Commissioner.

Division (A) of R.C. 5735.05 levies an excise tax on all motor fuel dealers on the use, distribution, or sale of motor fuel used in the operation of motor vehicles in Ohio. The tax applies to dealers that import motor fuel from another state or foreign country or acquire motor fuel by any means into a terminal in this state, acquire it in bulk for subsequent sale, refine motor fuel within Ohio, acquire motor fuel from a dealer for subsequent sale and distribution in this state, or possess an unrevoked permissive motor fuel license. *See* R.C. 5735.01 and R.C. 5735.05. For the period at issue, a consolidated rate of 28 cents per gallon is allocated in specified fractions that correspond with the five prior distinct levies. *See* R.C. 5735.05.

During the tax period in question, the petitioner was a motor fuel seller and distributor with an unrevoked permissive motor fuel license. Accordingly, it was subject to the Ohio motor fuel tax and required to file a motor fuel tax dealer return for the period in question. The petitioner provided no records or documentation to substantiate its claim it filed a motor fuel tax dealer return or made payments towards its tax obligations for the period at issue. Moreover, the evidence currently available to the Tax Commissioner indicates the petitioner neither filed a motor fuel tax return for August 2019 nor paid the August 2019 tax obligation.

Accordingly, for the foregoing reasons, 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 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 THESE MATTERS. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THESE MATTERS WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

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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

000000018

FINAL DETERMINATION

Date: MAY 12 2021

Silcor Oilfield Services, Inc.
Attn: Tax / Accounting Department
6874 Strimbu Drive
Brookfield, OH 44403

Re: Application No.: 101822W
Application Type: Water
County: Guernsey
Taxing District: 30-0040

This is the final determination of the Tax Commissioner on a request for reconsideration of an application, dated July 27, 2020, for an exempt facility certificate filed with the Ohio Department of Taxation (hereinafter "the Department").

I. BACKGROUND

The applicant operates brine injection wells and is based in Brookfield, Ohio. The subject application was filed to certify certain property located at two brine injection wells in Guernsey County, Ohio as an industrial water pollution control facility. The Department forwarded this application to the Ohio Department of Natural Resources (hereinafter "ODNR") for an opinion regarding the subject properties.

In its memorandum submitted November 16, 2020, the applicant describes its operations as follows:

> Silcor Oilfield Services, Inc ("Silcor") operates a brine handling and disposal facility in Guernsey County, Ohio. The facility includes two brine injection wells, classified as Class II wells, which were drilled and ODNR permitted in 2011 and 2014. Silcor accepts at its facility wastewater, known as brine, generated at oil and gas wells. Silcor receives brine by tanker truck. The brine is pumped from trucks at an offloading area into a 500 BBL tank that feeds into one of two other 500 BBL tanks. From there, the brine cascades through a series of 400 BBL tanks in a battery before entering a nearby pump house. In the pump house, the brine is filtered to remove particles and toxins using a series of bag and cartridge filters before being pumped into one of two "clean" or filtered brine tanks (400 BBL) outside the pump house. From filtered brine tanks, the brine is pumped back into the pump house and out to one of two brine injection wells where the filtered brine is pumped underground.

The Department received the opinion letter of the Director of the ODNR on June 26, 2020. The ODNR issued its recommendation letter for this application, which included a table of items at issue, which found that some of the equipment is exempt water pollution control equipment, some equipment at issue was not exempt water pollution control equipment, and for some equipment no recommendation

was given. On July 6, 2020, the Department of Taxation issued its Proposed Finding on this matter based upon the ODNR recommendation letter. On July 27, 2020, the applicant timely filed its Request for Reconsideration of the Department of Taxation's Proposed Finding. On November 16, 2020, a telephone hearing was held on this matter. The applicant's representative submitted a memorandum dated November 16, 2020 supporting its contentions.

II. THE APPLICANT'S CONTENTIONS

For the two brine injection wells at issue, the applicant seeks exemption for many different types of property and equipment as a water pollution control facility.

III. THE EXEMPT FACILITY PROCESS

The Ohio Supreme Court has discussed the history of the exempt facility process in identifying that "(i)n 1965, the General Assembly passed legislation 'to encourage the installation of industrial water pollution control facilities * * * by providing tax exemption for such facilities.'" *Veolia Water N. Am. Operating Servs., Inc. v. Testa*, 146 Ohio St.3d 52, 2016-Ohio-756, 51 N.E.3d 613, ¶¶ 6-7 (2016) citing Title, Am. H.B. No. 1, 131 Ohio Laws, Part II, 1635. The law provided for the issuance of certificates by the newly created water-pollution-control board in the state health department. *Id.* citing former R.C. 6111.02, at Part I, 1418–1419. In 2003, the provisions governing industrial-water-pollution-control facilities were consolidated with other exempt-facility provisions and placed under the administrative aegis of the tax department. *Id.* citing R.C. 5709.20 and 5709.21.

In late-2018, certain Ohio Revised Code sections within Chapter 5709 which govern exempt facility matters were amended by the 132nd General Assembly by Substitute House Bill 430 (H.B. 430). One of the major amendments contained in H.B. 430 specified that property approved by ODNR as part of a water pollution control facility qualifies for property tax and sales and use tax exemptions available under continuing law.[1] As such, ODNR is now responsible for providing water pollution control reviews and recommendations for certain oil and gas applications for exemption.

The current list of exempt facilities includes air-pollution-control facilities, energy-conversion facilities, noise-pollution-control facilities, solid-waste-energy-conversion facilities, thermal-efficiency-improvement facilities, and industrial-water-pollution-control facilities. R.C. 5709.20. Application for a certificate is made to the tax commissioner. R.C. 5709.21(B). Upon obtaining a certificate from the tax commissioner, the holder enjoys exemption of the property described in the certificate from real and personal-property taxation. R.C. 5709.25(B). Additionally, the transfer of tangible personal property when the personal property is incorporated into property certified as an exempt facility is not a sale, and the transaction is exempt from sales and use taxation. R.C. 5709.25(A).

The Ohio Supreme Court has acknowledged that the exempt-facility provisions at R.C. 5709.20, et seq. constitute tax reduction provisions that call for the applicant to meet a stringent burden of proof in which the applicant must clearly express the exemption in relation to the facts of the claim. *Veolia,* supra, at ¶ 19 citing *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, 937 N.E.2d 547, ¶ 16, quoting *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104, 554 N.E.2d 1310 (1990); accord *Timken Co. v. Lindley*, 64 Ohio St.2d 224, 227, 416 N.E.2d 592 (1980) (in evaluating a claim for an analogous air-pollution-control certificate, "laws relating to exemption from taxation" must be

[1] Legislative Service Commission. Final Bill Analysis of Sub. H.B. 430, 132nd General Assembly. Pages 1, 3.

"construed most strongly against the exemption"); *Newman v. Levin*, 120 Ohio St.3d 127, 2008-Ohio-5202, 896 N.E.2d 995, ¶ 30 (applying strict-construction principle to an electric-generating station's application to exempt a thermal efficiency improvement facility).

IV. ANALYSIS

A. THE APPLICANT DOES NOT OWN SOME OF THE EQUIPMENT FOR WHICH IT SEEKS EXEMPTION

The applicant leases or rents much equipment used at the brine injection well site. This includes drill bit rentals, equipment rentals, pump truck rental, tank rental, and fracking tank rental. The applicant seeks exemption for this rented equipment. However, for the reasons discussed below, an exemption under R.C. 5709.25 is only available for property owned by the applicant and cannot be granted for property that is rented or leased by the applicant.

R.C. 5709.20 defines the types of facilities that qualify for the exemption under R.C. 5709.25. Pertinent to this matter is division (L), which defines "industrial water pollution control facility", in relevant part, to mean:

> any property designed, constructed, or installed for the primary purpose of collecting or conducting industrial waste to a point of disposal or treatment; reducing, controlling, or eliminating water pollution caused by industrial waste; or reducing, controlling, or eliminating the discharge into a disposal system of industrial waste or what would be industrial waste if discharged into the waters of this state.

R.C. 5709.21(B) identifies the property that applicants should include in an application of an exempt facility certificate providing, in pertinent part, that:

> Application for an exempt facility certificate shall be filed with the tax commissioner in such manner and in such form as prescribed by the tax commissioner. The application shall contain plans and specifications of the property, including all materials incorporated or to be incorporated therein and their associated costs, and a descriptive list of all equipment acquired or to be acquired by the applicant for the exempt facility and its associated cost. [Emphasis added.]

Ohio Adm.Code 5703-1-06 amplifies R.C. 5709.20, et seq. and provides additional instruction and guidance for both applicants and the Tax Commissioner with respect to the exempt facility process. Notably, Division (A) of Ohio Adm.Code provides, in pertinent part, that:

> Application for certification of an exempt facility as defined in division (E) of section 5709.20 of the Revised Code shall be made by the person owning the facility at the time of application. The application shall contain plans and specifications of the property, including all materials incorporated or to be incorporated into the property and the associated costs of the materials, and a descriptive list of all equipment acquired or to be acquired by the applicant for the exempt facility and the associated costs of the equipment. [Emphasis added.]

If a statute is ambiguous, the tribunal, in determining the intention of the legislature may consider the circumstances under which the statute was enacted, the consequences of a particular construction, and the administrative construction of the statute. R.C. 1.49. Stated otherwise, the "primary goal in

construing a statute is to ascertain and give effect to the intent of the legislature." *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969 (2004). The fact that the Ohio General Assembly identified that property "designed, constructed, or installed" can qualify as an "industrial water pollution control facility" under R.C. 5709.20(L) while further requiring that materials be incorporated and equipment be acquired under R.C. 5709.21(B) is collectively indicative that equipment, materials, and property subject to the exemption under R.C. 5709.25 must be or become part of the exempt facility property. Here, the equipment at issue was rented and later removed from the property once it had been used.

Of equal importance is the fact that none of the relevant authority refers to the ability of a taxpayer to receive an exemption for equipment, property, or materials that they lease. The General Assembly's omission of a reference to leased equipment, property, or materials in subject statutes is, in and of itself, a sign of legislative intent. In other words, had the General Assembly intended to allow taxpayers to exempt leased property under R.C. 5709.25, it could have included a specific reference to the section and definition. Similarly, when construing a statute, a court must give effect to the words used, and neither delete nor insert words into the statute. *Slingluff v. Weaver*, 66 Ohio St. 621, 627, 64 N.E. 574, 576 (1902). With this in mind, it is important to note that the notion of the applicant owning the property subject to the exemption under R.C. 5709.25 is also repeatedly mentioned thereafter in the fifth paragraph of paragraph (A) of Ohio Adm.Code 5703-1-06 in the context of facilities in multiple counties and jointly owned facilities and is mentioned again in paragraph (F) of the same rule.

Information in the file indicates that the applicant rented some of the subject property in question for a certain period of time, and after that the lessor of the property took the rental equipment away to a different site for use there. Rentals at issue herein also include drill bit rentals, equipment rentals, pump truck rental, tank rental, and fracking tank rental. The applicant cannot receive an exemption for equipment it does not own. As cited above, Ohio Adm.Code 5703-1-06(A) provides, in pertinent part, that an "(a)pplication for certification of an exempt facility as defined in division (E) of section 5709.20 of the Revised Code shall be made by the person owning the facility at the time of application." In the case at hand, the applicant has sought exemption for property which it rents for temporary use and neither owns nor makes part of the exempt facility. The Ohio Supreme Court has indicated that an applicant seeking an exempt facility tax reduction must meet a burden of proof that clearly expresses its right to the exemption under the facts presented. See *Veolia,* supra. That has not happened here. The applicant has not identified any authority which would allow it to receive exemption under R.C. 5709.25 for property it rents or leases. Under the requisite strict construction standard for the exemption under R.C. 5709.25, the Tax Commissioner cannot grant the exemption that the applicant seeks for rented equipment.

B. ITEMS FOR WHICH "NO RECOMMENDATION" IS GIVEN

In its exempt facility reviews, the Department of Taxation and its partner agencies, such as ODNR, categorize items for which the applicant seeks exemption into three tables. Table 1 is for items recommended as exempt, Table 2 for items not recommended as exempt, and Table 3 is for items that are "without recommendation" or "no recommendation". If the application is reviewed by the Department of Taxation's audit staff, the audit staff normally will allow exemption for any item in Table 3 that can be tied to a physical asset in Table 1 which is recommended for exemption. Tables 1, 2 and 3 are presented below.

Typical items that are listed in Table 3 are "intangible costs and services" such as labor costs, overhead charges, interest expense, other intangible charges such as third-party labor charges, engineering charges, services of any sort, and other various intangible costs. Costs for services such as labor,

installation, engineering services, repairs, pumping charges, acid testing and acid services, contractor fees, consultation fees, drilling fees, maintenance costs are all intangible service costs and are included in this category. In the instant case, there are many intangible costs, service charges and labor costs and other costs which are categorized as Table 3 charges. As explained herein, the tax treatment of such Table 3 intangible costs as either "exempt" or "not exempt" is primarily based upon the treatment of the physical assets to which these intangible costs relate.

In its petition, the petitioner contends that "drilling services" should be listed as exempt equipment. However, as drilling services are an intangible service, these costs are properly categorized as Table 3 costs for which "no recommendation" is given. Likewise, the petitioner argues for "acid services" to be listed as Table 1 exempt equipment. However, this is a service, and is most properly categorized as Table 3 intangible property. Based upon the facts before us, intangible costs, such as acid services and drilling services, cannot be found to be Table 1 exempt pollution control equipment because Table 1 property is inherently tangible personal property. Therefore, Table 3 intangible costs will be found to be taxable unless the intangible costs relate to tangible personal property that is classified as Table 1 exempt property. Further, such intangible costs could be exempt under another exemption for such services or if such services are not a "sale" (i.e., not considered an enumerated service) pursuant to R.C. 5739.01(B).

C. ITEMS DENIED EXEMPTION DUE TO INADEQUATE DOCUMENTATION OR DESCRIPTION

The applicant has submitted many line items for which it seeks exemption which do not include a detailed explanation showing how it is used at the well site. Many of these items could be used in various parts of the well site. Thus, many items that have been denied exemption have been denied either due to inadequate documentation or description.

R.C. 5709.20(L) defines an "industrial water pollution control facility" as follows:

> "Industrial water pollution control facility" means any property designed, constructed, or installed for the primary purpose of collecting or conducting industrial waste to a point of disposal or treatment; reducing, controlling, or eliminating water pollution caused by industrial waste; or reducing, controlling, or eliminating the discharge into a disposal system of industrial waste or what would be industrial waste if discharged into the waters of this state. This division applies only to property related to an industrial water pollution control facility placed into operation or initially capable of operation after December 31, 1965, and installed pursuant to the approval of the environmental protection agency or any other governmental agency having authority to approve the installation of industrial water pollution control facilities. [Emphasis added.]

R.C. 6111.01(J) defines an "industrial water pollution control facility" as follows:

> "Industrial water pollution control facility" means any disposal system or any treatment works, pretreatment works, appliance, equipment, machinery, pipeline or conduit, pumping station, force main, or installation constructed, used, or placed in operation primarily for the purpose of collecting or conducting industrial waste to a point of disposal or treatment; reducing, controlling, or eliminating water pollution caused by industrial waste; or reducing, controlling, or eliminating the discharge into a disposal system of industrial waste or what would be industrial waste if discharged into the waters of the state.

R.C. 5709.20(M) provides that there is no exemption for property put in place primarily for the benefit of a business:

> Property designed, constructed, installed, used, or placed in operation primarily for the safety, health, protection, or benefit, or any combination thereof, of personnel of a business, or primarily for a business's own benefit, is not an "exempt facility."

As seen in the R.C. 5709.20(L) and 6111.01(J), above, in order to be an "industrial water pollution control facility", the facility must be "collecting or conducting industrial waste" or "reducing, controlling, or eliminating water pollution caused by industrial waste; or reducing, controlling, or eliminating the discharge into a disposal system of industrial waste or what would be industrial waste if discharged into the waters of this state". If property is not "collecting or conducting industrial waste" or "reducing, controlling, or eliminating water pollution caused by industrial waste; or reducing, controlling, or eliminating the discharge into a disposal system of industrial waste or what would be industrial waste if discharged into the waters of this state", then the property is not exempt water pollution property.

1. MISCELLANEOUS PARTS

The applicant has submitted approximately 250 different line items for which it seeks exemption. Many of the items do not include a sufficient explanation of what the item is and how it is used at the brine injection well. Such items include tubing and accessories, couplings, hose and tubing supplies, coupler adapters, and fittings and adapters. As can be seen from the description of these items, these are items that could be used in many ways, and from the description of these general items it cannot be determined how these items are used and in what function they are used.

In addition to the miscellaneous items for which it cannot be determined where or how it is being used, there are some miscellaneous items for which the applicant seeks exemption such as pumps, piping, hose, couplings, gaskets, miscellaneous tubing, strainers, gauges, cross tee pipe, flange gaskets, and other items that are used in the pump house. The pump house shelters the main pump on the premises and is an area where filtering of debris that is not industrial waste is removed from the water, as well as housing the well site's administrative offices. From the descriptions given, the Department of Taxation and ODNR are unable to determine the use and function of many of these items.

The applicant has filed this application to obtain exemption as a water pollution control facility in order to minimize Ohio sales and use tax. The evidence indicates that the applicant failed to keep sufficiently detailed tax records as required by Ohio sales and use tax law in R.C. 5741.15, R.C. 5739.11 and Ohio Adm.Code 5703-9-02. Although the applicant has provided a minimal description for each item, the description provided is not sufficient to show where and in what process these line items are used.

It is well established that under R.C. 5739.02, sales are presumed taxable unless proven otherwise, and that the taxpayer has the burden of proof. *CompuServe, Inc v. Limbach*, 93 Ohio App.3d 777, 639 N.E.2d 1227 (1994). This places upon the applicant an affirmative duty to show that its items at issue fit within the water pollution control exemption and thus are not subject to sales and use tax. The applicant must provide sufficient evidence to prove its objection. The applicant has failed to do that. Therefore, the applicant has not overcome the presumption of taxability.

As explained above, the Ohio Supreme Court has held that the exempt-facility provisions at R.C. 5709.20, et seq. are tax reduction provisions that require the applicant to meet a stringent burden of proof in which the applicant must clearly express the exemption in relation to the facts of the claim. *Veolia*, supra, at ¶ 19 citing *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, 937 N.E.2d 547, ¶ 16, quoting *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104, 554 N.E.2d 1310 (1990); accord *Timken Co. v. Lindley*, 64 Ohio St.2d 224, 227, 416 N.E.2d 592 (1980) (in evaluating a claim for an analogous air-pollution-control certificate, "laws relating to exemption from taxation" must be "construed most strongly against the exemption"); *Newman v. Levin*, 120 Ohio St.3d 127, 2008-Ohio-5202, 896 N.E.2d 995, ¶ 30 (applying strict-construction principle to an electric-generating station's application to exempt a thermal-efficiency-improvement facility). In the instant case, the applicant has not met this burden of proof of demonstrating that these miscellaneous items are used in a water pollution control function. As such, the exemption is denied.

D. ITEMS DENIED EXEMPTION FOR OTHER REASONS

1. FILTERS

Filters is one category of costs for which the water pollution control exemption is denied. Information in the file shows that these filters are used to filter water before it is pumped into the well. The filters remove naturally occurring substances in the water, such as garbage, refuse, wood debris and various solids. The filters are removing solid particles and not industrial waste. The filters do not remove industrial waste, and, as such, are not "reducing, controlling, or eliminating water pollution caused by industrial waste" as required in R.C. 5709.20(L) to be industrial water pollution control equipment, as these filters do not filter industrial waste. As the filters only remove garbage, refuse, wood debris and various solid particulates, but not industrial waste, the filters do not qualify as water pollution control equipment.

R.C. 6111.01 is titled "water pollution control definitions". R.C. 6111.01(c) defines "industrial waste" as follows:

> "Industrial waste" means any liquid, gaseous, or solid waste substance resulting from any process of industry, manufacture, trade, or business, or from the development, processing, or recovery of any natural resource, together with such sewage as is present.

R.C. 6111.01(d) defines "other wastes" as follows:

> "Other wastes" means garbage, refuse, decayed wood, sawdust, shavings, bark, and other wood debris, lime, sand, ashes, offal, night soil, oil, tar, coal dust, dredged or fill material, or silt, other substances that are not sewage, sludge, sludge materials, or industrial waste, and any other "pollutants" or "toxic pollutants" as defined in the Federal Water Pollution Control Act that are not sewage, sludge, sludge materials, or industrial waste.

R.C. 5709.20(L) clearly provides that an "industrial water pollution control facility" only includes "reducing, controlling or eliminating * * * industrial waste". In the case at hand, the filters are not filtering out industrial waste such as toxic chemicals in the brine water. The filters are filtering out R.C. 6111.01(d) "other wastes", not R.C. 6111.01(c) "industrial waste", and, thus, pursuant to R.C. 5709.20(L) do not qualify as a "water pollution control facility". The filters at issue are not filtering out "industrial waste" as is required to be exempt property under R.C. 5709.20(L), but merely filtering

out "other wastes". Therefore, the filters do not qualify for exemption.

Further, the primary purpose of these filters is to make the water injected into the well clean enough to not plug the porous spaces in the well rock so that the water will flow into the porous rock and the well will be able accept more water. Therefore, these filters have primarily a business purpose: to filter the water before injection so that the water will not clog the porous rock wall in the well and the well thus can accept more water. This is not a water pollution control purpose, but a business purpose to enable the wells to be able to accept more water. Pursuant to R.C. 5709.20(M), when property has primarily a business purpose that benefits the business, no exemption is allowed as an exempt facility. Accordingly, the request for exemption is denied.

2. PUMP HOUSE

The property used in the pump house is not exempt property because the pump house, itself, is not exempt water pollution control property. The pump house also has offices for staff and is used as an administrative building. Although the pump is also housed in the pump house, it is not required to be sheltered therein. As this pump does not need to be located in an enclosed facility like the pump house to carry out its pumping function, the pump house is not tied to the function of the pump. Further, information in the file shows that the water filtering occurring at the well site and in the pump house is not an exempt function, as explained herein.

Some of the miscellaneous equipment denied exemption in the table herein is equipment used within the pump house. This equipment is denied exemption as not being water pollution control equipment because it is used in the pump house, which is primarily an administrative facility and a facility for filtering non-industrial waste from the brine water.

The petitioner contends that the skid on which the pump sits should be considered exempt water pollution control equipment. This contention is denied. The skid is separate from the pump and is not part of the pump. Therefore, the skid is not exempt as part of the process of pumping brine water into the well.

The applicant contends that pump parts including pipes, tubing and accessories, hoses, gauges, plugs, gaskets, couplings, fittings, adapters, bushings, levers, straps, valves and other parts are related to the pumps that move the brine water through the filtration and underground injection process. The Department has allowed exemption for pump parts when it is able to discern that the pump parts are involved in pumping brine water into the well. However, some parts do not have a complete enough description to determine how and where they are used, and these parts were not granted exemption.

3. ACID AND ACID SERVICE

Acid service is a service in which acid is pumped into the brine injection well under pressure to open microscopic cracks in the rock formation of the well so that the brine water will more readily enter these cracks in the rock, allowing the brine well to have the space to accept more brine water.

The applicant contends that the acid and acid services provided to the brine injection well are exempt, arguing these are routine maintenance services necessary to keep the wells functioning. It cites R.C. 5739.01(B)(3)(a), which provides:

(B) "Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:
(3) All transactions by which:
(a) An item of tangible personal property is or is to be repaired, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code;

R.C. 5739.01(B)(3)(a) exempts repairs or maintenance of exempt tangible property. The applicant argues that as the well is exempt property, the acid and acid service should also be exempt property under R.C. 5739.01(B)(3)(a).

The purpose of the acid service is to increase the capacity of the well by creating cracks in the well to allow the brine water to go into cracks in the rock. As such, the acid service is not repairing or maintaining the brine well to help keep the brine water within the well, but rather creating cracks in the well that allow the water to go deeper into the rock. Therefore, this treatment may promote the profitability and business purpose of the well by allowing some brine water to go deeper into the rock so that more water may pumped into the well. The acid service, if anything, goes against the water pollution control purpose of the well itself as it makes it more likely that the brine water will escape the well, and the acid service cannot be considered as aiding the water pollution control containment goal of the well. The acid service aids the business purpose of the well by making the well able to accept more water, while impeding the water pollution control goal of permanently capturing all polluted brine water within the well. R.C. 5709.20(M) provides that there is no exemption for property put in place primarily for the benefit of a business, which is the purpose of the brine water treatment.

D. OTHER ITEMS AT ISSUE

1. CHEMICALS

The applicant contends that chemicals used in the well should be considered exempt as water pollution control equipment. This contention is well taken in part. As noted in the attached table, chemicals used that strengthen the cement in the well are herein found to be exempt water pollution control equipment, because these chemicals strengthen the cement and help keep the brine water inside the well and separated from ground water surrounding the well. These chemicals are listed in Table 1.

Regarding the service of applying these chemicals to the well, as this service is an intangible cost, this intangible service is best categorized as a Table 3 intangible cost for which "no recommendation" is given.

V. TABLES 1, 2 AND 3

SILCOR OILFIELD SERVICES, INC.								
EXEMPT FACILITY PROPERTY LISTING								
ATTACHMENT B								
Date	**Invoice**	**Supplier**	**Description**	**Cost**	**Property Type**	Sort	***ODNR Determination***	***Comments***
			TABLE 1- RECOMMENDED PROPERTY					
6/25/2014	8336	Powerzone Equipment, Inc	BG&S Q-165-M bare shaft pump	$38,000.00	exclusive	1	Recommended	pump for injection, has primary purpose of conducting industrial water pollution
5/13/2015		Custom Controls and Automation	100HP motor and accessories	$12,507.00	exclusive	1	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
5/22/2015	2447	Custom Controls and Automation	motor	$577.09	exclusive	1	Recommended	The motor's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
6/1/2015		Hydro Supply Company	hose	$1,323.84	exclusive	1	Recommended	hose was used transport brine to #2 well
7/9/2015	1030	Permian Pump & Power	suction/discharge valve assembly	$2,947.38	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
1/4/2013	n/a	Sutton Pump & Supply	piping, valves, fittings, casings	$19,255.16	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
1/4/2013	n/a	Gary Graham Construction	well piping, valves, fittings, casings	$22,403.38	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused

								by industrial waste.
9/30/2014	1045886	Ken Miller Supply	piping	$43,223.75	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
1/14/2015	1525915	Smith Concrete	concrete	$1,237.50	exclusive	1	Recommended	primary containment upgrades
1/15/2015	1526136	Smith Concrete	concrete	$1,076.50	exclusive	1	Recommended	primary containment upgrades
2/3/2015	9016	Powerzone Equipment, Inc	crankshaft	$252.00	exclusive	1	Recommended	part of pump, primary purpose is to conduct industrial water pollution
3/11/2015	1531922	Smith Concrete	cement	$815.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
3/12/2015	1532369	Smith Concrete	cement	$1,977.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
3/14/2015	25381	Power Tongs	casing liner	$1,800.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
5/29/2015	1016	Permian Pump & Power	injection well, suction / discharge valve assembly	$2,947.38	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
1/30/2013	n/a	Smith Concrete	concrete for tank farm pad	$27,172.40	exclusive	1	Recommended	part of pump, primary purpose is to collect industrial water pollution

9/18/2014	1045698	Ken Miller Supply	piping	$27,464.80	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
2/18/2015	1688	Diamond Oilfield Technologies	tanks	$10,950.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
10/19/2015	1615518	Smith Concrete	concrete	$10,310.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
10/20/2015	WS-24789	Myers Well Service, Inc.	concrete	$9,278.50	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
10/23/2015	1617806	Smith Concrete	concrete	$708.50	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
10/28/2015	WS-24897	Myers Well Service, Inc.	containment pad	$2,080.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
10/28/2015	WS-24885	Myers Well Service, Inc.	containment pad	$6,142.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
11/2/2015	1620537	Smith Concrete	concrete	$709.50	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.

11/2/2015	15-2981	Waterford Tank & Fabrication	500 BBL flat top non API tank, 500 BBL flat top non API gun barrel tanks	$43,253.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
11/3/2015	15-2983	Waterford Tank & Fabrication	tank bases	$5,892.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
11/6/2015	103115R	Liquid Luggers	tanks	$930.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
11/12/2015	1625706	Smith Concrete	concrete	$2,185.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
11/13/2015	WS-25473	Myers Well Service, Inc.	offloading dump stands	$3,317.50	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
11/16/2015	94238	D & K Supply & Equipment	threaded flanges, stud w/nuts, hex bushing, hammer union, check valve 300, nipple, elbow pipe, thread tape, pipe dope	$1,054.40	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
11/17/2015	1627913	Smith Concrete	concrete	$5,405.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
11/18/2015	WS-25692	Myers Well Service, Inc.	containment pads	$4,272.50	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.

11/19/2015	1628917	Smith Concrete	concrete	$1,667.50	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
11/24/2015	4355	Precision Poured Walls	concrete	$6,478.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
1/4/2015	1526821	Smith Concrete	concrete	$2,460.00	exclusive	1	Recommended	This property's primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
			TABLE 2- NOT RECOMMENDED PROPERTY					
1/1/2011	n/a	n/a	pump house	$100,434.15	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
6/25/2014	8337	Powerzone Equipment, Inc	pump parts	$3,648.95	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
9/23/2014	1045745	Ken Miller Supply	misc. tubing and accessories	$23,334.39	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
9/30/2014	1045888	Ken Miller Supply	misc. tubing and accessories	$926.00	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.

10/27/2014	81542	D & K Supply & Equipment	misc. tubing and accessories	$684.28	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
11/11/2014	82370	D & K Supply & Equipment	misc. tubing and accessories	$42.70	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
12/8/2014	1047349	Ken Miller Supply	misc. tubing and accessories	$2,777.59	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
12/19/2014	83899	D & K Supply & Equipment	hose and tubing supplies	$848.48	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
12/30/2014	84174	D & K Supply & Equipment	misc. tubing and accessories	$4,433.46	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
1/28/2015	85220	D & K Supply & Equipment	misc. tubing and accessories	$260.38	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
2/9/2015	915	Enertech	filters, filter bags, gravity glass hydrometers, single phase closed coupled pump	$6,186.31	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
2/16/2015	1048531	n/a	filter o-rings and cartridges	$127.68	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.

2/20/2015	86015	D & K Supply & Equipment	misc. tubing and accessories	$129.04	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
2/25/2015	86131	D & K Supply & Equipment	misc. tubing and accessories	$239.82	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
2/27/2015	86200	D & K Supply & Equipment	misc. tubing and accessories	$1,283.45	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
3/3/2015	86281	D & K Supply & Equipment	hose	$59.28	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
3/6/2015	86357	D & K Supply & Equipment	misc. tubing and accessories	$89.10	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
3/11/2015	86274	D & K Supply & Equipment	misc. tubing and accessories	$3,619.02	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
3/17/2015	86649	D & K Supply & Equipment	misc. tubing and accessories	$1,166.48	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.

3/18/2015	86743	D & K Supply & Equipment	misc. tubing and accessories	$218.32	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
3/26/2015	87049	D & K Supply & Equipment	gauges and tape	$53.90	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
3/31/2015	87090	D & K Supply & Equipment	coupler adapters,	$84.52	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
3/31/2015	87147	D & K Supply & Equipment	misc. tubing and accessories	$59.54	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
4/3/2015	87238	D & K Supply & Equipment	misc. tubing and accessories	$38.55	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
4/9/2015	87422	D & K Supply & Equipment	gauges and supplies	$78.86	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
4/10/2015	87465	D & K Supply & Equipment	bull plugs, couplings, spray rust coat	$82.22	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
4/10/2015	979, 980	Enertech	55-gallon drum intercool scale inhibitor chemical, 55-gallon drum sodium hypochlorite, filter bags	$3,710.48	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.

4/13/2015	990	Enertech	filters	$179.54	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
4/23/2015	1007, 1009	Enertech	filters	$2,237.18	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
5/1/2015	1006	Permian Pump & Power	pump parts	$4,687.88	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
5/11/2015	88340	D & K Supply & Equipment	misc. tubing and accessories	$202.79	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
5/13/2015	1028	Enertech	55-gallon drum intercool scale inhibitor chemical, 55-gallon drum sodium hypochlorite	$2,548.00	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
5/20/2015	88586	D & K Supply & Equipment	misc. tubing and accessories	$499.05	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
5/21/2015	88769	D & K Supply & Equipment	switch gauge	$189.27	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
5/22/2015	88776	D & K Supply & Equipment	misc. tubing and accessories	$872.98	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.

5/22/2015	88808	D & K Supply & Equipment	misc. tubing and accessories	$74.31	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
5/22/2015	314775, 314776	Hydro Supply Company	crimp fittings and adapters, hoses	$890.46	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
5/26/2015	88786	D & K Supply & Equipment	misc. tubing and accessories	$892.09	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
5/26/2015	88843	D & K Supply & Equipment	misc. tubing and accessories	$715.68	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
5/26/2015	88820	D & K Supply & Equipment	misc. tubing and accessories	$298.15	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
5/26/2015	88848	D & K Supply & Equipment	coupling	$5.53	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
5/27/2015	88855	D & K Supply & Equipment	coupling	$1.22	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.

6/1/2015	WS-21463, 65	Myers Well Service, Inc.	pump skid for new pump and motor, plumbing	$4,780.00	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
6/2/2015	89083	D & K Supply & Equipment	misc. tubing and accessories	$1,133.95	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
6/5/2015	1049	Enertech	filters, cartridges	$3,602.60	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
6/9/2015	1018	Permian Pump & Power	pump parts	$720.30	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
6/12/2015		D & K Supply & Equipment	gauges	$76.44	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
6/12/2015	315361, 70	Hydro Supply Company	hoses, 1/4" hex nipple	$180.57	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
6/15/2015	89474	D & K Supply & Equipment	misc. tubing and accessories	$352.30	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
6/18/2015	89490	D & K Supply & Equipment	mp 2500 charts, female/male coupling, hex bushing	$44.41	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
6/19/2015	1062	Enertech	55-gallon drum intercool scale inhibitor chemical, 55-gallon drum sodium hypochlorite	$2,213.00	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
6/25/2015	89800	D & K Supply & Equipment	barrel pump lever, bunji tarp straps	$175.17	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water

								pollution control.
7/1/2015	2464	Hawkins Well Services	repair quimplex plump, clean valves	$880.00	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
7/1/2015	90295	D & K Supply & Equipment	misc. tubing and accessories	$291.20	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
7/2/2015	89891	D & K Supply & Equipment	recorder charts	$25.25	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
7/7/2015	90134	D & K Supply & Equipment	male/female couplings, hex bushing	$38.85	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
7/9/2015	90217	D & K Supply & Equipment	meter charts	$50.50	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
7/9/2015		Plymouth Technology	DR900 Colorimeter	$1,325.60	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
7/13/2015	90250	D & K Supply & Equipment	elbow pipe, black pipe, thread charges, 3 fig 400 hammer union, 16 oz blue monster pipe dope, thread tape, 90 elbow pipe, nipples	$880.19	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
7/27/2015	90738	D & K Supply & Equipment	suction hose male	$192.45	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
8/4/2015	1880	Hawkins Well Services	repair quimplex pump	$1,880.00	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.

8/12/2015	91172	D & K Supply & Equipment	3 sight glass 500, male/female couplings, hex bushing	$120.63	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
8/13/2015	1195	D & K Supply & Equipment	couplings	$23.66	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
8/19/2015	91365	D & K Supply & Equipment	liquid filled gauges	$50.96	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
8/21/2015	317216	Hydro Supply Company	hoses	$621.96	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
8/24/2015	91516	D & K Supply & Equipment	2 fig 200 hammer union, nipple coupling	$35.08	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
8/24/2015	94509	Plymouth Technology	acid, testing meter	$5,935.03	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
8/26/2015	91605	D & K Supply & Equipment	black pipe, thread charge, 90 elbow pipe, nipples, 45 elbow pipe, ball valve 2000 fp balon	$287.15	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
8/28/2015	91717	D & K Supply & Equipment	swages, couplings, male tee pipes	$104.44	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
8/31/2015	91769	D & K Supply & Equipment	nipples, brass ball valve, female coupling, nipple, male tee pipe	$211.26	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
9/1/2015	91784	D & K Supply & Equipment	swage and female coupling	$55.86	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
9/3/2015	91864	D & K Supply & Equipment	valve 300	$45.70	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water

								pollution control.
9/4/2015	91960	D & K Supply & Equipment	female adapter, hex bushing, nipple, elbow, brass check valve	$134.26	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
9/8/2015	91966	D & K Supply & Equipment	tiger flex hoses, coupler, hose shank adapter, hose clamp punch	$1,022.43	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
9/14/2015	92068, 92380	D & K Supply & Equipment	sight glass 500, hex bushings, couplings, 90 elbow pipe, tape, tools	$210.60	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
9/15/2015	1602009	Smith Concrete	concrete	$8,437.50	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
9/16/2015	1602636	Smith Concrete	concrete	$2,097.00	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
9/21/2015	92380	D & K Supply & Equipment	gaskets	$12.90	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
9/24/2015	92170	D & K Supply & Equipment	couplings, nipple, spray	$90.63	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
10/13/2015	WS-24686	Myers Well Service, Inc.	excavate trench for electric to conduit for new pump system	$520.00	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
10/20/2015	94825	Plymouth Technology	acid	$1,937.63	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.

10/21/205	93332, 93362	D & K Supply & Equipment	sight glass 500, hex bushing, couplings, strainers	$442.51	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
10/21/2015	94834	Plymouth Technology	CWB7050, SI7481, Sodium Hypochlorite	$5,300.82	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
10/27/2015	93579	D & K Supply & Equipment	strainers	$41.47	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
11/9/2015	93924	D & K Supply & Equipment	spray, liquid filled gauges	$121.66	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
11/23/2015	WS-25777	Myers Well Service, Inc.	stone, manifold for pumps	$3,752.50	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
12/14/2015	WS-26249	Myers Well Service, Inc.	pumps to manifold, install wye cleanouts, tie-in for T, plumbing offloading pad sumps	$2,780.00	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
12/30/2015	1524952	Smith Concrete	concrete	$1,559.50	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
1/9/2013	n/a	Fastenal	misc. fittings	$428.27	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
10/8/2014	24799	TJC Enterprises Inc.	drill bit rentals	$39,318.00	exclusive	2	Not Recommended	intangible or service rendered (rental)
10/9/2014	WS-14848	Myers Well Service, Inc.	equipment rental	$6,250.00	exclusive	2	Not Recommended	intangible or service rendered (rental)
10/10/2014	WS-14902	Myers Well Service, Inc.	equipment rental	$5,550.00	exclusive	2	Not Recommended	intangible or service rendered (rental)

10/23/2014	WS-15403	Myers Well Service, Inc.	equipment rental	$5,620.00	exclusive	2	Not Recommended	intangible or service rendered (rental)
11/5/2014	101914-20	Liquid Luggers	SOS injection station landing	$3,761.35	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
12/3/2014	14379	Petroset	pump truck rental	$2,270.00	exclusive	2	Not Recommended	intangible or service rendered (rental)
1/27/2015	85163	D & K Supply & Equipment	cross tee pipe, 1/4 fluid pressure gauge	$141.63	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
2/27/2015	1048739	Ken Miller Supply	misc. tubing and accessories	$3,103.32	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
9/1/2014	103114R	Liquid Luggers	tank rental	$2,880.00	exclusive	2	Not Recommended	intangible or service rendered (rental)
10/8/2014	24842	TJC Enterprises Inc.	80' x 100' pit liner, shale control copolymer, defoamer	$13,085.72	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control. Liner used during completion operations and not permanently installed.
12/1/2014	1508	Diamond Oilfield Technologies	tank rental	$2,700.00	exclusive	2	Not Recommended	intangible or service rendered (rental)
12/12/2014	113014R	Liquid Luggers	tank rental	$1,800.00	exclusive	2	Not Recommended	intangible or service rendered (rental)
4/1/2015	033115R	Liquid Luggers	tank rental	$400.00	exclusive	2	Not Recommended	intangible or service rendered (rental)
4/30/2015	043015R	Liquid Luggers	frack tank rental	$1,500.00	exclusive	2	Not Recommended	intangible or service rendered (rental)
6/2/2015	053115R	Liquid Luggers	frank tank rental	$750.00	exclusive	2	Not Recommended	intangible or service rendered (rental)
10/13/2015	093015R	Liquid Luggers	tanks - rental	$640.00	exclusive	2	Not Recommended	intangible or service rendered (rental)
10/29/2015	93651	D & K Supply & Equipment	union, nipple, male tee pipe	$160.04	exclusive	2	Not Recommended	The Department of Natural Resources is unable to determine due to

								insufficient information provided by the applicant.
11/5/2015	93907	D & K Supply & Equipment	blind flange, stud w/nuts, flange gasket	$47.70	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
11/5/2015	1622578	Smith Concrete	piping	$690.00	exclusive	2	Not Recommended	The primary purpose of this item is not industrial water pollution control.
2/17/2015	1684	Diamond Oilfield Technologies	rental of tanks	$525.22	exclusive	2	Not Recommended	intangible or service rendered (rental)
			SPLIT ITEMS					
10/29/2014	17768	Producers Service Corp.	fluid pumping charge, chemicals	$43,558.25	exclusive	3	Split	There is no recommendation for the pumping charge (service), and the chemicals are not recommended due to not preventing water pollution.
9/1/2015	2515	Hawkins Well Services	pump valves, clean and replace	$720.00	exclusive	3	Split	no recommendation for services rendered, pump valves not recommended
9/23/2015	2538	Hawkins Well Services	replace valves and seal on pump	$3,248.17	exclusive	3	Split	No recommendation for services rendered; pump valves and seals are not recommended.
10/26/2015	2544	Hawkins Well Services	pump motor and skid, valve assembly, repair leaks on pipe	$12,426.00	exclusive	3	Split	No recommendation for services rendered; all tangible items are not recommended.
1/1/2011	n/a	n/a	well - well breakdown is below	$2,163,473.27	exclusive	3	Split	See attached chart supplied by Applicant.

9/18/2014	14284	Petroset	cement truck, cement, chemicals	$4,626.90	exclusive	3	Split	No recommendation for services rendered; all tangible items are recommended (chemicals in this case strengthen the cement for keeping brine separated from ground water)
9/18/2014	14285	Petroset	cement truck, cement, chemicals	$8,871.90	exclusive	3	Split	No recommendation for services rendered; all tangible items are recommended (chemicals in this case strengthen the cement for keeping brine separated from ground water)
9/20/2014	14281	Petroset	cement truck, cement, chemicals	$16,740.70	exclusive	3	Split	No recommendation for services rendered; all tangible items are recommended (chemicals in this case strengthen the cement for keeping brine separated from ground water)
9/23/2014	14289	Petroset	cement truck, cement, chemicals	$16,840.10	exclusive	3	Split	No recommendation for services rendered; all tangible items are recommended (chemicals in this case strengthen the cement for keeping brine separated from ground water)
9/30/2014	35170	Universal Well Services, Inc	flow stop, cement, chemicals	$20,805.17	exclusive	3	Split	No recommendation for services rendered; all tangible items are recommended (chemicals in this case

								strengthen the cement for keeping brine separated from ground water)
6/2/2015		Columbia River Electric Maintenance	injection well VFD#2	$1,866.50	exclusive	3	Split	No recommendation for services rendered; all tangible items are not recommended
10/30/2014	1358	Diamond Oil Services	5000' poly core tubing	$30,000.00	exclusive	3	Split	No recommendation for services rendered; tubing is recommended
1/28/2015	1614	Diamond Oilfield Technologies	road repairs	$9,645.47	exclusive	3	Split	No recommendation for services rendered; all tangible items are not recommended
8/5/2015	WS-22980, 83, 84	Myers Well Service, Inc.	site reclaim, well dike, hardline crossover, rubber hose with hardline	$14,132.95	exclusive	3	Split	No recommendation for services rendered; all tangible items not recommended
11/12/2015	WS-25394	Myers Well Service, Inc.	concrete, tank containment pad, lines, stone	$8,657.00	exclusive	3	Split	concrete, containment pad, and lines recommended; stone is not recommended
12/14/2015	15-3020	Waterford Tank & Fabrication	400 BBL API tanks, stair assemblies, catwalks, manway covers and gaskets	$28,955.00	exclusive	3	Split	tanks and gaskets approved, remaining items not approved
			TABLE 3 - NO RECOMMENDATION					
12/30/2014	13242	KDA Inc.	pump skid	$7,500.00	exclusive	4	No Recommendation	intangible or service rendered
3/4/2015	2423	Hawkins Well Services	pump repairs	$3,769.66	exclusive	4	No Recommendation	intangible or service rendered
5/4/2015	2452	Hawkins Well Services	repair quimplex plump	$1,120.00	exclusive	4	No Recommendation	intangible or service rendered
11/12/2015	WS-25400	Myers Well Service, Inc.	set 500 bbl. tank, lines for filter system and pumps	$4,440.00	exclusive	4	No Recommendation	intangible or service rendered

12/9/2015	2562	Hawkins Well Services	repair pumps	$1,444.00	exclusive	4	No Recommendation	intangible or service rendered
12/28/2015	WS-26455	Myers Well Service, Inc.	lines, install seals	$2,360.00	exclusive	4	No Recommendation	intangible or service rendered
12/30/2015	2574	Hawkins Well Services	repair pumps, seal	$3,294.67	exclusive	4	No Recommendation	intangible or service rendered
1/7/2013	n/a	Diversified Engineering	engineering services	$1,231.76	exclusive	4	No Recommendation	intangible or service rendered
1/21/2013	n/a	Kleese Development Associates	general contractor fee, well installation	$38,745.00	exclusive	4	No Recommendation	intangible or service rendered
1/26/2013	n/a	Matthew Kleese	consultation fee, well installation	$6,000.00	exclusive	4	No Recommendation	intangible or service rendered
2/8/2013	n/a	Kleese Development Associates	general contractor fee, well installation	$22,646.23	exclusive	4	No Recommendation	intangible or service rendered
9/24/2014	25359	Power Tongs	ran 8 5/8" casing 1316'	$2,500.00	exclusive	4	No Recommendation	intangible or service rendered
9/24/2014	25363	Power Tongs	ran 11 3/4" casing 812'	$3,500.00	exclusive	4	No Recommendation	intangible or service rendered
10/1/2014	25364	Power Tongs	ran 4 1/2" casing 5223'	$3,000.00	exclusive	4	No Recommendation	intangible or service rendered
10/29/2014	1596	Wildcat Drilling LLC	drill well	$155,486.35	exclusive	4	No Recommendation	intangible or service rendered
10/31/2014	11822	KDA Inc.	roustabout well head and tanks	$669.73	exclusive	4	No Recommendation	intangible or service rendered
12/4/2014	17195	Producers Service Corp.	fluid pumping charge	$1,700.00	exclusive	4	No Recommendation	intangible or service rendered
12/4/2014	17194	Producers Service Corp.	fluid pumping charge	$1,700.00	exclusive	4	No Recommendation	intangible or service rendered
12/30/2014	13241	KDA Inc.	cut & fabricate well head	$1,500.00	exclusive	4	No Recommendation	intangible or service rendered
1/13/2015	310688	Hydro Supply Company	injection well, maintenance and repair	$110.97	exclusive	4	No Recommendation	intangible or service rendered
1/20/2015	2334	Hawkins Well Services	injection well, maintenance and repair	$3,600.00	exclusive	4	No Recommendation	intangible or service rendered
2/27/2015	n/a	DM Excavating	4.5" well casing 300'.	$31,275.00	exclusive	4	No Recommendation	intangible or service rendered
3/23/2015	15454	KDA Inc.	installation of flowline	$14,657.00	exclusive	4	No Recommendation	intangible or service rendered
3/23/2015	15455	KDA Inc.	installation of flowline	$13,520.00	exclusive	4	No Recommendation	intangible or service rendered
3/27/2015	1848	Diamond Oil Services	PSI acid services	$7,400.00	exclusive	4	No Recommendation	intangible or service rendered
3/27/2015	1849	Diamond Oil Services	fluid pumping charge - acid test	$3,800.00	exclusive	4	No Recommendation	intangible or service rendered
6/19/2015	18816	Producers Service Corp.	acid service	$5,270.00	exclusive	4	No Recommendation	intangible or service rendered
12/24/2015	1515	Diamond Oilfield Technologies	flowline from SOS D1 to SOS D2	$15,000.00	exclusive	4	No Recommendation	intangible or service rendered

3/30/2015	1861	Diamond Oil Services	welding	$5,000.00	exclusive	4	No Recommendation	intangible or service rendered
5/1/2015	15907	KDA Inc.	labor	$11,954.50	exclusive	4	No Recommendation	intangible or service rendered
6/24/2015		Parnell & Associates	trench patch	$21,775.00	exclusive	4	No Recommendation	intangible or service rendered
8/18/2015	WS-23286	Myers Well Service, Inc.	excavator work	$360.00	exclusive	4	No Recommendation	intangible or service rendered
9/1/2015	WS-23694	Myers Well Service, Inc.	well drilling services	$15,000.00	exclusive	4	No Recommendation	intangible or service rendered
10/28/2015	WS-24893	Myers Well Service, Inc.	offload pad, installed sump pump in roll off containment, clean-up	$4,656.50	exclusive	4	No Recommendation	intangible or service rendered
12/1/2015	WS-25915	Myers Well Service, Inc.	control cuts in concrete, plumbing pipes, and mounting manifold	$5,184.00	exclusive	4	No Recommendation	intangible or service rendered
12/16/2015	WS-26720	Myers Well Service, Inc.	install tie-ins, cat walks, offloading pumps to manifold, doors, pumps	$6,220.00	exclusive	4	No Recommendation	intangible or service rendered
12/18/2015	WS-26316	Myers Well Service, Inc.	hung 6" lines for prefab, install plugs in tanks and flanges on receiving tank lines, hung 4" on gun barrels, installed final fab	$4,695.00	exclusive	4	No Recommendation	intangible or service rendered
12/22/2015	WS-26354	Myers Well Service, Inc.	installed poly lines, welded tie ins for tank	$1,940.00	exclusive	4	No Recommendation	intangible or service rendered
12/22/2015	WS-26353	Myers Well Service, Inc.	install check valves in tanks, stands for poly lines	$2,496.00	exclusive	4	No Recommendation	intangible or service rendered
				$3,458,490.58				

Injection Well	**$2,163,473.27**	***ODNR Determination***	***Comments***
			TABLE 1- RECOMMENDED PROPERTY
piping, valves, fittings, casings	$73,797.17	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
well piping, valves, fittings, casings	$85,863.01	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
piping	$165,658.98	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
concrete	$4,742.83	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution

			caused by industrial waste.
concrete	$4,125.78	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
crankshaft	$965.81	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
4.5" well casing	$119,864.30	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
cement	$3,123.56	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
cement	$7,577.03	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
casing liner	$6,898.66	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
injection well, suction / discharge valve assembly	$11,296.10	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
flowline	$57,488.87	Recommended	This properties' primary purpose is to reduce, control, or eliminate water pollution caused by industrial waste.
			TABLE 2- NOT RECOMMENDED PROPERTY
misc. fittings	$1,641.38	Not recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
drill bit rentals	$150,689.84	Not recommended	intangible or service rendered (rental)
equipment rental	$23,953.70	Not recommended	intangible or service rendered (rental)
equipment rental	$21,270.88	Not recommended	intangible or service rendered (rental)
equipment rental	$21,539.17	Not recommended	intangible or service rendered (rental)
SOS injection station landing	$14,415.72	Not recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
pump truck rental	$8,699.98	Not recommended	intangible or service rendered (rental)
cross tee pipe, 1/4 fluid pressure gauge	$542.81	Not Recommended	The primary purpose of this item is not industrial water pollution control.

misc. tubing and accessories	$11,893.76	Not recommended	The Department of Natural Resources is unable to determine due to insufficient information provided by the applicant.
injection well VFD	$7,153.53	Not recommended	The primary purpose of this item is not industrial water pollution control.
			SPLIT ITEMS
cement truck, cement, chemicals	$17,733.02	Split	No recommendation for services rendered; all tangible items are recommended (chemicals in this case strengthen the cement for keeping brine separated from ground water)
cement truck, cement, chemicals	$34,002.37	Split	No recommendation for services rendered; all tangible items are recommended (chemicals in this case strengthen the cement for keeping brine separated from ground water)
cement truck, cement, chemicals	$64,160.27	Split	No recommendation for services rendered; all tangible items are recommended (chemicals in this case strengthen the cement for keeping brine separated from ground water)
cement truck, cement, chemicals	$64,541.23	Split	No recommendation for services rendered; all tangible items are recommended (chemicals in this case strengthen the cement for keeping brine separated from ground water)
flow stop, cement, chemicals	$79,737.72	Split	No recommendation for services rendered; all tangible items are recommended (chemicals in this case strengthen the cement for keeping brine separated from ground water)
			TABLE 3 - NO RECOMMENDATION
engineering services	$4,720.83	No Recommendation	intangible or service rendered
general contractor fee, well installation	$148,493.76	No Recommendation	intangible or service rendered
consultation fee, well installation	$22,995.55	No Recommendation	intangible or service rendered
general contractor fee, well installation	$86,793.75	No Recommendation	intangible or service rendered
ran 8 5/8" casing	$9,581.48	No Recommendation	intangible or service rendered
ran 11 3/4" casing	$13,414.07	No Recommendation	intangible or service rendered
ran 4 1/2" casing	$11,497.77	No Recommendation	intangible or service rendered
drill well	$595,915.69	No Recommendation	intangible or service rendered

roustabout well head and tanks	$2,566.80	No Recommendation	intangible or service rendered
fluid pumping charge	$6,515.41	No Recommendation	intangible or service rendered
fluid pumping charge	$6,515.41	No Recommendation	intangible or service rendered
cut & fabricate well head	$5,748.89	No Recommendation	intangible or service rendered
injection well, maintenance and repair	$425.30	No Recommendation	intangible or service rendered
injection well, maintenance and repair	$13,797.33	No Recommendation	intangible or service rendered
installation of flowline	$56,174.30	No Recommendation	intangible or service rendered
installation of flowline	$51,816.64	No Recommendation	intangible or service rendered
PSI acid services	$28,361.18	No Recommendation	intangible or service rendered
fluid pumping charge - acid test	$14,563.85	No Recommendation	intangible or service rendered
acid service	$20,197.76	No Recommendation	intangible or service rendered
	$2,163,473.27		

VI. CONCLUSION

Based upon the foregoing reasons, the Tax Commissioner modifies his Proposed Finding for the subject application as it relates to the various types of equipment, material, or property.

Accordingly, the subject application is approved in part.

THIS REFLECTS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. NOTICE OF THIS FINAL DETERMINATION WILL BE SENT TO THE APPROPRIATE COUNTY AUDITOR IN ACCORDANCE WITH R.C. 5703.37, AS SET FORTH IN R.C. 5709.22(B). 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: MAY 26 2021

John and Waneema Adams
8776 Ironwood Dr.
Van Buren TWP, MI 48111

Re: Refund Claim No. 8171331041
Individual Income Refund Tax - 2017

This is the final determination of the Tax Commissioner with regard to an application for refund pursuant to R.C. 5747.11 concerning the personal income tax ("PIT") amount:

Tax Year	Refund Claimed
2017	$2,132.00

I. BACKGROUND:

John and Waneema Adams ("the claimants") jointly filed a 2017 Ohio IT 1040 reporting an overpayment of $2,132.00 and sought a refund of the overpayment.[1] The majority of the reported overpayment occurred because the claimants applied for the nonresident credit. However, upon initial review, the Department disallowed the nonresident credit and adjusted the refund accordingly. The claimants seek administrative review of the refund amount and forwarded evidence to support their request for the nonresident credit. 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 application for refund pursuant to R.C. 5703.70.

II. APPLICABLE STATUTORY LAW:

For Ohio income tax purposes, the starting tax base is Ohio adjusted gross income, which is federal adjusted gross income as adjusted pursuant to R.C. 5747.01(A). A resident of Ohio is always subject to the individual income tax, regardless of where the individual earns or receives income.[2] Division (I) of R.C. 5747.01 defines a "resident" as an individual who is domiciled in this state, subject to R.C. 5747.24. 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 lay out the analysis used to establish whether an individual is an Ohio resident for that taxable year.

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

[2] 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.

First, R.C. 5747.24 (B)(1) articulates the criteria by which an individual establishes an irrebuttable presumption that they are domiciled outside Ohio:

> (i) The individual has no more 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.

A contact period occurs 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. Former R.C. 5747.24 (A)(1). An individual is presumed to have a contact period for any period the individual fails to prove was not a contact period. Former R.C. 5747.24(E). However, an individual is not entitled to an irrebuttable presumption of domicile outside Ohio if they fail to timely file the affidavit of non-Ohio domicile or make a false statement in the affidavit. Former R.C. 5747.24 (B)(1). Additionally, this test does not apply to individuals whose domicile changed during the taxable year. Former R.C. 5747.24 (B)(2).

If an individual is unable to meet the statutory framework of an irrebuttable presumption of non-residency, the burden shifts to the individual to show they were not domiciled in Ohio during the taxable year. Former R.C. 5724.24 (C) & (D). An individual who shows at least 213 contact periods with Ohio and does not establish the irrebuttable presumption articulated in former R.C. 5747.34 (B) is presumed to be domiciled in Ohio for the entire taxable year. Former R.C. 5747.24 (D). However, this section does not apply individuals whose domicile changed during the taxable year. Former R.C. 5747.24 (D). An individual can rebut the presumption set forth in former R.C. 5747.24(D) only with clear and convincing evidence to the contrary. The Ohio Supreme Court defined clear and convincing evidence as "[t]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established." *Cross v. Ledford*, 161 Ohio St. 469 at 477 (1954). The court explained the clear and convincing evidence standard is an intermediary level of review, being more than a mere preponderance, but not requiring the certainty of beyond a reasonable doubt. *Id.*

III. COMMON-LAW DOMICILE:

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). "The law ascribes a domicile to every person, and no person can be without one." *Sturgeon v. Korte*, 34 Ohio St. 525, 534 (1878). "A person can have multiple residences but can have only one domicile." *Schill v. Cincinnati Ins. Co.*, 141 Ohio St.3d 382, 2014-Ohio-4527, 24 N.E.3d 1138, ¶ 25, citing *Grant v. Jones*, 39 Ohio St. 506, 515 (1883). "Domicile is generally 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." *Cunningham,* ¶ 12 quoting *Shill,* ¶ 24.

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). Evidence determining domicile consists 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).

"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). There must be an absence of intent to live anywhere else. *See Schill, supra* at ¶ 26.

IV. ANALYSIS:

The claimant, John Adams ("the husband") contends he was a part year resident of Ohio for tax year 2017 in his Michigan PIT return. However, he claims he was a full year resident of Ohio in his Ohio PIT return. This analysis will assume the husband is claiming part year residency in Ohio since the claimants argue they are entitled to a non-resident credit. The first step in the domicile analysis is to determine whether the husband is entitled to an irrebuttable presumption of non-Ohio domicile under former R.C. 5747.24. The husband failed to file the affidavit of non-Ohio domicile on or before the fifteenth day of the fourth month following the close of the taxable year. Therefore, the husband is not entitled to an irrebuttable presumption that he was not domiciled in Ohio for the entirety of tax year 2017 under former R.C. 5747.24.

The next step of the analysis is to determine what standard of proof the husband must meet to rebut the presumption of domicile in Ohio. R.C. 5724.24 (C)(D). The husband is presumed to be domiciled in Ohio every day he fails to prove was not a contact period with Ohio.

The only document provided by the husband reflecting potential contact periods with Ohio is the W-2 showing his income earned at his employment in Toledo, Ohio. The W-2 indicates a significant number of contact periods with Ohio. Because the husband failed to show contact periods of less than 213 days in Ohio and he is not entitled to an irrebuttable presumption that he was domiciled in Michigan, the husband must show by clear and convincing evidence that he was not domiciled in the State of Ohio for the entirety of 2017 under R.C. 5747.24(D).

The claimants' Michigan PIT return states the husband was a part year resident of Michigan from July 1st, 2017 to December 31, 2017. Nevertheless, physical presence is not, in and of itself, a determinative factor for the purpose of determining domicile. On the contrary, the evidence available to the commissioner shows he did not abandon his Ohio domicile in 2017. The husband was issued an Ohio driver's license on August 29, 2017. Evidence indicates the husband did not register a vehicle in Michigan, register to vote, or purchase real estate in Michigan until 2018. Records show that before 2018, the husband registered vehicles in Ohio, he registered to vote in Ohio, and he voted in prior Ohio elections. Additionally, most of the addresses attributed to him prior to 2018 were in Ohio. Therefore, the husband has not proven by clear and convincing evidence he was ever domiciled in Michigan for tax year 2017.

In this case, it is not necessary to determine Waneema Adams' (the wife) domicile for tax year 2017 because the claimants have failed to provide evidence to support their contention that they are entitled to the nonresident credit. In their 2017 Michigan return provided to the Department, the claimants stated their entire income was apportioned to Ohio, none of their income was subject to Michigan tax, and the claimants did not pay any Michigan tax. The claimants contradict their 2017 Michigan return by

allocating all their income to both Ohio and Michigan in their 2017 Ohio IT NRC. Because the claimants' income cannot be allocated to both states, the Department must conduct its own review to determine how the claimants' income should be allocated for the sake of determining the nonresident credit.

The only non-business income reported by the claimants in their Ohio and Michigan returns is the husband's employment in Toledo. This W-2 was issued by an Ohio entity and shows the entirety of the reported income was earned in Ohio. Furthermore, the W2 uses the husband's Ohio address. The W-2 also shows no tax was withheld for the State of Michigan or any Michigan locality. Finally, the claimants reported the W-2 income on their Michigan return as Ohio income. Because this income was earned by an Ohio resident and because the claimants' only paid Ohio tax on this income, the claimants are not entitled to the nonresident credit on their nonbusiness income.

The claimants also described business income in their Ohio and Michigan returns. However, the claimants failed to provide any evidence their business income was earned in Michigan. In fact, their 2017 Michigan return shows the claimants allocated that income to Ohio in that return and did not pay Michigan tax on this income. Furthermore, the Business Income Deduction the claimants applied for on their 2017 Ohio PIT return ensures this business income is not included in their Ohio Adjusted Gross Income regardless of whether the income was earned in Ohio or Michigan. Thus, the claimants are not entitled to a non-resident credit for their business income earned in tax year 2017.

V. CONCLUSION:

The totality of the evidence available to the Tax Commissioner show the husband's actions in 2017 are consistent with an intent to retain Ohio domicile. Therefore, the claimants failed to rebut the presumption that he was domiciled in Ohio for the entirety of tax year 2017 with clear and convincing evidence he was a part year resident of Ohio as required by R.C. 5747.24 (D). Furthermore, it is unnecessary to determine the wife's domicile in 2017 as the claimants have failed to provide evidence to support their contention that they are entitled to the nonresident credit.

Accordingly, the refund claim is denied.

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

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

JEFFREY A. MCCLAIN
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: MAY 12 2021

Wayne D. & Natalie M. Baumann
10465 Gore Orphanage Rd.
Amherst, OH 44001

Re: Assessment No. 02201902472492
Individual Income Tax – 2016

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

Tax	Interest	Penalty	Total
$293.00	$20.94	$41.88	$355.82

The Department assessed Wayne D. and Natalie M. Baumann ("the petitioners") for failing to pay the amount owed to the Department after a refund variance notice was sent to the petitioners. The petitioners objected to the assessment and provided portions of their Ohio PIT return and their federal Schedule E in support of their objection. The petitioners did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner.

Taxpayers may only report on the Ohio Schedule IT BUS items of business income included in the calculation of federal adjusted gross income. See R.C. 5747.01(A)(31), 5747.01(B), and 5747.01(HH).

In the present case, the petitioners claimed a $10,864.00 business income deduction on their Ohio PIT return. However, the Department received information from the IRS indicating the business income reported on the Ohio Schedule IT BUS did not match the business income included on their federal return. Furthermore, the federal Schedule E the petitioners provided shows a reported supplemental income of $3,015.00. The petitioners failed to include their rental loss of $7,849 described on their federal Schedule E on their Ohio Schedule IT Bus. Based on the Schedule E, the petitioners appeared to be in the business of renting out a commercial property for the entirety of tax year 2016. The petitioners do not argue the rental loss they incurred in tax year 2016 should not be considered business income. Therefore, the taxpayers could not report business income related to the real estate rental on their federal Schedule E and then not report the rental real estate income on their Ohio Schedule IT BUS.

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

Current records indicate the assessment has been paid 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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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

Philip R. & Victoria L. Bondi
800 Kelsey Ct.
Dayton, OH 45458

Re: Assessment No: 02201902472843
Individual Income Tax – 2016

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

Tax	Interest	Penalty	Total
$432.00	$30.87	$61.74	$524.61

I. BACKGROUND

The Department assessed Philip R. Bondi and Victoria L. Bondi ("the petitioners") for failing to pay the amount owed to the Department after a refund variance notice was sent to the petitioners. The Department partially disallowed the business income deduction (BID) claimed by the petitioners because the BID claimed on the Ohio return did not match the business income reported on the federal return. The petitioners object to the assessment and provided evidence to support the claimed BID on the return. The petitioners did not request a hearing on the matter; therefore, this matter is decided upon information currently available to the Tax Commissioner.

II. THE PETITIONERS' CONTENTIONS

The petitioners own three investment/rental properties in South Carolina and use a management company to take care of the day to day needs of the property. The petitioners argue that R.C. 5747.01 (C) does not allow activities from the investment/rental properties to be considered business income.

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."

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.

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 *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.

IV. ANALYSIS

In this case, the rental loss the petitioners reported on their federal Schedule E is business income whether the income is analyzed under the transactional test or functional test. The petitioners' sweeping contention that R.C. 5747.01 (C) states that all activities from investment/rental properties are non-business income is incorrect. R.C. 5747.01 (C) does hold that rents and royalties from real property may in some circumstances be classified as nonbusiness income. However, R.C. 5747.01 (B) contemplates income, gain, or loss from real property being classified as business income in certain situations. The petitioners also allege they use a management company to run the day-to-day operations of the company. However, the petitioners fail to show how this arrangement affects the analysis of their rental loss under the transactional or functional test.

Loss from real property is business income under the "transactional test" if it is derived from a transaction in which the taxpayer regularly engages. *Kemppel* at 422. The federal Schedule E shows the petitioners were in the business of renting three vacation homes through the entirety of tax year 2016. The petitioners failed to report any personal use days of the property. Because the petitioners regularly engaged in the business of renting the vacation homes throughout the year, the loss they claimed from operating the properties is business income using the transactional test under R.C. 5747.01(B).

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. In this case, the management of the properties is essential to the petitioners' business of renting vacation homes. There would be no vacation home rental business without management of the properties. Therefore, the rental loss is also business income using the functional test under R.C. 5747.01(B).

V. CONCLUSION

Therefore, the rental loss the petitioners reported on their federal Schedule E is business income using both the transactional and functional tests under R.C. 5747.01(B).

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

Current records indicate the taxpayer has not made a payment on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any 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.

MAY 28 2021
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THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND 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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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: MAY 28 2021

Randy & Cheryl Donnamiller
91 Linwood Ct.
Shelby, OH 44875

Re: Assessment No: 02201902474249
Individual Income Tax – 2016

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

Tax	Interest	Penalty	Total
$648.00	$46.29	$92.58	$786.87

I. BACKGROUND

The Department assessed Randy & Cheryl Donnamiller ("the petitioners") after adjusting their 2016 Ohio individual income tax return. Specifically, the Department disallowed a portion of the business income deduction ("BID") claimed by the petitioners because the petitioners did not include losses from their rental properties in their total claimed Ohio BID. The petitioners objected to the assessment but did not request a hearing on the matter; therefore, this matter is decided upon information currently available to the Tax Commissioner.

II. THE PETITIONERS' CONTENTIONS

The petitioners own rental properties in Florida and Tennessee. The petitioners argue that the Department erred in assuming the amount listed on their Schedule E would equal the amount of their Ohio BID. The petitioners also contend that these properties are not located in Ohio, that these properties do not qualify for the BID, and that these properties reflect losses.

III. AUTHORITY

A. THE AUTHORITY OF OHIO TO TAX RESIDENTS

Ohio's income tax is levied on individuals, trusts, and estates residing in Ohio or earning or receiving income in Ohio, or otherwise having nexus with or in Ohio. R.C. 5747.01, R.C. 5747.02. For Ohio income tax purposes, the starting point is FAGI which is then adjusted pursuant to R.C. 5747.01 et seq.

to reach Ohio Adjusted Gross Income. Every taxpayer who is liable for income earned or received in Ohio is required to file an annual income tax return. R.C. 5747.08.

B. 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.

C. BUSINESS INCOME – FUNCTIONAL & TRANSACTIONAL TESTS

Ohio's income tax distinguishes between "business income" and "nonbusiness income."

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.

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 *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.

IV. ANALYSIS

The petitioners argue that because the properties are located outside of Ohio, they do not qualify for the Ohio BID. The petitioners are Ohio residents and have not submitted any evidence that income or losses from the properties are allocated to any other state. Because the petitioners are residents of Ohio, they received this income in Ohio. Therefore, income and losses from these properties are taxable by Ohio under R.C. 5747.02(A).

The petitioners' contention that these properties do not qualify for the Ohio BID is incorrect. R.C. 5747.01(B) contemplates income, gain, or loss from real property being classified as business income in certain situations. These situations are analyzed using the "transactional test" or the "functional test. In this case, the petitioners' profits and losses from these rental properties qualifies as business income under both tests.

Loss from real property is business income under the "transactional test" if it is derived from a transaction in which the taxpayer regularly engages. *Kemppel* at 422. The federal Schedule E shows the petitioners were in the business of renting their properties for the entirety of tax year 2016. The petitioners did not report any personal use days for these properties. Because the petitioners regularly engaged in the business of renting the properties throughout the year, the loss they claimed from operating the properties is business income using the transactional test under R.C. 5747.01(B).

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. In this case, the acquisition and management of the properties is essential to the petitioners' business of renting the properties. There would be no rental business without acquisition and management of the properties. Therefore, the rental loss is also business income using the functional test under R.C. 5747.01(B). Accordingly, the petitioners' argument that the rental loss is not business income is not well taken.

V. CONCLUSION

The rental loss the petitioners reported on their federal Schedule E is business income using both the transactional and functional tests under R.C. 5747.01(B). Accordingly, the loss from the out of state properties qualifies for the Ohio BID. Therefore, the petitioners must include the losses from the out of state properties when calculating their Ohio BID.

Accordingly, the assessment is affirmed as issued.

Current records indicate the taxpayer has not made a payment on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any 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, PO Box 16158, Columbus, OH 43216-6158.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 26 2021

Peter Kilbinger Hansen
16 Ocean View Dr.
Stamford, CT 06902

Re: Assessment No. 02201905388637
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
$387,486.00	$13,619.75	$27,239.50	$428,345.25

The Ohio Department of Taxation assessed Peter Kilbinger Hanson ("the petitioner") after making adjustments to the Ohio individual income tax return for the tax period in question. Specifically, the Department disallowed the nonresident credit claimed by the petitioner. The petitioner contends that since he was not domiciled in Ohio during the 2017 tax year, he should be entitled to a full nonresident credit for tax year 2017.

In the present case, the petitioner registered a vehicle in Connecticut, owned a residence in Connecticut, possessed a Connecticut driver's license, and his US Permanent Residence Card showed his Connecticut address. The amended Ohio IT 1040 return filed by the petitioner appears to have allocated his income correctly. Based on the evidence now available to the Tax Commissioner, the petitioners' contention is well taken.

Accordingly, the assessment is cancelled.

Current records indicate that no payment has been applied to this assessment. However, based on the petitioner's amended return, the taxpayer is entitled to a $1,853.00 refund. This overpayment will be refunded to the petitioners. 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 APPRO-PRAITELY 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: MAY 26 2021

Jeffrey A. & Victoria A. Layman
5489 Wimbledon Park Drive
Monroe, Michigan 48161

Re: Assessment: 02201828948096
Refund Claim: 8312325708
Tax Year - 2017

This is the final determination of the Tax Commissioner regarding the above-referenced assessment pursuant to R.C. 5747.11:

Tax	Interest	Penalties	Total
$767.00	$15.04	$30.08	$812.12

This is also the final determination of the Tax Commissioner regarding the above-referenced application for individual income tax refund.

2017 Refund Claimed	$3,816.00

I. BACKGROUND:

The Ohio Department of Taxation assessed Jeffrey A. & Victoria A. Layman ("the claimants") regarding their individual income tax for 2017. In response to this assessment, the claimants filed an amended 2017 Ohio IT 1040 reporting an overpayment of $3,816.00 and seeking a refund.[1] The department denied this refund request citing insufficient evidence of non-Ohio domicile. The claimants submitted a petition for reassessment seeking administrative review of the denied refund claim. The claimants requested a hearing which was conducted on March 30, 2021. Following this hearing, the claimants submitted additional documents regarding their communications with the department and their claimed domicile in Michigan. The claimants did not file an Affidavit of Non-Ohio Residency/Domicile for Taxable Year 2017 nor submit any evidence addressing their number of contact periods with Ohio.

II. APPLICABLE STATUTORY LAW:

For Ohio income tax purposes, the starting tax base is Ohio adjusted gross income, which is federal adjusted gross income as adjusted pursuant to R.C. 5747.01(A). A resident of Ohio is always subject to the individual income tax, regardless of where the individual earns or receives income.[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 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 present case, the claimants were required to file an Affidavit of Non-Ohio Residency/Domicile ("Affidavit") for the tax year in question by April 15, 2018. Former R.C. 5747.24(B). However, the Department records do not show that this affidavit was submitted, so the claimants are not entitled to an irrebuttable presumption of non-domicile under former R.C. 5747.24(B).

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

III. COMMON-LAW DOMICILE:

The Ohio Supreme Court has held that rebutting the presumption of domicile in Ohio involves proving the substantive elements of domicile under the common law. *Cunningham v. Testa*, 144 Ohio St.3d 40, 2015-Ohio-2744, 40 N.E.3d 1096, ¶ 19 (2015). In addition, R.C. 5747.24(B) distinguishes verification

of domicile from verification of contact periods and abode: it does not conflate them. *Id.* The Ohio Revised Code does not define "domicile," but the definition of domicile has been set forth in previous Ohio decisions, including *Cunningham.*

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

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

Once domicile is established, it continues until the individual 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, supra* at ¶ 26. Moreover, [t]he essential fact that raises a change of abode to a change of domicile is the absence of any intention to live elsewhere * * *." *Id.* quoting, *Williamson v. Osenton*, 232 U.S. 619, 624, 34 S.Ct. 442, 58 L.Ed. 758 (1947).

IV. FACTS & CIRCUMSTANCES:

The claimants contend they were domiciled in Monroe, Michigan for tax year 2017. The claimants did not file an Affidavit of Non-Ohio Residency/Domicile for Taxable Year 2017 and are therefore presumed to be domiciled in Ohio for the entire taxable year. R.C. 5747.24(B)(1). Because the claimants had fewer than 2013 contact periods with Ohio, they must rebut the presumption of Ohio domicile with a preponderance of evidence to the contrary. R.C. 5747.24(C).

Although the claimants contend that they affirmatively established a domicile in Michigan, their actions and availments during 2017 show that they maintained significant connections with Ohio, reinforced their connections, and continued to enjoy the rights and privileges afforded to Ohio residents. The intent

to abandon one's domicile is shown by evidentiary factors including where the individual files federal income tax returns, where the individual votes, registers their vehicle, and maintains a driver's license. *Davis*, at *5-7.

Physical presence is not, in and of itself, a determinative factor for the purpose of determining domicile. In this case, claimants have submitted records of purchasing a home in Michigan. Claimants have also submitted their 2017 Michigan Individual Income Tax Return ("Michigan Return"). The Michigan return was filed from an address in Michigan. However, the property records and the Michigan Return are not sufficient to show the claimants were not domiciled in Ohio. The claimants have not submitted any further evidence of domicile in Michigan.

Notwithstanding the claimant's contentions, the evidence currently available to the Tax Commissioner indicates the claimants maintained significant connections to Ohio in 2017. For instance, the Lucas County Auditor shows that Victoria A. Layman owned property located at 292 117th Street, Toledo, Ohio 43611. Records indicate that Victoria Layman receives the Owner Occupied Credit for the Toledo property. Evidence available to the Tax Commissioner also reflects the claimants were registered to vote in Ohio and voted in Ohio elections during the period in question. The claimants also maintained Ohio driver's licenses during 2017 and in subsequent years. Additionally, the claimants have multiple vehicles registered in Ohio. The fact the Toledo property was held out as Victoria's principal residence and their status as registered voters in Lucas county show the claimants maintained an abode in Ohio during the tax period in question. This evidence demonstrates that the claimants intended to retain their Ohio domicile.

V. CONCLUSION:

The totality of the evidence available to the Tax Commissioner shows that the claimants' actions during 2017 are consistent with those of individuals maintaining an Ohio domicile. Even though the claimants assert that they did not have a domicile in Ohio for the tax period in question, they failed to provide evidence indicating that they took affirmative steps to establish a new domicile in Michigan.

Therefore, the claimants have failed to rebut the presumption that they were domiciled in Ohio for the entirety of tax year 2017 as required by R.C. 5747.24(D). Based on the Ohio law and the authority discussed above, the facts require the conclusion that the claimants continued to be domiciled in Ohio despite the claimants' contentions. Consequently, the claimants' contention is not well taken, and the claimants are presumed to have been domiciled in Ohio for the tax year at issue.

Accordingly, the assessment is affirmed and 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

Ohio | Department of Taxation

Office of the Tax Commissioner
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FINAL DETERMINATION

Date:

MAY 26 2021

Ronald & Kathleen Levac
N4372 Snyder Lake Road
Neillsville, Wisconsin 54456

Re: Refund Claim No. 1919800991
Individual Income Tax – 2018

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

Tax Year	Refund Claimed
2018	$1,395.00

Ronald & Kathleen Levac ("the claimants") filed an application for refund for tax year 2018. The claimants' application came in the form of a 2018 individual income tax return received on July 18, 2019.[1] The return reported an overpayment of $1,395.00 and requested a refund of that amount. Upon initial review, the Department denied the refund because it was unable to verify the claimed Ohio income tax payments reported on the claimants' return. The Department requested documents reflecting the amount of Ohio individual income tax withheld or payments made on behalf of the claimants in a Documentation Request dated September 6, 2019. In response, the claimants submitted their 2018 Schedule K-1 and stated that the guaranteed payments on the K-1 included the amount of Ohio tax withheld. The claimants did not submit any additional documentation or evidence reflecting the amount of Ohio income tax withheld or payments made on their behalf.

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. Former R.C. 5747.08(G).

On the filing of an application for refund * * * if the tax commissioner determines that the amount of the refund * * * which the applicant is entitled is less than the amount claimed in the application, the commissioner shall give the applicant written notice by ordinary mail of the amount. * * * The applicant shall have sixty days from the date the commissioner mails the notice to provide additional information to the commissioner or request a hearing, or both. R.C. 5703.70(A). If the applicant does not request a hearing, but provides additional information, within the time prescribed by division (A) of this section,

[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."

the commissioner shall review the information, make such adjustments to the refund or compensation as the commissioner finds proper, and issue a final determination thereon. 5703.70(C)(2).

In this case, the claimant failed to submit sufficient evidence, documentation, or explanation to support the claimed refund amount. Because of this, the Department is unable to verify the amount of Ohio income tax withheld or payments made on behalf of the claimants. The footnotes of the Schedule K-1 state that the amount of guaranteed payments made to the claimants includes Ohio income tax withheld. The claimants did not submit any additional returns or documents verifying the statement in the K-1 or indicating the amount of Ohio income tax withheld or payments made on their behalf. Therefore, the Department cannot grant the requested refund due to a lack of documentation reflecting the amount of Ohio income tax withheld or payments made on behalf of the claimants.

Accordingly, the application for refund is denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAY 26 2021

Denise C. Macerelli
4009 Magnolia Dr.
Brunswick, OH 44212

Re: Assessment No. 02201800920426
Individual Income Tax - 2014

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

Tax	Interest	Penalty	Total
$ 1,284.00	$118.37	$236.74	$1,639.11

I. BACKGROUND

The Ohio Department of Taxation assessed the petitioner after adjusting the individual income tax return she filed for the 2014 tax year. Specifically, the Department disallowed the petitioners' Ohio Schedule B, line 55, lump-sum retirement credit. The petitioner does not contest the tax amount owed but requests an abatement of the penalties and interest amounts assessed. The petitioner requested a hearing but later waived her right to a hearing via email on May 9, 2021. Therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

II. AUTHORITY & ANALYSIS

Former R.C. 5747.055(C), applicable for the period in question, allowed taxpayers to claim a credit for certain lump-sum distributions. Division (C) of former R.C. 5747.055 stated that "[a]t the election of a taxpayer who receives a lump-sum distribution from a pension, retirement, or profit-sharing plan within one year * * *" the taxpayer is entitled to the lump sum retirement credit. Thus, the taxpayer must demonstrate that they received the entirety of the lump-sum within a single tax year. The Board of Tax appeal also recently affirmed that the "lump-sum distribution credit can only be taken on account of a total, lump sum distribution." *Patrick Vincent v. McClain*, BTA 2019-427, 2019 WL 4645215, 1 (Sept. 17, 2019).

In this case, the petitioner initially contested the denial of her lump-sum retirement credit but later withdrew her contention. Based on the petitioner's total amount of retirement income received and her age for the 2014 tax year, the petitioner is not entitled to a lump-sum retirement credit. Although the petitioner is not entitled to the lump-sum retirement credit, she is entitled to and received a $200.00 retirement income credit pursuant to former R.C. 5747.055(B) for the 2014 tax year.

III. PENALTY ABATEMENT

The Tax Commissioner may abate penalties when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the petitioner claims that her failure to comply was due to reasonable cause and the evidence and circumstances support a full abatement of the penalty. However, the interest cannot be abated, as the payment of interest is mandatory pursuant to R.C. 5747.08(G).

IV. CONCLUSION

Ultimately, the petitioner failed to demonstrate how the lump-sum retirement credit she claimed on her 2014 Ohio Schedule B, is in accordance with former R.C. 5747.055(C). Accordingly, the information currently available to the Tax Commissioner indicates that the tax and interest amounts assessed are accurate and based upon the best information available.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$1,284.00	$118.37	$0.00	$1,402.37

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

MAY 12 2021

Nicholas J. Markos
1169 Obetz Rd.
Columbus, OH 43207

Re: Assessment No. 02201909206268
Individual Income Tax – 2013

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

Tax	Interest	Penalty	Total
$1,354.78	$236.84	$500.00	$2,091.62

The Department assessed Nicholas J. Markos ("the petitioner") for not filing an Ohio individual income tax return. Evidence available to the Department reflects the petitioner had an obligation to file an Ohio individual income tax return but failed to do so. The petitioner objected to the assessment. The petitioner did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner.

R.C. 5747.13(E)(3) sets forth jurisdictional requirements for filing a petition for reassessment where a taxpayer has failed to file a required return. In these circumstances, the taxpayer must pay the total amount of the assessment within the same time period the taxpayer has to file a petition for reassessment except where: (1) the basis for the failure to file the return is an assertion of lack of nexus with Ohio; or (2) the taxpayer's correctly calculated tax liability is less than $1.01.

Here, the petitioner has not filed a required return and has not paid the full amount of the assessment. Additionally, the petition for reassessment makes no assertion of lack of nexus with Ohio, and the properly calculated tax liability is greater than $1.01. As a result, the Tax Commissioner does not have jurisdiction to consider the petition.

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

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

MAY 28 2021

Gerald L. McFee and April T. Compton
1292 Shale Run Dr.
Delaware, OH 43015

Re: Assessment No. 02201911308234
Individual Income Tax – 2011

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
$29,203.22	$6,774.21	$10,221.12	$46,198.55

The Ohio Department of Taxation assessed Gerald L. McFee and April T. Compton (hereinafter "the petitioners") for failing to file an Ohio individual income tax return for 2011. The petitioner's failure to file an Ohio return was inconsistent with the evidence available to the Tax Commissioner at the time, including information reported to Ohio by the IRS under authorization of Section 6103(d) of the Internal Revenue Code. The petitioners contend they did not have enough contacts with the State of Ohio to be subject to Ohio income tax and that none of their Federal Adjusted Gross Income for tax year 2011 is allocable to the State of Ohio. The petitioners requested a hearing on the matter.

The petitioners argue they moved to Ohio in 2015. In 2016, they allege they filed various state and federal returns using their Ohio address for mailing purposes. Department records show the petitioners purchased their current Ohio residence in 2015. Nothing in Department records suggest the petitioners lived or owned real estate in Ohio during tax year 2011. Department records show the petitioners were issued Ohio driver's licenses in 2015, registered to vote in Ohio in 2015 and 2016, and the earliest vehicle registrations in Ohio occurred in 2015. Department records do not show the petitioners doing any of those actions in tax year 2011. Additionally, there is currently no evidence available to the Department showing any income earned in the state of Ohio during tax year 2011.

Accordingly, the assessment is cancelled.

Current records indicate that no payment has 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 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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FINAL DETERMINATION

Date: MAY 26 2021

Paul & Theresa Muething
6400 Kincaid Road
Cincinnati, Ohio 45213

Re: Income Tax Refund: 9228301535
Tax Year: 2018

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

Tax Year	Refund Claimed
2018	$178.00

The Ohio Department of Taxation adjusted Paul & Theresa Muething's ('the claimants") after denying a pass-through entity ("PTE") credit claimed on their 2018 individual income tax return. The Department initially denied the PTE credit because it was unable to verify any payments on behalf of the claimants. The claimants contend the Department erroneously denied the credit and request that the PTE credit be allowed.

R.C. 5747.08(I) entitles investors in a PTE to a refundable credit equal to the investor's proportionate share of the tax paid by the PTE on behalf of the investor. The claimants submitted evidence which allowed the Department to verify the PTE credit reported on the claimants' individual income tax return. This evidence shows Muething Family RE, LLC paid a total of $178.00 in taxes on behalf of the claimants for the period in question. Based on the evidence now available to the Tax Commissioner, the claimants' contention is well taken.

Accordingly, the refund of $178.00 requested by the claimants is granted in full plus applicable statutory interest.

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

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FINAL DETERMINATION

Date: MAY 26 2021

Ethan D. & Jaclyn L. Schulton
3639 SE Yamhill Street
Portland, Oregon 97214

Re: Refund Request No: 1900601
Individual Income Tax - 2017

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

Tax Year	Refund Requested
2017	$9,180.00

The Ohio Department of Taxation adjusted Ethan D. & Jaclyn L. Schulton's ("the claimants") refund amount on their Ohio individual income tax return for tax year 2017. Specifically, the Department disallowed two deductions claimed by the claimants. First, was the Miscellaneous Federal Income Deduction of $6,077.00 on line 23 of their 2017 Ohio Schedule A. Second, was the Refund or Reimbursement Claimed on a Prior Year Federal Income Tax Return of $5,374.00 on line 20 of their Ohio Schedule A. The claimants object to the adjustment but did not request a hearing. Therefore, this matter is decided upon information available to the Tax Commissioner and the evidence supplied with the request for reconsideration.

I. Miscellaneous Federal Income Tax Deductions

The Miscellaneous Federal Income Tax Reduction on line 23 of the Ohio Schedule A is for adjustments necessary when Ohio law fails to conform with changes made to federal income tax law. R.C. 5701.11 (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. Additionally, former 5701.11(B)(1), applicable to the period in question, states in pertinent part that:

> "For purposes of applying * * * 5747.01 of the Revised Code to a taxpayer's taxable year ending after March 22, 2013, 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."

The amount claimed by the claimants as Miscellaneous Federal Income Deduction comes from the FICA Tip Credit claimed on their federal income tax return. The FICA Tip Credit is not a credit recognized by Ohio. The claimants argue that the FICA Tip Credit is similar to the Work Opportunity Tax Credit ("WOTC"). Generally, the WOTC entitles employers to a credit for hiring members of certain targeted groups. I.R.C. § 51(d). These groups include qualified veterans, qualified ex-felons, and qualified long-term unemployment recipients. The FICA Tip Credit allows employers to take a credit based on the amount of FICA and Medicare taxes paid on tips to employees reported to the employer. Therefore, the claimants' argument that the FICA Tip Credit is similar to the WOTC is not well taken.

In the present case, Ohio conformed with federal income tax law for tax years 2017 and prior. The most current legislative amendment was effective March 30, 2018. Accordingly, nothing can be claimed as a miscellaneous federal income tax deduction on the Ohio Schedule A for the tax year at issue. Furthermore, because the miscellaneous federal income tax deduction is for federal conformity adjustments, federal Schedule A adjustments are also disallowed on this line. Therefore, the claimants are prohibited from claiming any amount on line 23 of the 2017 Ohio Schedule A.

Based on the totality of the evidence, since Ohio was in conformity with federal income tax for the tax period in question, the claimants are unable to claim any amount on the Miscellaneous Federal Income Tax Deduction line.

II. Refund or Reimbursement Claimed on a Prior Year Federal Income Tax Return

The other portion of the disallowed deduction comes from the amount claimed by the claimants for Refund or Reimbursement Claimed on a Prior Year Federal Income Tax Return on line 20 of their 2017 Ohio Schedule A. This amount is claimed on line 21 of the claimants' 2017 federal return. The claimants state that this amount is the total of two refunds from 2015 which were not issued until 2017. The claimants submitted 2017 1099-G forms from Ohio and Colorado. Both indicate state refunds from 2015 which were issued in 2017.

R.C. 5747(A)(12)(a) states:

> "Deduct any amount included in federal adjusted gross income solely because the amount represents a reimbursement or refund of expenses that in any year the taxpayer had deducted as an itemized deduction pursuant to section 63 of the Internal Revenue Code and applicable United States department of the treasury regulations. The deduction otherwise allowed under division (A)(12)(a) of this section shall be reduced to the extent the reimbursement is attributable to an amount the taxpayer deducted under this section in any taxable year."

Based on the totality of the evidence, the amount of the deduction claimed for Refund or Reimbursement Claimed on a Prior Year Federal Income Tax Return is correct.

Accordingly, the claimants' claimed Miscellaneous Federal Income Deduction of $6,077.00 is disallowed in full. The claimants' claimed deduction for Refund or Reimbursement Claimed on a Prior Year Federal Income Tax of $5,374.00 is allowed in full. The allowance of this deduction results in a refund due of $8,971.00. Department records indicate that this refund has already been issued to the

claimants in the form of a payment for $8,783.00 issued on January 11, 2019 and a payment of $188.00 issued on February 2, 2019. These two payments satisfied the entire $8,971.00 refund amount. Accordingly, there is no additional amount due to the claimants.

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

Ohio | Department of Taxation

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FINAL DETERMINATION

Date: MAY 28 2021

Paula K. Taylor
607 Balsam Fir Dr
Cary, NC 27519

Re: Assessment No. 02201902478156
Individual Income Tax - 2017

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

Tax	Interest	Penalty	Total
$9,291.00	$292.22	$584.44	$10,167.66

I. BACKGROUND:

The Department assessed Paula K. Taylor ("the petitioner") after disallowing a claimed nonresident credit on her Ohio 2017 IT 1040 Individual Income Tax Return. The petitioner filed a petition for reassessment contending she was not domiciled in Ohio but rather domiciled in Celaya, Mexico during 2017. In support of her position, the petitioner submitted the following documents: her 2017 Ohio IT 1040, an Affidavit of Non-Ohio Residency/Domicile for the Taxable Year 2017, a 2017 Ohio IT NRC, and a copy of her 2017 W2 from Honda North America, Inc. The petitioner did not request a hearing; therefore, the matter is now decided based on the evidence currently available to the Tax Commissioner.

II. RELEVANT AUTHORITY

A. OHIO RESIDENTS ARE 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] Division (I) of R.C. 5747.01 defines a "resident" as an individual who is domiciled in this state, subject to R.C. 5747.24. A "nonresident" is an individual who is not a resident. R.C. 5747.01(J).

The tests set forth in divisions (B), (C) and (D) of R.C. 5747.24 examine the number of Ohio contact periods to arrive at a presumption of whether the individual is an Ohio resident for 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 two consecutive days in Ohio. R.C. 5747.24(E) indicates that an individual is presumed to

[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.

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.

The location of an individual's spouse may be considered when making a determination of an individual's domicile. Ohio Adm.Code 5703-7-16(A)(13).

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 criteria is met:

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

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

In the present case, the petitioner timely filed the Affidavit of Non-Ohio Residency/Domicile for the 2017 tax year. However, based upon records and evidence available to the Department, this affidavit contains false statements regarding the petitioner's domicile in Celaya, Mexico. This evidence includes the petitioner's purchase of property in Marysville, Ohio in July of 2017. Evidence available from the Union County Auditor indicates that the petitioner utilized the prior owner's Owner Occupancy Credit for 2017 before applying for the credit themselves in 2018. The petitioner listed an Ohio address on her state and federal tax filings from at least 2010 through 2018. The petitioner maintained an Ohio driver's license from 2003 through 2017 and in subsequent years. Additionally, evidence indicates that the petitioner's spouse resided and worked in Ohio during 2017. R.C. 5747.24(B)(1), effective for the period in question, states: "If the individual * * * makes a false statement, the individual is presumed * * * to have been domiciled in this state the entire taxable year." The petitioner states that she had 15 workdays in Ohio but has not submitted any evidence to verify her number of workdays or contact periods. Accordingly, the petitioner is presumed have had at least 213 contact periods with Ohio and to have been domiciled in Ohio for the entirety of 2017. The petitioner can rebut this presumption only with clear and convincing evidence to the contrary. R.C. 5747.24(D).

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

The Ohio Supreme Court has held that the "domicile of a person [is] where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." *Sturgeon v. Korte*, 34 Ohio St. 525, 535 (1878), citing Story, Conflict of Laws, Section

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

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

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

Notably, the Ohio Board of Tax Appeals 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.

III. FACTS & CIRCUMSTANCES:

In support of her assertion that she was not domiciled in Ohio, the petitioner submitted the following documents: her 2017 Ohio IT 1040, an Affidavit of Non-Ohio Residency/Domicile for the Taxable Year 2017 dated March 31, 2018, and a copy of her 2017 W2 from Honda North America, Inc. The petitioner's 2017 W2 reflects an Ohio address – 700 Timber Lake Drive, Marysville, Ohio 43040 – as her mailing address. Additionally, the petitioner's federal income tax filing and Affidavit of Non-Ohio Residency/Domicile reflect another Ohio address – P.O. Box 40, Hilliard, Ohio 43026 – as her mailing address. The petitioner claims to have only had 15 workdays in Ohio but did not submit evidence to verify the number workdays or contact periods with Ohio.

Irrespective of the petitioner's argument that she spent 2017 in Mexico, physical presence is not, in and of itself, a determinative factor for the purpose of determining domicile. Although the petitioner's income may have been subject to taxation by Mexico, it is also not indicative of, or impactful on, common law domicile.[2] Rather, residents of Ohio are subject to the individual income tax, regardless of where the individual earns or receives income. Although 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]

The intent to abandon one's domicile is shown by evidentiary factors including where the individual files federal income tax returns, where the individual votes, registers their vehicle, and maintains a driver's license. *Davis*, at *5-7. Although the petitioner contends that she was domiciled in Celaya, Mexico, her actions during 2017 show she maintained significant connections with Ohio. She also reinforced her connection to Ohio and continued to enjoy the rights and privileges afforded to Ohio residents during 2017. The petitioner used an Ohio mailing address on her Ohio and federal individual income tax returns during her time working in Mexico, including the period in question. Department records also reflect the petitioner maintained an Ohio driver's license throughout her time working in Mexico. The petitioner's own LinkedIn page states that she worked for Honda in Guadalajara, Mexico and Celaya, Mexico from September 2015 until September 2018 when she began working in Marysville, Ohio. The fact that the petitioner has listed multiple locations in Mexico which are tied to her employment indicates that she did not intend to be domiciled in Celaya, Mexico during 2017. These facts demonstrate that the petitioner did not intend to abandon her Ohio domicile, but was working abroad while maintaining an Ohio domicile.

Evidence available from the Union County Auditor shows the petitioner and her spouse purchased a home in Marysville, Ohio during the period in question. Records show that the petitioner and her spouse were granted a deed for 700 Timber Lake Dr., Marysville, Ohio 43040 on July 20, 2017.[4] Records indicate that the petitioner and her spouse utilized the prior owner's Owner Occupancy Credit for the property during 2017 and then applied for it themselves in 2018. Evidence available the Department indicates that the petitioner's spouse resided and worked in Ohio during 2017. The petitioner's continued connections with Ohio, the purchase a residence with her spouse in Ohio, as well as her spouse residing and working in Ohio indicate an intent to remain domiciled in the state. The totality of the evidence demonstrates that the petitioner did not have the intention to remain and establish domicile in Mexico.

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[2] 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 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 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] Andrea L Weaver, Union County Auditor. http://union.ohiorevaluations.com/SalesHistory.aspx?Parcel=2900191120170 (accessed on March 26, 2021).

IV. CONCLUSION:

The petitioner fails to rebut the presumption of Ohio domicile with clear and convincing evidence to the contrary. The totality of the evidence available to the Tax Commissioner show that the petitioner's actions during 2017 are consistent with those of an individual maintaining an Ohio domicile while working abroad. Although the petitioner has provided evidence of her physical presence in Mexico, she has not provided any evidence indicating that she took affirmative steps to establish a new domicile in Mexico. The petitioner maintained and renewed significant ties to Ohio, purchased a home in Ohio, used her Ohio mailing address on her Ohio and federal filings, and registered to vote in Ohio. Furthermore, the petitioner has not demonstrated the intent to permanently reside in Mexico. The evidence available to the Commissioner shows that the petitioner did not establish domicile in Mexico because her residence in Mexico was temporary in nature and tied to her employment.

Therefore, the petitioner has failed to rebut the presumption that she was domiciled in Ohio for the entirety of tax year 2017 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 the petitioner continued to be domiciled in Ohio despite her work in Mexico.[5] Consequently, the petitioner's contention is not well taken and she is presumed to have been domiciled in Ohio for the tax year at issue.

Accordingly, the assessment is affirmed.

Current records indicate that no 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 "Treasurer - State of Ohio." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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

Jeffrey A. McClain

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:

MAY 26 2021

Dustin G. Brandyberry
114 New Street
P.O. Box 87
Quincy, OH 43343

Re: Refund Claim No. 1900731
School District Individual Income Tax – 2018

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

Tax Year	Refund Claimed
2018	$715.00

Dustin G. Brandyberry ("the claimant"), filed a 2018 SD 100 reporting an overpayment of $715.00 and requesting a refund of that amount.[1] However, upon initial review, the Department denied the refund amount requested by the claimant in the form of a refund variance notice. In response to the refund variance notice, the claimant seeks an administrative review of the denied refund claim. 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 application for refund pursuant to R.C. 5703.70.

Any individual residing in the state of Ohio who lives during all or part of a tax year in a school district with an income tax, must file an SD 100 School District Income Tax Return with the Department and remit the tax due. *See* R.C. 5748.01. Department records reflect that the claimant filed a school district income tax return for the 2018 tax year. The claimant contends that his employer withheld $715.00 to pay school district income tax to District 7506. However, based on the W-2 available to the Department, the claimant's employer did not withhold any amount to pay school district income tax to District 7506. The W-2 shows his employer withheld $715.00 to pay local income tax to the locality of Jackson Center. Given that the claimant's request for a refund relies entirely on the claimed tax withheld by the claimant's employer for District 7506, this refund claim must be denied.

Accordingly, the refund claim is denied.

[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."

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAY 26 2021

Kathryn Dupont
6645 Seville Road
Seville, OH 44273

Re: Refund Claim No. 1963500187
School District Income Tax – 2018

This is the final determination of the Tax Commissioner with regard to an application for refund pursuant to R.C. 5747.11 concerning the following school district income tax refund amount:

Tax Year	Refund Claimed
2018	$417.00

Kathryn Dupont ("the claimant"), filed a 2018 Ohio SD 100 reporting an overpayment of $417.00 for School District 8501 and requested a refund of that amount.[1] Upon initial review, the Department determined the claimant resided in School District 8501 for approximately half of 2018 and issued a variance notice authorizing a refund in the amount of $214.00. In response to the refund variance notice, the claimant seeks an administrative review of the adjusted refund claim. 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 application for refund pursuant to R.C. 5703.70.

Any individual residing in the state of Ohio who lives during all or part of a tax year in a school district with an income tax, must file an SD 100 School District Income Tax Return with the Department and remit the tax due. *See* R.C. 5748.01. The claimant filed two school district returns for tax year 2018. The first return stated the claimant was a full-year nonresident of School District 8501. The second return reported that she was a part-year resident of School District 5204 and stated she was a nonresident of School District 5204 between January 1, 2018 and June 30, 2018. The claimant did not submit any additional documentation or evidence of where she resided during this portion of 2018.

Records available from the Medina County Auditor indicate that the claimant purchased property at 6645 Seville Rd, Seville, Ohio 44273 on July 5, 2018.[2] This property is located within District 5204, where the claimant filed as a part-year resident. Records also indicate that the claimant claimed the Owner Occupied Reduction on the Seville property after the purchase. The claimant did not submit any evidence

[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] Mike Kovack, Medina County Auditor. https://www.medinacountyauditor.org/transfers_php.php?parcel=041-15D-13-005 (accessed on May 17, 2021).

of domicile prior to the purchase of the Seville property. However, records available to the Department indicate that the claimant registered to vote on July 28, 2017 and listed 12074 Vince Drive, Doylestown, Ohio 44230 as her address. The Doylestown address falls within School District 8501. Records also indicate that the claimant listed the Doylestown address on her Ohio driver's license from July of 2017 through February of 2021. Additionally, the claimant registered multiple vehicles using the Doylestown address between 2018 and 2021. The claimant did not submit any evidence indicating that she did not reside within School District 8501 prior to purchasing the Seville property. The claimant also did not submit an additional part-year resident school district return indicating which school district she resided in for the first half of 2018. Therefore, the evidence indicates the refund variance resulting from school district taxes owed to School District 8501 is correct.

Accordingly, the additional refund request is denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 2 8 2021

All In One Market
419 N. Main St.
New Carlisle, OH 45344

Re: Assessment No. 100001115979
Sales Tax
Account No. 12-057388

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
$38,520.13	$3,215.78	$5,777.86	$47,513.77

The assessment is the result of an audit of the petitioner's sales from January 12, 2015 through December 31, 2017. A hearing was held.

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 provided z-tapes, however, the sales tax listed did not match the sales tax remitted by the petitioner. Audit Remarks, p. 6. Therefore, a mark-up analysis was conducted using inventory purchase invoices supplied by the taxpayer and its 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).

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

Audit Methodology

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As noted above, a mark-up analysis was used to calculate taxable sales. A mark-up analysis was used to calculate taxable sales based upon a block sample period of January 1, 2017 through December 31, 2017. The taxpayer and auditor mutually agreed upon this sample period during a phone conversation on March 1, 2018. Audit Remarks, p. 4. A mark-up analysis was conducted using the petitioner's inventory purchase records and the records supplied by the petitioner's suppliers. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco, other alcohol, pop & soft drinks, energy drinks, and other taxable merchandise. Each category was assigned a mark-up percentage based on evidence from the petitioner, industry standards, and state minimum requirements. The petitioner signed a letter of agreement specifying the audit methodology, sample period, and mark-up percentages.

Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The totals for each category of taxable merchandise were summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales (93.2143%). 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.

It is noted at the outset that the petitioner signed a memorandum of agreement that specified the methodology of the audit. The agreement specified that the audit would be conducted using a block sample methodology. The audit agreement is binding and enforceable. When entering into a valid, enforceable agreement, the petitioner waives any objection it may have regarding the method used to determine sales. *Markho, Inc. dba One Stop Carry Out and One Stop Mini Mart v. Tracy,* BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999), citing *Akron Home Medical Services v. Lindley,* 25 Ohio St.3d 107, 495 N.E.2d 417 (1986). *See, also, Shaheen, Inc. dba Abe's Quick Shoppe v. Tracy,* BTA No. 96-M-1231, 1998 WL 127061 (Mar. 20, 1998), citing *Akron Home Medical Services v. Lindley,* 25 Ohio St.3d 107, 495 N.E.2d 417 (1986).

Alternate Sales Figures

The petitioner contends that its alternate sales figures should be substituted for the tax liability resulting from the audit. The petitioner presented alternate sales totals at hearing and in a submission after the hearing. The petitioner claims the figures represent the correct amount of taxable sales for the audit period. The petitioner does not show how it arrived at these figures or present any evidence to support them. The petitioner also states the primary sales records from 2015 and 2016 were destroyed during a remodeling. The petitioner also maintains its 2017 primary sales records were never returned by the auditor. The petitioner signed a receipt on September 11, 2018 acknowledging that the submitted records, included the 2017 z-tapes, were returned. It is

unclear what the petitioner's sales estimates could be based on, as it maintains all primary sales records from the audit period have been destroyed or were not returned. The petitioner presents no data to support these alternative sales figures. The only documentation presented by the petitioner to support this contention is a spreadsheet of alternative sales numbers. Without any data to support these figures, this spreadsheet is insufficient to show an error in the assessment. Where there is an objection that the liability for taxable sales is excessive, the burden is on the petitioner to establish its actual tax liability or any other error in the assessment through competent, probative evidence. *Castle's Gas & Deli LLC v. Testa*, BTA No. 2015-1477, 2016 WL 3577464 (June 26, 2016), *3. The evidence submitted does not prove the petitioner's actual tax liability. It is merely a set of unsupported numbers which the petitioner would like to use instead of the established audit liability. The objection is denied.

The petitioner also submits several other general contentions stating the audit is based on incorrect calculations or assumptions. The petitioner has not elaborated on these contentions, presented evidence in support, or pointed to any specific calculation errors. The petitioner has not presented evidence sufficient to show error in the assessment. The objection is denied.

Exempt Sales

The petitioner contends the audit methodology does not account for exempt sales. The contention is not well taken because the audit process explained above would inherently take exempt sales into consideration. The audit process starts by marking up the petitioner's purchases of inventory to be sold in a taxable manner. This gives the auditor an estimate of the petitioner's taxable sales. Exempt sales would not have factored into this calculation since it is based on inventory purchases of taxable items. The estimated taxable sales are then divided by the petitioner's reported gross sales. This gives the auditor a taxable percentage of gross sales. The taxable percentage of gross sales is then applied to each period of reported gross sales. The data used to calculate taxable sales is based off inventory purchased and sold in a taxable manner. Items included in this calculation are things such beer, cigarettes, or energy drinks on which the petitioner should have charged sales tax. Utilizing this audit methodology would inherently avoid assessing tax liability on any exempt income the petitioner reported as part of the gross sales. The objection is denied.

Beer Sales

The petitioner contends it did not sell beer for part of the audit period and when it did, beer was not sold at the price used by the auditor. The auditor employed the same mark-up percentage as the minimum mark-up the petitioner is allowed to employ by law. Ohio Adm.Code 4301:1-1-72(B)(3). The petitioner presents no evidence showing when beer sales started or primary records indicating beer was sold below the state required pricing. The burden is on the petitioner to present evidence sufficient to show error in the assessment. The objection is denied.

Sample Period and Memorandum of Agreement

The petitioner contends the sample period was not representative of its business throughout the audit period. Additionally, the petitioner's representative contends he was not consulted before the petitioner signed the agreement. With regard to its general contentions concerning the

enforceability of the memorandum of agreement, the BTA has consistently held, and the Supreme Court of Ohio has affirmed, that by signing the agreement without written objection, petitioner may not challenge its contents on appeal. *Williard Drive Thru & Carry Out v. Testa*, BTA No. 2016-16, 2017 WL 1443857, *3 and *Akron Home Med Servs., Inc. v. Lindley*, 25 Ohio St.3d 107 (1986). The BTA in *Williard* further rejected the petitioner's specific reason of counsel retention as a reason for rescission, noting "[i]t is incumbent upon a taxpayer that does not understand its responsibilities and obligations during the audit process to obtain knowledgeable representation that can adequately advocate on behalf of the taxpayer's interests." *Id.* The petitioner has not presented any evidence showing the petitioner's representative was not involved in the signing of the agreement. The petitioner had every chance to consult his representative over the contents of the memorandum of agreement. The burden is on the petitioner to present evidence sufficient to show error in the assessment. The objection is denied.

Wine

The petitioner contends the assessed wine sales did not occur and should be removed from the assessment. The petitioner presented evidence sufficient to support the contention. The objection is allowed.

Penalty Abatement

The petitioner requests abatement of the penalty. The petitioner was assessed a reduced penalty during the audit. Considering the surrounding facts and circumstances, abatement of the penalty is warranted. The request for penalty abatement is granted.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$38,161.41	$3,184.97	$0.00	$41,346.38

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

MAY 28 2021

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

Associated Hygienic Products, LLC
2332 State Rt. 42 S.
Delaware, OH 43015

RE: Refund Claim No.: 20191785309
Sales Tax
Refund Period: 06/01/2015 – 07/31/2019

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $13,742.15 of sales tax filed pursuant to R.C. 5739.07. The Department initially denied the claim. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. The additional information resulted in the Department partially granting an amount of $13,314.45, plus applicable interest, on June 9, 2020, prior to the issuance of this final determination. A hearing was not requested.

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

The claimant contends that during the refund period, it made various purchases of tangible personal property that were used to repair equipment that is used as a part of their manufacturing process. The claimant contends that those purchases qualified for sales tax exemption pursuant to R.C. 5739.02(B)(42)(a). These contentions are well taken.

The Department reviewed the information provided by the claimant regarding the parts it purchased. The parts that were purchased were determined to be used to repair equipment in the claimant's manufacturing process based on the information provided to the Department. However, the Department initially denied the request in full because the claimant did not provide proof that they had paid the invoices that were provided.

The Department requested additional information, including proof of payment for the invoices previously provided. The claimant provided the proof of payment for most of the invoices but were unable to provide proof for three of the invoices still at issue. The three invoices without proof of payment cannot be refunded and the initial denial of the requested $427.70 was proper.

MAY 2 8 2021

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

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

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:

MAY 26 2021

Baumann Chevrolet Buick GMC Inc.
2291 W. St. Rt. 18
Tiffin, OH 44883

RE: Refund Claim No.: 20212342182
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $1,264.95, in sales tax, filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. No hearing was requested.

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

The claimant is a motor vehicle dealer. On or about September 15, 2020 the claimant collected and remitted sales tax on the sale of a 2011 Dodge Ram 1500. The claimant contends that a refund was returned to the customer when the transaction was reversed.

The claimant provided an Ohio Certificate of Title which reported the sales tax paid as $1,264.95. The claimant is requesting a refund for sales tax because this customer returned the vehicle and backed out of the sale. Based on the retail purchase agreement, the total sale price of the vehicle was $20,0039.95, which includes sales tax. A refund of sales tax for returned merchandise is granted when the vendor refunds the full purchase price and sales tax to a customer or credits the customer's account. Ohio Adm.Code 5703-9-11(A). "In no event shall a transaction be treated as a return of merchandise or a rejection of services * * * if the vendor or seller deducts from the customer's refund any amount for use, damage, or wear and tear of the merchandise returned, any restocking or handling charge, or otherwise fails to refund to the customer or credit the customer's account with the full purchase price and applicable tax." Ohio Adm.Code 5703-9-11(B). The claimant provided a retail purchase agreement, which showed the total sale price noted above, that a down payment of $4500 was made, and that the remainder of the total sale price was financed. Although the claimant has provided various documents, the record is unclear surrounding the funds exchanged for the vehicle, after this customer returned

the vehicle and backed out of the sale. There is no evidence or documents to validate that this customer's lien was cancelled or paid off. Additionally, there is no evidence that this customer was returned the $4,500 down payment. Even though the claimant provided a bank statement that showed a returned deposit item for $4,500, the claimant has not demonstrated that the $4,500 was returned to this specific customer. The Ohio Administrative Code, as stated above, requires the vendor to return the full purchase price and sales tax amount before a refund request can be granted. The Department has insufficient evidence to demonstrate that the customer received a refund or credit for the full purchase price and sales tax for the vehicle.

Accordingly, the claim for a refund is denied.

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

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

0000000222

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

Beth El – The Heights Synagogue
3246 Desota Ave.
Cleveland Heights, OH 44118

RE: Refund Claim No: 202003508
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $820.68, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

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

The claimant contends that they erroneously paid tax on telephone service for a church, which is tax exempt. The claimant contends that the claimant paid sales tax totaling $820.68 on these transactions. The auditor sent a denial letter requesting a spreadsheet as they had more than (25) invoices. In response to the denial letter, the claimant sent a spreadsheet for the invoices; however, the claimant also amended their refund request to request only $562.82 in tax. The claimant provided an Ohio Sales and Use Tax Blanket Exemption Certificate. Upon further inspection, the auditor identified that the claimant included other tax charges, which were charges other than sales tax from the invoices, and allowed a partial grant of the refund in the amount of $527.77 plus applicable interest. This amount was remitted to the claimant in December 2020.

In response to the partial denial, the claimant has not provided evidence to substantiate that other tax that was charged on telephone services for the church were erroneous or illegally paid sales tax. The Tax Commissioner can only refund an amount of sales tax, erroneously or illegally paid to the State. Therefore, the evidence submitted is insufficient to warrant a grant of the amounts previously denied.

Accordingly, the remainder of the refund claim is denied.

MAY 28 2021

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

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

0000000218

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

Beyond Esthetics LLC
341 Chambers Rd
Ontario, OH 44903-8774

RE: Assessment No.: 100001541495
Tax Type: Sales
Account No.: 70-153769
Reporting Period: 09/01/2019 – 09/30/2019

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

Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
$804.83	$12.23	$80.48	$28.17	$281.69	$1,207.40

A hearing was scheduled on April 27, 2021.

On March 3, 2020, the petitioner was issued an assessment after failing to file the sales tax return for the period shown above. After the issuance of the assessment, the petitioner filed a sales tax return, and a corrected assessment was issued. As a result, the assessment has been adjusted.

When a taxpayer fails to comply with a statutory filing deadline, the Ohio Revised Code gives the Tax Commissioner broad authority to levy assessments concerning the taxpayer's business activity, based upon all information available to the Tax Commissioner at that time. R.C. 5739.13.

The petitioner objects to the additional charge, additional charge penalty, and the penalty. The petitioner asserts that he made a mistake by filing late; however, once he received the assessment, he immediately filed his return. Each vendor is required to file a return for the preceding month on or before the twenty-third day of each month as stated in R.C. 5739.12(A)(1). Any vendor who fails to file a return *** in the manner prescribed under this section and the rules of the commissioner may, for each such return, be required to forfeit and pay into the state treasury an additional charge not exceeding fifty dollars or ten per cent of the tax required to be paid for the reporting period, whichever is greater, *** and such sum may be collected by assessment in the manner provided in section 5739.13 of the Revised Code. R.C. 5739.12(D). The Ohio Revised Code provides for both an additional charge for a vendor's failure to timely file sales tax returns and a penalty on sales tax assessments. *O'Brien v. Tracy*, BTA No. 96-B-665, 1997 WL 594266 (Sept. 19, 1997). R.C. 5739.133 provides that "a penalty may be added to every amount assessed under section 5739.13 or 5739.15 of the Revised Code." The

penalty applies not only to the actual sales tax assessed, but also to the additional charge imposed. *Ernst Enterprises, Inc. v. Tracy*, 68 Ohio St.3d 542, 629 N.E.2d 410 (1994). Based on the facts and circumstances, the additional charge is partially abated, while the additional charge penalty and penalty are fully abated.

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
$804.83	$12.23	$50.00	$0.00	$0.00	$867.06

Current records indicate that $817.06 in 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-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:
MAY 2 8 2021

BRP Manufacturing Company
637 N. Jackson St.
Lima, OH 45801

RE: Refund Claim No. 20181441299
Refund Amount Requested: $11,128.42
Refund Period: September 2014 – July 2018
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of $11,128.42 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant then provided additional information and the claim was partially approved in the amount of $11,109.16. A hearing was not requested.

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

Greto Corporation

The claimant requests a refund of tax paid on a purchase from the Greto Corporation. The claimant submitted a transaction spreadsheet which contained the transactions at issue. The spreadsheet identifies the contested purchase as tape, stretch film, kraft paper, and liner board. The claimant contends that this transaction is exempt because it is used to package and ship products pursuant to R.C. 5739.02(B)(15). The tax levied by R.C. 5739.02 does not apply to sales "of packages, including material, labels, and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale, including any machinery, equipment, and supplies used to make labels or packages, to prepare packages or products for labeling, or to label packages or products, by or on the order of the person doing the packaging, or sold at retail" when sold to a person primarily engaged in a manufacturing operation to produce tangible personal property for sale. R.C. 5739.02(B)(15). Additionally, when submitting a request for refund of tax, the claimant must provide copies of original invoices or similar documents and copies of canceled checks or some other proof that the invoices were paid in full, including the tax. Ohio Adm.Code 5703-9-07(A)(4).

As previously noted, the claimant submitted an excel spreadsheet containing a list of each transaction for which they requested a refund of tax. The spreadsheet contains columns that identify the invoice number and the corresponding check used to pay the invoice. Additionally, the claimant provided copies of checks used to pay the vendor. The transaction at issue is listed under invoice number 129240-01. In the column containing the check number used to pay the invoice, the claimant did not

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list a check number but instead stated "CANNOT FIND." Additionally, the invoice link provided by the claimant did not contain an invoice for review. Therefore, the item purchased cannot be verified, and without proof of payment, there is no evidence that tax was paid to the vendor.

Accordingly, the remaining request 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

0000000220

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

Centripetal Designs LLC
1379 Pingree Ave.
Lincoln Park, MI 48146-2064

RE: Assessment No.: 100001628449
Tax Type: Sales Tax
Account No.: 94-034633
Reporting Period: 08/09/2019 – 12/31/2019

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

Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
$2,000.00	$66.26	$200.00	$70.00	$700.00	$3,036.26

A hearing was scheduled for May 4, 2021; however, the petitioner did not appear.

On September 22, 2020, the petitioner was issued an assessment after failing to file the sales tax return for the period shown above. After issuance of the assessment, the petitioner submitted a petition for reassessment, based on the contentions listed below.

The petitioner contends that there is error in the assessment. The petitioner contends that his total sales, in Ohio for the entire year of 2019, were only $997.00. Also, the petitioner asserts that there should not be any sales tax owed since he already paid the State for any outstanding tax liability. These contentions are not well taken.

When a taxpayer fails to comply with a statutory filing deadline, the Ohio Revised Code gives the Tax Commissioner broad authority to levy assessments concerning the taxpayer's business activity, based upon all information available to the Tax Commissioner at that time. R.C. 5739.13. Here, the petitioner untimely filed this return. The petitioner was due to file this return in January of 2020; however, the petitioner did not file the return until January 22, 2021. The tax liability is adjusted below to reflect the untimely filed return.

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
$54.83	$2.74	$50.00	$17.50	$19.19	$144.26

MAY 2 8 2021

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-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: MAY 28 2021

Nicos Chapman
The Pit Candy Shop
8557 Daly Rd., Apt. 6
Cincinnati, OH 45231-5749

RE: Assessment No.: 100001620590
Tax Type: Sales Tax
Account No.: 31-394622
Reporting Period: 07/01/2019 – 12/31/2019

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

Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
$13,956.58	$454.72	$488.48	$1,395.66	$4,884.80	$21,180.24

A hearing was scheduled for May 6, 2021; however, the petitioner did not appear.

On September 17, 2020, the petitioner was issued an assessment after failing to file the sales tax return for the period shown above. After issuance of the assessment, the petitioner submitted a petition for reassessment, based on the contentions listed below.

The petitioner contends that he never received the audit paperwork. Further, the petitioner contends that there is error in the assessment because he is not and was never the owner of The Pit Candy Shop. These contentions are not well taken.

When a taxpayer fails to comply with a statutory filing deadline, the Ohio Revised Code gives the Tax Commissioner broad authority to levy assessments concerning the taxpayer's business activity, based upon all information available to the Tax Commissioner at that time. R.C. 5739.13. Based on these contentions, there is no documentation or evidence in file that substantiates the assertions by the petitioner. Therefore, the petitioner's objections are denied.

Accordingly, the assessment is affirmed as issued.

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

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determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000224

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:
MAY 28 2021

Cross the Street Ventures Inc.
145 N. Main St.
Bowling Green, OH 43402

RE: 4 Refund Claims
Refund Amount Requested: $1,286.64
Sales Tax

This is the final determination of the Tax Commissioner on four applications for refund, in the amount of $1,286.64, in sales tax filed pursuant to R.C. 5739.07. The claims were initially denied. The claimant disagreed with the denial and requested reconsideration of these matters. A hearing was not requested.

Claim No.	Claim Period	Refund Requested
202001217	06/01/18 – 06/30/18	$231.01
202001220	09/01/18 – 09/30/18	$360.95
202001219	10/01/18 – 10/31/18	$354.83
202001218	11/01/18 – 11/30/18	$339.85
	Total:	$1,286.64

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

June 2018

The claimant amended the tax return for the period of June 1, 2018 through June 30, 2018, lowering the taxable income. The claimant filed a refund claim for the period and provided a printout of the tax summary for the period. The tax summary did not match the original or amended tax returns to support the claim. This claim was denied. In the letter of denial, the claimant was instructed to submit "Proof of your original and amended figures. This may include sales journals, summary reports or cash register receipts used to file your return(s)."

In response to the letter of denial, the claimant provided the tax summary that was previously provided. The claimant also described that they erroneously filed the figures for July 2018 as the figures for the amended return. The sales report does not prove why the reported tax had

decreased and does not show the original return or figures. The Department requested additional information and was provided with a calculations worksheet that the claimant used to get the tax figures and a financial overview. The worksheet appears to be screenshots of an excel workbook and the tax calculations do not match the tax figures previously reported nor do they match the financial overview taxes. The Department again requested more information and was provided with more worksheet screenshots and explanations of the claimant's calculations. The additional worksheets show different tax calculations and the explanations provided do not explain why the tax amount is different from the amended return. Not all of the documents provided are primary business records and the information provided is inconsistent when compared with the other information provided. Further, none of the figures provided to the Department by the claimant as the proper tax for the period match the amended return. The claimant failed to provide conclusive proof of the proposed figures that is consistent with the returns as filed. The evidence in the file does not support the claimant's refund request.

September 2018 – November 2018

The claimant amended the tax returns for the periods of September 1, 2018 through November 30, 2018, lowering the taxable income in each periods. The claimant filed a refund claim for the periods and provided a printout of the tax summary for the periods showing a tax amount that did not match the original or amended tax returns to support the claim. This claim was denied. In the letter of denial, the claimant was instructed to submit "Proof of your original and amended figures. This may include sales journals, summary reports or cash register receipts used to file your return(s)."

In response to the letter of denial, the claimant provided the tax summary that was previously provided. The sales report does not prove why the reported tax amounts had decreased and does not show the original returns or figures. The Department requested additional information and was provided with a calculations worksheet the claimant used to get the tax figures and a financial overview. The claimant also explained that they were reporting the wrong figures at first reporting the gross sales, then the net sales, and finally that they should be deducting the carryout food from the net sales. The worksheet appears to be screenshots of an excel workbook and the tax calculations do not match the tax figures previously reported nor do they match the financial overview taxes. The Department again requested more information and was provided with more worksheet screenshots and explanations of the claimant's calculations. The additional worksheets show different tax calculations and the explanations provided do not explain why the tax is different from the amended return. Not all of the documents provided are primary business records and the information provided is inconsistent when compared with the other information provided. Further, none of the figures provided to the Department by the claimant as the proper tax for the period match the amended return. The claimant failed to provide conclusive proof of the proposed figures that is consistent with the returns as filed. The evidence in the file does not support the claimant's refund request.

Accordingly, the claims for refund are denied.

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MAY 2 8 2021

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: MAY 28 2021

D & B Quality Foods, Inc.
C/O Carol Scott
5900 Downs Rd.
Warren, OH 44481

Re: Assessment No. 100001765425
Sales Tax
Account No. 78-075073

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
$69,415.69	$7,568.91	$17,353.72	$94,338.32

The petitioner operates as a convenience store and gas station. This assessment is the result of a markup audit of the petitioner's sales from January 1, 2017 through December 31, 2019. The petitioner filed a petition for reassessment. A hearing was not requested.

Audit Methodology

The petitioner did not provide primary sales records and as a result the auditor engaged in a mark-up analysis pursuant to R.C. 5739.13(A). Audit Remarks, p. 7. The mark-up analysis was conducted using the profit and loss reports, purchase invoices, and records provided to the Department by the petitioner's suppliers. The auditor and petitioner agreed that 2018 would be a representative sample of the petitioner's business for the audit period. Audit Remarks, p. 4. Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The totals for each category of taxable merchandise were summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales of 74.6009 percent. The reported gross sales for each non-sampled month of the audit period were multiplied by that percentage to determine the calculated taxable sales for each non-sampled month. The calculated taxable sales for each non-sampled month were multiplied by the applicable tax rate to determine the sales tax liability for each non-sampled month. Sales tax liability for sampled months was determined

by multiplying the actual calculated monthly taxable sales for each sampled month by the applicable tax rate. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability.

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 Tax Commissioner erred in including distributer data in the mark-up audit. This objection is not well met. The petitioner refused to sign the distributor contact letter, stating that she buys product at the location subject to this audit and then transfers it to other locations that she owns. However, the petitioner failed to provide any records to support this claim and the auditor could not identify what products were moved between locations in the records provided. 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. Because the petitioner did not provide primary sales records, the Tax Commissioner was allowed to use the information provided to the department by the petitioner's suppliers. Therefore, the objection is denied.

Cigarette Rebates

The petitioner contends that the auditor failed to consider all of their cigarette rebates in the calculations. The petitioner agreed to a sample period of 2018 with the auditor. Audit Remarks, p. 4. In the letter of agreement, it was explained that the sample of 2018 would be used and, although the petitioner did not sign the letter of agreement, they also failed to provide an alternate audit methodology following the 10-day letter. Because the petitioner only provided Phillip Morris rebate records for 2019, they could not be used in the sample period as they were from a different year. Further, the auditor made numerous attempts to get rebate records or alternate records to support the petitioner's claims, but the petitioner failed to provide any Phillip Morris rebate records for 2018. Accordingly, this objection is denied.

Inventory

The petitioner contends that they hold a large stock of inventory for cigarettes and that should have been taken into consideration in the audit. The petitioner's contention is without merit. The audit methodology utilized in calculating the sales tax liability does not include the beginning nor ending inventory totals. While the Tax Commissioner acknowledges that it is probably true that not all inventory purchased during the sample period was resold during same period, it is probably also true that goods already held in inventory were sold during the sample period. Therefore, it stands to reason that the method used in calculating the sales tax liability already incorporates any inventory buildup into the calculation. Moreover, the Board of Tax Appeals rejected a similar argument in *Markho dba One Stop Carry Out and One Stop Mini Mart v. Tracy*, BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999). The objection is denied.

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Penalty

The petitioner requests penalty and interest abatement. The request for abatement of pre-assessment interest cannot be considered. The Tax Commissioner lacks jurisdiction to abate pre-assessment interest added to an assessment pursuant to R.C. 5739.133(B). Therefore, the request for interest abatement is denied. 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)(1). Penalty abatement is within the discretion of the Tax Commissioner. *See Jennings & Churella Constr. Co. v. Lindley,* 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The facts and circumstances support partial abatement of the penalty.

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$69,415.60	$7,568.91	$10,412.15	$87,396.75

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

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

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: MAY 26 2021

Generational Imperative Inc.
973 Hatch St.
Cincinnati, OH 45202

RE: Refund Claim No: 202000350
Refund Amount Requested: $3,120.58
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $3,120.58, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). The claimant amended its sales tax return for the tax period of January 1, 2018 through June 30, 2018, changing all the reported sales for the period to exempt. The claimant provided a screen print from the Ohio Business Gateway of the amended return filing to support the claim. This claim was initially denied. In the letter of denial, the claimant was instructed to submit "Proof of your original and amended figures. This may include sales journals, summary reports or cash register receipts used to file your return(s)."

In response to the letter of denial, claimant again provided the screen print for the amended return and a transaction detail printout. The screen print does not demonstrate why all of the reported sales are exempt and does not show the original return or figures. The transaction detail printout does not explain why the sales are exempt either, it is a list of transactions that occurred during the period separated into a few categories. The claimant failed to provide any information about the original figures or the reason for the amended return. The claimant failed to prove that it erroneously paid tax. The evidence in the file does not support the claimant's refund request.

Accordingly, the claim for a refund is denied.

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

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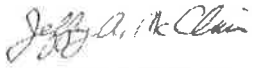

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000227

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

Lott Industries Inc.
3350 Hill Ave.
Toledo, OH 43607

RE: Refund Claim No: 20201839339
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $2,297.31, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

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

The claimant contends that two of its customers short paid sales tax on customer invoices, because the customers claimed that they were tax exempt. The claimant contends that sales tax totaling $2,297.31 was remitted on these transactions. When the claim was submitted, the claimant created credit memos for two customers, Kennametal Inc. ("Kennametal") and Calphalon Corporation ("Calphalon"); however, only Kennametal provided an exemption certificate. The auditor approved the Kennametal transactions, except for one transaction. That transaction was partially denied in the amount of $2.90, due to a data entry discrepancy. The auditor denied all transactions for Calphalon because an exemption certificate was not provided. The refund was granted in part for $270.57, plus applicable interest. The auditor sent a denial letter and requested additional information consisting of the exemption certificate that was not provided for Calpahlon. In response to the denial letter, the claimant sent a blanket certificate of exemption for Calphalon. Upon further inspection and review of the refund claim, the auditor identified that the exemption certificate was valid and granted a full refund. That refund amount was $2,006.64, which was $15.17 less than requested because of the claimant's timely filing discount.

The claimant has not provided evidence to substantiate that the remaining $18.07 was erroneous or illegally paid sales tax. As noted above, the Tax Commissioner can only refund an amount of sales tax, erroneously or illegally paid to the State Therefore, the evidence submitted is insufficient to warrant a full refund.

Accordingly, the claim for refund for the remaining $18.07 is denied.

100000228

MAY 28 2021

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 26 2021

McGrew Equipment Company
P.O. Box 6
Seven Valleys, PA 17360

RE: Refund Claim No.: 20202259896
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $686.72, in sales tax, filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. No hearing was requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). R.C. 5739.01(H)(1)(a)(ii) defines price as the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for "the cost of materials used, labor or service costs, interest, losses, all costs of transportation to the vendor, all taxes imposed on the vendor, and any other expense of the vendor." A refund of sales tax for returned merchandise is granted when the vendor refunds the full purchase price and sales tax to the customer or credits the customer's account. Ohio Adm.Code 5703-9-11(A). If the full price is not refunded to the customer, a partial refund cannot be 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 an equipment company. On or about June 30, 2020 the claimant collected sales tax on the sale of a Ford 4610 Series 2. 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 provided documentation in the form of an invoice, which reported the sales tax amount as $730.22. The claimant is requesting a refund of the sales tax based off a selling price that is less than the amount stated on the invoice. The total sale price on the invoice was $10,822.22; however, the claimant lists the purchase price on the refunded credit memo as $10,178.72. A refund of sales tax for returned merchandise is granted when the vendor refunds the full purchase price and sales tax to a customer or credits the customer's account. Ohio Adm.Code 5703-9-11(A). "In no event shall a transaction be treated as a return of merchandise

or a rejection of services * * * if the vendor or seller deducts from the customer's refund any amount for use, damage, or wear and tear of the merchandise returned, any restocking or handling charge, or otherwise fails to refund to the customer or credit the customer's account with the full purchase price and applicable tax." Ohio Adm.Code 5703-9-11(B). The claimant provided an invoice and credit memo for the returned vehicle which demonstrated that there was a difference between the refunded total and the purchase total. The refunded total was less $600 for a "trucking" fee. Additionally, the claimant is requesting a refund of sales tax in the amount of $686.72, which is less than the sales tax amount listed on the invoice purchase price of $730.22. The Ohio Administrative code, as stated above, requires the vendor to return the full purchase price and sales tax amount before a refund request can be granted.

Therefore, the evidence submitted is insufficient to warrant a refund of the sales tax as the claimant failed to demonstrate that the customer received a refund or credit for the full purchase price and sales tax for the vehicle.

Accordingly, the claim for a refund is denied.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

MAY 26 2021

Mercy Healthcare Physicians Defiance LLC
1701 Mercy Health Pl.
Cincinnati, OH 45237

Re: Refund Claim No. 20181310440
Refund period: February 1, 2017-July 30, 2017
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $1,054.70 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

The claimant is a nonprofit health care system with locations in Ohio and Kentucky. This refund claim pertains to tax paid on telephone bills invoiced between February 1, 2017 and July 30, 2017. A hearing was held on April 13, 2021.

At review of the initial refund application, the reviewing agent requested invoices and proof of payment. Subsequently, the claimant produced invoices but failed to provide cancelled checks and the claim was denied in whole. The claimant appealed the denial and produced both invoices and proof of payment for the at-issue transactions at hearing.

The claimant contends that, as a nonprofit organization, it erroneously paid tax on purchases of telecommunications services. Pursuant to R.C. 5739.02(B)(12) sales tax does not apply to "[s]ales of tangible personal property or services to … organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 and to any other nonprofit organizations operated exclusively for charitable purposes in this state…" The Code, in the same section, defines "[c]haritable purposes" as, among other activities, "the improvement of health through the alleviation of illness, disease, or injury …" The contention is well met.

Accordingly, a refund in the amount of $1,054.70 with appropriate 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

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

MAY 26 2021

Mercy Healthcare Physicians Lorain
1701 Mercy Health Pl.
Cincinnati, OH 45237

Re: Refund Claim No. 20181310434
Refund period: February 1, 2017 - July 30, 2017
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $5,553.66 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

The claimant is a nonprofit health care system with locations in Ohio and Kentucky. This refund claim pertains to tax paid on telephone bills invoiced between February 1, 2017 and July 30, 2017. A hearing was held on April 13, 2021.

At review of the initial refund application, the reviewing agent approved $139.13 of the claim, and requested invoices and proof of payment for the remainder. Subsequently, the claimant produced some cancelled checks but failed to provide invoices, and the remainder of the claim was denied. The claimant appealed the denial and produced both invoices and proof of payment for the at-issue transactions at hearing.

The claimant contends that, as a nonprofit organization, it erroneously paid tax on purchases of telecommunications services. Pursuant to R.C. 5739.02(B)(12) sales tax does not apply to "[s]ales of tangible personal property or services to … organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 and to any other nonprofit organizations operated exclusively for charitable purposes in this state…" The Code, in the same section, defines "[c]haritable purposes" as, among other activities, "the improvement of health through the alleviation of illness, disease, or injury …" The contention is well met.

Accordingly, a refund in the amount of $5,414.53 with appropriate 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

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 26 2021

Mercy Healthcare Physicians Lorain
1701 Mercy Health Pl.
Cincinnati, OH 45237

Re: Refund Claim No. 20181310435
Refund period: February 1, 2017-July 30, 2017
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $1,894.30 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

The claimant is a nonprofit health care system with locations in Ohio and Kentucky. This refund claim pertains to tax paid on telephone bills invoiced between February 1, 2017 and July 30, 2017. A hearing was held on April 13, 2021.

At review of the initial refund application, the reviewing agent requested invoices and proof of payment. Subsequently, the claimant produced some invoices but failed to provide cancelled checks, and the claim was denied in whole. The claimant appealed the denial and produced both invoices and proof of payment for the at-issue transactions at hearing.

The claimant contends that, as a nonprofit organization, it erroneously paid tax on purchases of telecommunications services. Pursuant to R.C. 5739.02(B)(12) sales tax does not apply to "[s]ales of tangible personal property or services to … organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 and to any other nonprofit organizations operated exclusively for charitable purposes in this state…" The Code, in the same section, defines "[c]haritable purposes" as, among other activities, "the improvement of health through the alleviation of illness, disease, or injury …" The contention is well met.

Pursuant to the claimant at hearing, the initial information provided to support the refund contained an inaccurate sales tax total. Due to this inaccuracy, an adjusted refund claim of $1,144.81 was submitted with the additional invoices and proof of payment.

Accordingly, a refund of $1,144.81 with appropriate interest is hereby authorized.

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

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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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: MAY 26 2021

Mercy Healthcare Regional Medical Center LLC
1701 Mercy Health Pl.
Cincinnati, OH 45237

Re: Refund Claim No. 20181310437
Refund period: February 1, 2017 - July 30, 2017
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $1,683.75 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

The claimant is a nonprofit health care system with locations in Ohio and Kentucky. This refund claim pertains to tax paid on telephone bills invoiced between February 1, 2017 and July 30, 2017. A hearing was held on April 13, 2021.

At review of the initial refund application, the reviewing agent requested invoices and proof of payment. Subsequently, the claimant produced some invoices but failed to provide cancelled checks, and the claim was denied in whole. The claimant appealed the denial and produced both invoices and proof of payment for the at-issue transactions at hearing.

The claimant contends that, as a nonprofit organization, it erroneously paid tax on purchases of telecommunications services. Pursuant to R.C. 5739.02(B)(12) sales tax does not apply to "[s]ales of tangible personal property or services to … organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 and to any other nonprofit organizations operated exclusively for charitable purposes in this state…" The Code, in the same section, defines "[c]haritable purposes" as, among other activities, "the improvement of health through the alleviation of illness, disease, or injury …" The contention is well met.

Accordingly, a refund in the amount of $1,683.75 with appropriate 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

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 26 2021

Mercy Healthcare Shared Services LLC
1701 Mercy Health Pl.
Cincinnati, OH 45237

Re: Refund Claim No. 20181310441
Refund period: February 1, 2017-July 30, 2017
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $27,157.99 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

The claimant is a nonprofit health care system with locations in Ohio and Kentucky. This refund claim pertains to tax paid on telephone bills invoiced between February 1, 2017 and July 30, 2017. A hearing was held on April 13, 2021.

At review of the initial refund application, the reviewing agent requested invoices and proof of payment. Subsequently, the claimant produced some invoices and a partial refund in the amount of $7,380.91 was approved, but failed to provide further cancelled checks, and the remainder of the claim was denied. The claimant appealed the denial and produced both invoices and proof of payment for the at-issue transactions at hearing.

The claimant contends that, as a nonprofit organization, it erroneously paid tax on purchases of telecommunications services. Pursuant to R.C. 5739.02(B)(12) sales tax does not apply to "[s]ales of tangible personal property or services to … organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 and to any other nonprofit organizations operated exclusively for charitable purposes in this state…" The Code, in the same section, defines "[c]haritable purposes" as, among other activities, "the improvement of health through the alleviation of illness, disease, or injury …" The contention is well met.

Accordingly, a refund in the amount of $19,777.08 with appropriate 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

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 26 2021

Mercy Healthcare St. Anne Hospital LLC
1701 Mercy Health Pl.
Cincinnati, OH 45237

Re: Refund Claim No. 20181310438
Refund period: February 1, 2017-July 30, 2017
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $21,895.36 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

The claimant is a nonprofit health care system with locations in Ohio and Kentucky. This refund claim pertains to tax paid on telephone bills invoiced between February 1, 2017 and July 30, 2017. A hearing was held on April 13, 2021.

At review of the initial refund application, a partial refund in the amount of $268.24 was granted, and the reviewing agent requested proof of payment and a statement as to why the name on produced invoices was different from that of the claimant. The claimant produced an explanation of the naming difference, but failed to provide proof of payment, and the remainder of the claim was denied. The claimant appealed the denial and produced both invoices and proof of payment for the at-issue transactions at hearing.

The claimant contends that, as a nonprofit organization, it erroneously paid tax on purchases of telecommunications services. Pursuant to R.C. 5739.02(B)(12) sales tax does not apply to "[s]ales of tangible personal property or services to … organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 and to any other nonprofit organizations operated exclusively for charitable purposes in this state…" The Code, in the same section, defines "[c]haritable purposes" as, among other activities, "the improvement of health through the alleviation of illness, disease, or injury …" The contention is well met.

The contention is well met, and the objection is granted as to all but three of invoices. The claimant's representative stated the remaining invoices numbered 0200347684001201610, 0200347684001201611, and 0200347684001SEP2716 were erroneously included in the initial refund claim, having already been credited in full to the claimant by the vendor. As such, they are not eligible for refund and have been voluntarily removed from the claim.

Accordingly, a partial refund in the amount of $1,718.58 with appropriate interest is hereby authorized.

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

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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: MAY 26 2021

Mercy Healthcare Youngstown LLC
1701 Mercy Health Pl.
Cincinnati, OH 45237

Re: Refund Claim No. 20181310439
Refund period: February 1, 2017 - July 30, 2017
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $5,297.11 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

The claimant is a nonprofit health care system with locations in Ohio and Kentucky. This refund claim pertains to tax paid on telephone bills invoiced between February 1, 2017 and July 30, 2017. A hearing was held on April 13, 2021.

At review of the initial refund application, a partial refund of $1999.12 with applicable interest was granted, and the reviewing agent requested invoices and proof of payment. Subsequently, the claimant produced some cancelled checks but failed to provide invoices, and the remainder of the claim was denied. The claimant appealed the denial and produced both invoices and proof of payment for the at-issue transactions at hearing.

The claimant contends that, as a nonprofit organization, it erroneously paid tax on purchases of telecommunications services. Pursuant to R.C. 5739.02(B)(12) sales tax does not apply to "[s]ales of tangible personal property or services to … organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 and to any other nonprofit organizations operated exclusively for charitable purposes in this state…" The Code, in the same section, defines "[c]haritable purposes" as, among other activities, "the improvement of health through the alleviation of illness, disease, or injury …" The contention is well met.

Accordingly, a refund in the amount of $3,297.99 with appropriate 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

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

MAY 28 2021

Metal Panel Systems Inc.
9283 Sutton Pl., Ste. 201
Hamilton, OH 45011

RE: Refund Claim No: 20191606114
Refund Amount Requested: $1,660.10
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $1,660.10, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

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

The claimant filed a refund application with no supporting documentation other than a submitted exemption certificate. The Department requested additional information and was provided with some documentation, but the provided documentation showed that the sale was still taxed and did not show a refund was paid to a customer. Pursuant to R.C. 5739.07(A), a refund will only be granted if the vendor has repaid the tax in full to the consumer or has billed a consumer but has not collected tax from the consumer. This claim was denied. In the letter of denial, the claimant was instructed to submit "Copies of credit memos, a statement from your customer stating that they agree to await reimbursement of the tax until final determination of the refund claim, or some other proof the accounts receivable was adjusted for the tax to account activity was not provided for the refund request."

In response to the letter of denial, claimant's representative talked with the tax examiner and indicated that the documentation requested was not available to the claimant and no supporting documentation was provided to the Department after the letter of denial. The claimant failed to provide any information about whether the sales tax was refunded to the customer. The evidence in the file does not support the claimant's refund request.

Accordingly, the claim for a refund is denied.

0000000230

MAY 28 2021

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

MAY 2 8 2021

Akram Rabah
26702 Brahms Dr.
Westlake, OH 44145

Re: 8 Assessments
Tax Type: Sales (Responsible Party)
Global Auto Body & Collision Inc.
Account No.: 18-509482

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 assessments:

Assessment No.	Filing Period	Total
100001559292	12/01/15 – 12/31/15	$7,349.85
100001559313	05/01/15 – 05/31/15	$6,760.49
100001559314	08/01/15 – 08/31/15	$8,005.37
100001559315	10/01/15 – 10/31/15	$7,501.55
100001559316	04/01/15 – 04/30/15	$6,796.74
100001559317	11/01/15 – 11/30/15	$8,987.80
100001559318	10/01/17 – 10/31/17	$8,756.59
100001559319	09/01/17 – 09/30/17	$3,732.87
	Total:	$57,891.26

These are responsible party assessments. Global Auto Body & Collision Inc. incurred sales tax liability resulting in sales tax assessments for the periods listed above. Those tax assessments were never satisfied by Global Auto Body & Collision Inc. and remained outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns, those in charge of, or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liabilities of Global Auto Body & Collision Inc. were derivatively assessed against Akram Rabah. Therefore, the only issue that can be considered is whether the petitioner was 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 scheduled for April 15, 2021, but the petitioner failed to attend.

The petitioner objects to being personally assessed for the outstanding sales tax liability of the underlying corporation and claims that the party assessed is not him. The petitioner provided no evidence or additional objections. The evidence indicates that the petitioner was a signatory on Global Auto Body & Collision Inc.'s articles of incorporation. The petitioner was listed as the

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president on Global Auto Body & Collision Inc.'s application for a vendor's license. The petitioner's social security number is consistent on the petition for reassessment, vendor's license application, and notice of assessment.

Generally, personal liability for officers of a corporation for failure of a corporation to file returns or pay taxes is limited to those officers who have control or supervision or are charged with the responsibility of filing returns and making payments. *Weiss v. Porterfield*, 27 Ohio St.2d 117, 271 N.E.2d 792 (1971): *Spithogianis v. Limbach*, 53 Ohio St.3d 55, 559 N.E.2d 449 (1990). However, even if an individual does not actually participate in or supervise the corporation's fiscal operations, if his or her position is one that would ordinarily be responsible for such duties, then the officer may be found to be responsible to the state. *Id.*

The Supreme Court of Ohio held that a corporate officer who had nothing to do with the day-to-day operations of a business was nonetheless personally liable. *McGlothin v. Limbach*, 57 Ohio St.3d 72, 565 N.E.2d 1276 (1991). Specifically, the Court stated: "[i]n that case the corporate officer had the authority to control or supervise the tax return and tax payment activities of the corporation." *Id.* Here, the president of a corporation would have the authority to control the finances of the business and the power to direct the operations of the corporation, regardless of the extent the petitioner exercised that authority.

Therefore, based on information available to the Tax Commissioner, it is determined that the petitioner is a responsible party of Global Auto Body & Collision Inc. under R.C. 5739.33.

Accordingly, the assessments are affirmed as issued.

Current records indicate that no payments have been made toward these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to these assessments 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 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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000209

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 2 8 2021

Schwarz Uniform Corp.
4711 State Rd.
Cleveland, OH 44109-5244

Re: Refund Claim No. 201902176
Sales Tax
Refund Period: May 1, 2018 - May 31, 2018
Refund Amount Requested: $794.00

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $794.00 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.

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

The claimant filed an amended return for the filing period above which indicated that their taxable sales were lower than originally reported. A letter was then issued by the Department to the claimant indicating that there was an overpayment on their account and requested supporting documentation in order to receive a refund if appropriate. The claimant provided Ohio Business Gateway printouts and a copy of its telefile spreadsheet. The auditor denied the refund request due to lack of evidence and requested proof of the claimant's original and amended return figures. The claimant provided a spreadsheet which aligned with the total figures on original filing. The spreadsheet did not contain any details concerning the nature of the claimant's transactions. The spreadsheet does not differentiate between exempt and taxable sales, it merely shows a total amount of sales tax charged each day. Additionally, the total sales tax charged for the reporting period on the spreadsheet does not match the sales tax liability reported on the amended return. A spreadsheet, alone, is insufficient evidence to establish a basis for a refund. In this case, the submitted spreadsheet also does not align with the figures reported on the amended return. This evidence is insufficient to support the claimant's refund request.

The claimant did not submit the requested support for the amended figures, such as sales journals, cash register receipts, summary reports used to prepare returns, or any other documentation speaking to the nature of its sales figures. The claimant has not met its burden of proving they are entitled to a refund.

Therefore, the claim for refund is denied.

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THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-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

0000000184

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

Laura Smith
8073 Tylersville Rd., Ste. 264
West Chester, OH 45069-2547

RE: 6 Assessments
Tax Type: Sales (Responsible Party)
Smith & English II Inc.
Vendor's License No.: 83-028085

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

Assessment No.	Time Period	Total
100001590170	12/01/16 – 12/31/16	$9,398.66
100001590171	04/01/16 – 04/30/16	$9,353.56
100001590182	04/01/17 – 04/30/17	$24,842.14
100001590183	01/01/17 – 01/31/17	$9,929.75
100001590185	10/01/16 – 10/31/16	$10,211.42
100001590186	09/01/17 – 09/30/16	$8,829.33
	Total	$72,564.86

These are responsible party assessments. Smith & English II Inc. incurred sales tax liability resulting in multiple assessments. These assessments were never fully satisfied by Smith & English II 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, those in charge of, or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Smith & English II Inc. has been derivatively assessed against Laura Smith. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues, nor consideration of remission of the penalties, can be considered. A hearing was held on May 18, 2021.

The petitioner objects to the assessment. The petitioner contends that she is not a responsible party for the periods shown above. The evidence in file supports this contention.

Therefore, the assessments are cancelled.

This final determination is intended to bind the Tax Commissioner only in the absence of

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evidence supporting a finding of responsibility under R.C. 5747.07(G). Should additional evidence become available, which contradicts any information relied upon in the final determination, the petitioner may be subject to future reassessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

Upper Cup Coffee Company Ltd.
121 Mill St., Ste. 117
Gahanna, OH 43230

RE: Assessment Nos.: 100001677717 & 100001700614
Tax Type: Sales
Account No.: 25-324341
Reporting Periods: 01/01/2020 – 01/31/2020, 02/01/2020 – 02/28/2020

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

Assessment Number	Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
100001677717	$2,000.00	$73.11	$200.00	$70.00	$700.00	$3,043.11
100001700614	$2,000.00	$67.36	$200.00	$70.00	$700.00	$3,037.36
					Total:	$6,080.47

A hearing was held on May 5, 2021.

The petitioner was issued assessments after failing to file sales tax returns for the periods shown above. The petitioner contends that the assessments were a result of their filing frequency changing at the start of 2020 from semi-annually to monthly. The petitioner contends that the returns have been filed and the tax has been paid. Evidence available to the Department supports this contention.

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

Accordingly, the assessments are amended as follows:

Assessment Number	Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
100001677717	$105.80	$5.55	$0.00	$0.00	$0.00	$111.35
100001700614	$124.87	$6.07	$0.00	$0.00	$0.00	$130.94
					Total:	$242.29

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Current records indicate that payments have been applied in complete satisfaction of these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000216

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

West Chester Collision Center Inc.
8895 Cincinnati-Columbus Rd.
Westchester, OH 45069

Re: Refund Claim No. 20202021914
Refund Amount Requested: $1,984.77
Refund Period: May 1, 2019 – May 31, 2019
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $1,984.77 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was not requested.

The claimant filed an amended return for the filing period of May 2019 that indicated its taxable sales were significantly lower than originally reported. A letter was then issued to the claimant indicating that there was an overpayment on their account and requested supporting documentation in order to receive a refund, if appropriate. The claimant returned the letter, requesting a refund, and did not provide any other documentation. The auditor denied the refund request and requested proof of tax collected. Also, in that denial letter, the claimant was advised that they were required to remit all tax collected from their customers, if they collected an amount greater than the statutory rate, or provide proof that the customers were reimbursed the difference between the correct and incorrect taxes. The claimant responded with a transaction report that organized the transactions by customer and type of transaction – parts, labor, storage, paint materials, and refunds; however, the transaction report did not include any reference to sales tax being charged or, if it was, how much was charged. Further, the claimant included a profit and loss report, which listed the sales tax discounts and taxes paid as part of payroll expenses; however, the figures did not match the discount for either original or amended return. The claimant did not include any information regarding the sales tax due for the month, just the amounts of the discount and payroll taxes.

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

Aside from the abovementioned submissions, the claimant provided no other evidence or documentation to substantiate this refund request. As mentioned, although a transaction report was provided, no description, detail, or computation described whether sales tax was being charged. Additionally, even though the claimant provided a profit and loss report that listed the sales tax discounts and taxes paid as part of payroll expenses, these figures do not correspond with the tax liability reported on either the original or amended returns. In that same report, the claimant

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demonstrated a discount and payroll tax and did not include any information regarding the sales tax due for the month. The claimant did not explain these irregularities or explain any of the figures calculated in the documents submitted, such as why these figures do not correspond with the tax liability reported on either the original or amended returns. The claimant has not met their burden of proving they are entitled to a refund.

Accordingly, the claim for refund is denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

XTI Inc.
760 Beta Dr., Ste. L
Cleveland, OH 44143

RE: Refund Claim No: 202003908
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $11,019.62, in sales tax filed pursuant to R.C. 5739.07. The claim was initially partially allowed in the amount of $1,077.91 plus applicable interest. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

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

The claimant contends that they erroneously paid tax on items that were purchased for resale. The claimant submitted documentation detailing credit card statements and invoices for numerous transactions. The original claim included credit card statements and five invoices. The taxpayer had marked off a total of 40 transactions on the credit card statements; however, the invoices only covered five of the 40 transactions. The claimant contended those documents show that the claimant paid sales tax totaling $11,019.62 on those transactions. The auditor part-paid the claim in the amount of $1,077.91 plus applicable interest for the five transactions with sufficient documentation.

The partial denial letter that was sent to the claimant also requested additional information regarding the other 35 transactions. The claimant resubmitted bank statements and invoices for the remaining transactions; however, the auditor was able to refund an additional $9,694.51 based upon 34 of the additional invoices. The auditor was able to account for the line items on the original credit card statements labeled 1 through 39 with the invoices submitted; however, the auditor did not receive any invoices attached to the item marked as 40 on the claimant's credit card statement, leaving $247.20 that could not be refunded.

According to R.C. 5739.01(E), "[r]etail sale" and "sales at retail" include all sales, except those 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. Here, the claimant provided sufficient information for 39 transactions, which was approved by the auditor; however, the claimant provided insufficient information for the fortieth transaction marked on the credit card statement to demonstrate that sales tax was erroneously or

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illegally paid for that transaction. The Tax Commissioner can only refund an amount of tax, erroneously or illegally paid to the State. Therefore, the evidence submitted is insufficient to warrant a refund of the additional sales tax.

Accordingly, the claim for a refund is denied.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 26 2021

Austin Atwood
9878 Mill Dam Rd.
Hebron, OH 43025

Re: Assessment No. 100001505957
Use Tax

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 and R.C. 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$978.75	$112.50	$131.81	$1,223.06

This assessment was issued based upon the conduct of a special audit of a motor vehicle title transfer. The petitioner purchased a 1967 Ford Mustang on February 8, 2017. At the time of the title transfer, the petitioner reported that he paid $1,500.00 for the vehicle. The Department was unable to verify the reported purchase price. The Department determined the actual purchase price for this vehicle was $15,000.00. This assessment was issued for the difference between the reported purchase price and the actual purchase price. The petitioner filed a petition for reassessment. A hearing was scheduled for March 23, 2021. The petitioner confirmed receipt of the hearing notice but did not attend the hearing. Per the petitioner's request, the hearing was rescheduled to March 29, 2021. The petitioner did not attend the rescheduled hearing. The petitioner was then given until April 29, 2021 to provide additional documentation, but no documentation was received by the Department.

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

The petitioner contends that he purchased the vehicle for $1,500.00 and that the State of Ohio deemed no tax is due on the vehicle. The petitioner failed to provide any evidence to support his

contentions. The petitioner failed to provide any documentation showing the purchase price such as a bill of sale or notarized statement from the seller. The objections are denied.

Accordingly, the assessment shall stand as issued.

Current records indicate that payments in the amount of $100.00 have been applied on this assessment, leaving a balance of $1,123.18. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post-assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

Battle Axe Construction LLC
8050 Beckett Center Dr.
West Chester, OH 45069-5017

Re: Assessment No. 100001584130
Consumer's Use Tax

This is the final determination of the Tax Commissioner regarding a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$8,255.00	$333.37	$1,238.25	$9,826.62

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. No hearing was requested.

The petitioner contends that the vehicle is exempt because it was purchased for use in its business for highway transportation for hire. R.C. 5739.02(B)(32) exempts "the sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are *primarily* used for transporting tangible personal property by a person engaged in highway transportation for hire." (Emphasis added.) According to R.C. 5739.01(Z), "highway transportation for hire" means "the transportation of personal property belonging to others for consideration" by the holder of a permit or certificate issued by Ohio or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration on the public highways."

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).

In order to qualify for the exemption, the petitioner is required to demonstrate that the motor vehicle in question is primarily used in transporting personal property belonging to others for consideration. The Department requested additional information from the petitioner twice, but the information provided both times was insufficient to support the contentions. The Transportation

for Hire questionnaire initially submitted by the petitioner listed "Hauling Construction Debris" as fifty percent of vehicle usage, "Hauling Products Sold by Your Business" as twenty-five percent of the usage and "Hauling Trash or Garbage" as twenty-five percent of the usage. However, the petitioner struck through the initial values and adjusted the percentages to show seventy percent of the usage as "Hauling goods … for others", twenty percent as "Hauling Construction Debris", ten percent as "Hauling Trash or Garbage", and zero percent as "Hauling Products Sold by Your Business". The petitioner provided the Department with contracts and a small number of invoices. The contracts did not specify which type of "hauling services" were to be conducted. The invoices included vague descriptions such as "Materials hauled", "Gravel hauled", or "Dirt hauled." The petitioner failed to show that they are engaged in the transportation of personal property belonging to another because they failed to prove that the materials hauled belonged to its customers. The petitioner did not show cause for the changes in the uses of the vehicle on their questionnaires and failed to show that the vehicle is used for an exempt use.

Further, to qualify for the exemption, the petitioner is required to have a permit or certificate issued by Ohio or the United States authorizing them to engage in highway transportation for hire. The petitioner is registered with PUCO and has a USDOT number. However, their USDOT registration shows they are only authorized for "Private(Property)" which is "[a] motor carrier whose highway transportation activities are incidental to, and in furtherance of, its primary business activity" and not "Auth. for Hire" which is "[a] commercial motor carrier whose primary business activity is the transportation of property/passengers by motor vehicle for compensation" by the USDOT[1]. *See Rumpke Container Serv., Inc. v. Zaino*, 94 Ohio St.3d 304, 762 N.E.2d 995 (2002). The Department's records show that the petitioner's PUCO permit authorizes highway transportation for hire in Ohio. However, the petitioner failed the first half of the test, thus the petitioner's objection is rejected.

Accordingly, the assessment shall stand as issued.

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

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

[1] https://safer.fmcsa.dot.gov/saferhelp.aspx#Class, Accessed April 22, 2021.

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

BRP Manufacturing Company
637 N. Jackson St.
Lima, OH 45801

RE: Refund Claim No. 20181441298
Refund Amount Requested: $13,792.52
Refund Period: February 1, 2015 – July 31, 2018
Use Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of $13,792.52 in use tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant then provided additional information and the claim was partially approved in the amount of $10,084.61. The claimant disagreed with the denial of the remaining amount and requested reconsideration of the matter. A hearing was not requested.

After additional information was submitted, the Department agreed tax was overpaid on transactions with tax totaling $11,120.89. However, a review of the evidence provided by the claimant indicated that the claimant used an incorrect tax rate when remitting use tax in the first and second quarters of 2018. The claimant's use tax returns show that the claimant used a tax rate of 5.95%, while the actual tax rate for both quarters was 6.75% for Allen County. Additionally, the refund amount requested by the claimant was calculated using the actual tax rate. Therefore, the amounts approved during Q1 and Q2 of 2018 were reduced by $562.92 and $473.57 respectively to account for the tax being remitted using an incorrect rate. Finally, the claim was increased by $.21 to account for a rounding error which resulted in the approved amount of $10,084.61.

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

Abrasive Products LLC

The claimant requests a refund of use tax remitted on a purchase from Abrasive Products. The claimant contends that they purchased abrasive rolls which are used on their buffer machine. The claimant maintains that this purchase is exempt pursuant to Ohio Adm.Code 5703-9-21(C)(4). "Machinery, equipment, and other tangible personal property used during the manufacturing operation that control, physically support, produce power for, lubricate, or are otherwise necessary for the functioning of production machinery and equipment and the continuation of the manufacturing operation" are exempt. Ohio Adm.Code 5703-9-21(C)(4). The petitioner provided an invoice in support of this refund request; however, the invoice is illegible. The taxpayer was provided with an opportunity to resubmit

this invoice but was unable to do so and stated that the file was corrupted. As previously stated, it is the taxpayer's burden to put forth evidence that allows the Tax Commissioner to come to the conclusion that they are entitled to a refund. An application for refund filed by a consumer must show that tax was paid to the vendor or directly to the state. Ohio Adm.Code 5703-9-07(A)(4). Additionally, the consumer must provide invoices or similar documents. Ohio Adm.Code 5703-9-07(A)(4)(a). While the petitioner provided an invoice in support of this transaction, it is not legible. Therefore, the Department cannot verify what the claimant purchased or confirm that the transactions is exempt. Therefore, the request for refund is denied.

EDCO of Ohio

The claimant requests a refund of use tax remitted on a purchase from EDCO of Ohio. The claimant identifies the purchase as poly-kraft paper, and states that it is exempt pursuant R.C. 5739.02(B)(15). The tax levied by R.C. 5739.02 does not apply to sales "of packages, including material, labels, and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale, including any machinery, equipment, and supplies used to make labels or packages, to prepare packages or products for labeling, or to label packages or products, by or on the order of the person doing the packaging, or sold at retail" when sold to a person primarily engaged in a manufacturing operation to produce tangible personal property for sale. R.C. 5739.02(B)(15). The claimant provided an invoice for this transaction that could not be opened. The Department asked the claimant to provide another copy, but the claimant indicated that the file was corrupted, and they were unable to do so. Without a copy of the invoice, the claimant has not provided sufficient evidence to prove that they are entitled to a refund because the purchase cannot be verified. The request for refund is denied.

Liberty Moving and Storage Co

The claimant requests a refund of use tax accrued on a purchase from Liberty Moving and Storage which the claimant identifies as millwright services. The claimant contends that Liberty Moving and Storage provided a non-taxable service. In support of this request, the claimant cites R.C. 5739.01(B)(3) which delineates specific services that are subject to taxation. Additionally, the claimant cites R.C. 5739.01(Y)(2), which provides that "personal and professional services" are defined as all services other than automatic data processing, computer services, or electronic information services.

The claimant provided an invoice in support of this transaction which contains the following description: "cut out and remove to yard. Cooling tank and conveyor system to #9 Bambury. Work Done on June 2, 3, 9, 10, 16, 17." It is not clear from this description what was included in the service provided. The claimant's transaction spreadsheet provides a general description regarding this transaction that states that the service in question involved disassembly, relocation and setup of manufacturing equipment. However, the invoice description is vague and even when taken in conjunction with the claimant's explanation, it is unclear what the service included. The request for refund is denied.

Lima Pallet Co Inc

The claimant requests a refund of use tax accrued on purchases from Lima Pallet Company which the claimant identifies as pallets. The claimant contends that the purchases are exempt pursuant to R.C. 5739.02(B)(15). Tax does not apply to sales "of packages, including material, labels, and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale, including any machinery, equipment, and supplies used to make labels or packages, to prepare packages or products for labeling, or to label packages or products, by or on the order of the person doing the packaging, or sold at retail" when sold to a person primarily engaged in a manufacturing operation to produce tangible personal property for sale. R.C. 5739.02(B)(15). Whether pallets are eligible for the packaging exemption depends on how they are used. The Supreme Court of Ohio established that in order for a pallet to be viewed as a package within the meaning of R.C. 5739.02(B)(15), it must "restrain movement of the packaged object in more than one plane of direction." *Custom Beverage Packers, Inc. v. Kosydar*, 33 Ohio St.2d 68, 294 N.E.2d 672 (1973). Additionally, the Board of Tax Appeals has allowed the exemption when the evidence presented establishes that the pallets in question do in fact restrain movement of the packaged object in more than one plane of direction. *Miles Laboratories, Inc. v. Limbach*, BTA No. 88-C-345, 1991 WL 235408 (Oct. 18, 1991).

The claimant has not provided any information regarding how they use the pallets in question. It is not clear if the pallets are bound such that they restrain the movement of the packed object in more than one plane of direction such as the BTA established in *Miles Laboratories*, or if the pallets are used more consistently with the situation described in *Custom Beverage Packers*[1]. The auditor requested pictures of the packaging area, which the claimant provided. However, these pictures do not include displays of the pallets after products manufactured by the claimant are loaded onto them. Additionally, the claimant was provided with an opportunity to provide clarity regarding this claim and failed to provide additional information. Therefore, as previously stated, a determination cannot be made regarding whether the pallets are bound such that they qualify as a package. Without additional information the request for refund cannot be approved.

Quantifi Digital

The claimant requests a refund of use tax accrued on purchases from Quantifi Digital which they identify as non-taxable services. The claimant contends that the vendor provided search engine marketing services. Pursuant to R.C. 5739.01(Y)(2)(k) providing digital advertising is an exempt professional and personal service. However, the court has previously discussed the taxability of advertising services and has consistently held that when advertising services involve the transfer of tangible personal property, the transaction is taxable if the true object of the transaction is the tangible personal property. For example, in *Federated Department Stores v. Kosydar*, the taxpayer purchased advertising materials consisting of radio and television commercials and sketches used in newspaper and magazine compositions. *Federated Department Stores v. Kosydar*, 45 Ohio St.2d 1, 3, 340 N.E.2d 840 (1976). Similarly, in *U.S. Shoe Corp. v. Kosydar*, the taxpayer purchased advertising services that

[1] The Supreme Court of Ohio determined that it was readily apparent that Custom Beverage Packers' unbound pallets did not qualify as a package, because they restrained the movement of cases of soft drinks in only one direction-downward. *Custom Beverage Packers, Inc. v. Kosydar*, 33 Ohio St.2d 68, 73, 294 N.E.2d 672 (1973).

included television and radio commercials, sales brochures, photographs, rental of movie projectors, presentation kits, promotional films, and annual reports. *U.S. Shoe Corp. v. Kosydar*, 41 Ohio St.2d 68, 322 N.E.2d 668 (1975). In both cases, the Supreme Court of Ohio held that the advertising services in question were taxable because the true purpose of the transactions were the advertising materials.[2]

The claimant provided invoices in support of the contested transactions but did not explain what "search engine marketing services" entails. The invoice descriptions contain two line-items. The first line item identifies the month followed by "display campaign - # Impressions" and the second line-item states "month-SEM." For example, invoice number 2017216 contains the following description: "FEB Display Campaign – 10,000 Impressions" and "FEB-SEM." The description alone does not explain the marketing services being provided or what the petitioner received. The claimant has not provided sufficient evidence to explain the marketing services provided by the vendor. The request for refund is denied.

R&D Projects Group LLC

The claimant requests a refund of use tax accrued on a purchase from R&D Projects Group. The claimant contends that the transaction is an exempt service. The claimant cites R.C. 5739.01(B)(3) which delineates specific services that are subject to taxation. Additionally, the claimant cites R.C. 5739.01(Y)(2), which provides that "personal and professional services" are defined as all services other than automatic data processing, computer services, or electronic information services.

The claimant identifies the transaction as a fee for R&D tax credit study. The invoice description says, "Interim R&D Credit Professional Service Billing" and contains expense charges for travel and meals. Additionally, the invoice contains a line at the top that says "For: 2017 R&D Tax Credit Study." The claimant did not submit any other information to explain this transaction, and the invoice description alone is not sufficient to identify the service or determine that the transaction is exempt. The request for refund is denied.

Sealing Resource Inc

The claimant requests a refund of use tax accrued on a purchase of gaskets from Sealing Resource. The claimant contends that the purchase is exempt pursuant to Ohio Adm.Code 5703-9-21(C)(11) which exempts "parts, components, and repair and installation services for items used in the manufacturing operation."

The claimant's transaction spreadsheet lists this as a single transaction. However, the claimant submitted two invoices and purchase orders for this transaction. Both invoices contain the same invoice number, however, the purchase orders are different. One of the purchase orders notes that there was a revision changing the quantity of gaskets purchased from two to four. While the claimant provided both purchase orders for refund, the evidence supports a refund only for the revised purchase order and invoice increasing the quantity. The tax being requested for refund is consistent with a purchase of six gaskets. However, the evidence indicates that the claimant only purchased four. The

[2] See *Federated Department Stores v. Kosydar*, 45 Ohio St.2d 1, 340 N.E.2d 840 (1976).; *U.S. Shoe Corp. v. Kosydar*, 41 Ohio St.2d 68, 322 N.E.2d 668 (1975).

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auditor has previously approved the tax accrued on the revised purchase order. The evidence does not support an additional refund for this transaction. Therefore, the request 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

0000000186

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

Crane Pumps & Systems, Inc.
420 3rd St.
Piqua, OH 45356-3918

RE: Assessment No. 100001748358
Use Tax
Account No. 97-138985

This is the final determination of the Tax Commissioner regarding a petition for reassessment filed pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$23,056.00	$3,137.00	$2,305.53	$28,498.53

The petitioner provides engineering solutions to manufacturing sectors. This assessment is the result of an audit of the petitioner's purchases from July 1, 2016 through June 30, 2019. A hearing was not requested.

The petitioner requested abatement of the interest and penalty. The Tax Commissioner lacks jurisdiction to abate preassessment interest added to an assessment pursuant to R.C. 5739.133. Therefore, this request cannot be allowed. Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The facts and circumstances support abatement of the penalty.

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$23,056.00	$3,137.00	$0.00	$26,193.00

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

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MAY 28 2021

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

000000051

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:

MAY 12 2021

Geddis Paving & Excavating
1019 Wamba Ave
Toledo, OH 43607

Re: Assessment No. 100000850801
Account No. 97-133153
Use Tax

This final determination of the Tax Commissioner hereby vacates and replaces the final determination issued on April 30, 2021.

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
$132,914.25	$8,262.86	$19,936.94	$161,114.05

The petitioner provides paving, excavating, and utility installation services. This assessment is the result of an audit of the petitioner's purchases from January 1, 2014 through December 31, 2016. The petitioner filed a petition for reassessment. A hearing was held.

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. All sales are subject to tax until the contrary is established. R.C. 5739.02. 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 History

On February 10, 2017, an auditor contacted the petitioner regarding the impending audit. Audit Remarks, Page 3. The petitioner and the auditor agreed that electronic transmittal of information was the preferred format for the transmission of information. *Id.* The petitioner gave the auditor a new contact, its controller, for the audit in June of 2017. *Id.*

The auditor sent a block sample methodology agreement letter to the petitioner in June of 2017. Audit Remarks, Page 9. The auditor and petitioner agreed upon 2016 as a sample year that was most representative of the petitioner's business during the audit period. Auditor's June 2017 E-mail. The petitioner did not express any concern about the agreement. Audit Remarks, Page 9. The auditor reviewed the petitioner's records on site in July of 2017. *Id.* The petitioner did not express any concerns about the sample methodology at the time. *Id.*

During the records review, the petitioner informed the auditor that it filed records on a fiscal year of April to March. *Id.* As a result, the auditor amended the sample period to remove the first three months of 2016, the agreed upon sample period. *Id.* The auditor provided an amended sample agreement removing those three months with the preliminary audit results in August 2017. *Id.*

After the preliminary audit results were provided, the petitioner objected to the block sample methodology. *Id.*, Pages 9-10. It requested that the purchases in Account 5020 (Asphalt Material) be reviewed comprehensively as it stated they relate to one taxable job in which the petitioner failed to pay sales tax. *Id.*, Page 8. The auditor responded that there were potentially other unknown items from the audit period that could skew toward more tax liability, such as a change in vendors over the years where one charged sales tax to the petitioner during the sample period while a prior one did not. *Id.* It also requested removal of some charges related to a mining operation that had some common ownership. These objections will be discussed below. After the hearing, the petitioner also submitted Account 7050 as an account that should not be extrapolated over the audit period and requested the removal of some fixed asset purchases.

Audit Methodology

Capital asset purchases were reviewed for the entire audit period. Taxable tax deficient capital asset purchases were listed and provided to the petitioner for review. The primary data source wherein most transactions are recorded was the Expense Report and Job Cost Expense Report. The petitioner provided the Department an electronic download of the population from this primary record source for the sample period. This information was condensed to a listing of all purchases that have tax relevance. Taxable expense purchases in the sample upon which tax was properly paid to vendors were treated as non-errors. Taxable expense purchases with no tax or insufficient tax paid to vendors or use tax accrued were coded as positive errors. Once all worksheet reviews were concluded, the total tax deficient expense purchases, by account, were divided by the total purchase activity in the same account for the sample period to determine the percentage of error for each account. These percentages of error were then applied to the corresponding total audit period account purchases to determine the untaxed taxable purchases for the audit period for each account. Audit Remarks, Page 4.

Objection to Audit Methodology

The petitioner maintains that including Account 5020 in the block sample distorts the error percentage of the expense account resulting in an inflated amount of use tax. It also states that Account 7050 has transactions from Belna Petroleum that were not representative of the audit period. It is noted that, while the petitioner did not object to the sample methodology until after

receiving the results, R.C. 5739.13 grants the Commissioner the right to "audit a sample of the vendor's sales or the consumer's purchases for a representative period, to ascertain the per cent of exempt or taxable transactions or the effective tax rate and may issue an assessment based on the audit." This section gives the Commissioner express authorization to both assess additional taxes when he determines additional taxes are due and to conduct representative sampling audits of both vendors' and consumers' records. *Lubrizol Corp. v. Tracy*, BTA No. 92-M-1342, 1994 WL 501269, *4 (Sep. 9, 1994). 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. It also could be true the petitioner used vendors outside of the sample period who did not charge sales tax, while using different vendors during the sample 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 auditor chose this period based upon discussion with the petitioner. Audit Remarks, Pages 4, 8-10.

The petitioner's argument is similar to one rejected by the Board of Tax Appeals ("BTA") in *Lubrizol Corp v. Tracy* and affirmed by the Eleventh District of Ohio. There, the taxpayer claimed because it never consented to a test check and had complete records with which a full audit was possible that a sample audit was incomplete and inappropriate. *Lubrizol Corp. v. Tracy*, 11th Dist. Lake No. 94-L-151, 1995 WL 453125, *2. Here, the petitioner argues that a "self-audit" of the entire audit period reflects less tax to be paid and the accounts are not representative of the sample period.

> This contention is contrary to the clear and unambiguous language of R.C. 5739.13. So long as the Commissioner has information that suggests that the taxpayer has not paid the appropriate amount of taxes, the sample audit is expressly permitted. [* * *] The test check audit will be found to be proper so long as it was employed when information in the possession of the Commissioner indicated that insufficient taxes had been paid by appellant. [* * *] Absent a showing that the methods employed by the Commissioner were unlawful or unreasonable, the procedures will be upheld.

Id., *3-4. The petitioner did not object to over half of the tax assessed so it is clear the parties agree that insufficient tax had been paid. This statutorily authorized the Tax Commissioner to estimate the amount due based on the records at his disposal. Therefore, the assessment was lawful. The auditor spoke with the petitioner and determined the representative period of 2016 with its help. Audit Remarks, Page 4. The auditor informed the petitioner of the purchase audit and its methods. It was not until a review of the petitioner's records that the auditor determined 2016 would be better represented by the fiscal year terms. The petitioner's arguments make clear it objects to 2016 as the sample period, *not* the fact the auditor, in good faith, determined removing January to March of 2016 was proper due to the petitioner's record-keeping. The auditor further reviewed the petitioner's objection to the sample period after the liability had been calculated and informed the petitioner about her reasonable disagreement with its objection. She further removed transactions from the audit based on information that was provided. *Id.*, Pages 3-5, 8-10.

In *Lubrizol*, the Tax Commissioner offered an agreement regarding the sample analysis to the taxpayer. It provided the methods for the test period. This was determined to be a "good faith" effort. *Lubrizol*, 11th Dist. Lake No. 94-L-151, *4. The only real difference is that the taxpayer in *Lubrizol* did not provide an alternative method. Here, the auditor reviewed the petitioner's proposal. She then provided a response declining the petitioner's proposal with information that explained why the sample method was reasonable to use. The facts and relevant law demonstrate the Tax Commissioner was reasonable in differing from the petitioner's opinion on how it should be audited for its own non-compliance. Further, the petitioner had no objections or any response to the initial sample agreement upon submission or when the auditor was reviewing its documents. "It appears incongruous for the taxpayer to refuse to participate in the planning of the audit at the time when meaningful participation is anticipated, and then attack the procedures on appeal claiming unfairness." *Id.* Therefore, the use of the block sample to determine the petitioner's liability as outlined in the original and amended purchase audit letter of agreement was valid. This objection is denied.

Separate Entity Objection

The petitioner objected to the inclusion of purchases that it states were for a future mining operation by Cornerstone Crushing, LLC ("Cornerstone Crushing") a separate entity that had similar ownership. Under R.C. 5741.02(A)(1), a tax is levied on "the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided." There is no question that the petitioner purchased, benefitted from, and kept the transactions on its books for the audit period, among other incidences of use. The Supreme Court of Ohio unanimously held that the Tax Commissioner has the right to assess both the petitioner and a separate entity where both have incidences of use that make it unclear as to who the true owner of the property is. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶¶ 37-41. There is no disagreement that the petitioner's transactions are purchases that it made for which no evidence was provided that any entity ever paid the requisite tax. The Department of Taxation will only collect the single tax liability due on the purchases per *Satullo*.

The petitioner has cited no law that would lead to an opposite result in this situation. It provided a letter of intent about a potential mine in August of 2016. It provided some invoices between the two companies. It stated at hearing there was no contract between the two companies. It also stated that Cornerstone Crushing did not even operate until the "end of November 2016" – one month prior to the end of the audit period. Petitioner's Exhibit F to Petition for Reassessment, Page 1. None of the information provided indicates that the petitioner did not exhibit usage of the items and, therefore, would not be liable for the tax. The petitioner has provided no explanation that would justify removal of these transactions from the assessment. Based upon the record, the Tax Commissioner cannot conclude that the assessment was in error. Therefore, this objection was denied.

Mining Objection

The petitioner further contends that the transactions at issue are further exempt from taxation because they are tangible personal property that will be used for mining. The petitioner generally objects stating that part of the assessment should be reduced because some purchases were used in

mining. After the hearing, the Tax Commissioner requested briefing regarding the specific transactions at issue, including documentary evidence such as usage logs and studies for proof of use in mining and the specific statute or law it was using as a basis for its objection. The petitioner did not respond to that request.

Purchases directly used in mining are exempt. R.C. 5739.02(B)(42)(a), R.C. 5741.02(C)(2). As with any claimed exemption from taxation, it must be strictly construed. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 15. Testimonial evidence without corroborating documentary evidence is insufficient to establish exempt use. *R.L. Best Co. v. Testa,* 7th Dist. Mahoning No. 18 MA 0001, 2018-Ohio-5400, ¶ 40. The mere showing that a petitioner is engaged in an excepted or exempted activity is not enough to confer an exception or exemption of its purchases. The petitioner must also demonstrate that the item purchased was used in an excepted or exempted manner. *Landscaping & Reclamation Specialists v. Tracy*, BTA No. 94-T-512, 1996 WL 765160, *6 (October 18, 1996) (further citation omitted). Without anything besides testimonial evidence, the Tax Commissioner cannot conclude that what has been provided meets the petitioner's burden to demonstrate exemption by mining. The objection is denied.

Fixed Asset Objections

The petitioner objects to the inclusion of three assets in the assessment. It first objects to the inclusion of an excavator it says it initially paid rent for and then purchased. It states that it should receive credit for tax paid on the transaction as it initially rented the item and then purchased it. The petitioner provided invoices that it alleges show tax paid on a rental. The petitioner does not dispute that the purchase price was listed as $300,000.00 on the invoice from Komatsu Financial. The measure of tax is the price of the item. R.C. 5741.01(G)(1); R.C. 5739.01(H)(1). The petitioner has not provided any information regarding a rental agreement of the property. The Tax Commissioner cannot conclude this meets the petitioner's burden to show error in the assessment. This objection is denied.

The petitioner also objects to the inclusion of a hammer that is a part of the excavator. It states that because the Tax Commissioner found that the petitioner was previously engaged in a manufacturing operation, this purchase is exempt. The mere showing that a petitioner is engaged in an excepted or exempted activity is not enough to confer an exception or exemption of its purchases. The petitioner must also demonstrate that the item purchased was used in an excepted or exempted manner. *Landscaping & Reclamation Specialists v. Tracy*, BTA No. 94-T-512, 1996 WL 765160, *6 (October 18, 1996) (further citation omitted). No documentary evidence on the use of this hammer was provided. This objection is denied.

The petitioner finally objects to the inclusion of two stackers. It states they are used in the quarry. It appears that the petitioner is also claiming that the purchase of these items is exempt from taxation as items used in a manufacturing operation. Again, the petitioner has not provided any information to demonstrate that the items were used in an exempt manner. This objection is denied.

Penalty Abatement

The petitioner requests full abatement of the penalty. Penalty remission is within the discretion of the Tax Commissioner. R.C. 5739.133(A)(3); R.C. 5739.13; *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Based on the facts and circumstances, the penalty abatement is warranted.

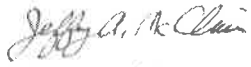
Therefore, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$132,914.25	$8,262.86	$0.00	$141,177.11

Current records indicate that a payment of $84,351.79 has been made towards the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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:

MAY 26 2021

The Herbert E. Orr Company
P.O. Box 209
Paulding, OH 45879

Re: Refund Claim No. 20181449558
Use Tax
Refund period: September 1, 2014 – May 31, 2018
Account No. 97-121959

This is the final determination of the Tax Commissioner on an application for refund of use tax in the amount of $7,949.65 filed pursuant to R.C. 5739.07 and 5741.10. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

The claimant is a manufacturer of forged lug wrenches and wire form products, and provides powder and e-coating for the automotive and agricultural industries. This refund claim pertains to tax paid on purchases of items used in the claimant's production and shipping between September 1, 2014 and May 31, 2018. Purchases in the claim consist of packaging and shipping supplies, repairs to fork trucks, bar code printers and handheld scanners, consumables used to finish dies and fixtures, and quality control tags and trackers. A hearing was held.

Upon initial review, a partial refund in the amount of $5,789.56 plus applicable interest was granted for all items save fork trucks and QC tags and trackers. The reviewing agent requested additional documentation for the denied items, such as statements of usage or other proof that the items were used in the claimant's manufacturing process.

The claimant appealed the denial and provided a plant schematic detailing their manufacturing process, a lease analysis for the fork trucks, a statement of usage for same, and a statement of usage for the QC tags. Each of these claims is addressed in turn below.

Fork Trucks

The claimant contends that these fork trucks are exempt under R.C. 5739.02(B)(42)(g). Based upon the plant schematic and description of operations provided by claimant, the contention is well met. As such, the refund request as to these transactions is approved.

QC Tags

The claimant contends that tags purchased from Brune Printing are not inspection tags, as they were classified in the initial denial, but tags that are placed on the parts that are still in the continuous manufacturing process to identify parts that have passed inspection and are saleable.

Sales tax does not apply to sales where the purpose of the purchaser is to use the thing transferred primarily in a manufacturing operation. R.C. 5739.02(B)(42)(g). "Thing transferred" includes "Machinery, equipment, and other tangible personal property used by a manufacturer to test raw materials, the product being manufactured, or the completed product…" R.C. 5739.011(B)(6). The Ohio Administrative Code provides a further definition of testing in this context. "'Testing' means a process or procedure to identify the properties or assure the quality of a material or part." Ohio Adm.Code 5703-9-21(B)(7).

Based on the statement of use provided by the claimant, the tags used as part of the QC process only mark which parts have been already cleared as "ready for sale." The labels are not used as testing equipment, they merely record the equivalent of test results. The labels to do not take samples, test the quality of the product, or provide results in and of themselves. Therefore, they are not used as "a process or procedure to identify the properties or assure the quality of a material or part" as required by the rule regarding the exemption for testing equipment. The refund request as to these transactions is denied.

Accordingly, a refund in the amount of $1,998.05 is approved.

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: MAY 19 2021

KMC Holdings LLC
114 S. Bloomingdale Rd.
Bloomingdale, IL 60108

RE: Assessment No.: 100001013421
Reporting Period: 10/01/2010 – 09/30/2016
Use Tax
Account No.: 97-304416

This final determination of the Tax Commissioner hereby vacates the final determination issued on April 21, 2021 pertaining to Assessment 100001013421.

This matter will be reconsidered based upon additional information to be submitted.

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:
MAY 2 8 2021

Mastin Site Services LLC
13323 Woodbrier Ln.
Grand Rapids, OH 43522

Re: Assessment No. 100001391485
Consumer's Use Tax

This is the final determination of the Tax Commissioner regarding a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$688.75	$10.56	$103.31	$802.62

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. No hearing was requested. The Department requested additional information on February 22, 2021 but did not receive an answer to the request.

The petitioner contends that the vehicle is exempt because it was purchased under a PUCO number. R.C. 5739.02(B)(32) exempts "the sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are *primarily* used for transporting tangible personal property by a person engaged in highway transportation for hire." (Emphasis added.) According to R.C. 5739.01(Z), "highway transportation for hire" means "the transportation of personal property belonging to others for consideration" by the holder of a permit or certificate issued by Ohio or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration on the public highways."

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).

In order to qualify for the exemption, the petitioner is required to demonstrate that the motor vehicle in question is primarily used in transporting personal property belonging to others for

consideration. While having a permit issued by Ohio authorizing transportation of property of others is a part of the exemption, it is not the only requirement. The petitioner's contention that they purchased the vehicle under a PUCO number is not sufficient to qualify for the exemption. The petitioner's website advertises vehicles that could be used for exempt and taxable purposes.[1] The petitioner's response to the Department's request for information to describe the uses of the vehicle was insufficient and the petitioner did not return a questionnaire that was requested with the original assessment. The petitioner provided the Department with a picture of the vehicle, showing it is a dump truck, and an invoice that indicated that they hauled "dirt, stone/dirt, or rough", who they contracted with, and the price they were paid. While it is shown that the hauling was done was for consideration, it cannot be equally concluded that it was personal property belonging to others. The proof provided does not indicate where the "dirt, stone/dirt, or rough" was sourced from, if it was carried to or from the customer, if the customer maintained any control or direction about the destination or disposal. The petitioner failed to meet the burden to show error in the assessment and did not prove that the vehicle is used primarily for exempt purposes. The petitioner's objection is denied.

Accordingly, the assessment shall stand as issued.

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

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] https://www.mastinsiteservices.com/ (Accessed March 24, 2021)

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 26 2021

Ohio Utilities Protection Services
P.O. Box 729
12467 Mahoning Ave.
North Jackson, OH 44451

RE: Refund Claim No. 20191692273
Tax Type: Use
Refund Period: January 1, 2018 – June 30, 2018

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $217.98, plus applicable interest in 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 contends that it erroneously paid sales tax for six exempt transactions. The claimant contends that it is a not-for-profit organization, and its purchases are exempt due to its tax status as a 501(c)(6). The petitioner contends that it operates exclusively for the charitable purpose of the improvement of health through the alleviation of injury.

Background

Ohio Utilities Protection Services is a tax-exempt, 501(c)(6) organization pursuant to the Internal Revenue Code. The claimant provides utility line marking services. The claimant is the 811-contact number for residents to call to have utility lines marked when digging near underground utility lines. The claimant contends that it purchased natural gas used for heating the business premises and water. The claimant contends that as a tax-exempt organization, its purchases are exempt from sales and use tax. The claimant's contentions are addressed in detail below.

Tax Exempt Entities

The claimant contends that it overpaid sales and use tax for six transactions of natural gas from Dominion Energy Solutions from January through June of 2018. The claimant submitted invoices from Dominion Energy Solutions and bank account information regarding the transactions. The Department informed the claimant in the initial denial letter that the

Department required additional evidence to support the tax exemption, such as a copy of the Federal 501(c)(3) determination letter from the Internal Revenue Service.

R.C. 5739.02(B)(12) provides a tax exemption for sales of tangible personal property or services to churches, to organizations exempt from taxation under section *501(c)(3) of the Internal Revenue Code of 1986*, and to any other *nonprofit* organizations *operated exclusively for charitable purposes*. (Emphasis added.)

The claimant submitted two letters dated November 1, 1980 and November 28, 1980 from the Internal Revenue Service designating the claimant a tax-exempt, 501(c)(6) organization in support of its contention. During review of the claimant's support, the auditor noted that the claimant failed to demonstrate it was a tax-exempt 501(c)(3) organization under the Internal Revenue Code of 1986 as required by R.C. 5739.02(B)(12). The claimant contends that it is a not-for-profit organization that operates exclusively for the charitable purpose of the improvement of health through the alleviation of injury. The claimant operates as a "call before you dig" contact service that identifies underground utility lines. The claimant's operations do not improve health through the alleviation of injury, but rather prevents injury by providing the marking of underground utility lines. Therefore, the claimant's operations do not satisfy the definition of "charitable purposes" as defined in R.C. 5739.02(B)(12).

Further, as stated by the claimant, the claimant operates as a not-for-profit, not a nonprofit as required by R.C. 5739.02(B)(12). The Internal Revenue Code and R.C. 5739.02(B)(12) provide that a 501(c)(3) organization is expressly prohibited from engaging in more than an insubstantial number of activities not in furtherance of its exempt purpose, whereas a 501(c)(6) organization may engage in more than an insubstantial number of activities not in furtherance of its exempt purpose.[1] Additionally, R.C. 5739.02(B)(12) prohibits a nonprofit organization from a substantial part of the activities that consist of otherwise attempting to influence legislation. Similarly, the Internal Revenue Code prohibits a 501(c)(3) organization from attempting to influence legislation as a substantial part of its activities.[2] The petitioner's website contains a page dedicated to the Ohio Underground Damage Prevention Coalition. The website states, "[the] Ohio Underground Damage Prevention Coalition (OUDPC) is a dedicated group of leaders who serve their industry and communities by working to *create and advocate for legislation* that will address the needs within Ohio's excavation laws." (Emphasis added.)[3] The claimant serves as the Coalition's Secretary. *Id.* Based on the operations of the claimant and its income tax status as registered with the Internal Revenue Service, the claimant does not qualify as an exempt nonprofit under R.C. 5739.02(B)(12).

Further, R.C. 5739.02(B)(12) specifically excludes sales to any organization for use in the operation or carrying on of a trade or business. Section 501(c)(6) of the Internal Revenue Code provides for the exemption of the following types of organizations: business leagues, chambers

[1] *https://www.irs.gov/charities-non-profits/common-tax-law-restrictions-on-activities-of-exempt-organizations (accessed April 30, 2021).*
[2] *https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations (accessed May 3, 2021).*
[3] *https://www.oups.org/legislative-coalition-oudpc/ (accessed May 3, 2021).*

of commerce, real estate boards, boards of trade, and professional football leagues.[4] All of the organizations listed are organizations for use in the operation or carrying on of a trade. Since such trade organizations are excluded from R.C. 5739.02(B)(12), the claimant has not satisfied its burden that the claimant is entitled to a refund as required by R.C. 5739.07. The evidence submitted is insufficient to warrant a refund of the use tax. 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.

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

[4] *https://www.irs.gov/charities-non-profits/other-non-profits/types-of-organizations-exempt-under-section-501c6 (accessed May 3, 2021).*

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 26 2021

Patrick Products, Inc.
150 S. Werner St.
Leipsic, OH 45856

Re: Assessment No. 100000808471
Use Tax
Account No. 97-164630

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$75,456.05	$3,890.41	$11,318.32	$90,664.78

The assessment is the result of an audit of the petitioner's purchases from July 1, 2013 through December 31, 2016. A hearing was held.

As an initial matter, assessments are presumptively valid. *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing, *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983); *Automotive Warehouse, Inc. v. Limbach*, BTA No. 87-D-652, 1989 WL 82761 (Jan. 13, 1989). Exemptions from taxation are to be strictly construed. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). The sale or use of tangible personal property is presumed taxable. *Moulton Gas Service, Inc. v. Zaino*, 97 Ohio St.3d 48, 2002-Ohio-5309, 776 N.E.2d 72 ¶ 12. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove their objections. This burden means the petitioner must do more than merely restate the exemption. *Safety-Kleen Corp. v. Tracy*, BTA No. 95-L-1092, 1998 WL 887688 (Dec. 11, 1998), citing *Stotts-Friedman Co. v. Lindley*, 69 Ohio St.2d 348, 432 N.E.2d 202 (1982).

Audit Methodology

A block sample analysis of purchases and a comprehensive review of fixed assets was used to calculate use tax due based upon a sample period of January 1, 2016 through December 31, 2016. The petitioner and auditor mutually agreed upon the calendar year 2016 as the sample period. Audit Remarks, p. 6. The petitioner signed a memorandum of agreement that specified the methodology of the audit. The agreement specified that the audit would be conducted using a block sample of purchases, as well as a comprehensive review of capitalized assets. The audit agreement

is binding and enforceable. When entering into a valid, enforceable agreement, the petitioner waives any objection it may have regarding the method used to determine sales. *Markho, Inc. dba One Stop Carry Out and One Stop Mini Mart v. Tracy,* BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999), citing *Akron Home Medical Services v. Lindley,* 25 Ohio St.3d 107, 495 N.E.2d 417 (1986). *See also Shaheen, Inc. dba Abe's Quick Shoppe v. Tracy*, BTA No. 96-M-1231, 1998 WL 127061 (Mar. 20, 1998), citing *Akron Home Medical Services v. Lindley,* 25 Ohio St.3d 107, 495 N.E.2d 417 (1986). The petitioner's objections will be addressed below.

HVAC

The petitioner contends twelve transactions concerning fixed assets are exempt as tangible personal property incorporated into real property. Use tax is applicable to "the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided." R.C. 5741.02(A)(1). R.C. 5741.02(C)(2) excepts from the use tax the acquisition of "tangible personal property or services, the acquisition of which, if made in Ohio, would be a sale not subject" to the sales tax.

In designating the transactions to which R.C. 5739.02 "sale" and "selling" applies, R.C. 5739.01(B)(5) allows that "... a construction contract pursuant to which tangible personal property is or is to be incorporated into a structure or improvement on and becoming a part of real property is not a sale of such tangible personal property." R.C. 5701.02(A) defines real property as "...unless otherwise specified in this section or 5701.03 of the Revised Code, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto."

R.C. 5701.03 provides the differentiation between real property and tangible personal property referenced in the "unless otherwise specified" language of R.C. 5701.02(A). "'Personal property' includes every tangible thing that is the subject of ownership, whether animate or inanimate, including a business fixture, and that does not constitute real property as defined in section 5701.02 of the Revised Code." R.C. 5701.03(A). The next section, R.C. 5701.03(B), defines "business fixture" as "...an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty." Therefore, if the tangible personal property primarily benefits the business on the property it is a business fixture, not real property, and does not receive the R.C. 5739.01(B)(5) exemption. Ohio Adm.Code 5703-9-14(B); *Metamora Elevator Co. v. Fulton City Board of Education,* 143 Ohio St.3d 359, 364, 2015-Ohio-2807, 37 N.E.3d 1223; *Funtime, Inc. v. Wilkins,* 105 Ohio St.3d 74, 78, 2004-Ohio-6890, 822 N.E.2d 781.

Further, pursuant to R.C. 5739.01(B)(3)(a) and (b), repair and installation of tangible personal property subject to taxation is included in the definition of "sale" and "selling" and likewise subject to taxation. ("Sale" and "selling" include all of the following transactions for a consideration in any manner...All transactions by which [a]n item of tangible personal property is or is to be repaired...[a]n item of tangible personal property is or is to be installed..."). Therefore, the nature of the fixture or improvement controls the taxability of any subsequent repairs or installations related to that property.

To determine the nature of the thing incorporated, R.C. 5701.02 and 5701.03 must be read in tandem:

> Reading the two statutes in pari materia and harmonizing them to give effect to the language of both statutes, we find that the correct order of application is as follows: first, determine whether the item meets the requirements of one of the definitions of real property set forth in R.C. 5701.02. If the item does not, then it is personal property. If the item fits a definition of real property in R.C. 5701.02, it is real property unless it is "otherwise specified" in R.C. 5701.03. If an item is "otherwise specified" under R.C. 5701.03, it is personal property.

Funtime, Inc. v. Wilkins, 105 Ohio St.3d 74, 79, 2004-Ohio-6890, 822 N.E.2d 781. Both statutes and case law reinforce the standard that a business fixture is tangible personal property that primarily benefits the business conducted on the premises and not the property itself.

As fixtures, the tangible personal property does meet the definition of real property under R.C. 5701.02. However, the next step is to determine if the real property is "otherwise specified" in R.C. 5701.03. "If the item fits a definition of real property in R.C. 5701.02, it is real property unless it is 'otherwise specified' in R.C. 5701.03. If an item is "otherwise specified" under R.C. 5701.03, it is personal property." *Funtime,* at 79.

R.C. 5701.03(B) maintains that items of tangible personal property that have become affixed to a building that primarily benefit the business and not the realty are business fixtures, and thus personal property under R.C. 5701.03(A). Once they are classified as personal property, they are no longer eligible for the R.C. 5739.01(B)(5) exemption.

The installed items and maintenance of tangible property qualify as taxable business fixtures under this analysis. The petitioner installed and paid for repair costs of HVAC units during the audit period. The petitioner contends these transactions are exempt from transactions as the tangible personal property incorporated in real property. The petitioner maintains, "While the rooftop HVAC units were installed to control the environment of the production area, the primary purpose for the installation of this equipment is for the environmental control of the building and for the comfort of the people in the building." Petition's Request for Reassessment, p. 3. The petitioner also maintains the removal of the HVAC units would damage the building. The petitioner's contentions are not well taken.

The auditor and audit manager toured the petitioner's facility on October 28, 2016. The tour was given by the petitioner's Controller, Gary Young. The petitioner is a manufacturer of plastic bottles. The bottles are created using a blown injection molding process. Heated plastic resin is poured into a mold for the bottle. Air is forced into the model is expand the resin to the desired shape. Cold water is then run through the mold to harden the plastic. The product is then taken away to be packaged.

During the tour Mr. Young discussed the HVAC system with the auditor. Mr. Young stated that a specialized HVAC system is needed to control humidity in the facility. Audit Remarks, p. 5. He

explained that humidity in the air could result in spots, possible bubbles, or weak spots in the finished plastic bottles. *Id.* This type of specialized system is primarily for the benefit of the business. The statements of the petitioner's employee show the system is intended to benefit the business, as the petitioner's manufacturing process may not function without such a system. While, HVAC systems are typically considered to primarily benefit the property, this is a general guideline and not a rule. The rule, explained in *Funtime*, requires that the primary purpose of the item in question determine its classification and taxability.

The petitioner contends that the system is primarily for the benefit of its employees. As evidence, the petitioner presented a spreadsheet identifying the transactions in question and the invoices for said transactions. The evidence presented does not speak to the primary purpose of the HVAC system. In this instance, the needs of the petitioner's business dictated a specialized system. Based on upon the information conveyed by the petitioner during the audit, the HVAC system was purchased with certain specifications in order to allow the petitioner's business to function. The manufacturing process of the petitioner dictated the HVAC needs, which shows the system is primarily for the benefit of the petitioner's business. The next occupant of the land would likely not need the same specialized dehumidification from an HVAC system. The sale or use of tangible personal property is presumed taxable until the contrary is established. R.C. 5739.02(C) and 5741.02(G). As discussed above, assessments are presumed valid. The burden is on the petitioner to present evidence sufficient to show error in the assessment. The petitioner has not met its burden. The objection is denied.

The petitioner also maintains that the removal of the system would damage the property. The petitioner presented no evidence to support this contention. The petitioner appears to be alluding to *Inverness Club v. Wilkins,* BTA No. 2004-R-338, 2007 WL 1453730 (May 11, 2007). *Inverness* deals with a unique fact pattern in which a golf club objected to the taxation of modifications to their course, including the addition of bunkers and hills. The BTA found that these improvements were site improvements to "the land itself" as outlined in R.C. 5701.02(A), and never became personal property. "The modifications to the golf course are site improvements to the land and not on the land. These are not fixtures that can be readily removed and transported and installed somewhere else, and their removal would cause *significant injury to the land itself.*" (Emphasis added.) *Inverness,* at 6. The BTA's reference of "significant injury" cannot be read outside of the *Inverness* context. It does not establish "significant injury" as an independent measure by which to determine if personal property has become real property for the purposes of R.C. 5739.01(B)(5). The improvements at issue in *Inverness* were not of the same nature as the HVAC system at issue in the instant matter. An HVAC system is not integrated into the land itself in the same manner as a hill or cart path. The petitioner's HVAC system involves fixtures attached to a structure on the property, the items at issue were never incorporated into the land in the same way as the subject of *Inverness*. Additionally, the petitioner has presented no evidence speaking to any injury to the structure which would result from the removal of the HVAC system. The petitioner has not met its burden. The objection is denied.

Penalty Abatement

The petitioner requests abatement of the penalty. The surrounding facts and circumstances warrant an abatement of the penalty. The petitioner's request is granted.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$75,456.05	$3,890.41	$0.00	$79,346.46

Current records indicate that the petitioner has made payments of $90,664.78, resulting in a refund of $11,318.32 plus applicable interest.

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

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: MAY 28 2021

Tiago Salvador
837 E. 23rd St.
Houston, TX 77069

RE: Assessment No.: 100001012670
Purchase Period: 03/29/2012 – 03/30/2013
16 Motor Vehicles
Use Tax

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$50,286.47	$9,550.59	$7,542.94	$67,380.00

This assessment was issued based upon the conduct of a special audit of the purchases of motor vehicles. The petitioner purchased the sixteen (16) vehicles, detailed below, without the payment of tax. It was the petitioner's contention at the time of the purchase of each vehicle that the vehicle was exempt from taxation because it was being sold to a non-resident of Ohio for immediate removal from the state, pursuant to R.C. 5739.02(B)(23). The Ohio Department of Taxation was unable to verify that exempt usage of the vehicles. Accordingly, this assessment was issued. A hearing was held as requested on January 6, 2021.

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. 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). "Exemptions or exceptions from sales and use tax are to be strictly construed in favor of taxation and one claiming exemption must establish his right thereto." *National Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (Apr. 30, 1952). 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 taxpayer purchased the sixteen (16) motor vehicles, detailed below, in the state of Ohio, claiming exemption from sales and use taxation as a non-resident at the times of the purchases. The vehicles were each titled in Ohio to the taxpayer, personally, and listed an out-of-state address in Texas as the taxpayer's address. During the purchase of the majority of the vehicles, the taxpayer submitted affidavits regarding the sale of motor vehicles to an out-of-state resident, on which he claimed that each vehicle would be immediately removed from Ohio after its purchase and subsequently titled in the state of Texas.

An audit commencement letter was mailed to the taxpayer on March 14, 2018, requesting the taxpayer to submit proof of taxes paid or verification of his exempt usage of the sixteen vehicles in question, along with any documentation necessary to prove the claimed, exempt usage of the vehicles. On May 23, 2018, the Department received title documentation and shipping invoices which showed that a company owned by the taxpayer, TSL Trading LLC, was the shipping company used to eventually move the vehicles out-of-state after their purchases. The taxpayer also submitted tax information for 2011-2014, copies of his IRS Schedule C, and the articles of incorporation for TSL Trading LLC.

During the audit, the Department reviewed vehicles records provided by the BMV, the taxpayer's income tax returns, vehicle records submitted by the taxpayer, bills of sale, affidavits of non-resident use, TSL Trading LLC incorporation details, and all other communications and documentation submitted by the taxpayer. The Department thoroughly reviewed all evidence submitted regarding each vehicle's purchase, usage, time spent in Ohio, and movements before issuing this assessment.

Vehicles

2012 BMW S10

This motor vehicle, title No. 8500927376, was purchased in Ohio on July 28, 2012 and subsequently titled in Ohio on August 14, 2012. Audit Remarks, p. 5. The buyer's orders and title documentation identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner "completed an Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed from Ohio and titled in the state of Texas." *Id.*

The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on October 26, 2012." *Id.* This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas as claimed by the petitioner on his affidavit.

2013 Ford Mustang

This motor vehicle, title No. 2511376326, was purchased in Ohio on March 29, 2012 and subsequently titled in Ohio on April 2, 2012. 2013 Mustang-Car 2-Title Documents 1_2, pp. 2-3. The buyer's orders and title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." Audit Remarks, p. 6. The petitioner claimed at the time of the purchase that the vehicle would be immediately removed from Ohio and titled in the state of Texas.

The evidence in the file shows that the taxpayer applied for a duplicate title, title No. 2511404083, for this vehicle on April 18, 2012. *See* 2013 Mustang-Car 2-Title Documents 2_2, p. 4. The petitioner, on his application for the duplicate certificate of title, attested that this motor vehicle had not yet been sold or disposed of by the taxpayer. Id. The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on May 16, 2012." Audit Remarks, p. 6. This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas.

2013 Chevrolet Camaro LT

This motor vehicle, title No. 8500935514, was purchased in Ohio on October 25, 2012 and subsequently titled in Ohio on October 29, 2012. Audit Remarks, p. 6. The buyer's orders and title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner "completed the Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed from Ohio and titled in the state of Texas." *Id.*

The evidence shows that this vehicle was shipped by the petitioner's company, TSL Trading LLC, on December 5, 2012. This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas as stated by the petitioner on his affidavit.

2013 Dodge Challenger

This motor vehicle, title No. 1000285945, was purchased in Ohio on August 25, 2012 and subsequently titled in Ohio on August 29, 2012. Audit Remarks, p. 7; 2013 Challenger Title Documents 1_2, p. 2. The buyer's orders and title documents identify the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." Audit Remarks, p. 7. The petitioner claimed at the time of the purchase that the vehicle would be immediately removed from Ohio and titled in the state of Texas.

The evidence in the file also shows that the taxpayer applied for a duplicate title, title No. 1809817708, for this vehicle on November 29, 2012. 2013 Challenger Title Documents 2_2, p. 3. On the application for the duplicate certificate of title, the petitioner attested that the motor vehicle had not yet been sold or disposed of by him. *Id.* The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on December 12, 2012." Audit Remarks, p. 7. This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas.

2013 Chevrolet Corvette

This motor vehicle, title No. 4501705459, was purchased in Ohio on October 6, 2012 and subsequently titled in Ohio on October 22, 2012. Audit Remarks, p. 7. The buyer's orders and title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner "completed the Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed from Ohio and titled in the state of Texas." *Id.*

The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on November 22, 2012." *Id.* This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas as stated by the petitioner on his affidavit.

2012 Dodge Challenger

This motor vehicle, title No. 4702613155, was purchased in Ohio on July 25, 2012 and subsequently titled in Ohio on August 2, 2012. Audit Remarks, p. 7. The buyer's orders and title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner claimed at the time of the purchase that the vehicle would be immediately removed from Ohio and titled in the state of Texas.

The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on October 26, 2012." *Id.* This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas.

2013 BMW BX6

This motor vehicle, title No. 7705517559, was purchased in Ohio on August 30, 2012 and subsequently titled in Ohio on September 18, 2012. Audit Remarks, p. 8. The buyer's orders and

title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner "completed the Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed from Ohio and titled in the state of Texas." *Id.*

The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on November 2, 2012." *Id.* This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas as stated by the petitioner on his affidavit.

2013 Ford Mustang

This motor vehicle, title No. 1809802402, was purchased in Ohio on October 23, 2012 and subsequently titled in Ohio on November 13, 2012. 2013 Mustang-Car 8-Title Documents 1_2, pp. 2-8. The buyer's orders and title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner "completed the Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed from Ohio and titled in the state of Texas." *Id.* at pp. 8-9.

The evidence in the file also shows that the taxpayer applied for a duplicate title, title No. 1809817710, for this vehicle on November 29, 2012. 2013 Mustang-Car 8-Title Documents 2_2, p. 3. The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on December 12, 2012." *Id.* at p. 9. This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas as stated by the petitioner on his affidavit.

2012 Chevrolet Camaro

This motor vehicle, title No. 1809620991, was purchased in Ohio on May 5, 2012 and subsequently titled in Ohio on May 18, 2012. Audit Remarks, p. 9. The buyer's orders and title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner "completed the Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed and titled in the state of Texas." *Id.*

The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on June 13, 2012." *Id.* This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time

before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas as stated by the petitioner on his affidavit.

2012 Chevrolet Camaro

This motor vehicle, title No. 1809620990, was purchased in Ohio on May 5, 2012 and subsequently titled in Ohio on May 18, 2012. Audit Remarks, p. 9. The buyer's orders and title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* at p. 10. The petitioner claimed at the time of the purchase that the vehicle would be immediately removed from Ohio and titled in the state of Texas.

The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on June 13, 2012." *Id.* This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas.

2013 BMW BX6

This motor vehicle, title No. 1809780628, was purchased in Ohio on October 11, 2012 and subsequently titled in Ohio on October 18, 2012. Audit Remarks, p. 10. The buyer's orders and title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner "completed the Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed from Ohio and titled in the state of Texas." *Id.*

The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on January 11, 2013." *Id.* This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas as stated by the petitioner on his affidavit.

2012 Volkswagen Golf

This motor vehicle, title No. 1809611077, was purchased in Ohio on April 21, 2012 and subsequently titled in Ohio on May 8, 2012. 2012 Golf Title Documents, pp. 3-4. The buyer's orders and title documents identified the petitioner as the purchaser. Audit Remarks, p. 10. "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* at p. 11. The petitioner "completed the Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed from Ohio and titled in the state of Texas." *Id.* at p. 10.

The evidence shows that the vehicle was shipped by the petitioner's company, TSL Trading LLC, on June 5, 2012. Golf Title Documents, pp. 1-2. This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. Audit Remarks, p. 11. The vehicle was never titled in Texas as stated by the petitioner on his affidavit.

2014 Ford Mustang

This motor vehicle, title No. 1809953375, was purchased in Ohio on March 30, 2013 and subsequently titled in Ohio on April 11, 2013. 2014 Mustang Title Documents, pp. 2-7. The buyer's orders and title documents identified the petitioner as the purchaser. Audit Remarks, p. 11. "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner "completed the Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed from Ohio and titled in the state of Texas." *Id.*

The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on May 11, 2013." *Id.* This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas as stated by the petitioner on his affidavit.

2014 Ford Mustang

This motor vehicle, title No. 1809950515, was purchased in Ohio on March 30, 2013 and subsequently titled in Ohio on April 9, 2013. Audit Remarks, p. 11. The buyer's orders and title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner "completed the Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed from Ohio and titled in the state of Texas." *Id.*

The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on May 11, 2013." *Id.* This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas as stated by the petitioner on his affidavit.

2013 Ford Mustang

This motor vehicle, title No. 1809869129, was purchased in Ohio on January 11, 2013 and subsequently titled in Ohio on January 24, 2013. Audit Remarks, p. 12. The buyer's orders and title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of

purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner "completed the Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed from Ohio and titled in the state of Texas." *Id.*

The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on March 6, 2013." *Id.* This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas as stated by the petitioner on his affidavit.

2013 Ford Mustang

This motor vehicle, title No. 1809861102, was purchased in Ohio on December 29, 2012 and subsequently titled in Ohio on January 15, 2013. Audit Remarks, p. 12. The buyer's orders and title documents identified the petitioner as the purchaser. *Id.* "No sales tax was paid at the time of purchase nor has any evidence of use tax having been paid on this vehicle been provided." *Id.* The petitioner "completed the Exemption Certificate and Affidavit Regarding Sales of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident, claiming the vehicle would be immediately removed from Ohio and titled in the state of Texas." *Id.*

The evidence shows that "this vehicle was shipped by the petitioner's company, TSL Trading LLC, on February 27, 2013." *Id.* This vehicle was not immediately removed from Ohio. The information provided shows that the vehicle was purchased and sat in Ohio for a period of time before it was taken to Detroit, Michigan to be loaded into a shipping container and shipped to its destination. *Id.* The vehicle was never titled in Texas as stated by the petitioner on his affidavit.

Sale to Non-Resident Exemption

The petitioner contends that the Department errantly assessed use tax on vehicles he purchased under the exemption from sales and use tax for a non-resident purchasing motor vehicles for immediate removal from the state of Ohio. The petitioner contends that the transactions were exempted from taxation under R.C. 5739.02(B)(23) and 5739.029(B). The petitioner contends that he purchased the vehicles to export to Brazil as a source of supplementary income. The petitioner contends that he has always been a Texas resident, and he thought he had properly completed the exemption certificates that were submitted with the vehicle purchases. The petitioner contends that he was never an Ohio resident and that his accountant incorrectly checked the residency box on his income tax return in Ohio for 2012.

The petitioner contends that the vehicles were immediately removed from Ohio and taken to Detroit, Michigan, via common carrier, where they were then exported to Brazil. The petitioner contends that his economic activity in Ohio was limited to purchasing the vehicles at retail from a licensed Ohio motor vehicle dealer and shipping the vehicles out of the country via an international shipper in Michigan. The petitioner contends that the "sum and substance" of the transactions was that the cars went directly from the dealership to a common carrier.

The petitioner contends that the Department incorrectly applied the BTA's ruling in *Dotzauer v. Testa* to the facts at hand. *See Dotzauer v. Testa*, BTA No. 2014-2030, 2014-2076, 2015 WL 1048568 (Feb. 27, 2015). The petitioner contends that, in contrast to *Datzauer*, the petitioner did not bring the vehicles in question into Ohio from outside the state, did not store the vehicles at his own property, and did not use or display the vehicles for sale in any way in Ohio. The petitioner contends that the vehicles remained on the dealers' lots until the cars were ready to be transported to Michigan, and that he did not take possession of the vehicles.

The petitioner contends that Brazil had very strict rules regarding importing vehicles. The petitioner contends that Brazil only allowed the importation of new cars, not used, so he could not have "used" any of the vehicles after each purchase. The petitioner contends that, as a result, it would have been against his economic interests in the transactions for any use to have happened. The petitioner contends that the vehicles were shipped overseas and never registered in any jurisdiction in the United States; however, the petitioner also, contradictorily, contends that the assessment ignored the fact that the vehicles were validly purchased for export, as evidenced by the international bills of lading and the Cuyahoga County Clerk of Courts issued title documents. *See* Petition for Reassessment.

The petitioner contends that he should not owe use tax for any intermittent "use" prior to shipping overseas. In support of these contentions, the petitioner submitted additional information in the form of two emails, one of which explained the exportation process and cited Brazil's rules regarding the process for the importation of motor vehicles into Brazil. These contentions are not well taken.

An excise tax is levied on each retail sale made in Ohio. R.C. 5739.02. "All sales are presumed to be taxable until the contrary is established. If a purchaser claims that tax does not apply to a transaction, the purchaser must provide a fully completed exemption certificate to the vendor or seller." Ohio Adm.Code 5703-9-03(B)(1). "'Sale'" and 'selling' include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever: all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted." R.C. 5739.01(A).

"If any sale of a motor vehicle, off-highway motorcycle, or all-purpose vehicle is claimed to be exempt from the sales tax on the basis that the sale is to an out-of-state resident for immediate removal of the motor vehicle from Ohio for exclusive use outside this state, the clerk of courts shall refuse to issue a certificate of title unless the application is accompanied by an affidavit signed by the purchaser." Ohio Adm.Code 5703-9-10(C).

> "No tax is due under this section, any other section of this chapter, or Chapter 5741 of the Revised Code under any of the following circumstances: the consumer intends to immediately remove the motor vehicle from this state for use outside this state; upon removal of the motor vehicle from this state, the consumer intends to title or register the vehicle in another state if such titling or registration

> is required; the consumer executes an affidavit as required under division (C) of this section affirming the consumer's intentions under divisions (B)(1)(a) and (b) of this section; and the state in which the consumer titles or registers the motor vehicle or to which the consumer removes the vehicle for use provides an exemption under circumstances substantially similar to those described in division (B)(1) of this section."

R.C. 5739.029(B). "No sales tax was paid at the time of purchases nor has any evidence of use tax having been paid on these vehicles been provided." Audit Remarks, pp. 5-13. The Tax Commissioner routinely audits motor vehicle purchases on which an exemption is claimed; after receiving an investigatory letter, a taxpayer has the opportunity to establish his claim of exemption by providing the Tax Commissioner with evidence of the exempt usage to which the vehicle was put. *See Stephenson v. Tracy*, BTA No. 94-2-1144, 1995 WL 581558 (Sept. 29, 1995).

The petitioner's contention that Brazilian law forbid the importation of used cars, with a few exceptions, and, therefore, he could not have "used" the vehicles he purchased, is invalid. The petitioner was incorrectly trying to apply Brazilian importation laws to the case at hand which has solely to deal with the sales and use tax laws of the state of Ohio. As noted above, "use" includes the exercise of any right or power incidental to the ownership of the things used. R.C. 5741.01(C). It does not require a purchaser to physically drive a vehicle as the petitioner incorrectly contended.

In *Dotzauer*, the BTA affirmed the Tax Commissioner's final determination and noted that "the case at issue involved sixty-two invoices for vehicles purchased in Ohio and twenty invoices for vehicles purchased outside of Ohio. Both petitioners were Ohio residents. Neither petitioner was a licensed automobile dealer." *Dotzauer* at *1. The Dotzauers had contended that they purchased the eighty-two vehicles to export to Australia. *Id.* The Dotzauers had not contested the portion of the assessment related to vehicles purchased in Ohio. *Id.*

The Dotzauers only contested six of the vehicles that were purchased outside of Ohio. *Id.* The Dotzauers testified to the Tax Commissioner that they had lacked an intent to use the vehicles in Ohio or to do business in Ohio. *Id.* at *2. The Dotzauers had contended that the vehicles simply were transported through Ohio, on their way to a port for delivery outside the United States. *Id.* The Dotzauers' accountant had tried to contend that even though the six vehicles physically entered the state of Ohio, the timeframes that the vehicles were located in Ohio or at the Dotzauer residence were insignificant and ranged from only a few hours to less than a week. *Id.*

The BTA reiterated in *Dotzauer* that use tax was supposed to be collected on purchases "acquired or received for a consideration, whether such acquisition or receipt was effected by a transfer of title, or of possession, or of both, or a license to use or consume; whether such transfer was absolute or conditional, and by whatever means the transfer was effected; and whether the consideration was a money, credit, barter, or exchange." *Id.*; R.C. 5741.01(D). The BTA noted that R.C. 5741.02(A)(1) explicitly provided that "an excise tax is *** levied on the storage, use, or other consumption in this state of tangible personal property." *Id.* The BTA

affirmed the Tax Commissioner's finding that the Dotzauers had brought the six contested vehicles into Ohio and exercised control over them. *Id.* The BTA determined that by bringing the vehicles in question to their residence, albeit for a limited time while waiting to transport them out of state, the Dotzauers exercised ownership and control over the vehicles, thereby subjecting themselves to the assessed use tax obligations. *Id.*

Like in *Dotzauer*, and contrary to the petitioner's contentions, the petitioner was an Ohio resident during the time of the vehicle purchases and did not hold a motor vehicle dealer's license. The petitioner likewise purchased motor vehicles in Ohio to export outside the country. The motor vehicles also sat in Ohio for a period of time between the dates of purchase and the dates they were transported out of the state. The petitioner evidenced that he had control over the vehicles by titling the vehicles in Ohio. The petitioner contended that the cars were transported via common carrier from the dealerships to Michigan; however, the petitioner has failed to provide any evidence of this.

The petitioner contended that, like the Dotzauers, he had no intention to use the vehicles or conduct sales in Ohio. While the vehicles may not have been driven by the petitioner, "'use' means and includes the exercise of any right or power incidental to the ownership of the things used." R.C. 5741.01(C); Audit Remarks, pp. 5-13. Even though the petitioner may not have exercised the same manner of control and ownership over the vehicles as the Dotzauers, the evidence still shows that petitioner purchased vehicles in Ohio, titled the vehicles in his name in Ohio, and allowed them to remain in Ohio for a period of time after they were titled before transporting them out of state. Furthermore, the petitioner evidenced that there were extended periods of time that he had some of the cars under his control in Ohio by applying for duplicate titles for those vehicles, as noted above. The petitioner had to attest that he still had possession and had not disposed of those vehicles in order to receive the duplicate titles.

Even though the petitioner claimed his residency situation was complicated during the audit period, he did file Ohio income tax returns claiming Ohio residency during the time in question in a clear and consistent pattern. *Id.* Evidence available to the Department showed that the taxpayer was in fact an Ohio resident during the period in which the purchases occurred. The taxpayer filed Ohio income tax returns and claimed Ohio residency from July 1, 2011 through April 30, 2013. The petitioner filed a part-year resident return, claiming Ohio residency from July through December 2011. *Id.*; Income Tax Return Summaries, p. 2. The petitioner filed a full-time resident return, claiming Ohio residency for the whole year of 2012. *Id.* The petitioner filed a part-year return for 2013, claiming residency from January 2013 through April 2013. *Id.* at p. 5.

To further contradict the petitioner's contention that he was not an Ohio resident during the audit period, evidence in the file shows that, on February 7, 2012, the petitioner purchased a boat and titled it in Ohio. *See* Boat Documents. Information submitted to the state shows that the petitioner provided, both, an Ohio address and paid the appropriate amount of sales tax at the time of its purchase. *Id.* The petitioner listed his address on documents that were notarized during the purchase as 30532 Adams Ln., Westlake, OH 44145. *Id.* The petitioner's business even listed that same Ohio address as its business address on the majority of the bills of lading

that he submitted during the audit to evidence that the cars were moved from Ohio to Michigan. *See* Petitioner's Email, dated April 26, 2018.

The evidence in the file failed to prove that the petitioner was not a resident of the state of Ohio. The petitioner failed to show that the vehicles were immediately removed from Ohio after their purchases and titled in Texas. As a result, the petitioner has failed to substantiate its contentions that these vehicles were validly purchased without taxation by a non-resident for immediate removal from the state of Ohio. Therefore, these contentions are denied.

Sale-For-Resale Exemption

The petitioner contends that he purchased the vehicles in question at retail from a licensed motor vehicle dealer for exportation outside of the United States. The petitioner contends that he had no obligation to register or be regulated as a motor vehicle dealer in Ohio since the vehicles were not being sold in the state of Ohio, he was not offering or displaying the motor vehicles for sale to others on either a wholesale or retail basis in Ohio, and his sole activity involved purchasing motor vehicles at retail from a licensed dealer to export outside of the United States. These contentions are not well taken.

In *Dotzauer*, the Dotzauers had, in the alternative, tried to claim that the vehicles were entitled to an exemption from the imposition of sales and use tax since the vehicles were purchased as part of sale-for-resale transactions. *Dotzauer* at *2. The BTA upheld the Tax Commissioner's determination that because the Dotzauers were not licensed as motor vehicle dealers, they were not eligible to claim that exemption. *Id.*; *see* R.C. 4517.02(A)((1)-(2)). The BTA determined that by not being properly licensed to legally make sales of motor vehicles, in the first instance, the Dotzauers could not avail themselves of the resale exemption from the sales and use tax during their purchases and sales of the motor vehicles. *Id.; see Auto Reality Service, Inc. v. Brown*, 27 Ohio App.2d 77, 272 N.E.2d 642 (10th Dist.1971).

Like the Dotzauers, the petitioner was not licensed to conduct the business of buying and selling cars in Ohio. The petitioner contended that the vehicles were purchased for resale overseas, but the petitioner did not have the appropriate motor vehicle dealer's and vendor's licenses "that would have allowed him to conduct such business activities with a valid exemption." Audit Remarks, pp. 5-17. As a result, the petitioner failed to demonstrate that the vehicle purchases qualified for the sale-for-resale exemption. Therefore, these contentions are denied.

Interstate and International Commerce

The petitioner contended that this assessment violated R.C. 5739.02(B)(10) by taxing interstate and international commerce. "The tax does not apply to the following: * * * sales not within the taxing power of this state under the Constitution or laws of the United States or the Constitution of this state." R.C. 5739.02(B)(10). Ohio law says that all sales in Ohio are presumed taxable until the contrary is established. R.C. 5739.02(C). The vehicles were purchased by an Ohio resident in Ohio, claiming an invalid exemption from Ohio sales and use tax. The petitioner has failed to prove how this assessment violated R.C. 5739.02(B)(10). Therefore, this contention is

MAY 28 2021

denied.

Due Process and Equal Protection Clauses

Finally, the petitioner contends that this assessment violated the equal protection and due process clauses of the United States and Ohio constitutions. The petitioner failed to demonstrate how this assessment violated the equal protection and due process clauses of the United States and Ohio constitutions. Therefore, 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:

Pre-Assessment

Tax	Interest	Penalty	Total
$50,286.47	$9,550.59	$3,771.44	$63,608.50

Current records indicate that no payments have been made in satisfaction of the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, 3Columbus, 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: MAY 26 2021

Speer Bros., Inc.
3812 Old Railroad Rd.
Sandusky, OH 44870

Re: Assessment No. 100000557849
Reporting Period: 1/1/2010 – 12/31/2015
Use Tax
Account No. 97-303363

This is the final determination of the Tax Commissioner on a petition for reassessment filed pursuant to R.C. 5739.13 and 5741.14 concerning the above-referenced use tax assessment.

In resolution of this matter, the liability has been adjusted and paid in full.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAY 28 2021

Tuente Trucking, Inc.
14804 State Rt. 716
Yorkshire, OH 45388

Re: Refund Claim No. 201903543
Refund Amount Requested: $3,050.27
Use Tax

This is the final determination of the Tax Commissioner on an application for the refund of the sales tax in the amount of $3,050.27 filed pursuant to R.C. 5739.07 and 5741.10. The claimant contends that the tax was illegally of erroneously paid to the Treasurer of State.

This refund claim pertains to the tax paid on the purchase of a 2018 Chevrolet Silverado. Upon initial review, the claim was denied. The claimant disagreed and requested reconsideration of the matter. A hearing was not requested.

The claimant objects to the assessment, contending that the truck is exempt under R.C. 5739.02(B)(32). R.C. 5739.02(B)(32) provides an exemption for:

> The sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire.

"Highway transportation for hire" is defined in R.C. 5739.01(Z) as the transportation of personal property belonging to others for consideration by the holder of a permit from Ohio, or the United States, authorizing the holder to engage in transportation of personal property belonging to others for consideration over the highway.

Accordingly, in order for the claimant to be entitled to the exemption set forth in R.C. 5739.02(B)(32), four conditions of the definition of "highway transportation for hire" must be satisfied. First, the taxpayer must transport personal property. Second, the personal property being transported must belong to others. Third, the taxpayer must transport the personal property for consideration. Finally, the taxpayer must be certified by Ohio or the United States to engage in the transportation of personal property. *Triad Transport Inc. v Tracy,* Case No. 97-K-164, 1998 WL652680 (September 18, 1998).

The claimant must be licensed by the Public Utility Commission of Ohio or the United States 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. To show that a motor vehicle is primarily used for the transportation of tangible personal property of others for consideration, there must be proof of that use. *RKE Trucking Inc. v. Zaino,* 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. The burden is on the claimant to demonstrate these conditions to be granted the exemption. *Id.*

"Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. For purposes of Chapters 5739 and 5741 of the Revised Code, "tangible personal property" includes motor vehicles, electricity, water, gas, steam, and prewritten computer software. R.C. 5739.01(YY). Here, the claimant provided a copy of a completed transportation for hire questionnaire for the vehicle. The transportation for hire questionnaire submitted by the claimant listed this vehicle as a "[c]ompany car (transporting personnel) or repair vehicle" as for 90% of the vehicle's usage. Because this vehicle is used 90% of the time and it could be used to haul tools to repair another of its vehicles with a flat tire, haul tools to a job site, or haul office supplies to its office, this vehicle is primarily hauling tangible personal property as defined in the Revised Code. Therefore, the first condition of this test is satisfied.

The next condition to be satisfied is that this vehicle is primarily used to haul tangible personal property belonging to others. There is nothing in file that demonstrates that the claimant is using this vehicle to primarily haul tangible personal property belonging to others. In fact, based on the transportation for hire questionnaire, the vehicle is listed as "[h]auling goods … for others" as only 10% of its usage. Because the vehicle is primarily used to haul property belonging to the claimant, whether it is hauling tools to repair a customer's flat tire or transporting resources to a jobsite, the tangible personal property being hauled belongs to the claimant. It is a company vehicle used primarily for the needs of the claimant, rather than the needs of someone else. Therefore, the second condition of this test is not satisfied.

The third condition needing satisfied would be that the vehicle was primarily used to transport the property of others and it was done for consideration. "Consideration" means any consideration sufficient to support a simple contract. R.C. 1303.33(B). Regardless of the nature of the consideration provided, the plain meaning of the phrase "for consideration" in the exemption statute requires the claimant to have held itself out to its customers as a transportation-for-hire business. The 'for consideration' requirement speaks directly to the "for hire" portion of the phrase 'transportation for hire.' *See R.L. Best Company v. Testa,* 7th District Mahoning, No. 18 MA 0001, 2018-Ohio-5400. Here, there is nothing in the record demonstrating that the claimant was primarily using this vehicle to complete contracts with a customer to transport the customer's tangible personal property. Based on the claimant's questionnaire, this vehicle is listed primarily as a company car. Since there is no evidence showing the claimant's primary uses of this vehicle was for any consideration "for hire,' the third condition of this test is not satisfied.

The claimant submitted evidence that demonstrated it was properly licensed by the Public Utility Commission of Ohio or the United States and is legally authorized to transport personal property belonging to others for consideration, there must be proof this motor vehicle's primary uses fulfill all three of the above conditions. The burden was on the claimant to prove that its vehicle was primarily used for transportation of personal property of others for consideration; however, the

claimant presented no evidence to demonstrate the primary use of this vehicle fulfills the conditions that would entitle an exemption. Without such proof, there can be no exemption.

Accordingly, this refund claim is denied.

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

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

JEFFREY A. MCCLAIN
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/s/ Jeffrey A. McClain

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