



Department of  
Taxation

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

# FINAL DETERMINATION

Date:

OCT 1 2 2022

Thomas A. & Michelle J. Lupica  
2153 Circular Rd.  
Toledo, OH 43614

Re:    Multiple Assessments  
      Individual Income Tax – Multiple Periods

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

Assessment	Year	Tax	Interest	Penalties	Total
02201708827528	2013	\$2,194.35	\$201.16	\$402.32	\$2,797.83
02201708827529	2014	\$2,404.51	\$148.29	\$296.58	\$2,849.38
02201708827530	2015	\$1,225.47	\$38.74	\$77.48	\$1,341.69

## I. BACKGROUND

The Ohio Department of Taxation assessed Thomas and Michelle Lupica (the “petitioners”) after disallowing a portion of the Ohio Small Business Investor Income Deduction (“SBD”) and Ohio Business Income Deduction (“BID”) claimed on their Ohio individual income tax returns for the periods at issue. Specifically, the Department removed amounts reported to the petitioners as guaranteed payments from Spengler Nathanson P.L.L. (the “firm”) because Mr. Thomas Lupica did not own at least 20% of the qualifying pass-through entity as required by R.C. 5733.40(A)(7). The petitioners timely filed petitions for reassessment and requested a hearing, which was held in person on this matter.<sup>1</sup>

## II. PETITIONERS’ CONTENTIONS

The petitioners object to the assessments and contend that the returns were correct as filed. Specifically, the petitioners contend:

1. The income at issue is not a guaranteed payment but instead is business income eligible for the Ohio SBD and the Ohio BID;
2. Assuming, arguendo, that the income at issue is a guaranteed payment, the partners of the firm are sole proprietors who provide services to the partnership and therefore their guaranteed payments are business income;
3. The guaranteed payments are not nonbusiness income and R.C. 5733.40(A)(7) does not convert the guaranteed payments from business income to nonbusiness income;
4. The Department’s interpretation of R.C. 5733.40(A)(7) is contrary to the statute’s historical justification; and

<sup>1</sup> The petitioners were represented as part of a consolidated hearing. Each petitioner represented at the hearing was a partner of the firm who had similar issues and contentions related to their Ohio income tax for tax years 2013, 2014, and/or 2015.

5. *HBD Industries, Inc. v. Levin* does not impact the analysis of this matter.

The petitioners' contentions generally fall into four categories. First, the subject payments were a distributive share of the firm's income and therefore should be considered business income. Second, the subject payments are business income for federal income tax purposes. Third, the subject payments are sole proprietor income from self-employment and are therefore business income. Finally, R.C. 5733.40(A)(7) and *HBD Industries* do not apply to this case. Under these theories, the petitioners believe the income at issue is business income and is eligible for the SBD or the BID. In support of these objections, the petitioners provided the Department with the firm's partnership agreement. The income at issue is Mr. Lupica's fixed monthly draw detailed in the partnership agreement and Exhibit A to the partnership agreement.

### III. AUTHORITY

#### A. BUSINESS INCOME AND THE OHIO SMALL BUSINESS INVESTOR INCOME DEDUCTION AND THE OHIO BUSINESS INCOME DEDUCTION

In 2013, Ohio allowed a deduction for business income under the Ohio Small Business Investor Income Deduction. Former R.C. 5747.01(A)(31) allowed married filing jointly taxpayers to claim a deduction of the 50% of the taxpayer's first \$250,000 of Ohio small business investor income. In 2014, the SBD was increased to the 75% of the taxpayer's first \$250,000 of Ohio small business investor income. "Ohio small business investor income" was defined as the portion of the taxpayer's adjusted gross income that is business income reduced by deductions from business income and apportioned or allocated to Ohio under R.C. 5747.21 and 5747.22 to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year.

In 2015, Ohio transitioned to the Ohio Business Income Deduction. Former R.C. 5747.01(A)(31) allowed married filing jointly taxpayers to claim a deduction equal to 75% of the taxpayer's first \$250,000.00 of business income. For 2015, taxpayers could include all business income in this calculation, not just Ohio business income. The remaining business income was then taxed at a special set of business income tax rates, capped at 3%.

Ohio's income tax distinguishes between "business income" and "nonbusiness income." For the period at issue, R.C. 5747.01(B) defined business income as:

[I]income, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade<sup>2</sup> 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.<sup>3</sup> '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.<sup>4</sup>

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

---

<sup>2</sup> Commonly referred to as the "transactional test". *See Kemppel v. Zaino*, 91 Ohio St.3d 420, 746 N.E.2d 1073 (2001).

<sup>3</sup> Commonly referred to as the "functional test". *See Kemppel*.

<sup>4</sup> The second sentence was added after the *Kemppel* decision. Herein referred to as the "liquidation test."

[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.

#### **B. GUARANTEED PAYMENTS RECLASSIFICATION UNDER R.C. 5733.40(A)(7)**

In addition to the definition found in R.C. 5747.01(B), R.C. 5733.40(A)(7) also states, in relevant part, that:

For the purposes of Chapters 5733. and 5747. of the Revised Code, guaranteed payments or compensation paid to investors by a qualifying entity...shall be considered a distributive share of income of the qualifying entity. Division (A)(7) of this section applies only to such payments or such compensation paid to an investor who at any time during the qualifying entity's taxable year *holds at least a twenty per cent* direct or indirect interest in the profits or capital of the qualifying entity... (Emphasis added).

R.C. 5733.40(A)(7) reclassifies certain guaranteed payments and compensation paid by a pass-through entity to an investor who owns at least 20% of the entity as a distributive share of business income from the entity. As business income, amounts may be deductible as part of the Ohio SBD or Ohio BID. However, by its own terms R.C. 5733.40(A)(7) reclassifies only such guaranteed payments or compensation paid to an investor who owns *at least 20%* of the profits or capital of the qualifying entity. As such, taxpayers must own at least 20% of the qualifying pass-through entity to reclassify their guaranteed payment or compensation as business income under R.C. 5733.40(A)(7).

#### **C. STATUTORY CONSTRUCTION**

In cases of statutory construction, legislative intent in enacting the statute is of paramount concern. *State ex re. Steele v. Morrissey*, 103 Ohio St.3d 355, 358, 2004-Ohio-4960, 815 N.E.2d 1107, \*21. Legislative intent is determined by looking to the language of the statute and the purpose that is to be accomplished by the statute. *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 419, 704 N.E.2d 1217 (1999). When the meaning of the statute is “clear and unambiguous,” the statute must be applied “as written.” *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 495, 2008-Ohio-6323, 900 N.E.2d 601, \*9.

#### **IV. ANALYSIS**

The firm is a qualifying pass-through entity under R.C. 5733.40(N). The firm’s partnership agreement states that Mr. Lupica is a partner with the firm and derives income from the firm. However, not all of the income is a distributive share directly related to the profits of the firm; a portion of the petitioners’ income is characterized as guaranteed payments. According to the partnership agreement, “[e]ach partner *shall be entitled* to receive a monthly drawing account chargeable against the partnership profits . . . The annual Draw levels for partners *shall be* between \$60,000-\$70,000.” (Emphasis added). The draws must be paid out monthly in the amount agreed upon by the firm and the partners. While the firm’s management committee may defer payments of the draws, it must pay them to partners as soon as there is sufficient cash available.

The partnership agreement and the petitioners’ Schedule K-1 show that Mr. Lupica held less than a 20% interest in the firm during the period in question. Because Mr. Lupica did not own a 20% or greater interest in the firm during the applicable period, R.C. 5733.40(A)(7) does not reclassify the guaranteed payments from the firm as business income. The petitioners acknowledge the requirements of R.C. 5733.40(A)(7) are not met in this case. Therefore, the amounts are not eligible for the Ohio SBD or Ohio BID.

Additionally, guaranteed payments are not business income under Ohio law. Ohio has its own definition of business income in R.C. 5747.01(B) separate from any federal definition. The guaranteed payment at issue was not part of a partial or complete liquidation of a business, nor income from real, tangible, or intangible property that is integral to trade or business operation. Since the guaranteed payment was not business income under either the functional or liquidation tests, the payment must meet the requirements of the transactional test in order to be considered business income under R.C. 5747.01(B). 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. *See generally Kemppel.*

In this case, the firm is in the business of providing legal services and the income received for such legal services are fees from clients which are distributed to the partners as part of their distributive share of income. The guaranteed payments are not tied to the transactions or activities of the firm;<sup>5</sup> rather, they are a guaranteed amount paid to the partner regardless of the services rendered or the amount of income generated. Mr. Lupica, himself, is likewise not in the business of receiving guaranteed payments. Therefore, the guaranteed payments are not business income to the petitioners under the transactional test.

Furthermore, the existence of R.C. 5733.40(A)(7) shows that guaranteed payments are not inherently business income. R.C. 5733.40(A)(7) reclassifies certain income as business income in specific situations, including guaranteed payments made to investors owning more than 20% of a qualifying business. If guaranteed payments were inherently business income, there would be no need for R.C. 5733.40(A)(7), as there would be no reason to reclassify such amounts as part of a distributive share of business income. The enactment of R.C. 5733.40(A)(7), which coexists with R.C. 5747.01(B), shows the Ohio General Assembly believed a specific statute was needed to reclassify certain guaranteed payments as a distributive share of business income.<sup>6</sup>

Accordingly, Mr. Lupica's guaranteed payments are not business income; they are nonbusiness income under Ohio law. *See R.C. 5747.01(C).* The remainder of this analysis addresses the petitioners' contentions.

#### A. GUARANTEED PAYMENTS AS A DISTRIBUTIVE SHARE

As stated above, the income at issue is Mr. Lupica's partnership draw. According to the firm's partnership agreement, Mr. Lupica is *guaranteed* payment of his partnership draws. While the firm may defer the payments based upon the ability to pay, the fact that these payments may be deferred does not change that they are guaranteed to be paid. The guaranteed payment is not tied to the firm's profits or losses, and guaranteed payments are not something the firm earns and distributes as part of the regular course of its trade or business. Additionally, guaranteed payments are not something the firm itself receives. Because the amount of the draw is guaranteed to Mr. Lupica, it is not tied to the profitability of the firm and, thus, is not a direct distribution of the firm's income to him.

The petitioners also contend that because the law firm is in the business of receiving legal fees, the payments to the owners are made up of legal fees and, thus, qualify as income earned in the normal course of a trade or business. This contention is not well taken. The petitioners also contend that it is a legal impossibility for clients to make guaranteed payments to the firm. The Department does not dispute that the firm's clients are not making guaranteed payments to the firm. Rather, payments for legal fees are made to the firm by the firm's clients in a transaction. The firm then makes the guaranteed payments to the partners, pursuant to their

---

<sup>5</sup> The firm does not receive the guaranteed payments at issue; instead, the firm pays said guaranteed payments to Mr. Lupica under their partnership agreement.

<sup>6</sup> The Ohio General Assembly did not reclassify *all* guaranteed payments as a distributive share of business income; instead, they put certain ownership thresholds (i.e., 20% ownership) on the reclassification.

agreement, in a separate transaction, irrespective of the amounts received from the clients.<sup>7</sup> Additionally, as discussed above, the petitioners agree that the guaranteed payments are not reclassified as a distributive share of business income under R.C. 5733.40(A)(7). Thus, this contention that the guaranteed payment is a distributive share of business income from the firm is not well taken.

#### B. GUARANTEED PAYMENTS AND FEDERAL INCOME TAX LAW

The petitioners next contend that the guaranteed payments are not nonbusiness income because the guaranteed payment is not “compensation” as defined by 5747.01(D). They argue that the firm is not Mr. Lupica’s employer, and he is not the firm’s employee. Because he is not an employee of the firm, the payments at issue are not “compensation”. Therefore, the petitioners conclude that the Department’s position is contrary to treasury regulations 26 CFR 1.707-1(c) (regarding guaranteed payments) and 26 CFR 31.3401(c)-1 (defining employee).

The Department does not dispute that these payments are not compensation. R.C. 5733.40(A)(7) clearly references both “guaranteed payments or compensation paid to investors....” Using canons of statutory construction, it would be impossible for both terms to have the same meaning. The petitioners seem to contend that all income is either business income or compensation. This contention is not well taken. Nonbusiness income includes other types of income besides compensation. R.C 5747.01(C) states that nonbusiness income means all income other than business income. The statute states that nonbusiness income may include, but is not limited to, compensation (among other things such as rents, capital gains, and interest). Thus, compensation is merely an *example* of nonbusiness income. *See id.* Instead, the payments at issue are guaranteed payments; these amounts are nonbusiness income because they do not qualify as business income under R.C. 5747.01(B) (as discussed above) and are not reclassified as a distributive share of business income under R.C. 5733.40(A)(7).

Regarding the petitioners’ conclusory statements pertaining to 26 CFR 1.707-1(c) and 26 CFR 31.3401(c)-1, the Department again notes that the petitioners have not shown how these federal regulations apply to the Ohio SBD and the Ohio BID. As noted above, Ohio has its own definition of “business income.” However, the petitioners contend the Department is bound to follow federal definitions and treatments because of the preamble to R.C. 5747.01. This is not correct. The preamble to R.C. 5747.01 states, in relevant part:

Except as otherwise expressly provided or clearly appearing from the context, any *term used in this chapter that is not otherwise defined* in this section has the same meaning as when used in a *comparable context* in the laws of the United States relating to federal income taxes or if not used in a comparable context in those laws, has the same meaning as in section 5733.40 of the Revised Code.

*Id.* (Emphasis added). The preamble does not bind the Commissioner to federal income tax characterizations. Instead, this provision, which appears at the beginning of the definition section of Chapter 5747 of the Revised Code, states that Ohio’s income tax uses the Internal Revenue Code (or other laws related to federal income tax) to define any *undefined* term in the chapter. As noted above, the issue in this case is whether Mr. Lupica’s guaranteed payments are “business income”. The term business income *is* defined under Ohio law at R.C. 5747.01(B). As such, the petitioners’ reliance on treasury regulations, as opposed to Ohio’s own definition of business income, to determine what is “business income” under Ohio law is misplaced.

---

<sup>7</sup> Under the petitioners’ logic, all income earned by anyone who works for a business would be business income. For example, a grocery store employee who receives an hourly wage would receive “business income” since the wage is paid using money received from customers of the grocery store as payment for items the store sells.

### C. GUARANTEED PAYMENTS AS SOLE PROPRIETOR INCOME

The petitioners next contend that the guaranteed payment is business income under R.C. 5747.01(B) because Mr. Lupica is not an employee of the firm, but rather a sole proprietor providing his services to the firm. However, as part of this contention, the petitioners admit that: "Each Subject Partner is a partner in Partnership. Each Subject Partner actively participates in Partnership's day to day business operations". Thus, the petitioners acknowledge that Mr. Lupica is not a sole proprietor, but is in fact a partner in the firm. Thus, the idea that Mr. Lupica is a sole proprietor is not well taken.

Black's Law Dictionary defines "Sole Proprietorship" as: "A business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity." Black's Law Dictionary (11th ed. 2019). In this case, Mr. Lupica does not own all the assets, owe all the liabilities, nor operate the firm in his personal capacity. He does not own the business by himself; in fact, the petitioners provided a "partnership agreement" between Mr. Lupica and the firm. There are also other partners in the partnership. Additionally, a sole proprietor is required to report the income and losses from a sole proprietorship on a federal Schedule C. In this case, Mr. Lupica did not file a federal Schedule C for the tax year in question, but instead reported his income on federal Schedule E under the section for "Income or Loss from *Partnerships* and S Corporations." (Emphasis added).

The firm is a limited liability partnership and has a partnership agreement signed by all the partners of the firm. Mr. Lupica is a partner in the firm and is subject to the partnership agreement. The partnership agreement details the annual draw amount as well as policies regarding business decisions, retirement, expulsion of partners, and a restriction against nepotism. A sole proprietor would not be subject to a partnership agreement or any of the types of policies contemplated by the firm's partnership agreement. Therefore, Mr. Lupica is not a sole proprietor, but rather is a partner in the firm. As such, this contention is without merit.

### D. R.C. 5733.40(A)(7) HISTORY AND HBD INDUSTRIES

The petitioners contend that R.C 5733.40(A)(7) does not convert the payments from business income to nonbusiness income.<sup>8</sup> They continue that the requirements of R.C. 5733.40(A)(7) apply only to situations in which a taxpayer has at least a 20% ownership interest, and do not contemplate situations in which a taxpayer owns less than 20% of the entity; put another way, they contend guaranteed payments to an investor owning less than 20% could be either business or nonbusiness income depending on how the partnership derived the income used to make said guaranteed payments. The petitioners conclude that the Department's position is speculating regarding legislative intent and applying the law incorrectly. This contention is not well taken.

R.C. 5733.40(A)(7) reclassifies guaranteed payments made to an investor holding at least a 20% ownership interest in an entity as business income. If the 20% ownership threshold is not met, the guaranteed payments are not reclassified as business income. As noted above, guaranteed payments by those who own less than 20% of a qualifying entity are not inherently business income without showing these payments are business income under R.C. 5747.01(B). Additionally, R.C. 5733.40(A)(7) serves to reclassify certain guaranteed payments as a distributive share of business income from a PTE if the investor owns 20% or more of the PTE. The logical

---

<sup>8</sup> The Commissioner does not dispute this; instead, as analyzed above, guaranteed payments do not meet the definition of business income in R.C. 5747.01(B), and, thus, are *nonbusiness income*. That is why R.C. 5733.40(A)(7) was enacted by the Ohio General Assembly, to reclassify guaranteed payments for certain investors, which are otherwise *nonbusiness income* as a distributive share of *business income* from a PTE if certain criteria are met.

operation of this statute for an investor who owns less than 20% simply means that the guaranteed payment is *not* reclassified as a distributive share of business income.

The petitioners cite tax forms, tax return instructions, informal guidance, and a Department-hosted webinar to support their contention that the Department is misapplying R.C. 5733.40(A)(7). Specifically, the petitioners note the Department did not specifically address this issue until a 2015 webinar. Thus, the petitioners seem to contend that because the Department was silent on the issue in its forms and instructions, then that somehow means guaranteed payments to these investors must be business income.<sup>9</sup> Cutting against this contention, the petitioners concede that Department guidance allows only investors owning at least 20% to claim the guaranteed payments as business income. In fact, the Department could not assert that guaranteed payments to investors owning less than 20% are business income, as that would render the reclassification in R.C. 5733.40(A)(7) meaningless. Since the Department did not assert guaranteed payments to a less than 20% investor were business income, the petitioners cannot contend they detrimentally relied on Department guidance when they classified their guaranteed payments as business income. Thus, this contention is not well taken.

The petitioners attempt to analyze the history of R.C. 5733.40(A)(7) to determine its intent and bolster their case. However, the petitioners do not cite any authority or present anything other than conclusory statements that R.C. 5733.40(A)(7) does not apply to situations of less than 20% ownership. The petitioners have not shown that R.C. 5733.40(A)(7) is ambiguous. The statute specifically addresses investors owning at least 20% of a qualifying entity. For such investors, guaranteed payments shall be considered a distributive share of the entity's income and are therefore business income to the investor. When the meaning of the statute is "clear and unambiguous," the statute must be applied "as written." *Cheap Escape Co.*, 1900 N.E.2d 601 at 604. In this case, the meaning and language of R.C. 5733.40(A)(7) is clear and unambiguous. For the purposes of R.C. Chapters 5733. and 5747., certain guaranteed payments and compensation are reclassified as a distributive share of income from a PTE when the investor receiving the income owns at least 20% of the entity making the payment. R.C. 5733.40(A)(7). There is no ambiguity in R.C. 5733.40(A)(7) and it must be applied as written. Additionally, portions of the statute would be rendered meaningless if guaranteed payments to those owning less than 20% of a qualifying entity were already classified as business income. For example, why would a taxpayer need to reclassify guaranteed payments as business income if such amounts are already business income? Accordingly, because Mr. Lupica does not own at least 20% of the firm, R.C. 5733.40(A)(7) does not convert his guaranteed payments into business income.

The petitioners' contention that the payments at issue qualify for the Ohio SBD or Ohio BID is not well taken. Regardless of the petitioners' choice of definition regarding "guaranteed payments," Mr. Lupica owns less than 20% of the firm's capital or profit share and is not entitled to claim either deduction. R.C. 5733.40(A)(7) only applies to guaranteed payments paid to an investor that holds at least 20% direct or indirect interest in the profits or capital of the qualifying entity. In this case, according to the firm's partnership agreement and its tax filings, Mr. Lupica owned a vested capital interest of less than 20% in the partnership's profits during the years in question, which falls short of the required 20% threshold.

---

<sup>9</sup> This cannot be so. The Ohio Board of Tax Appeals ("BTA") has routinely held that "Taxpayers are required to follow the law of the state of Ohio.... *Ricchuiti v. Limbach* (Oct. 23, 1992), BTA No. 1989-K-1124, unreported. The instructions to the returns are not the law." *Benedetti v. Zaino*, BTA No. 2003-R-1817, 2004 WL 1488191 (June 25, 2004). Additionally, the BTA has noted "[i]t would be unreasonable for a taxpayer to expect that the intricacies of Ohio's income tax laws encompassed within R.C. Chapter 5747 could be reduced to a single line on a form." *Ricchuiti* at \*5. Similarly, it is unreasonable to expect the Department to provide guidance on every possible situation or on every position that a taxpayer could possibly take.

Finally, the petitioners contend the holding of *HBD Industries, Inc. v. Levin* does not affect the analysis of this case. Specifically, the petitioners contend *HBD Industries* involved the meaning of “compensation” and not “guaranteed payments”. While the Commissioner does not concede that *HBD Industries* has no effect on the outcome of this case, none of the billings, assessments, or guidance related to this matter directly cited or referenced this case. Furthermore, the case was not cited in any of the Commissioner’s above analysis.

#### V. PENALTY ABATEMENT

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

#### VI. CONCLUSION

Mr. Lupica’s guaranteed payments are not eligible for the Ohio SBD or Ohio BID. Mr. Lupica did not have the necessary 20% or greater ownership of the firm to reclassify the guaranteed payments as a distributive share of business income under R.C. 5733.40(A)(7). Despite their numerous assertions to the contrary, the petitioners’ contentions are not well taken, and the guaranteed payments at issue are not business income under R.C. 5747.01(B). However, the petitioners are granted a penalty abatement in this matter.

Accordingly, the assessments are adjusted as follows:

Assessment	Year	Tax	Interest	Penalties	Total
02201708827528	2013	\$2,194.35	\$201.16	\$0.00	\$2,395.51
02201708827529	2014	\$2,404.51	\$148.29	\$0.00	\$2,552.80
02201708827530	2015	\$1,225.47	\$38.74	\$0.00	\$1,264.21

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

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner



FINAL  
DETERMINATION

Date:

OCT 1 2 2022

William E. & Shelley E. Morgenstern  
5575 Frazer Ave. NW  
North Canton, OH 44720

Re: Assessment No. 02201900763538  
Individual Income Tax - 2017

Tax	Interest	Penalty	Total
\$72,422.00	\$1,865.01	\$3,730.02	\$78,017.03

William and Shelley Morgenstern (the “petitioners”) filed a 2017 IT 1040 reporting an overpayment of \$38,857.00 and requested a credit carryforward of \$25,000.00 towards tax year 2018 and a refund of the remaining amount.<sup>1</sup> The Department adjusted the return because it could not determine from the information provided if the amounts reported on the Schedule D line of the petitioners’ Ohio IT BUS were business income. This adjustment resulted in a denial of the claimed overpayment and the assessment at issue. The petitioners object to the assessment and provided evidence related to their contentions. The petitioners also filed an amended return requesting an additional refund of \$2,108.00. A hearing was conducted on the matter.

The petitioners state that Mr. Morgenstern was president of DRB Holdings, LLC and owned a 4.98% interest in the company. They contend Mr. Morgenstern worked full time for the company and that it was his primary source of income. Eventually, the company negotiated a sale of the business and its assets were sold. The petitioners believe that the resulting capital gains are business income. They also contend a portion of the gain was considered an IRC 751 gain, which was reported on the federal form 4797.

During tax year 2017, former R.C. 5747.01(A)(31) allowed taxpayers who jointly filed their Ohio IT 1040 to deduct the first \$250,000 of business income, to the extent such income is included in federal adjusted gross income. Any remaining business income was taxed at a flat 3% rate. R.C. 5747.02(A)(4). The Ohio Supreme Court has often held that “taxation is the rule, and exemption is the exception.” *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104, (1990). Since an exemption, credit, or as is the case here deduction “depends on legislative grace, the statute must clearly express the exemption...and a taxpayer must show his entitlement to it.” *Id.* (internal citations omitted); *Vought Industries v. Tracy*, 72 Ohio St.3d 261, 264 (1995).

During the applicable tax year, R.C. 5747.01(B) defined business income 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

<sup>1</sup> The claimants’ Ohio income tax return meets the definition of an “application for refund” under R.C. 5747.11. Ohio Adm. Code 5703-7-02(A)(1).

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

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

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

The definition of nonbusiness income necessarily excludes business income, and only “may include” the listed items. In *Kemppel v. Zaino*, 91 Ohio St.3d 420 (2001), the Ohio Supreme Court reviewed the two tests used to classify business income. 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.

The Court described the transactional test, which “considers the statute as a whole and emphasizes Part I of the definition.” *Id.* The Court determined that income is classified as business income under the transactional test if “it arises from a transaction or activity that occurs in the regular course of the business in which the taxpayer engages.” *Id.* The Court then described the functional test finding that income is classified as business income if “use of the property constituted an integral part of the regular course of a trade or business operation.” *Id.* at 423. Under the functional test, the extraordinary nature or infrequency of the transaction is irrelevant.” *Id.* at 422-423.

The second sentence of R.C. 5747.01(B) was added after *Kemppel*. Under this additional test, income generated from the “partial or complete liquidation of a business, including, but not limited to, gain or loss from the sale or other disposition of goodwill” is also business income. R.C. 5747.01(B). Additionally, Ohio Substitute H.B. 515 (the “Bill”), signed into law on June 24, 2022, further modified the definition of “business income” under R.C. 5747.01(B) to include the sale of an equity or ownership interest in a business.<sup>2</sup> The “sale of an equity or ownership interest in a business” means either (1) a sale treated for federal income tax purposes as an asset sale, or (2) a sale where the seller materially participated in the business during the year of the sale or during any of the five preceding years.

The petitioners have not provided evidence that the sale generating the capital gains at issue was treated as an asset sale for federal income tax purposes. R.C. 5747.01(B)(1). Additionally, the petitioners have also failed to show that Mr. Morgenstern materially participated in the business as required by R.C. 5747.01(B)(2). The Commissioner notes there is some ambiguity as to exactly what business was sold by the petitioners.<sup>3</sup> In their addendum to the petition, the petitioners maintain that Mr. Morgenstern was

---

<sup>2</sup> The changes apply to any audits, refund applications, petitions for reassessment, and appeals pending on or after the Bill’s effective date.

<sup>3</sup> The petitioners failed to provide the purchase agreement despite the Department requesting the document on numerous occasions. The petitioners claim they do not have a copy of the agreement.

the president of *DRB Holdings, LLC*. However, the online article they provided states that Mr. Morgenstern was president of *DRB Systems*, and their federal form 6252 states they sold a 4.98% interest in *DRB Systems LLC*. While the petitioners provided a K-1 from *DRB Holdings, LLC* showing guaranteed payments to Mr. Morgenstern, they also provided documents showing Mr. Morgenstern signed documents as the CEO of *DRB Holdings, LLC* and *DRB Systems LLC*. Finally, the petitioners also provided documents showing that *DRB Holdings, LLC* owned 100% of *DRB Systems LLC*, but have not shown how *DRB System LLC*'s status as a disregarded entity of *DRB Holdings* affects the business income analysis under R.C. 5751.01(B). As a result, there are too many unsettled factual issues to allow the Commissioner to find that Mr. Morgenstern "materially participated, as described in 26 C.F.R. 1.469-5T, in the activities of the business" in which he sold "an equity or ownership interest...", nor can the Commissioner determine that the sale at issue was an asset sale (or treated as an asset sale for federal income tax purposes). R.C. 5747.01(B)(1) and (2). As such, based on the best information currently in the Commissioner's possession, he cannot find the capital gains at issue to be "business income" under R.C. 5747.01(B)(1) or (2).<sup>4</sup> See R.C. 5703.36.

That petitioners also state this income obviously fits under the liquidation test, although they fail to elaborate on how the income qualifies as a "liquidation of a business" under R.C. 5747.01(B). When interpreting statutes, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.42. If a statute is ambiguous, legislative intent can be derived from, among other things, the "object sought to be attained", "circumstances under which the statute was enacted", "legislative history", and "administrative construction of the statute." R.C. 1.49. 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.

In *Kemppel*, the corporation sold all its assets and ceased doing business. *Kemppel* at 420. The link between liquidation and cessation of operations was reiterated several times throughout the *Kemppel* decision. The Court cited many out-of-state cases that differentiate between the sale of assets as part of the cessation of the business (a "true liquidation") versus the sale of assets to another who continues the business. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Com., Bd. of Fin. & Revenue*, 537 Pa. 205, 209, 642 A.2d 472, 474–75 (1994) and *Polaroid Corp. v. Offerman*, 349 N.C. 290, 307, 507 S.E.2d 284, 296 (1998).

In response to *Kemppel*, the Ohio General Assembly passed Senate Bill 261, which added the second sentence to Ohio's definition of business; thus, after the change "business income" included income from the partial or complete liquidation of a business.<sup>5</sup> This legislative history shows the General Assembly relied on the facts in *Kemppel* when enacting this amendment to R.C. 5747.01(B). The Legislative Service Commission's "Final Analysis" for Senate Bill 261, which is an explanation of permanent law, directly references the *Kemppel* case when explaining the change to R.C. 5747.01(B).<sup>6</sup> Additionally, the Ohio General Assembly chose the phrase "partial or complete liquidation of a business", as opposed to partial or complete liquidation of an "ownership interest" or "equity interest",

---

<sup>4</sup> The petitioners do not make any contentions that the capital gains at issue are business income under either the transactional or functional tests of R.C. 5747.01(B). The Commissioner agrees that the income at issue is not business income under either of these tests.

<sup>5</sup> The amendment did not, however, define "partial or complete liquidation of a business."

<sup>6</sup> See Ohio Legislative Service Commission Final Bill Analysis for Am. Sub. Senate Bill 261 at 4 (2003) (stating "In a recent case, gains from the liquidation of an Ohio pass-through entity \*\*\* were found to be nonbusiness income \*\*\*. See *Kemppel v. Zaino*, 91 Ohio St.3d 420 (2001).")

both terms it uses in several places in Chapter 5747 of the Revised Code.<sup>7</sup> R.C. 5747.01(B) (emphasis added). Taken together, this is a clear indication that the cessation of business operations is a material fact in determining what can be considered a liquidation under Ohio law. The converse implication is that the sale of an ownership or equity interest in an entity that *continues to operate after the sale* is not a liquidation under Ohio law, but rather is simply the sale of an interest in an entity (i.e., an intangible asset).

Additionally, when the Ohio General Assembly recently clarified R.C. 5747.01(B), it did not choose to define or modify liquidation to include the sale of an equity or ownership interest. Rather, it chose to separately add that the sale of an equity or ownership interest is also business income under Ohio law. Therefore, by adding new language about the sale of an interest in a business, as opposed to defining “liquidation of a business” to include a liquidation of ownership, the Ohio General Assembly affirmed that liquidation for purposes of R.C. 5747.01(B) contemplates the cessation of business operations for purposes of defining business income pursuant to a liquidation. The petitioners have not provided any evidence that this sale was related to a liquidation. Thus, they failed to meet their burden of showing that the relevant transaction was a liquidation.

Accordingly, the assessment stands as issued and the underlying overpayment is denied in full.

Current records indicate no payments have been applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to “Treasurer – State of Ohio.” Any payment made within (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.

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

/s/ Jeffrey A. McClain

  
JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner

<sup>7</sup> See e.g. R.C. 5747.01(AA)(4)(c)(ii) and (EE)(3). See also R.C. 5747.212 (which was also enacted as part of Senate Bill 261 and addresses “income, including gain or loss, realized from the sale, exchange, or other disposition of a debt or equity interest” in a pass-through entity.). (emphasis added).



1000000242

FINAL

# DETERMINATION

Date:

OCT 12 2022

Mark E. & Tonya M. Robinson  
428 Blue Jacket Rd.  
Perrysburg, OH 43551

Re:    Multiple Assessments  
      Individual Income Tax – Multiple Periods

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

Assessment	Year	Tax	Interest	Penalties	Total
02201705326963	2013	\$1,179.15	\$103.70	\$207.40	\$1,490.25
02201705527052	2014	\$3,832.40	\$222.90	\$445.80	\$4,501.10
02201705927082	2015	\$2,265.76	\$64.42	\$128.84	\$2,459.02

## I. BACKGROUND

The Ohio Department of Taxation assessed Mark and Tonya Robinson (the “petitioners”) after disallowing a portion of the Ohio Small Business Investor Income Deduction (“SBD”) and Ohio Business Income Deduction (“BID”) claimed on their Ohio individual income tax returns for the periods at issue. Specifically, the Department removed amounts reported to the petitioners as guaranteed payments from Spengler Nathanson P.L.L. (the “firm”) because Ms. Tonya Robinson did not own at least 20% of the qualifying pass-through entity as required by R.C. 5733.40(A)(7). The petitioners timely filed petitions for reassessment and requested a hearing, which was held in person on this matter.<sup>1</sup>

## II. PETITIONERS’ CONTENTIONS

The petitioners object to the assessments and contend that the returns were correct as filed. Specifically, the petitioners contend:

1. The income at issue is not a guaranteed payment but instead is business income eligible for the Ohio SBD and the Ohio BID;
2. Assuming, arguendo, that the income at issue is a guaranteed payment, the partners of the firm are sole proprietors who provide services to the partnership and therefore their guaranteed payments are business income;
3. The guaranteed payments are not nonbusiness income and R.C. 5733.40(A)(7) does not convert the guaranteed payments from business income to nonbusiness income;
4. The Department’s interpretation of R.C. 5733.40(A)(7) is contrary to the statute’s historical justification; and
5. *HBD Industries, Inc. v. Levin* does not impact the analysis of this matter.

<sup>1</sup> The petitioners were represented as part of a consolidated hearing. Each petitioner represented at the hearing was a partner of the firm who had similar issues and contentions related to their Ohio income tax for tax years 2013, 2014, and/or 2015.

The petitioners' contentions generally fall into four categories. First, the subject payments were a distributive share of the firm's income and therefore should be considered business income. Second, the subject payments are business income for federal income tax purposes. Third, the subject payments are sole proprietor income from self-employment and are therefore business income. Finally, R.C. 5733.40(A)(7) and *HBD Industries* do not apply to this case. Under these theories, the petitioners believe the income at issue is business income and is eligible for the SBD or the BID. In support of these objections, the petitioners provided the Department with the firm's partnership agreement. The income at issue is Ms. Robinson's fixed monthly draw detailed in the partnership agreement and Exhibit A to the partnership agreement.

### III. AUTHORITY

#### A. BUSINESS INCOME AND THE OHIO SMALL BUSINESS INVESTOR INCOME DEDUCTION AND THE OHIO BUSINESS INCOME DEDUCTION

In 2013, Ohio allowed a deduction for business income under the Ohio Small Business Investor Income Deduction. Former R.C. 5747.01(A)(31) allowed married filing jointly taxpayers to claim a deduction of the 50% of the taxpayer's first \$250,000 of Ohio small business investor income. In 2014, the SBD was increased to the 75% of the taxpayer's first \$250,000 of Ohio small business investor income. "Ohio small business investor income" was defined as the portion of the taxpayer's adjusted gross income that is business income reduced by deductions from business income and apportioned or allocated to Ohio under R.C. 5747.21 and 5747.22 to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year.

In 2015, Ohio transitioned to the Ohio Business Income Deduction. Former R.C. 5747.01(A)(31) allowed married filing jointly taxpayers to claim a deduction equal to 75% of the taxpayer's first \$250,000.00 of business income. For 2015, taxpayers could include all business income in this calculation, not just Ohio business income. The remaining business income was then taxed at a special set of business income tax rates, capped at 3%.

Ohio's income tax distinguishes between "business income" and "nonbusiness income." For the period at issue, R.C. 5747.01(B) defined business income as:

[I]ncome, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade<sup>2</sup> 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.<sup>3</sup> '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.<sup>4</sup>

<sup>2</sup> Commonly referred to as the "transactional test". *See Kemppel v. Zaino*, 91 Ohio St.3d 420, 746 N.E.2d 1073 (2001).

<sup>3</sup> Commonly referred to as the "functional test". *See Kemppel*.

<sup>4</sup> The second sentence was added after the *Kemppel* decision. Herein referred to as the "liquidation test."

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

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

#### **B. GUARANTEED PAYMENTS RECLASSIFICATION UNDER R.C. 5733.40(A)(7)**

In addition to the definition found in R.C. 5747.01(B), R.C. 5733.40(A)(7) also states, in relevant part, that:

For the purposes of Chapters 5733. and 5747. of the Revised Code, guaranteed payments or compensation paid to investors by a qualifying entity...shall be considered a distributive share of income of the qualifying entity. Division (A)(7) of this section applies only to such payments or such compensation paid to an investor who at any time during the qualifying entity's taxable year *holds at least a twenty per cent* direct or indirect interest in the profits or capital of the qualifying entity... (Emphasis added).

R.C. 5733.40(A)(7) reclassifies certain guaranteed payments and compensation paid by a pass-through entity to an investor who owns at least 20% of the entity as a distributive share of business income from the entity. As business income, amounts may be deductible as part of the Ohio SBD or Ohio BID. However, by its own terms R.C. 5733.40(A)(7) reclassifies only such guaranteed payments or compensation paid to an investor who owns *at least 20%* of the profits or capital of the qualifying entity. As such, taxpayers must own at least 20% of the qualifying pass-through entity to reclassify their guaranteed payment or compensation as business income under R.C. 5733.40(A)(7).

#### **C. STATUTORY CONSTRUCTION**

In cases of statutory construction, legislative intent in enacting the statute is of paramount concern. *State ex re. Steele v. Morrissey*, 103 Ohio St.3d 355, 358, 2004-Ohio-4960, 815 N.E.2d 1107, \*21. Legislative intent is determined by looking to the language of the statute and the purpose that is to be accomplished by the statute. *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 419, 704 N.E.2d 1217 (1999). When the meaning of the statute is “clear and unambiguous,” the statute must be applied “as written.” *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 495, 2008-Ohio-6323, 900 N.E.2d 601, \*9.

#### **IV. ANALYSIS**

The firm is a qualifying pass-through entity under R.C. 5733.40(N). The firm’s partnership agreement states that Ms. Robinson is a partner with the firm and derives income from the firm. However, not all of the income is a distributive share directly related to the profits of the firm; a portion of the petitioners’ income is characterized as guaranteed payments. According to the partnership agreement, “[e]ach partner *shall be entitled* to receive a monthly drawing account chargeable against the partnership profits . . . The annual Draw levels for partners *shall be* between \$60,000-\$70,000.” (Emphasis added). The draws must be paid out monthly in the amount agreed upon by the firm and the partners. While the firm’s management committee may defer payments of the draws, it must pay them to partners as soon as there is sufficient cash available.

The partnership agreement and the petitioners’ Schedule K-1 show that Ms. Robinson held less than a 20% interest in the firm during the period in question. Because Ms. Robinson did not own a 20% or greater interest in the firm during the applicable period, R.C. 5733.40(A)(7) does not reclassify the guaranteed payments from

the firm as business income. The petitioners acknowledge the requirements of R.C. 5733.40(A)(7) are not met in this case. Therefore, the amounts are not eligible for the Ohio SBD or Ohio BID.

Additionally, guaranteed payments are not business income under Ohio law. Ohio has its own definition of business income in R.C. 5747.01(B) separate from any federal definition. The guaranteed payment at issue was not part of a partial or complete liquidation of a business, nor income from real, tangible, or intangible property that is integral to trade or business operation. Since the guaranteed payment was not business income under either the functional or liquidation tests, the payment must meet the requirements of the transactional test in order to be considered business income under R.C. 5747.01(B). 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. *See generally Kemppel.*

In this case, the firm is in the business of providing legal services and the income received for such legal services are fees from clients which are distributed to the partners as part of their distributive share of income. The guaranteed payments are not tied to the transactions or activities of the firm;<sup>5</sup> rather, they are a guaranteed amount paid to the partner regardless of the services rendered or the amount of income generated. Ms. Robinson, herself, is likewise not in the business of receiving guaranteed payments. Therefore, the guaranteed payments are not business income to the petitioners under the transactional test.

Furthermore, the existence of R.C. 5733.40(A)(7) shows that guaranteed payments are not inherently business income. R.C. 5733.40(A)(7) reclassifies certain income as business income in specific situations, including guaranteed payments made to investors owning more than 20% of a qualifying business. If guaranteed payments were inherently business income, there would be no need for R.C. 5733.40(A)(7), as there would be no reason to reclassify such amounts as part of a distributive share of business income. The enactment of R.C. 5733.40(A)(7), which coexists with R.C. 5747.01(B), shows the Ohio General Assembly believed a specific statute was needed to reclassify certain guaranteed payments as a distributive share of business income.<sup>6</sup>

Accordingly, Ms. Robinson's guaranteed payments are not business income; they are nonbusiness income under Ohio law. *See R.C. 5747.01(C).* The remainder of this analysis addresses the petitioners' contentions.

#### A. GUARANTEED PAYMENTS AS A DISTRIBUTIVE SHARE

As stated above, the income at issue is Ms. Robinson's partnership draw. According to the firm's partnership agreement, Ms. Robinson is *guaranteed* payment of her partnership draws. While the firm may defer the payments based upon the ability to pay, the fact that these payments may be deferred does not change that they are guaranteed to be paid. The guaranteed payment is not tied to the firm's profits or losses, and guaranteed payments are not something the firm earns and distributes as part of the regular course of its trade or business. Additionally, guaranteed payments are not something the firm itself receives. Because the amount of the draw is guaranteed to Ms. Robinson, it is not tied to the profitability of the firm and, thus, is not a direct distribution of the firm's income to her.

The petitioners also contend that because the law firm is in the business of receiving legal fees, the payments to the owners are made up of legal fees and, thus, qualify as income earned in the normal course of a trade or business. This contention is not well taken. The petitioners also contend that it is a legal impossibility for

---

<sup>5</sup> The firm does not receive the guaranteed payments at issue; instead, the firm pays said guaranteed payments to Ms. Robinson under their partnership agreement.

<sup>6</sup> The Ohio General Assembly did not reclassify *all* guaranteed payments as a distributive share of business income; instead, they put certain ownership thresholds (i.e., 20% ownership) on the reclassification.

clients to make guaranteed payments to the firm. The Department does not dispute that the firm's clients are not making guaranteed payments to the firm. Rather, payments for legal fees are made to the firm by the firm's clients in a transaction. The firm then makes the guaranteed payments to the partners, pursuant to their agreement, in a separate transaction, irrespective of the amounts received from the clients.<sup>7</sup> Additionally, as discussed above, the petitioners agree that the guaranteed payments are not reclassified as a distributive share of business income under R.C. 5733.40(A)(7). Thus, this contention that the guaranteed payment is a distributive share of business income from the firm is not well taken.

#### B. GUARANTEED PAYMENTS AND FEDERAL INCOME TAX LAW

The petitioners next contend that the guaranteed payments are not nonbusiness income because the guaranteed payment is not "compensation" as defined by 5747.01(D). They argue that the firm is not Ms. Robinson's employer, and she is not the firm's employee. Because she is not an employee of the firm, the payments at issue are not "compensation". Therefore, the petitioners conclude that the Department's position is contrary to treasury regulations 26 CFR 1.707-1(c) (regarding guaranteed payments) and 26 CFR 31.3401(c)-1 (defining employee).

The Department does not dispute that these payments are not compensation. R.C. 5733.40(A)(7) clearly references both "guaranteed payments or compensation paid to investors...." Using canons of statutory construction, it would be impossible for both terms to have the same meaning. The petitioners seem to contend that all income is either business income or compensation. This contention is not well taken. Nonbusiness income includes other types of income besides compensation. R.C 5747.01(C) states that nonbusiness income means all income other than business income. The statute states that nonbusiness income may include, but is not limited to, compensation (among other things such as rents, capital gains, and interest). Thus, compensation is merely an *example* of nonbusiness income. *See id.* Instead, the payments at issue are guaranteed payments; these amounts are nonbusiness income because they do not qualify as business income under R.C. 5747.01(B) (as discussed above) and are not reclassified as a distributive share of business income under R.C. 5733.40(A)(7).

Regarding the petitioners' conclusory statements pertaining to 26 CFR 1.707-1(c) and 26 CFR 31.3401(c)-1, the Department again notes that the petitioners have not shown how these federal regulations apply to the Ohio SBD and the Ohio BID. As noted above, Ohio has its own definition of "business income." However, the petitioners contend the Department is bound to follow federal definitions and treatments because of the preamble to R.C. 5747.01. This is not correct. The preamble to R.C. 5747.01 states, in relevant part:

Except as otherwise expressly provided or clearly appearing from the context, any *term used in this chapter that is not otherwise defined* in this section has the same meaning as when used in a *comparable context* in the laws of the United States relating to federal income taxes or if not used in a comparable context in those laws, has the same meaning as in section 5733.40 of the Revised Code.

*Id.* (Emphasis added). The preamble does not bind the Commissioner to federal income tax characterizations. Instead, this provision, which appears at the beginning of the definition section of Chapter 5747 of the Revised Code, states that Ohio's income tax uses the Internal Revenue Code (or other laws related to federal income tax) to define any *undefined* term in the chapter. As noted above, the issue in this case is whether Ms.

---

<sup>7</sup> Under the petitioners' logic, all income earned by anyone who works for a business would be business income. For example, a grocery store employee who receives an hourly wage would receive "business income" since the wage is paid using money received from customers of the grocery store as payment for items the store sells.

Robinson's guaranteed payments are "business income". The term business income is defined under Ohio law at R.C. 5747.01(B). As such, the petitioners' reliance on treasury regulations, as opposed to Ohio's own definition of business income, to determine what is "business income" under Ohio law is misplaced.

### C. GUARANTEED PAYMENTS AS SOLE PROPRIETOR INCOME

The petitioners next contend that the guaranteed payment is business income under R.C. 5747.01(B) because Ms. Robinson is not an employee of the firm, but rather a sole proprietor providing her services to the firm. However, as part of this contention, the petitioners admit that: "Each Subject Partner is a partner in Partnership. Each Subject Partner actively participates in Partnership's day to day business operations". Thus, the petitioners acknowledge that Ms. Robinson is not a sole proprietor, but is in fact a partner in the firm. Thus, the idea that Ms. Robinson is a sole proprietor is not well taken.

Black's Law Dictionary defines "Sole Proprietorship" as: "A business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity." Black's Law Dictionary (11th ed. 2019). In this case, Ms. Robinson does not own all the assets, owe all the liabilities, nor operate the firm in her personal capacity. She does not own the business by herself; in fact, the petitioners provided a "partnership agreement" between Ms. Robinson and the firm. There are also other partners in the partnership. Additionally, a sole proprietor is required to report the income and losses from a sole proprietorship on a federal Schedule C. In this case, Ms. Robinson did not file a federal Schedule C for the tax year in question, but instead reported her income on federal Schedule E under the section for "Income or Loss from *Partnerships* and S Corporations." (Emphasis added).

The firm is a limited liability partnership and has a partnership agreement signed by all the partners of the firm. Ms. Robinson is a partner in the firm and is subject to the partnership agreement. The partnership agreement details the annual draw amount as well as policies regarding business decisions, retirement, expulsion of partners, and a restriction against nepotism. A sole proprietor would not be subject to a partnership agreement or any of the types of policies contemplated by the firm's partnership agreement. Therefore, Ms. Robinson is not a sole proprietor, but rather is a partner in the firm. As such, this contention is without merit.

### D. R.C. 5733.40(A)(7) HISTORY AND HBD INDUSTRIES

The petitioners contend that R.C 5733.40(A)(7) does not convert the payments from business income to nonbusiness income.<sup>8</sup> They continue that the requirements of R.C. 5733.40(A)(7) apply only to situations in which a taxpayer has at least a 20% ownership interest, and do not contemplate situations in which a taxpayer owns less than 20% of the entity; put another way, they contend guaranteed payments to an investor owning less than 20% could be either business or nonbusiness income depending on how the partnership derived the income used to make said guaranteed payments. The petitioners conclude that the Department's position is speculating regarding legislative intent and applying the law incorrectly. This contention is not well taken.

R.C. 5733.40(A)(7) reclassifies guaranteed payments made to an investor holding at least a 20% ownership interest in an entity as business income. If the 20% ownership threshold is not met, the guaranteed payments are not reclassified as business income. As noted above, guaranteed payments by those who own less than 20% of a qualifying entity are not inherently business income without showing these payments are business income

---

<sup>8</sup> The Commissioner does not dispute this; instead, as analyzed above, guaranteed payments do not meet the definition of business income in R.C. 5747.01(B), and, thus, are *nonbusiness income*. That is why R.C. 5733.40(A)(7) was enacted by the Ohio General Assembly- to reclassify guaranteed payments for certain investors, which are otherwise *nonbusiness income* as a distributive share of *business income* from a PTE if certain criteria are met.

under R.C. 5747.01(B). Additionally, R.C. 5733.40(A)(7) serves to reclassify certain guaranteed payments as a distributive share of business income from a PTE if the investor owns 20% or more of the PTE. The logical operation of this statute for an investor who owns less than 20% simply means that the guaranteed payment is *not* reclassified as a distributive share of business income.

The petitioners cite tax forms, tax return instructions, informal guidance, and a Department-hosted webinar to support their contention that the Department is misapplying R.C. 5733.40(A)(7). Specifically, the petitioners note the Department did not specifically address this issue until a 2015 webinar. Thus, the petitioners seem to contend that because the Department was silent on the issue in its forms and instructions, then that somehow means guaranteed payments to these investors must be business income.<sup>9</sup> Cutting against this contention, the petitioners concede that Department guidance allows only investors owning at least 20% to claim the guaranteed payments as business income. In fact, the Department could not assert that guaranteed payments to investors owning less than 20% are business income, as that would render the reclassification in R.C. 5733.40(A)(7) meaningless. Since the Department did not assert guaranteed payments to a less than 20% investor were business income, the petitioners cannot contend they detrimentally relied on Department guidance when they classified their guaranteed payments as business income. Thus, this contention is not well taken.

The petitioners attempt to analyze the history of R.C. 5733.40(A)(7) to determine its intent and bolster their case. However, the petitioners do not cite any authority or present anything other than conclusory statements that R.C. 5733.40(A)(7) does not apply to situations of less than 20% ownership. The petitioners have not shown that R.C. 5733.40(A)(7) is ambiguous. The statute specifically addresses investors owning at least 20% of a qualifying entity. For such investors, guaranteed payments shall be considered a distributive share of the entity's income and are therefore business income to the investor. When the meaning of the statute is "clear and unambiguous," the statute must be applied "as written." *Cheap Escape Co.*, 1900 N.E.2d 601 at 604. In this case, the meaning and language of R.C. 5733.40(A)(7) is clear and unambiguous. For the purposes of R.C. Chapters 5733. and 5747., certain guaranteed payments and compensation are reclassified as a distributive share of income from a PTE when the investor receiving the income owns at least 20% of the entity making the payment. R.C. 5733.40(A)(7). There is no ambiguity in R.C. 5733.40(A)(7) and it must be applied as written. Additionally, portions of the statute would be rendered meaningless if guaranteed payments to those owning less than 20% of a qualifying entity were already classified as business income. For example, why would a taxpayer need to reclassify guaranteed payments as business income if such amounts are already business income? Accordingly, because Ms. Robinson does not own at least 20% of the firm, R.C. 5733.40(A)(7) does not convert her guaranteed payments into business income.

The petitioners' contention that the payments at issue qualify for the Ohio SBD or Ohio BID is not well taken. Regardless of the petitioners' choice of definition regarding "guaranteed payments," Ms. Robinson owns less than 20% of the firm's capital or profit share and is not entitled to claim either deduction. R.C. 5733.40(A)(7) only applies to guaranteed payments paid to an investor that holds at least 20% direct or indirect interest in the profits or capital of the qualifying entity. In this case, according to the firm's partnership agreement and its tax filings, Ms. Robinson owned a vested capital interest of less than 20% in the partnership's profits during the years in question, which falls short of the required 20% threshold.

---

<sup>9</sup> This cannot be so. The Ohio Board of Tax Appeals ("BTA") has routinely held that "Taxpayers are required to follow the law of the state of Ohio.... *Ricchuiti v. Limbach* (Oct. 23, 1992), BTA No. 1989-K-1124, unreported. The instructions to the returns are not the law." *Benedetti v. Zaino*, BTA No. 2003-R-1817, 2004 WL 1488191 (June 25, 2004). Additionally, the BTA has noted "[i]t would be unreasonable for a taxpayer to expect that the intricacies of Ohio's income tax laws encompassed within R.C. Chapter 5747 could be reduced to a single line on a form." *Ricchuiti* at \*5. Similarly, it is unreasonable to expect the Department to provide guidance on every possible situation or on every position that a taxpayer could possibly take.

Finally, the petitioners contend the holding of *HBD Industries, Inc. v. Levin* does not affect the analysis of this case. Specifically, the petitioners contend *HBD Industries* involved the meaning of “compensation” and not “guaranteed payments”. While the Commissioner does not concede that *HBD Industries* has no effect on the outcome of this case, none of the billings, assessments, or guidance related to this matter directly cited or referenced this case. Furthermore, the case was not cited in any of the Commissioner’s above analysis.

#### V. PENALTY ABATEMENT

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

#### VI. CONCLUSION

Ms. Robinson’s guaranteed payments are not eligible for the Ohio SBD or Ohio BID. Ms. Robinson did not have the necessary 20% or greater ownership of the firm to reclassify the guaranteed payments as a distributive share of business income under R.C. 5733.40(A)(7). Despite their numerous assertions to the contrary, the petitioners’ contentions are not well taken, and the guaranteed payments at issue are not business income under R.C. 5747.01(B). However, the petitioners are granted a penalty abatement in this matter.

Accordingly, the assessments are adjusted as follows:

Assessment	Year	Tax	Interest	Penalties	Total
02201705326963	2013	\$1,179.15	\$103.70	\$0.00	\$1,282.85
02201705527052	2014	\$3,832.40	\$222.90	\$0.00	\$4,055.30
02201705927082	2015	\$2,265.76	\$64.42	\$0.00	\$2,330.18

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

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner



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

Department of  
Taxation

000000240

# FINAL DETERMINATION

Date: OCT 1 2 2022

Michael & Amy Southard  
3444 Lanark Lane  
Pepper Pike, Ohio 44124

Re: Assessment No. 02202007023730 & Refund Claim No. 1828410119  
Individual Income Tax - Tax Years 2017 & 2018

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

Tax Year	Overpayment claimed
2017	\$214,083.00

This is also 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 Year	Tax	Interest	Penalty	Total
2018	\$9,235.00	\$410.85	\$821.70	\$10,467.55

Michael and Amy Southard (the “claimants”<sup>1</sup>), filed a 2017 IT 1040 reporting an overpayment of \$214,083.00 and requested a credit carryforward of that amount towards tax year 2018.<sup>2</sup> The Department reduced the credit carryforward amount on the return to \$204,848.00 because it could not verify the capital gains the claimants reported on their Ohio Schedule IT BUS were business income. The claimants subsequently filed their 2018 IT 1040 reporting the unadjusted credit carryforward amount from their 2017 IT 1040; the Department reduced the credit carryforward amount to match the Department’s tax year 2017 adjustment and issued the above assessment for tax year 2018. The claimants filed a petition for reassessment and a request for administrative review of the refund denial and provided documents related to their contention. They request both returns be accepted as filed, and thus the remaining credit carryforward amount from 2017 be allowed on their 2018 Ohio IT 1040. The claimants did not request a hearing; therefore, these matters are now decided based upon the evidence available to the Tax Commissioner.

Upon review of Department records and the evidence submitted by the claimants, their contention related to the remaining requested credit carryforward is well taken.

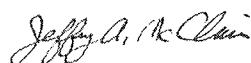
Accordingly, the claimants Ohio IT 1040s for 2017 and 2018 are accepted as filed. The remaining 2017 credit carryforward will be applied to tax year 2018, which results in a cancellation of the assessment.

<sup>1</sup> Although the claimants are both petitioners as to the assessment and claimants as to the refund claim, they are referred to as the “claimants” in this final determination.

<sup>2</sup> The claimants’ Ohio income tax return meets the definition of an “application for refund” under R.C. 5747.11. Ohio Adm. Code 5703-7-02(A)(1).

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



Department of  
Taxation

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

# FINAL DETERMINATION

Date:

OCT 1 2 2022

Stephen M. & Elaine B. Szuch  
1837 Fallen Oak Cir.  
Perrysburg, OH 43551

Re:     Multiple Assessments  
          Individual Income Tax – Multiple Periods

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

Assessment	Year	Tax	Interest	Penalties	Total
02201713028084	2013	\$1,194.75	\$115.12	\$230.24	\$1,540.11
02201713028083	2014	\$1,858.82	\$123.34	\$246.68	\$2,228.84

## I. BACKGROUND

The Ohio Department of Taxation assessed Stephen and Elaine Szuch (the “petitioners”) after disallowing a portion of the Ohio Small Business Investor Income Deduction (“SBD”) claimed on their Ohio individual income tax returns for the periods at issue. Specifically, the Department removed amounts reported to the petitioners as guaranteed payments from Spengler Nathanson P.L.L. (the “firm”) because Stephen Szuch did not own at least 20% of the qualifying pass-through entity as required by R.C. 5733.40(A)(7). The petitioners timely filed petitions for reassessment and requested a hearing, which was held in person on this matter.<sup>1</sup>

## II. PETITIONERS’ CONTENTIONS

The petitioners object to the assessments and contend that the returns were correct as filed. Specifically, the petitioners contend:

1. The income at issue is not a guaranteed payment but instead is business income eligible for the Ohio SBD;
2. Assuming, arguendo, that the income at issue is a guaranteed payment, the partners of the firm are sole proprietors who provide services to the partnership and therefore their guaranteed payments are business income;
3. The guaranteed payments are not nonbusiness income and R.C. 5733.40(A)(7) does not convert the guaranteed payments from business income to nonbusiness income;
4. The Department’s interpretation of R.C. 5733.40(A)(7) is contrary to the statute’s historical justification; and
5. *HBD Industries, Inc. v. Levin* does not impact the analysis of this matter.

<sup>1</sup> The petitioners were represented as part of a consolidated hearing. Each petitioner represented at the hearing was a partner of the firm who had similar issues and contentions related to their Ohio income tax for tax years 2013, 2014, and/or 2015.

The petitioners' contentions generally fall into four categories. First, the subject payments were a distributive share of the firm's income and therefore should be considered business income. Second, the subject payments are business income for federal income tax purposes. Third, the subject payments are sole proprietor income from self-employment and are therefore business income. Finally, R.C. 5733.40(A)(7) and *HBD Industries* do not apply to this case. Under these theories, the petitioners believe the income at issue is business income and is eligible for the SBD. In support of these objections, the petitioners provided the Department with the firm's partnership agreement. The income at issue is Mr. Szuch's fixed monthly draw detailed in the partnership agreement and Exhibit A to the partnership agreement.

### III. AUTHORITY

#### A. BUSINESS INCOME AND THE OHIO SMALL BUSINESS INVESTOR INCOME DEDUCTION

In 2013, Ohio allowed a deduction for business income under the Ohio Small Business Investor Income Deduction. Former R.C. 5747.01(A)(31) allowed married filing jointly taxpayers to claim a deduction of the 50% of the taxpayer's first \$250,000 of Ohio small business investor income. In 2014, the SBD was increased to the 75% of the taxpayer's first \$250,000 of Ohio small business investor income. "Ohio small business investor income" was defined as the portion of the taxpayer's adjusted gross income that is business income reduced by deductions from business income and apportioned or allocated to Ohio under R.C. 5747.21 and 5747.22 to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year.

Ohio's income tax distinguishes between "business income" and "nonbusiness income." For the period at issue, R.C. 5747.01(B) defined business income as:

[I]ncome, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade<sup>2</sup> 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.<sup>3</sup> '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.<sup>4</sup>

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

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

#### B. GUARANTEED PAYMENTS RECLASSIFICATION UNDER R.C. 5733.40(A)(7)

In addition to the definition found in R.C. 5747.01(B), R.C. 5733.40(A)(7) also states, in relevant part, that:

<sup>2</sup> Commonly referred to as the "transactional test". *See Kemppel v. Zaino*, 91 Ohio St.3d 420, 746 N.E.2d 1073 (2001).

<sup>3</sup> Commonly referred to as the "functional test". *See Kemppel*.

<sup>4</sup> The second sentence was added after the *Kemppel* decision. Herein referred to as the "liquidation test."

For the purposes of Chapters 5733. and 5747. of the Revised Code, guaranteed payments or compensation paid to investors by a qualifying entity...shall be considered a distributive share of income of the qualifying entity. Division (A)(7) of this section applies only to such payments or such compensation paid to an investor who at any time during the qualifying entity's taxable year *holds at least a twenty per cent* direct or indirect interest in the profits or capital of the qualifying entity... (Emphasis added).

R.C. 5733.40(A)(7) reclassifies certain guaranteed payments and compensation paid by a pass-through entity to an investor who owns at least 20% of the entity as a distributive share of business income from the entity. As business income, amounts may be deductible as part of the Ohio SBD. However, by its own terms R.C. 5733.40(A)(7) reclassifies only such guaranteed payments or compensation paid to an investor who owns *at least 20%* of the profits or capital of the qualifying entity. As such, taxpayers must own at least 20% of the qualifying pass-through entity to reclassify their guaranteed payment or compensation as business income under R.C. 5733.40(A)(7).

#### C. STATUTORY CONSTRUCTION

In cases of statutory construction, legislative intent in enacting the statute is of paramount concern. *State ex re. Steele v. Morrissey*, 103 Ohio St.3d 355, 358, 2004-Ohio-4960, 815 N.E.2d 1107, \*21. Legislative intent is determined by looking to the language of the statute and the purpose that is to be accomplished by the statute. *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 419, 704 N.E.2d 1217 (1999). When the meaning of the statute is “clear and unambiguous,” the statute must be applied “as written.” *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 495, 2008-Ohio-6323, 900 N.E.2d 601, \*9.

#### IV. ANALYSIS

The firm is a qualifying pass-through entity under R.C. 5733.40(N). The firm’s partnership agreement states that Mr. Szuch is a partner with the firm and derives income from the firm. However, not all of the income is a distributive share directly related to the profits of the firm; a portion of the petitioners’ income is characterized as guaranteed payments. According to the partnership agreement, “[e]ach partner *shall be entitled* to receive a monthly drawing account chargeable against the partnership profits . . . The annual Draw levels for partners *shall be* between \$60,000-\$70,000.” (Emphasis added). The draws must be paid out monthly in the amount agreed upon by the firm and the partners. While the firm’s management committee may defer payments of the draws, it must pay them to partners as soon as there is sufficient cash available.

The partnership agreement and the petitioners’ Schedule K-1 show that Mr. Szuch held less than a 20% interest in the firm during the period in question. Because Mr. Szuch did not own a 20% or greater interest in the firm during the applicable period, R.C. 5733.40(A)(7) does not reclassify the guaranteed payments from the firm as business income. The petitioners acknowledge the requirements of R.C. 5733.40(A)(7) are not met in this case. Therefore, the amounts are not eligible for the Ohio SBD.

Additionally, guaranteed payments are not business income under Ohio law. Ohio has its own definition of business income in R.C. 5747.01(B) separate from any federal definition. The guaranteed payment at issue was not part of a partial or complete liquidation of a business, nor income from real, tangible, or intangible property that is integral to trade or business operation. Since the guaranteed payment was not business income under either the functional or liquidation tests, the payment must meet the requirements of the transactional test in order to be considered business income under R.C. 5747.01(B). 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. *See generally Kemppel.*

In this case, the firm is in the business of providing legal services and the income received for such legal services are fees from clients which are distributed to the partners as part of their distributive share of income. The guaranteed payments are not tied to the transactions or activities of the firm;<sup>5</sup> rather, they are a guaranteed amount paid to the partner regardless of the services rendered or the amount of income generated. Mr. Szuch, himself, is likewise not in the business of receiving guaranteed payments. Therefore, the guaranteed payments are not business income to the petitioners under the transactional test.

Furthermore, the existence of R.C. 5733.40(A)(7) shows that guaranteed payments are not inherently business income. R.C. 5733.40(A)(7) reclassifies certain income as business income in specific situations, including guaranteed payments made to investors owning more than 20% of a qualifying business. If guaranteed payments were inherently business income, there would be no need for R.C. 5733.40(A)(7), as there would be no reason to reclassify such amounts as part of a distributive share of business income. The enactment of R.C. 5733.40(A)(7), which coexists with R.C. 5747.01(B), shows the Ohio General Assembly believed a specific statute was needed to reclassify certain guaranteed payments as a distributive share of business income.<sup>6</sup>

Accordingly, Mr. Szuch's guaranteed payments are not business income; they are nonbusiness income under Ohio law. *See R.C. 5747.01(C).* The remainder of this analysis addresses the petitioners' contentions.

#### A. GUARANTEED PAYMENTS AS A DISTRIBUTIVE SHARE

As stated above, the income at issue is Mr. Szuch's partnership draw. According to the firm's partnership agreement, Mr. Szuch is *guaranteed* payment of his partnership draws. While the firm may defer the payments based upon the ability to pay, the fact that these payments may be deferred does not change that they are guaranteed to be paid. The guaranteed payment is not tied to the firm's profits or losses, and guaranteed payments are not something the firm earns and distributes as part of the regular course of its trade or business. Additionally, guaranteed payments are not something the firm itself receives. Because the amount of the draw is guaranteed to Mr. Szuch, it is not tied to the profitability of the firm and, thus, is not a direct distribution of the firm's income to him.

The petitioners also contend that because the law firm is in the business of receiving legal fees, the payments to the owners are made up of legal fees and, thus, qualify as income earned in the normal course of a trade or business. This contention is not well taken. The petitioners also contend that it is a legal impossibility for clients to make guaranteed payments to the firm. The Department does not dispute that the firm's clients are not making guaranteed payments to the firm. Rather, payments for legal fees are made to the firm by the firm's clients in a transaction. The firm then makes the guaranteed payments to the partners, pursuant to their agreement, in a separate transaction, irrespective of the amounts received from the clients.<sup>7</sup> Additionally, as discussed above, the petitioners agree that the guaranteed payments are not reclassified as a distributive share

---

<sup>5</sup> The firm does not receive the guaranteed payments at issue; instead, the firm pays said guaranteed payments to Mr. Szuch under their partnership agreement.

<sup>6</sup> The Ohio General Assembly did not reclassify *all* guaranteed payments as a distributive share of business income; instead, they put certain ownership thresholds (i.e., 20% ownership) on the reclassification.

<sup>7</sup> Under the petitioners' logic, all income earned by anyone who works for a business would be business income. For example, a grocery store employee who receives an hourly wage would receive "business income" since the wage is paid using money received from customers of the grocery store as payment for items the store sells.

of business income under R.C. 5733.40(A)(7). Thus, this contention that the guaranteed payment is a distributive share of business income from the firm is not well taken.

#### B. GUARANTEED PAYMENTS AND FEDERAL INCOME TAX LAW

The petitioners next contend that the guaranteed payments are not nonbusiness income because the guaranteed payment is not “compensation” as defined by 5747.01(D). They argue that the firm is not Mr. Szuch’s employer, and he is not the firm’s employee. Because he is not an employee of the firm, the payments at issue are not “compensation”. Therefore, the petitioners conclude that the Department’s position is contrary to treasury regulations 26 CFR 1.707-1(c) (regarding guaranteed payments) and 26 CFR 31.3401(c)-1 (defining employee).

The Department does not dispute that these payments are not compensation. R.C. 5733.40(A)(7) clearly references both “guaranteed payments or compensation paid to investors....” Using canons of statutory construction, it would be impossible for both terms to have the same meaning. The petitioners seem to contend that all income is either business income or compensation. This contention is not well taken. Nonbusiness income includes other types of income besides compensation. R.C 5747.01(C) states that nonbusiness income means all income other than business income. The statute states that nonbusiness income may include, but is not limited to, compensation (among other things such as rents, capital gains, and interest). Thus, compensation is merely an *example* of nonbusiness income. *See id.* Instead, the payments at issue are guaranteed payments; these amounts are nonbusiness income because they do not qualify as business income under R.C. 5747.01(B) (as discussed above) and are not reclassified as a distributive share of business income under R.C. 5733.40(A)(7).

Regarding the petitioners’ conclusory statements pertaining to 26 CFR 1.707-1(c) and 26 CFR 31.3401(c)-1, the Department again notes that the petitioners have not shown how these federal regulations apply to the Ohio SBD. As noted above, Ohio has its own definition of “business income.” However, the petitioners contend the Department is bound to follow federal definitions and treatments because of the preamble to R.C. 5747.01. This is not correct. The preamble to R.C. 5747.01 states, in relevant part:

Except as otherwise expressly provided or clearly appearing from the context, any *term used in this chapter that is not otherwise defined* in this section has the same meaning as when used in a *comparable context* in the laws of the United States relating to federal income taxes or if not used in a comparable context in those laws, has the same meaning as in section 5733.40 of the Revised Code.

*Id.* (Emphasis added). The preamble does not bind the Commissioner to federal income tax characterizations. Instead, this provision, which appears at the beginning of the definition section of Chapter 5747 of the Revised Code, states that Ohio’s income tax uses the Internal Revenue Code (or other laws related to federal income tax) to define any *undefined* term in the chapter. As noted above, the issue in this case is whether Mr. Szuch’s guaranteed payments are “business income”. The term business income *is* defined under Ohio law at R.C. 5747.01(B). As such, the petitioners’ reliance on treasury regulations, as opposed to Ohio’s own definition of business income, to determine what is “business income” under Ohio law is misplaced.

#### C. GUARANTEED PAYMENTS AS SOLE PROPRIETOR INCOME

The petitioners next contend that the guaranteed payment is business income under R.C. 5747.01(B) because Mr. Szuch is not an employee of the firm, but rather a sole proprietor providing his services to the firm.

However, as part of this contention, the petitioners admit that: “Each Subject Partner is a partner in Partnership. Each Subject Partner actively participates in Partnership’s day to day business operations”. Thus, the petitioners acknowledge that Mr. Szuch is not a sole proprietor, but is in fact a partner in the firm. Thus, the idea that Mr. Szuch is a sole proprietor is not well taken.

Black’s Law Dictionary defines “Sole Proprietorship” as: “A business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity.” Black’s Law Dictionary (11th ed. 2019). In this case, Mr. Szuch does not own all the assets, owe all the liabilities, nor operate the firm in his personal capacity. He does not own the business by himself; in fact, the petitioners provided a “partnership agreement” between Mr. Szuch and the firm. There are also other partners in the partnership. Additionally, a sole proprietor is required to report the income and losses from a sole proprietorship on a federal Schedule C. In this case, Mr. Szuch did not file a federal Schedule C for the tax year in question, but instead reported his income on federal Schedule E under the section for “Income or Loss from *Partnerships* and S Corporations.” (Emphasis added).

The firm is a limited liability partnership and has a partnership agreement signed by all the partners of the firm. Mr. Szuch is a partner in the firm and is subject to the partnership agreement. The partnership agreement details the annual draw amount as well as policies regarding business decisions, retirement, expulsion of partners, and a restriction against nepotism. A sole proprietor would not be subject to a partnership agreement or any of the types of policies contemplated by the firm’s partnership agreement. Therefore, Mr. Szuch is not a sole proprietor, but rather is a partner in the firm. As such, this contention is without merit.

#### D. R.C. 5733.40(A)(7) HISTORY AND HBD INDUSTRIES

The petitioners contend that R.C 5733.40(A)(7) does not convert the payments from business income to nonbusiness income.<sup>8</sup> They continue that the requirements of R.C. 5733.40(A)(7) apply only to situations in which a taxpayer has at least a 20% ownership interest, and do not contemplate situations in which a taxpayer owns less than 20% of the entity; put another way, they contend guaranteed payments to an investor owning less than 20% could be either business or nonbusiness income depending on how the partnership derived the income used to make said guaranteed payments. The petitioners conclude that the Department’s position is speculating regarding legislative intent and applying the law incorrectly. This contention is not well taken.

R.C. 5733.40(A)(7) reclassifies guaranteed payments made to an investor holding at least a 20% ownership interest in an entity as business income. If the 20% ownership threshold is not met, the guaranteed payments are not reclassified as business income. As noted above, guaranteed payments by those who own less than 20% of a qualifying entity are not inherently business income without showing these payments are business income under R.C. 5747.01(B). Additionally, R.C. 5733.40(A)(7) serves to reclassify certain guaranteed payments as a distributive share of business income from a PTE if the investor owns 20% or more of the PTE. The logical operation of this statute for an investor who owns less than 20% simply means that the guaranteed payment is *not* reclassified as a distributive share of business income.

The petitioners cite tax forms, tax return instructions, informal guidance, and a Department-hosted webinar to support their contention that the Department is misapplying R.C. 5733.40(A)(7). Specifically, the petitioners note the Department did not specifically address this issue until a 2015 webinar. Thus, the petitioners seem to contend that because the Department was silent on the issue in its forms and instructions, then that somehow

---

<sup>8</sup> The Commissioner does not dispute this; instead, as analyzed above, guaranteed payments do not meet the definition of business income in R.C. 5747.01(B), and, thus, are *nonbusiness income*. That is why R.C. 5733.40(A)(7) was enacted by the Ohio General Assembly, to reclassify guaranteed payments for certain investors, which are otherwise *nonbusiness income* as a distributive share of *business income* from a PTE if certain criteria are met.

means guaranteed payments to these investors must be business income.<sup>9</sup> Cutting against this contention, the petitioners concede that Department guidance allows only investors owning at least 20% to claim the guaranteed payments as business income. In fact, the Department could not assert that guaranteed payments to investors owning less than 20% are business income, as that would render the reclassification in R.C. 5733.40(A)(7) meaningless. Since the Department did not assert guaranteed payments to a less than 20% investor were business income, the petitioners cannot contend they detrimentally relied on Department guidance when they classified their guaranteed payments as business income. Thus, this contention is not well taken.

The petitioners attempt to analyze the history of R.C. 5733.40(A)(7) to determine its intent and bolster their case. However, the petitioners do not cite any authority or present anything other than conclusory statements that R.C. 5733.40(A)(7) does not apply to situations of less than 20% ownership. The petitioners have not shown that R.C. 5733.40(A)(7) is ambiguous. The statute specifically addresses investors owning at least 20% of a qualifying entity. For such investors, guaranteed payments shall be considered a distributive share of the entity's income and are therefore business income to the investor. When the meaning of the statute is "clear and unambiguous," the statute must be applied "as written." *Cheap Escape Co.*, 1900 N.E.2d 601 at 604. In this case, the meaning and language of R.C. 5733.40(A)(7) is clear and unambiguous. For the purposes of R.C. Chapters 5733. and 5747., certain guaranteed payments and compensation are reclassified as a distributive share of income from a PTE when the investor receiving the income owns at least 20% of the entity making the payment. R.C. 5733.40(A)(7). There is no ambiguity in R.C. 5733.40(A)(7) and it must be applied as written. Additionally, portions of the statute would be rendered meaningless if guaranteed payments to those owning less than 20% of a qualifying entity were already classified as business income. For example, why would a taxpayer need to reclassify guaranteed payments as business income if such amounts are already business income? Accordingly, because Mr. Szuch does not own at least 20% of the firm, R.C. 5733.40(A)(7) does not convert his guaranteed payments into business income.

The petitioners' contention that the payments at issue qualify for the Ohio SBD is not well taken. Regardless of the petitioners' choice of definition regarding "guaranteed payments," Mr. Szuch owns less than 20% of the firm's capital or profit share and is not entitled to claim either deduction. R.C. 5733.40(A)(7) only applies to guaranteed payments paid to an investor that holds at least 20% direct or indirect interest in the profits or capital of the qualifying entity. In this case, according to the firm's partnership agreement and its tax filings, Mr. Szuch owned a vested capital interest of less than 20% in the partnership's profits during the years in question, which falls short of the required 20% threshold.

Finally, the petitioners contend the holding of *HBD Industries, Inc. v. Levin* does not affect the analysis of this case. Specifically, the petitioners contend *HBD Industries* involved the meaning of "compensation" and not "guaranteed payments". While the Commissioner does not concede that *HBD Industries* has no effect on the outcome of this case, none of the billings, assessments, or guidance related to this matter directly cited or referenced this case. Furthermore, the case was not cited in any of the Commissioner's above analysis.

---

<sup>9</sup> This cannot be so. The Ohio Board of Tax Appeals ("BTA") has routinely held that "Taxpayers are required to follow the law of the state of Ohio.... *Ricchuiti v. Limbach* (Oct. 23, 1992), BTA No. 1989-K-1124, unreported. The instructions to the returns are not the law." *Benedetti v. Zaino*, BTA No. 2003-R-1817, 2004 WL 1488191 (June 25, 2004). Additionally, the BTA has noted "[i]t would be unreasonable for a taxpayer to expect that the intricacies of Ohio's income tax laws encompassed within R.C. Chapter 5747 could be reduced to a single line on a form." *Ricchuiti* at \*5. Similarly, it is unreasonable to expect the Department to provide guidance on every possible situation or on every position that a taxpayer could possibly take.

V. PENALTY ABATEMENT

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

VI. CONCLUSION

Mr. Szuch's guaranteed payments are not eligible for the Ohio SBD. Mr. Szuch did not have the necessary 20% or greater ownership of the firm to reclassify the guaranteed payments as a distributive share of business income under R.C. 5733.40(A)(7). Despite their numerous assertions to the contrary, the petitioners' contentions are not well taken, and the guaranteed payments at issue are not business income under R.C. 5747.01(B). However, the petitioners are granted a penalty abatement in this matter.

Accordingly, the assessments are adjusted as follows:

Assessment	Year	Tax	Interest	Penalties	Total
02201713028084	2013	\$1,194.75	\$115.12	\$0.00	\$1,309.87
02201713028083	2014	\$1,858.82	\$123.34	\$0.00	\$1,982.16

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

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner



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

Department of  
Taxation

0000000268  
**FINAL  
DETERMINATION**

Date:

**OCT 13 2022**

Wada Farms Marketing Group, LLC  
2155 Providence Way  
Idaho Falls, Idaho 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 following the decision and order of the Board of Tax Appeals in Case No. 2021-1097 dated September 19, 2022. In this order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, assessment number 10001013383 has been adjusted and is 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



Department of  
Taxation

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

000000269  
**FINAL  
DETERMINATION**

Date: **OCT 13 2022**

John J. and Dawn M. Baker  
7599 Sunrise Oval  
Parma, Ohio 44134

Re: Assessment No.: 02202023440908  
Individual Income Tax - 2016

This is the final determination of the Tax Commissioner of Ohio (“Tax Commissioner”) following a decision and order of the Board of Tax Appeals (“BTA”) in Case No. 2021-387, dated October 4, 2021. In that order, the BTA remanded the case to the Tax Commissioner.

Upon remand, the Tax Commissioner finds that the taxpayers were assessed for failing to report additional income on their 2016 individual income tax return. This assessment was calculated using the taxpayer’s federal adjusted gross income as reported to Ohio by the IRS under authorization of Section 6103(d) of the Internal Revenue Code.

The taxpayers filed a petition for reassessment objecting to the assessment. However, R.C. 5747.13(E) requires the total assessed amount to be paid with a petition for reassessment if the taxpayer fails to file a tax return, and the basis for this failure is not an assertion of lack of nexus with Ohio or a contention that the correctly calculated tax liability minus credits is less than \$1.01. In this case, the change in the taxpayers’ federal adjusted gross income affects the taxpayers’ Ohio individual income tax liability. Therefore, the taxpayer was required to file an amended individual income tax return. *See R.C. 5747.10.* The taxpayers did not file the return prior to the assessment, and did not pay the total amount of tax, interest, and penalty with the petition. Additionally, the taxpayers have not claimed that they lacked nexus with the state of Ohio or that their tax liability minus credits were less than \$1.01. Since the taxpayers have not made the required payment, nor filed the required return, the Tax Commissioner must dismiss the petition.

Accordingly, the matter is dismissed for lack of jurisdiction.

Current records indicate that no payments have been made on this assessment, resulting in a balance of \$2,450.56 being due. 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 “Ohio Treasurer.” Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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

/s/ Jeffrey A. McClain



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner

**Ohio**

Department of  
Taxation

Office of the Tax Commissioner  
4405 Northland Ridge Blvd • Columbus, OH 43229

000000271  
**FINAL  
DETERMINATION**

Date:

OCT 13 2022

Bernard and Veronica Butler  
140 Cambridge Drive  
Aurora, Ohio 44202

Re: Assessment No.: 02202005105348  
Individual Income Tax - 2017

This is the final determination of the Tax Commissioner of Ohio ("Tax commissioner") following a decision and order of the Board of Tax Appeals ("BTA") in Case No. 2021-324, dated October 4, 2021 and a decision and order of the Board of Tax Appeals in Case No. 2021-465, dated February 1, 2022. In those orders, the BTA remanded the case to the Tax Commissioner.

Upon remand, the Tax Commissioner finds that the assessment shall be adjusted as follows:

Tax	Interest	Late Filing Penalty	Total
\$0.00	\$0.00	\$50.00	\$50.00

Current records indicate that a payment of \$789.06 has been applied to this assessment, resulting in an overpayment of \$739.06. This overpayment will be refunded to the taxpayers. If the taxpayers have an existing liability to Ohio, the approved refund amount may be reduced to offset the liability. *See R.C.5747.12.*

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

/s/ Jeffrey A. McClain

  
JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner

**Ohio**

**Department of  
Taxation**

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

0000000272  
**FINAL  
DETERMINATION**

Date:

**OCT 13 2022**

Steve & Emma Ingram  
5614 Innerarity Cir.  
Pensacola, FL 32507

Re: Tax Type: Individual Income Tax – 2017  
Assessment No.: 02201921927080

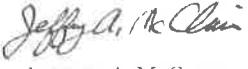
This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2021-1768, dated July 28, 2022. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, the assessment has been cancelled and a refund is granted in the amount of \$268.00 plus applicable 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.

/s/ Jeffrey A. McClain

  
JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner

**Ohio**

**Department of  
Taxation**

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

0000000273  
**FINAL DETERMINATION**

Date: **OCT 13 2022**

Paul W. & Gina L. Linehan  
251 Plymouth Drive  
Bay Village, Ohio 44140

Re: Refund Claim No. 0182904475  
Reporting Period: 01/01/2017 – 12/31/2017  
Individual Income Tax

This is the final determination of the Tax Commissioner following the decision and order of the Board of Tax Appeals in Case No. 2020-430 dated September 13, 2022. In this order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

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

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner



Department of  
Taxation

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

000000289  
**FINAL  
DETERMINATION**

Date: **OCT 20 2022**

Hamilton Riverside Dentistry LLC  
112 N 2nd St. #120  
Hamilton, OH 45011-2702

Re: Assessment No. 100002003466  
Sales Tax  
Audit Period: 10/01/2013 – 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.

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.

/s/ **Jeffrey A. McClain**

Jeffrey A. McClain  
Tax Commissioner



Department of  
Taxation

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

000000283  
**FINAL  
DETERMINATION**

Thomas W. Kruger  
6188 Co. Rd. 97  
Mt. Gilead, OH 43338

Date: OCT 20 2022

Re: Assessment No.: 100002190774  
Use Tax

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

<u>Pre-Assessment</u>			
<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$1,087.50	\$30.02	\$163.13	\$1,280.65

The petitioner purchased a trailer, on or around February 8, 2021, without the payment of tax. The petitioner provided the seller with a certificate of exemption claiming the vehicle was used directly in farming. The Department was unable to verify the exempt use of the trailer. Accordingly, this assessment was issued. A hearing on the matter was not requested.

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

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property. There is a farming exemption to the Ohio sales and use tax under R.C. 5739.02(B)(42)(n) if the purpose of the transaction is "to use or consume the thing transferred primarily in producing tangible personal property for sale by farming, agriculture, horticulture, or floriculture." However, not every agricultural activity is "farming." "Farming" is defined in Ohio Adm. Code 5703-9-23(A)(1) as the "occupation of *tilling the soil for the production of crops* as a business and shall include the raising of farm livestock, bees, or poultry, where the purpose is to sell such livestock, bees, or poultry, or the products thereof as a business." (Emphasis added.)

Types of equipment that generally qualify for the farming exemption are tractors, combines, planters, balers, and similar equipment. Therefore, in order for the trailer to be eligible for the farming exemption, three prerequisites must be met. First, the trailer must be used by a person that

farms as a business enterprise, such as growing agricultural crops or raising livestock for sale as a business. Second, the person must be able to demonstrate that the trailer is used primarily in specific farming activities that are part of growing crops or caring for livestock. Third, these farming activities must account for the primary usage of the trailer.

Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). The farming exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming as defined in the Ohio Administrative Code. In order to claim the exemption, the petitioner must first prove that he is engaged in farming as a business. The petitioner provided a copy of his 2018 1040 Schedule F to prove that he was engaged in the business of farming.

The remaining questions are whether the trailer is used in farming and whether the farming use of the trailer is its primary purpose. According to the petitioner, the trailer is used the majority of the time to transport a track machine from field to field because it cannot be driven on roadways, while also being used to sometimes haul tile to be put in the ground for field drainage. Petition for Reassessment. However, the Farm Use Questionnaire submitted by the petitioner states that the trailer was used entirely to transport farm machinery within the boundaries of his farm. Farm Use Questionnaire, dated Nov. 22, 2021. The singular usage listed in the questionnaire is contrary to the two usages stated in the petition for reassessment.

When analyzing if a piece of equipment is used for farming as defined by law, the primary use of the equipment is the key factor. *Lucinda Hart v. Limbach*, BTA No. 86-D-280, 1988 WL 162378 (July 22, 1988). If the equipment is used solely in transporting farm equipment or tangible personal property instead of being used to sow, cultivate, or harvest crops, it is not eligible for the farm use exemption. *Medina Sod Farms v. Limbach*, BTA No. 2152, 1986 WL 7747 (July 9, 1986). Transporting equipment and materials is not the “tilling of soil for the production of crops” as farming is defined in the Administrative Code. While the trailer in question is stated to be used exclusively for farming business and may be a necessary piece of that business, “the law does not provide \* \* \* that any item necessary for farming is exempt.” *Bahan Farms, LLC v. McClain*, BTA No. 2017-2180, 2019 WL 1260533 (Mar. 11, 2019).

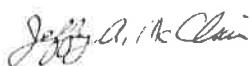
The petitioner failed to provide sufficient evidence that the trailer is used primarily in the production of tangible personal property for sale by farming as required pursuant to R.C. 5739.02(B)(42)(n). Therefore, the petitioner’s objection is denied.

Accordingly, the assessment is affirmed as issued.

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

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner



**Department of  
Taxation**

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

**FINAL  
DETERMINATION**

Date: **OCT 20 2022**

Trevor D. Rindler  
6613 Loblolly Dr.  
Huber Heights, OH 45424-6502

Re: Assessment No.: 100002181792  
Use Tax

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

<u>Pre-Assessment</u>			
<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$410.64	\$4.89	\$17.72	\$433.25

This assessment was issued based upon the conduct of a special audit of a motor vehicle title transfer. On or around June 14, 2021, the petitioner purchased a 2014 Hyundai Elantra GT from an individual seller in Montgomery County in Ohio. At the time of the title transfer, the petitioner indicated that he paid \$1,500.00 for the vehicle and paid sales tax based off that amount. The Department was unable to verify that purchase price and determined the average purchase price for this type of vehicle was \$6,975.31. This assessment was issued for the difference in tax between the reported purchase price and the average purchase price. A hearing was held as requested, but the petitioner failed to attend.

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

The petitioner has not provided any evidence as to the actual purchase price of the vehicle to the Department. The Department sent a title transfer questionnaire to the seller, on July 16, 2021, and received no response. The Department then sent a buyer's questionnaire along with a billing notice to the petitioner on October 8, 2021. The petitioner failed to complete the buyer's questionnaire. Instead, on October 14, 2021, the petitioner remitted an additional \$292.50 in tax to the Department, indicating that the purchase price which was stated at the time of titling the vehicle had been incorrect. As a result, the underlying assessment was issued on January 6, 2022.

The petitioner then submitted a petition for reassessment requesting a hearing. The petition stated that the Department had overvalued the purchase price and that the full amount of tax was paid after the billing notice was received. The petitioner did provide any evidence with his petition to prove the actual purchase price of the vehicle. Pursuant to R.C. 5703.60(A)(3), a hearing was set, as requested by the petitioner. Notice of the date and time for the hearing was appropriately sent to the petitioner. The petitioner failed to attend the hearing or submit any additional information.

To the extent that the petitioner objects to the appropriate purchase price of the car, the assessment is presumptively valid. Absent any further information, the Tax Commissioner cannot conclude that there was any error in the assessment. The petitioner has failed to provide any documentation that verified the actual purchase price of the vehicle. Therefore, the petitioner's objections are denied.

Accordingly, this assessment is affirmed as issued.

Current records indicate that payments in the amount of \$292.50 have been made towards satisfaction of this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post-assessment interest will be added to the assessment 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, OH 43216-2678.

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner



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

Department of  
Taxation

# FINAL DETERMINATION

Date: OCT 20 2022

Rocky Ridge Development LLC  
3793 Silica Rd., Ste. B  
Sylvania, OH 43560

Re: Assessment No.: 100002130697  
Use Tax

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

Pre-Assessment			
<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$580.00	\$6.29	\$87.00	\$673.29

The petitioner purchased a 1999 Ford F350, on or around June 30, 2021, without the payment of tax. The petitioner claimed the vehicle qualified for exemption because it was to be used directly in mining. The Department was unable to verify that exempt usage of the vehicle. Accordingly, this assessment was issued. A hearing was held.

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

The petitioner contends that this vehicle is exempt under R.C. 5739.02(B)(42)(a). Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of services provided. There is an exemption from sales and use taxation for items where the purpose of the purchaser is to use or consume the thing transferred directly in producing tangible personal property for sale by mining pursuant to R.C. 5739.02(B)(42)(a). Mining includes the extraction from the earth of all substances that are classed geologically as minerals. *Id.* Rules that define the scope of the mining exemption have been promulgated under Ohio Adm. Code 5703-9-22.

This rule contains five different ways that purchases of tangible personal property can qualify for the mining exemption. First, taxpayers engaged in the production of tangible personal property for sale by mining may claim exemption when purchasing machinery, equipment, or other property that is to be used or consumed principally in a mine or excavation pursuant to R.C. 5739.02(B)(42)(a). Second, taxpayers may claim exemption on purchases of machinery, equipment, or other property that is to be used or consumed primarily to transport the substance extracted from the mine or excavation to a plant, factory, or tipple where the substance extracted is to be processed by the taxpayer conducting the mining operation. Third, taxpayers may claim exemption on purchases of aggregate, gravel, and other materials to incorporate into temporary private roads, either during construction or in repair and maintenance, that are used principally for the transportation of the substance extracted from the mine or excavation to a plant, factory, or tipple where that substance is to be processed by the person conducting the mining operations. Fourth, taxpayers may claim exemption on purchases of machinery, equipment, or other property used to repair or maintain the machinery, equipment, and other property consumed directly in mining or transporting mined materials to one's own plants for further processing. Finally, taxpayers may claim exemption on purchases of articles primarily for the physical protection of production employees from the dangers of the operations in which they are engaged, when used principally in a mine or excavation or in the transportation of a mined substance to a plant, factory, or tipple where the substance is to be processed by the person conducting the mining operations.

The Supreme Court of Ohio set forth a two-prong test to determine if the purchases of certain items qualify for the mining exemption in *Fyr-Fyter Co. v. Glander*, 150 Ohio St. 118, 124, 80 N.E.2d 776 (1948). First, a taxpayer must establish that its operations involved mining. Second, the taxpayer must demonstrate that the property claimed to be exempted from taxation is used or consumed *directly* in that mining operation. (Emphasis added.) The Board of Tax Appeals held that, "while the majority of the direct use cases have involved manufacturing or processing, the test for determining whether a particular item is "directly used" with respect to mining is the same as it is for manufacturing or processing." *Int'l Salt Co. v. Tracy*, BTA No. 92-S-504, 1994 WL 621413 (Nov. 4, 1994).

The Board cited to the Supreme Court's test to determine whether property is used "directly" in a manufacturing operation. "In attempting to interpret the ambiguous word, 'directly,' as used by the General Assembly, this court has adopted a physical test: when does the manufacturing or processing activity begin and end, and is the property used or consumed during and in the manufacturing or processing period?" *Id.* at \*6, quoting *Youngstown Bldg. Material & Fuel Co. v. Bowers*, 167 Ohio St. 363, 149 N.E.2d 1 (1958). The Court had framed its analysis to focus on establishing the beginning and ending points for a specific process in order to determine if a piece of property was actually used or consumed during that interim period.

Mining is distinguishable from transportation as the latter does not satisfy the "directly used" test for the mining exemption. The Board in *Int'l Salt* noted that the Supreme Court has also examined that distinction in *Powhatan Mining Co. v. Peck*. *Id.* at \*8, citing *Powhatan Mining Co. v. Peck*, 160 Ohio St. 389, 116 N.E.2d 426 (1953). There, the Court had held that "where the principal use of property claimed to be used 'directly in' a particular activity is in transportation to or from the activity, as distinguished from transportation which is a part of that activity or between essential

steps of that activity, such use is not ‘directly in’ such activity.” *Id.*, quoting *Powhatan Mining Co. v. Peck*, 160 Ohio St. 389, 116 N.E.2d 426 (1953).

The Court determined in *Powhatan* that certain trucks which had been used to transport waste material from a cleaning plant were not directly used in mining and, as such, were not excepted from taxation. *Id.* The Court reached that determination even though the removal of the waste by-product was necessary for that taxpayer’s mining operations to be able to continue. *Id.* The Court determined that the primary function of those trucks did not involve transporting a mined product between essential steps in the mining process, but rather involved transporting waste by-product created as a result of the mining process to another location. *Id.*

In the case at hand, the petitioner contends that it operates a 29.1 acre mine in Toledo, Ohio. The petitioner states that it mines sand, topsoil, and clay to sell to municipalities like the city of Toledo in addition to private businesses like landscaping companies, material resellers, and contractors. Generally, the petitioner contends that it purchased the 1999 Ford F350 at issue to be used in several aspects of its mining operations.

Specifically, the petitioner contends that the truck routinely pulls a trailer with a water wagon, as evidenced by the photos submitted on July 11, 2022. The petitioner contends that its truck was also used to haul trailers of mined products. The petitioner argues that its operations required a vehicle capable of traversing all 29.1 acres so that operations can be monitored and appropriately supervised. Further, the petitioner contends the truck is used to traverse the location of the mine to evaluate product and to locate new areas to be mined which meet its customers’ needs. The petitioner contends that the truck was used to pick up supplies, parts, equipment, and other purchases and deliver them to the mine as part of its mining operation. Finally, the petitioner contends that the truck is also used to deliver supplies, parts, and material on site in furtherance of mining operations.

In order to qualify for the mining exemption, the first requirement is that the petitioner operate a mine. The petitioner has provided evidence that demonstrates it operates a mine. Therefore, the petitioner has satisfied the first prong of the *Fyr-Fyter Co. v. Glander* test.

The petitioner submitted evidence that it uses the truck at issue primarily in taxable manners. The petitioner failed to present evidence that the truck was used or consumed directly in its mining operations as required to satisfy the second prong and qualify for exemption. The petitioner’s pictures show that the truck is used to haul supplies and they do not demonstrate that the truck was being directly used during actual mining processes. The petitioner failed to evidence how photos of the trailer proved that the truck was being used directly in its mining operations. The petitioner’s use of the truck to transport supplies, parts, and equipment for use during its mining operations constitutes a taxable use pursuant to the Court’s analysis in *Powhatan Mining*. *Powhatan Mining* at \*392-395.

The petitioner contends that it used the truck to haul trailers of mined products, but it failed to provide evidence that the truck was used to transport mined materials that were still “in process” which might have qualified as an exempt usage. Furthermore, the pictures show that the trailer attached to the truck has the inscription “LF Rocky Ridge Farms” written on its side. That writing

suggests that the vehicle is pulling property for some sort of farming operation. It does not evidence that the vehicle or the trailer are pieces of tangible personal property that are used directly in a mining operation. Lastly, the petitioner failed to prove how its use of the truck to traverse the mine in order to manage and supervise operations qualified as being used directly in its mining operations pursuant to the analysis in *Int'l Salt*. *Int'l Salt* at \*6-8.

The petitioner has failed to submit any evidence that the truck is used in a manner that qualifies for the mining exemptions listed in Ohio Adm. Code 5703-9-22. As a result, the petitioner has failed to prove error in the assessment. Therefore, the petitioner's contentions are denied.

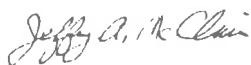
Accordingly, the assessment is affirmed as issued.

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

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

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

/s/ Jeffrey A. McClain

  
JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43224  
(614) 466-2166 Fax (614) 466-7979

# FINAL DETERMINATION

Date: OCT 20 2022

Patricia J. Rolk  
23846 Parkwood Dr.  
Columbia Station, OH 44028-9611

Re: Sales Tax (Responsible Party)  
Erie Coast Customs & Collisions LLC  
Reporting Period: 07/01/2016 – 12/31/2019

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:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$101,584.23	\$12,053.27	\$15,237.58	\$128,875.08

This is a responsible party assessment. Erie Coast Customs & Collisions LLC incurred sales tax liability resulting in an assessment for the period above. This assessment was never satisfied and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Erie Coast Customs & Collisions LLC has been derivatively assessed against Patricia Rolk. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the listed period. Underlying substantive objections to the tax assessment cannot be considered.

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).

A person is considered a responsible party when they are an officer of an entity and responsible for the entity's fiscal responsibilities. R.C. 5739.33. An officer includes a treasurer. Ohio Adm.Code 5703-9-49(A)(1). If the officer manages sales tax paid by consumers, they are a responsible party. Ohio Adm.Code 5703-9-49(C)(7). The evidence indicates that the petitioner was an officer and owner of Erie Coast Customs & Collisions LLC. The petitioner was listed as

the Owner of Erie Coast Customs & Collisions LLC on the business's webpage at the time of the assessment. Additionally, the petitioner signed the vendor's license application and listed herself as the Treasurer for the underlying entity. The user information for the Ohio Business Gateway, the online sales tax payment option offered by the Department, shows the petitioner's name listed on the account as treasurer and filing administrator as of December 28, 2021. The petitioner stated at hearing that she was one of the people at the company who submitted sales tax returns through the Ohio Business Gateway. The evidence shows the petitioner was an officer of the underlying entity and responsible for the execution of its fiscal responsibilities.

The petitioner contends she was not a responsible party and control of the entity was seized by her former business partner. The petitioner submitted business listings from the Ohio Secretary of State, court orders involved in the petitioner's dispute with a business partner, and screenshots of petitioner's business partners involvement in the business. The documentation details a dispute with petitioner's former business partner and shows him operating a separate business entity. The documentation submitted by the petitioner does not speak to the reporting period at issue in the assessment. The court proceedings involving the petitioner and her business partner began on February 26, 2020, according to the Lorain County Court of Common Pleas online records. The petitioner maintains a restraining order from the dispute barred her from participating in the business. The journal entry for the court's temporary restraining order is dated March 19, 2020.

The submitted documentation does not speak to period at issue. The events detailed in the documentation and any change in control of the entity, as alleged by the petitioner, appears to have taken place after the assessed period. The documentation fails to demonstrate the petitioner lacked responsibility for the underlying entity's fiscal responsibilities during the period assessed. The burden is on the petitioner to submit evidence sufficient to show error in the assessment. The petitioner has not met her burden to demonstrate the assessment was in error. Therefore, it is determined that the petitioner was a responsible party of Erie Coast Customs & Collisions LLC, under R.C. 5739.33. The objection is denied.

The petitioner contends the proper responsible party is her business partner. The Commissioner is not limited to assessing one responsible party. The Commissioner may assess all responsible parties and their liability shall be joint and several. Ohio Adm.Code 5703-9-49(H). The objection is denied.

#### Bankruptcy Filing

On July 16, 2021, the petitioner filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio, under *In Re: Patricia J. Rolko, 21-12453*. The petitioner received a discharge in the bankruptcy case on January 12, 2022. The petitioner contends that filing for bankruptcy and obtaining a discharge from the Bankruptcy Court entitles the petitioner to relief from the underlying sales tax assessment. However, the petitioner's contention is misplaced.

The priority of tax claims in a bankruptcy and whether the tax debt is subject to discharge is governed by 11 U.S.C. 507. Generally, the tax type will determine whether priority applies. Under 11 U.S.C. 507 (a)(8)(C) priority will attach on a tax that is required to be collected or withheld for

which the bankruptcy debtor is liable in whatever capacity. In Ohio, sales tax is deemed to be a "trust" tax because the consumer has entrusted this tax to retailers and certain service providers with the understanding that the tax will be reported and paid to the State of Ohio in a timely manner. Sales tax returns are a required filing under R.C. 5739.30 and the debtor can be held liable for the sales tax assessment as a responsible party under R.C. 5739.33.

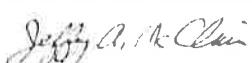
Here, the underlying debt is a sales tax assessment, and the petitioner is a responsible party for the debt. Based upon applicable bankruptcy law, the sales tax assessment would not be subject to discharge and the underlying debt would remain. Therefore, the petitioner remains liable for the sales tax assessment.

Accordingly, the assessment is affirmed as issued.

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

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner

Ohio

Department of  
Taxation

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

# FINAL DETERMINATION

Date: OCT 20 2022

The Fishel Company  
1366 Dublin Rd.  
Columbus, OH 43215

Re: Assessment No. 100001578947  
Use Tax  
Audit Period: 10/01/2014 – 05/31/2017

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.

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.

/s/ Jeffrey A. McClain



Jeffrey A. McClain  
Tax Commissioner



Department of  
Taxation

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

1000000342

FINAL  
DETERMINATION

Date:

OCT 26 2022

Doner Partners LLC  
400 Galleria Officentre, Suite 300  
Southfield, MI 48034

Re: Assessment No. 100001573748  
Commercial Activity Tax - 01/01/2016 – 12/31/2017

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

Tax	Interest	Penalty	Total
\$209,930.00	\$27,145.82	\$31,489.50	\$268,565.32

Doner Partners LLC (the “petitioner”) is an advertising firm that provides graphic design and media advertising worldwide. The petitioner was registered as a single entity taxpayer during the tax period at issue. The Department assessed the petitioner after an audit identified that the petitioner had only reported gross receipts generated from services performed in its office in Cleveland, Ohio. It was determined that Doner Partners LLC and Arsenal LLC were required to be added to a combined taxpayer group per R.C. 5751.012 and that the petitioner had unreported taxable gross receipts situs to Ohio per R.C. 5751.033(I). The petitioner objected to the assessment and requested a hearing, which was held via telephone. This matter is now decided based upon the evidence currently available to the Commissioner and provided at the hearing.

Taxable gross receipts for the audit period were calculated using the best available information in accordance with R.C. 5703.36. The Department and the petitioner have since agreed upon an appropriate situsing method for its taxable gross receipts. Accordingly, the tax and interest are recalculated consistent with this agreed upon method.

The petitioner also requested a penalty abatement. R.C. 5751.06(F) allows the Commissioner to abate penalties. The evidence and circumstances in this matter support a partial penalty abatement. Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
\$67,682.00	\$8,805.30	\$6,768.20	\$83,255.50

Current records indicate that payments totaling \$302.54 have been applied to this assessment, leaving a balance due of \$82,952.96. 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.

000000343

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

/s/ Jeffrey A. McClain



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner

0000000354



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd. • Columbus, OH 43215  
(614) 466-6750 Fax (614) 466-7979

# FINAL DETERMINATION

America's Best Bowstrings, Inc.  
3149 OH-39.  
Millersburg, OH 44654-8805

Re: Assessment No.: 100001917701  
Employer Withholding Tax - 01/01/2014-12/31/2015

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

Period	Tax	Interest	Penalty	Total
01/01/2014-12/31/2015	\$28,996.19	\$6,975.12	\$7,248.97	\$43,220.28

The Ohio Department of Taxation assessed America's Best Bowstrings, Inc. (the "petitioner") upon a field audit of its employer withholding account. The petitioner does not contest the tax and interest portion of the assessment but requests an abatement of the assessed penalties.

The Commissioner may abate penalties when the taxpayer demonstrates the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the petitioner claims its failure to comply was due to reasonable cause, and the evidence and circumstances support this claim. As such the penalty shall be abated in full.

Accordingly, this assessment is adjusted as follows:

Period	Tax	Interest	Penalty	Total
01/01/2014-12/31/2015	\$28,996.19	\$6,975.12	\$0.00	\$35,971.31

Current records indicate that payments totaling \$43,220.28 have been applied on this assessment, resulting in a refund of \$7,248.97 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



# FINAL DETERMINATION

Debora Broderick  
908 State Route 588  
Gallipolis, OH 45631-8299

Re: Assessment No.: 100001881244  
Employer Withholding Responsible Party

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

Year	Tax	Interest	Penalty	Total
2019	\$8,060.84	\$635.99	\$4,030.36	\$12,727.19

The Ohio Department of Taxation originally assessed P.R.I.S.M. Behavioral Healthcare (the “company”) the above amounts for 2019 because it failed to report and remit its employer withholding tax for that year.<sup>1</sup> The Department subsequently derivatively assessed Debora Broderick (the “petitioner”) as a responsible party for these amounts under R.C. 5747.07(G). *See also* Ohio Adm. Code 5703-7-15. The petitioner objects to the assessment, arguing she is not a responsible party because she was working under the direct order of CEO Edgar Penrod. The petitioner did not requested a hearing; therefore, the matter will be decided based on evidence currently available to the Commissioner.

R.C. 5747.07(G) allows the Tax Commissioner to assess “[a]n employee of a corporation” who has “control or supervision of or charged with the responsibility of filing” the employer withholding returns, or paying the company’s employer withholding tax, as a responsible party for the corporation’s Ohio employer withholding assessments. *See also* Ohio Adm. Code 5703-7-15.

The petitioner admits she served as Financial Manager during 2019. She indicated on the Responsible Party Questionnaire<sup>2</sup> that she was responsible for the overall fiscal responsibilities of the company, that she executed the overall fiscal responsibilities of the company, and that she had the authority to prepare Ohio business tax reports and returns on behalf of the company. Although she states that she was under the direct order of the CEO, her answers on the questionnaire indicate that she is “an employee with control or supervision over, or charged with the responsibility of, filing the required returns or making the required payments” for Ohio employer withholding tax purposes, and is thus a responsible party under R.C. 5747.07(G). Ohio Adm. Code 5703-7-15(A)(1).

Accordingly, this responsible party assessment is affirmed.

<sup>1</sup> This underlying assessment (assessment no.100001876413) is certified to the Ohio Attorney General’s Office for collections.

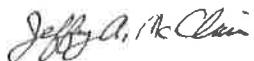
<sup>2</sup> Which she completed and signed “under penalties of perjury”.

Current records indicate payments totaling \$11,968.92 have been applied towards this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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

/s/ Jeffrey A. McClain



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner



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

Department of  
Taxation

0000000355  
**FINAL  
DETERMINATION**

Date:

**OCT 26 2022**

Donald H. Barnes, Jr. and Beverly Barnes  
1000 Enterprise Drive  
Allen Park, Michigan 48101

Re: Refund Claim No. 2029037802  
Individual Income Tax – 2019

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

Tax Year	Refund Claimed
2019	\$7,777.00

Donald and Beverly Barnes (the “claimants”) filed a 2019 Ohio individual income tax return (form “IT 1040”) reporting an overpayment of \$7,777.00 and requesting a refund of that amount.<sup>1</sup> The Department denied \$3,335.00 of pass-through entity (“PTE”) credit reported by the claimants because it could not verify the credit amount. This adjustment reduced the claimants’ refund to \$4,442.00. In response, the claimants submitted additional documentation related to the claim and requested administrative review. The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

R.C. 5747.08(I) allows a refundable credit to certain PTE investors equal to the investor’s proportionate share of the lesser of the tax due from or tax paid by the PTE on behalf of the investor. In this case, the claimants are claiming a \$3,335.00 PTE credit from Belle Tire Distributors, Inc and a \$4,442.00 PTE credit from Clueless Properties, LLC.<sup>2</sup> While Belle Tire Distributors, Inc. issued an Ohio IT K-1 to the claimants for the above amount, the PTE did **not pay** the tax due with its entity-level filing (form “IT 4708”). Therefore, the claimant is not entitled to a PTE credit from that entity (i.e., the lesser of the tax due or **tax paid** by Belle Tire Distributors, Inc. is \$0).

Accordingly, the remaining 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

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02(A)(1).

<sup>2</sup> The PTE credit from Clueless Properties, LLC was previously verified and thus is not at issue in this final determination.



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

0000000352  
**FINAL  
DETERMINATION**

Date: **OCT 26 2022**

Scott & Bridget Baum  
2812 Kersdale Rd.  
Pepper Pike, OH 44124

Re: Assessment No. 02202031756861  
Individual Income Tax –2017

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$490.00	\$59.32	\$118.64	\$667.96

Scott and Bridget Baum (the “petitioners”) timely filed their 2017 Ohio individual income tax return as a part-year residents, reporting a federal adjusted gross income (“FAGI”) of \$161,756.00 and remitting payment of \$343.00, their reported tax due. The Ohio Department of Taxation later adjusted the petitioners’ FAGI to \$175,177.00 and assessed them the above amounts after determining the petitioners failed to report additional income now included in their 2017 FAGI. This information was reported to the Department by the Internal Revenue Service (“IRS”) under authorization of IRC 6103(d). The petitioners object to the assessment, contending they already paid their 2017 Ohio individual income tax, and the assessment must be a mistake since they only lived in Ohio for seven months in 2017. The petitioners did not request a hearing; therefore, the matter is now decided based on the information currently in the Commissioner’s possession.

Ohio’s individual income tax is levied on Ohio adjusted gross income (“OAGI”) less exemptions. R.C. 5747.02(A)(3). R.C. 5747.01(A) defines OAGI as “federal adjusted gross income [“FAGI”], as defined and used in the Internal Revenue Code, adjusted as provided in” that division. Here, the petitioners did not account for additional income now included in their FAGI.<sup>1</sup> That adjustment to their FAGI increased their tax liability from \$2,091.00, as reported on their 2017 Ohio return, to \$2,581.00; a difference of \$490.00. The petitioners were assessed that amount, as noted above.

R.C. 5747.13(E)(3) requires the total assessed amount to be paid with a petition for reassessment if the taxpayer fails to file a tax return, and the basis for this failure is not an assertion of lack of nexus with Ohio or a contention that the correctly calculated tax liability minus credits is less than \$1.01. In this case, the petitioner failed to file an amended individual income tax return as required by R.C.

<sup>1</sup> Department records indicate their correct FAGI for 2017 is \$175,177.00; any increase in FAGI due to a final federal adjustment requires taxpayers to file an amended Ohio return within 90 days of such an adjustment pursuant to R.C. 5747.10(B)(1). Regardless of why the income was not included in the petitioners’ FAGI reported on their 2017 Ohio return, they still owe tax on that additional income. The petitioners do not assert their additional income is not subject to Ohio tax, and previously claimed a nonresident credit for the portion of their income not earned in Ohio on their 2017 Ohio return.

5747.10(B)(1) for the tax year at issue and did not pay the tax, interest, and penalty amounts assessed. Additionally, the petitioner has not claimed that he lacked nexus with Ohio (in fact, he concedes that he was a part-year resident). Records reflect that the petitioner had federal adjusted gross income in an amount which would have resulted in an Ohio income tax liability exceeding \$1.01.<sup>2</sup> Unless the taxpayer makes the required payment, the Tax Commissioner must dismiss the petition.

Accordingly, the matter is dismissed for lack of jurisdiction, and the assessment stands as issued.<sup>3</sup>

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

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

<sup>2</sup> They do not dispute that the additional income was earned outside Ohio, nor have they filed an amended return to provide an updated resident or nonresident credit.

<sup>3</sup> Additionally, while their contention they paid their *reported* 2017 Ohio individual income tax liability is correct, the Department did not err in adjusting the petitioners' FAGI to match the FAGI reported by the IRS. As such, the assessed amounts are accurate.



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd. • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

000000324

**FINAL  
DETERMINATION**

Date: OCT 26 2022

Michael N. & Linda D. Beyersdorfer  
9988 Southport Ln.  
Loveland, Ohio 45140

Re: Assessment No. 02202007026635  
Individual Income Tax – 2017

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
\$5,731.00	\$502.89	\$1,005.78	\$7,239.67

The Department assessed Michael and Linda Beyersdorfer (the “petitioners”) after adjusting their individual income tax return for tax year 2017. Specifically, the Department disallowed a portion of the business income deduction claimed by the petitioners because it was unable to verify the income was business income under R.C. 5747.01(B). The petitioners objected to the assessment and submitted additional documentation. The petitioners did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Commissioner.

Based upon review of the evidence now available to the Commissioner, the petitioners’ contentions are well taken. Accordingly, the assessment is cancelled.

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

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

JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner

# Ohio

Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd. • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

000000359

## FINAL DETERMINATION

Date:

OCT 26 2022

Richard & Patricia Beyersdorfer  
825 Myrtle Ave.  
Terrace Park, Ohio 45174

Re: Assessment No. 02201934478905  
Individual Income Tax – 2017

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
\$4,963.00	\$373.77	\$747.54	\$6,084.31

The Department assessed Richard & Patricia Beyersdorfer (the “petitioners”) after adjusting their individual income tax return for tax year 2017. Specifically, the Department disallowed a portion of the business income deduction claimed by the petitioners because it was unable to verify the income was business income under R.C. 5747.01(B). The petitioners objected to the assessment and submitted additional documentation. The petitioners did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Commissioner.

Based upon review of the evidence now available to the Commissioner, the petitioners’ contentions are well taken. Accordingly, the assessment is cancelled.

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

000000322

FINAL  
DETERMINATION

Date:

OCT 26 2022

Robert J. & A. Elaine Bittner  
13045 W. Geauga Trl.  
Chesterland, OH 44026

Re: Multiple Refund Claims  
Individual Income Tax –Multiple Years

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

Refund Claim No.	Tax Year	Refund Claimed
1037350101	2013	\$51.00
1037350303	2014	\$1,251.00
1039350611	2015	\$1,208.00

Robert and Elaine Bittner (the “claimants”) filed amended Ohio individual income tax returns for the tax years at issue, claiming refunds in the above amounts.<sup>1</sup> The Ohio Department of Taxation denied the claimants’ refunds because the requests were filed outside of the four-year statute of limitations. *See* R.C. 5747.11. The claimants contend they were unable to file refund claims sooner due to the pandemic. They did not request a hearing; therefore, these matters are decided based on the information currently in the Commissioner’s possession.

R.C. 5747.11 requires the Tax Commissioner to refund any overpayment of tax, provided the taxpayer files a refund claim within four years of “the illegal, erroneous, or excessive payment of the tax.” R.C. 5747.11(B). Here, the claimants filed amended returns for these years on January 21, 2021; such amended returns increase certain Ohio Schedule A deductions not previously claimed and thus request a refund based on these larger deductions. However, the claimants filed these refund claims more than four years after their taxes for those years were deemed paid.<sup>2</sup>

Accordingly, the claimants’ refunds are time barred by the statute of limitations<sup>3</sup> and thus denied.

<sup>1</sup> These returns meet the definition of a refund application under R.C. 5747.11. *See* Ohio Adm. Code 5703-7-02.

<sup>2</sup> The claimants are requesting a refund of payments made on February 18, 2014 (tax year 2013), April 10, 2015 (tax year 2014), and April 10, 2016 (tax year 2015). Using the unextended due date of each return as the “deemed” payment date for each, all three were well outside the four-year statute of limitations under R.C. 5747.11 as of the date the refund application was filed. *See* R.C. 5747.11(C)(1).

<sup>3</sup> The claimants request special consideration due to the pandemic. While the Ohio General Assembly did pass Am. Sub. H.B. 197, which tolled deadlines for all administrative matters with deadlines falling between March 9, 2020 and July 31, 2020, the refund claims for 2013 and 2014 were already out of statute prior to the effective date of that provision. The tolling provision extended the statute of limitations for the 2015 refund claim, but the claimants failed to file that refund claim before their extended deadline, which was September 9, 2020. Thus, the tolling provision does not apply to these matters.

000000323

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner



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

Department of  
Taxation

000000304  
**FINAL  
DETERMINATION**

Date:

OCT 26 2022

Larry Bryant  
1721 Sundale Avenue  
Cincinnati, OH 45239

Re: Multiple Refund Claims  
Individual Income Tax – Multiple Years

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

Refund Claim Nos.	Tax Year	Refund Claimed
1090301201	2013	\$260.00
1099201406	2014	\$93.00
1090300814	2015	\$95.00
2107210588	2018	\$467.00

Larry Bryant (the “claimant”) was assessed for failing to file Ohio individual income tax returns (form “IT 1040”) for tax years 2013 through 2018; these assessments were certified to the Ohio Attorney General for collections. The claimant subsequently filed Ohio individual income tax returns for the tax years at issue.<sup>1</sup> The Department denied the requested credit carryforwards and refunds for tax years 2013, 2014 and 2015 because they were outside the statute of limitations provided by R.C. 5747.11. *See also* R.C. 5747.12 (which allows a credit carryforward for “any refund due”). The Department also adjusted the claimant’s 2018 IT 1040, which reduced his refund to \$59.00. The claimant requested administrative review of the denials.<sup>2</sup> The claimant did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

Regarding the claimant’s 2013, 2014, and 2015 refund claims, R.C. 5747.11 requires refund applications be filed on a form prescribed by the Commissioner within four years from the date of the illegal, erroneous, or excessive payment of the tax. Amounts withheld by an employer are deemed paid on the return’s unextended due date. *See* R.C. 5747.11(C)(1) and 5747.08(G). The claimant’s 2013, 2014 and 2015 refund claims are based on the tax withheld from the claimant’s wages by his employer. These amounts are deemed paid on the due date of the respective tax returns (i.e., April 15, 2014 for 2013, April 15, 2015 for 2014, and April 15, 2016 for 2015). The claimant’s 2013 and 2014 returns were filed on March 17, 2021, and his 2015 return was filed on March 16, 2021- more than four years from the

<sup>1</sup> The claimant also filed returns requesting refunds for tax years 2016 and 2017. Those refunds were granted and then offset against the claimant’s debts pursuant to R.C. 5747.12. Since they were previously granted in full, those years are not at issue in this final determination.

<sup>2</sup> In the claimant’s petition, he also requests refunds for tax years 2010, 2011, and 2012; however, the claimant did not file refund applications for these tax years as required by R.C. 5747.11. The claimant filed a “tax due” return for 2010 and did not file an Ohio income tax return or refund application for tax years 2011 and 2012. Therefore, those years are not at issue in this final determination.

date of payment. Therefore, the statute of limitations for these refunds expired prior to the refund requests.<sup>3</sup>

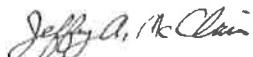
Regarding the claimant's 2018 refund claim, Ohio's tax base for individuals is Ohio adjusted gross income, less taxable business income and exemptions. *See R.C. 5747.02(A)(3).* Ohio adjusted gross income starts with "federal adjusted gross income, as defined and used in the Internal Revenue Code \* \* \*." R.C. 5747.01(A). In this case, the claimant filed his 2018 Ohio individual income tax return reporting a federal adjusted gross income of \$71,531.00. However, the IRS, under authorization of IRC 6103(d), reported the claimant's 2018 federal adjusted gross income as \$83,060.00. Using the correct figure as the starting point for calculating the claimant's 2018 Ohio tax liability, and applying the employer withholding claimed on the return, the Department correctly reduced the claimant's refund from \$467.00 to \$59.00.<sup>4</sup>

Accordingly, the refund claims for 2013, 2014, and 2015 are denied in full as untimely requested. The remaining refund requested for 2018 is also denied.

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

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

/s/ Jeffrey A. McClain



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner

---

<sup>3</sup> The claimant also asks for a refund of amounts paid towards the certified assessments for the tax years at issue. While the Commissioner can determine the claimant's correct tax liability for the periods at issue, the certified assessment payments were made to the Ohio Attorney General, not the Department of Taxation. Thus, the Commissioner does not have authority to issue refunds of those amounts.

<sup>4</sup> This refund was then offset against the claimant's debt pursuant to R.C. 5747.12.



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

1000000346

FINAL  
DETERMINATION

Date:

OCT 26 2021

Robert J. & Susan Dresner  
3241 Shadydale Ln.  
West Bloomfield, MI 48323

Re: Refund Claim No. 2029038459  
Individual Income Tax – 2019

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

Tax Year	Refund Claimed
2019	\$7,648.00

Robert and Susan Dresner (the “claimants”) filed their 2019 Ohio individual income tax return<sup>1</sup> claiming a \$7,648.00 pass-through entity (“PTE”) credit and requesting a refund of that amount. The Ohio Department of Taxation could not verify the claimants’ PTE credit and thus denied it in full. The claimants contend the Department erroneously denied their credit and request their return be accepted as filed; they provided numerous documents related to their claim, including excerpts from a 2018 IT 1140 filed by the Milton H. Dresner Estate, an Ohio Schedule K-1 Equivalent, and an IRS form. The claimants did not request a hearing; therefore, the matter is decided based on the information currently in the Commissioner’s possession.

R.C. 5747.059 allows a refundable credit to qualifying beneficiaries of certain trusts equal to the beneficiary’s proportionate share of the lesser of tax paid by the trust or the tax liability of the trust. Here the claimants are the beneficiary of an estate that claims to be the beneficiary a trust. The claimants provided the estate’s 2018 IT 1140,<sup>2</sup> and an Ohio K-1 equivalent indicating \$7,648.00 in PTE credit due to the claimants based on tax purported paid by the trust on behalf of the estate. However, the trust has not filed an Ohio trust withholding return (form IT 1140) for 2019 or paid 2019 Ohio trust withholding tax.<sup>3</sup> Neither the trust nor the estate should have filed an Ohio IT 1140 or paid Ohio trust withholding tax; to date, neither entity has paid any amount to the Department for 2019. As such, the PTE credit amounts reported on the IT 1140 and the K-1 equivalent are incorrect. In short, the claimants’

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02.

<sup>2</sup> However, the estate was not permitted to file an IT 1140, as it is not a “qualifying entity”. R.C. 5747.42 and 5733.40(L). Its filing (the excerpt of which was provided by the claimants) contained multiple errors and resulted in an assessment. The assessment against the estate has since been cleared by amending the amounts reported by the estate to \$0, since it should not have filed in the first place.

<sup>3</sup> In fact, the trust was likewise not permitted to file an IT 1140 on behalf of the estate, as the estate is not a “qualifying beneficiary”. See R.C. 5747.41, 5747.42, and 5733.40(C). Thus, no filing is permitted, and no tax is due. See R.C. 5747.42 (the requirements for filing the IT 1140) and 5733.40(A)(1)(b) (the tax base on qualifying trusts).

000000347

proportionate share of the lesser of the Ohio tax paid by, or the Ohio tax due from, the trust or the estate, is \$0.00. As such, they are not entitled to the PTE credit claimed on their Ohio income tax return.

Accordingly, the claimants' refund is denied.

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner

# Ohio

Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

0000000336

## FINAL DETERMINATION

Date:

OCT 26 2022

Jerome M. & Carol J. Ferstman  
950 N. Michigan Ave. Apt. 3503  
Chicago, IL 60611

Re: Refund Claim No. 2028919430  
Individual Income Tax - 2019

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

Tax Year	Refund Claimed
2019	\$4,114.00

Jerome and Carol Ferstman (the “claimants”) filed their 2019 Ohio individual income tax return claiming \$4,114.00 in pass-through entity (“PTE”) credits and requesting a refund of that amount.<sup>1</sup> The Ohio Department of Taxation reduced the claimants’ PTE credit to \$3,827.00 because one of the underlying PTEs from which a PTE credit was claimed had not filed a 2019 Ohio return or paid Ohio PTE tax. Nevertheless, the claimants contend the Department erroneously denied the remaining \$287.00 in PTE credit and request their 2019 Ohio income tax return be accepted as filed. The claimants did not request a hearing; therefore, this matter is decided based on the information currently in the Commissioner’s possession.

R.C. 5747.059 allows a refundable credit to certain PTE investors equal to the investor’s proportionate share of the lesser of tax paid by the PTE or the tax liability of the PTE. Here, the PTE has since filed its 2019 PTE return (form IT 1140); however, it did not report a tax liability or pay any PTE tax. Thus, the amount of PTE credit reflected on the Ohio IT K-1 the claimants received from the PTE and provided in support of their request for administrative review is not consistent with the information reported by the PTE to the Department. Since the PTE did not pay any tax or report a PTE tax liability, the lesser of the claimants’ proportionate share of the tax paid by the PTE or the tax liability of the PTE is \$0.00. *See* R.C. 5747.059.

Accordingly, the claimants’ remaining refund is denied.

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner

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



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

0000000335  
**FINAL  
DETERMINATION**

Date:

OCT 26 2022

Mark R. & Connie J. Garrett  
2620 Invitational Dr.  
Oakland, MI 48363

Re: Refund Claim No. 2027600328  
Individual Income Tax - 2019

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

Tax Year	Refund Claimed
2019	\$5,198.00

Mark and Connie Garrett (the “claimants”) filed their 2019 Ohio individual income tax return claiming \$5,198.00 in pass-through entity (“PTE”) credits and requesting a refund of that amount.<sup>1</sup> The Ohio Department of Taxation adjusted their refund to \$97.00 based on the PTE credit from one entity, but could not allow the remaining credit because the PTE from which the other credit was claimed had not paid the underlying tax. The claimants contend the Department erroneously denied their \$5,101.00 PTE credit and request their 2019 Ohio income tax return be accepted as filed. The claimants did not request a hearing in this matter; therefore, it is decided based on the information currently in the Commissioner’s possession.

Department records show the relevant PTEs have since paid their respective Ohio PTE tax liabilities for 1029. The claimants’ Ohio individual income tax return is thus accepted as filed.

Accordingly, the remaining refund of \$5,101.00 is granted 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

<sup>1</sup> These returns meet the definition of a refund application under R.C. 5747.11. See Ohio Adm.Code 5703-7-02.



000000333  
**FINAL  
DETERMINATION**

Date:

OCT 26 2022

Lynn R. Gellermann  
13398 Mansfield Rd.  
Athens, OH 45701

Re: Refund Claim No. 2029041528  
Individual Income Tax - 2019

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

Tax Year	Refund Claimed
2019	\$14,091.00

Lynn Gellermann (the “claimant”) filed a 2019 Ohio individual income tax return (form “IT 1040”) reporting an overpayment of \$14,091.00 and requesting a refund of that amount.<sup>1</sup> The Department denied \$12,723.00 of pass-through entity (“PTE”) credit reported by the claimant because it could not verify the credit amount, which reduced the claimant’s refund to \$1,368.00. In response, the claimant submitted additional documentation related to the claim and requested administrative review. The claimant did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

R.C. 5747.08(I) allows a refundable credit to certain PTE investors equal to the investor’s proportionate share of the lesser of the tax due or tax paid by the PTE on behalf of the investor. In this case, the claimant is claiming indirect pass-through entity credit for taxes paid by US SBA Rcvr for Adena Ventures LP via her ownership of Adena Partners LLC. However, US SBA Rcvr for Adena Ventures LP did **not pay** the tax due with its entity-level filing.<sup>2</sup> Thus, no indirect credit is warranted from this PTE.

However, in response to an assessment, Adena Partners LLC paid \$11,288.00 in tax for 2019. Since the claimant owns 28.46% of Adena Partners LLC, she is entitled to a PTE credit equal to her proportionate share of the lesser of the tax due or tax paid by Adena Partners LLC. Therefore, the claimant is entitled to a PTE credit of \$3,212.56.

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02(A)(1).

<sup>2</sup> Additionally, Adena Partners LLC filed the IT 4708, and thus even if US SBA Rcvr for Adena Ventures LP had paid the tax due, Adena Partners LLC was the *proper* person to claim the PTE credit for said payment (as opposed to the claimant). Regardless, since US SBA Rcvr for Adena Ventures LP did not pay any tax, the lesser of the tax due or tax paid is \$0.

Accordingly, an additional refund of \$3,212.56, plus applicable statutory interest, is granted. The remaining 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

/s/ Jeffrey A. McClain



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner

# FINAL DETERMINATION

Date:

OCT 26 2022

Garrett R. Gordy  
32 Crestwood Dr.  
Houston, TX 77007

Re: Refund Claim No. 0303326310  
Individual Income Tax – 2019

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

Tax Year	Refund Claimed
2019	\$55,372.00

Garrett Gordy (the “claimant”) filed his 2019 Ohio individual income tax return (form IT 1040)<sup>1</sup> claiming a \$15,372.00 pass-through entity (“PTE”) credit and requesting a refund in the above amount. The Ohio Department of Taxation denied a portion of the claimant’s PTE credit<sup>2</sup> because the credit reported on the Ohio IT K-1s provided to the claimant’s PTE from underlying PTEs it owned, and the amount of Ohio tax actually paid by those PTEs, did not match. The claimant contends the Department erroneously denied that portion of his credit and requests his return be accepted as filed. The claimant did not request a hearing; therefore, the matter is decided based on the information currently in the Commissioner’s possession.

R.C. 5747.059 allows a refundable credit to certain direct or indirect PTE investors equal to the investor’s proportionate share of the lesser of tax paid by the PTE or the tax liability of the PTE. The claimant owns 24.5025% of Elk Mountain Ltd., which reported an indirect PTE credit of \$15,372 from Flatirons Self Storage Dst. Desposito (\$4,380.00), Encino Energy LLC (\$220.00), Brook Capital Partners Red Dot LP (\$1,331.00) and Sparkplug Holdings LLC (\$56,808.00).<sup>3</sup> However, Encino Energy LLC and Brook Capital Partners Red Dot LP reported \$0.00 and \$1,617.07 in Ohio tax paid on behalf of Elk Mountain Ltd. respectively.<sup>4</sup> Thus, the claimant’s correct total PTE credit, based on the underlying PTEs’ filings and payments, and his ownership in Elk Mountain Ltd., is \$15,388.81.

Accordingly, an additional refund of \$10,449.81 is granted, plus applicable statutory interest.

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02.

<sup>2</sup> The Department previously granted \$4,939.00 of the \$15,372.00 in PTE credits reported on the claimant’s IT 1040.

<sup>3</sup> These amounts multiplied by the claimant’s 24.5025% ownership share in Elk Mountain Ltd. would equal \$15,372.00.

<sup>4</sup> The Brock Capital Partners amounts reflect PTE credit from an underlying PTE (\$1,058.07). That amount results from the claimant’s 24.5025% ownership of Elk Mountain Ltd., which owns 49.2813140% of Brook Capital Partners and paid \$2,147.00 on behalf of Elk Mountain Ltd. It paid \$559.00 directly on behalf of Elk Mountain Ltd. as well.

0000000358

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



Department of  
Taxation

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

# FINAL DETERMINATION

Date:

OCT 26 2022

Teresa L. Grigsby  
4401 Fleetwood Ln.  
Sylvania, OH 43560

Re:    Multiple Assessments  
      Individual Income Tax – Multiple Periods

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

Assessment	Year	Tax	Interest	Penalties	Total
02201704726854	2013	\$1,224.00	\$106.94	\$213.88	\$1,544.82
02201704726853	2014	\$1,776.84	\$101.94	\$203.88	\$2,082.66

## I. BACKGROUND

The Ohio Department of Taxation assessed Teresa L. Grigsby (the “petitioner”) after disallowing a portion of the Ohio Small Business Investor Income Deduction (“SBD”) claimed on her Ohio individual income tax returns for the periods at issue. Specifically, the Department removed amounts reported to the petitioner as guaranteed payments from Spengler Nathanson P.L.L. (the “firm”) because the petitioner did not own at least 20% of the qualifying pass-through entity as required by R.C. 5733.40(A)(7). The petitioner timely filed petitions for reassessment and requested a hearing, which was held in person on this matter.<sup>1</sup>

## II. PETITIONER’S CONTENTIONS

The petitioner objects to the assessments and contend that the returns were correct as filed. Specifically, the petitioner contends:

1. The income at issue is not a guaranteed payment but instead is business income eligible for the Ohio SBD;
2. Assuming, arguendo, that the income at issue is a guaranteed payment, the partners of the firm are sole proprietors who provide services to the partnership and therefore their guaranteed payments are business income;
3. The guaranteed payments are not nonbusiness income and R.C. 5733.40(A)(7) does not convert the guaranteed payments from business income to nonbusiness income;
4. The Department’s interpretation of R.C. 5733.40(A)(7) is contrary to the statute’s historical justification; and
5. *HBD Industries, Inc. v. Levin* does not impact the analysis of this matter.

<sup>1</sup> The petitioner was represented as part of a consolidated hearing. Each petitioner represented at the hearing was a partner of the firm who had similar issues and contentions related to their Ohio income tax for tax years 2013, 2014, and/or 2015.

The petitioner's contentions generally fall into four categories. First, the subject payments were a distributive share of the firm's income and therefore should be considered business income. Second, the subject payments are business income for federal income tax purposes. Third, the subject payments are sole proprietor income from self-employment and are therefore business income. Finally, R.C. 5733.40(A)(7) and *HBD Industries* do not apply to this case. Under these theories, the petitioner believes the income at issue is business income and is eligible for the SBD. In support of these objections, the petitioner provided the Department with the firm's partnership agreement. The income at issue is the petitioner's fixed monthly draw detailed in the partnership agreement and Exhibit A to the partnership agreement.

### III. AUTHORITY

#### A. BUSINESS INCOME AND THE OHIO SMALL BUSINESS INVESTOR INCOME DEDUCTION AND THE OHIO BUSINESS INCOME DEDUCTION

Beginning in 2013, Ohio allowed a deduction for business income under the Ohio Small Business Investor Income Deduction. Former R.C. 5747.01(A)(31) allowed married filing jointly taxpayers to claim a deduction of the first 50% of the taxpayer's Ohio small business investor income up to \$250,000. In 2014, this was adjusted to allow married filing joint taxpayers to claim a deduction of the first 75% of the taxpayer's Ohio small business investor income up to \$250,000. "Ohio small business investor income" means the portion of the taxpayer's adjusted gross income that is business income reduced by deductions from business income and apportioned or allocated to Ohio under R.C. 5747.21 and 5747.22 to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year.

Ohio's income tax distinguishes between "business income" and "nonbusiness income." For the period at issue, R.C. 5747.01(B) defined business income as:

[I]ncome, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade<sup>2</sup> 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.<sup>3</sup> '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.<sup>4</sup>

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

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

#### B. GUARANTEED PAYMENTS RECLASSIFICATION UNDER R.C. 5733.40(A)(7)

In addition to the definition found in R.C. 5747.01(B), R.C. 5733.40(A)(7) also states, in relevant part, that:

<sup>2</sup> Commonly referred to as the "transactional test". *See Kemppel v. Zaino*, 91 Ohio St.3d 420, 746 N.E.2d 1073 (2001).

<sup>3</sup> Commonly referred to as the "functional test". *See Kemppel*.

<sup>4</sup> The second sentence was added after the *Kemppel* decision. Herein referred to as the "liquidation test."

For the purposes of Chapters 5733. and 5747. of the Revised Code, guaranteed payments or compensation paid to investors by a qualifying entity...shall be considered a distributive share of income of the qualifying entity. Division (A)(7) of this section applies only to such payments or such compensation paid to an investor who at any time during the qualifying entity's taxable year *holds at least a twenty per cent* direct or indirect interest in the profits or capital of the qualifying entity... (Emphasis added).

R.C. 5733.40(A)(7) reclassifies certain guaranteed payments and compensation paid by a pass-through entity to an investor who owns at least 20% of the entity as a distributive share of business income from the entity. As business income, amounts may be deductible as part of the Ohio SBD. However, by its own terms R.C. 5733.40(A)(7) reclassifies only such guaranteed payments or compensation paid to an investor who owns *at least 20%* of the profits or capital of the qualifying entity. As such, taxpayers must own at least 20% of the qualifying pass-through entity to reclassify their guaranteed payment or compensation as business income under R.C. 5733.40(A)(7).

#### C. STATUTORY CONSTRUCTION

In cases of statutory construction, legislative intent in enacting the statute is of paramount concern. *State ex re. Steele v. Morrissey*, 103 Ohio St.3d 355, 358, 2004-Ohio-4960, 815 N.E.2d 1107, \*21. Legislative intent is determined by looking to the language of the statute and the purpose that is to be accomplished by the statute. *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 419, 704 N.E.2d 1217 (1999). When the meaning of the statute is “clear and unambiguous,” the statute must be applied “as written.” *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 495, 2008-Ohio-6323, 900 N.E.2d 601, \*9.

#### IV. ANALYSIS

The firm is a qualifying pass-through entity under R.C. 5733.40(N). The firm’s partnership agreement states that the petitioner is a partner with the firm and derives income from the firm. However, not all of the income is a distributive share directly related to the profits of the firm; a portion of the petitioner’s income is characterized as guaranteed payments. According to the partnership agreement, “[e]ach partner *shall be entitled* to receive a monthly drawing account chargeable against the partnership profits . . . The annual Draw levels for partners *shall be* between \$60,000-\$70,000.” (Emphasis added). The draws must be paid out monthly in the amount agreed upon by the firm and the partners. While the firm’s management committee may defer payments of the draws, it must pay them to partners as soon as there is sufficient cash available.

The partnership agreement and the petitioner’s Schedule K-1 show that she held less than a 20% interest in the firm during the period in question. Because the petitioner did not own a 20% or greater interest in the firm during the applicable period, R.C. 5733.40(A)(7) does not reclassify the guaranteed payments from the firm as business income. The petitioner acknowledges the requirements of R.C. 5733.40(A)(7) are not met in this case. Therefore, the amounts are not eligible for the Ohio SBD.

Additionally, guaranteed payments are not business income under Ohio law. Ohio has its own definition of business income in R.C. 5747.01(B) separate from any federal definition. The guaranteed payment at issue was not part of a partial or complete liquidation of a business, nor income from real, tangible, or intangible property that is integral to trade or business operation. Since the guaranteed payment was not business income under either the functional or liquidation tests, the payment must meet the requirements of the transactional test in order to be considered business income under R.C. 5747.01(B). 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. *See generally Kempel.*

In this case, the firm is in the business of providing legal services and the income received for such legal services are fees from clients which are distributed to the partners as part of their distributive share of income. The guaranteed payments are not tied to the transactions or activities of the firm;<sup>5</sup> rather, they are a guaranteed amount paid to the partner regardless of the services rendered or the amount of income generated. The petitioner, herself, is likewise not in the business of receiving guaranteed payments. Therefore, the guaranteed payments are not business income to the petitioner under the transactional test.

Furthermore, the existence of R.C. 5733.40(A)(7) shows that guaranteed payments are not inherently business income. R.C. 5733.40(A)(7) reclassifies certain income as business income in specific situations, including guaranteed payments made to investors owning more than 20% of a qualifying business. If guaranteed payments were inherently business income, there would be no need for R.C. 5733.40(A)(7), as there would be no reason to reclassify such amounts as part of a distributive share of business income. The enactment of R.C. 5733.40(A)(7), which coexists with R.C. 5747.01(B), shows the Ohio General Assembly believed a specific statute was needed to reclassify certain guaranteed payments as a distributive share of business income.<sup>6</sup>

Accordingly, the petitioner's guaranteed payments are not business income; they are nonbusiness income under Ohio law. *See R.C. 5747.01(C).* The remainder of this analysis addresses the petitioner's contentions.

#### A. GUARANTEED PAYMENTS AS A DISTRIBUTIVE SHARE

As stated above, the income at issue is the petitioner's partnership draw. According to the firm's partnership agreement, the petitioner is *guaranteed* payment of her partnership draws. While the firm may defer the payments based upon the ability to pay, the fact that these payments may be deferred does not change that they are guaranteed to be paid. The guaranteed payment is not tied to the firm's profits or losses, and guaranteed payments are not something the firm earns and distributes as part of the regular course of its trade or business. Additionally, guaranteed payments are not something the firm itself receives. Because the amount of the draw is guaranteed to the petitioner, it is not tied to the profitability of the firm and, thus, is not a direct distribution of the firm's income to her.

The petitioner also contends that because the law firm is in the business of receiving legal fees, the payments to the owners are made up of legal fees and, thus, qualify as income earned in the normal course of a trade or business. This contention is not well taken. The petitioner also contends that it is a legal impossibility for clients to make guaranteed payments to the firm. The Department does not dispute that the firm's clients are not making guaranteed payments to the firm. Rather, payments for legal fees are made to the firm by the firm's clients in a transaction. The firm then makes the guaranteed payments to the partners, pursuant to their agreement, in a separate transaction, irrespective of the amounts received from the clients.<sup>7</sup> Additionally, as discussed above, the petitioner agrees that the guaranteed payments are not reclassified as a distributive share

---

<sup>5</sup> The firm does not receive the guaranteed payments at issue; instead, the firm pays said guaranteed payments to the petitioner under their partnership agreement.

<sup>6</sup> The Ohio General Assembly did not reclassify *all* guaranteed payments as a distributive share of business income; instead, they put certain ownership thresholds (i.e., 20% ownership) on the reclassification.

<sup>7</sup> Under the petitioner's logic, all income earned by anyone who works for a business would be business income. For example, a grocery store employee who receives an hourly wage would receive "business income" since the wage is paid using money received from customers of the grocery store as payment for items the store sells.

of business income under R.C. 5733.40(A)(7). Thus, this contention that the guaranteed payment is a distributive share of business income from the firm is not well taken.

#### B. GUARANTEED PAYMENTS AND FEDERAL INCOME TAX LAW

The petitioner next contends that the guaranteed payments are not nonbusiness income because the guaranteed payment is not “compensation” as defined by 5747.01(D). She argues that the firm is not her employer, and she is not the firm’s employee. Because she is not an employee of the firm, the payments at issue are not “compensation”. Therefore, the petitioner concludes that the Department’s position is contrary to treasury regulations 26 CFR 1.707-1(c) (regarding guaranteed payments) and 26 CFR 31.3401(c)-1 (defining employee).

The Department does not dispute that these payments are not compensation. R.C. 5733.40(A)(7) clearly references both “guaranteed payments or compensation paid to investors....” Using canons of statutory construction, it would be impossible for both terms to have the same meaning. The petitioner seems to contend that all income is either business income or compensation. This contention is not well taken. Nonbusiness income includes other types of income besides compensation. R.C 5747.01(C) states that nonbusiness income means all income other than business income. The statute states that nonbusiness income may include, but is not limited to, compensation (among other things such as rents, capital gains, and interest). Thus, compensation is merely an *example* of nonbusiness income. *See id.* Instead, the payments at issue are guaranteed payments; these amounts are nonbusiness income because they do not qualify as business income under R.C. 5747.01(B) (as discussed above) and are not reclassified as a distributive share of business income under R.C. 5733.40(A)(7).

Regarding the petitioner’s conclusory statements pertaining to 26 CFR 1.707-1(c) and 26 CFR 31.3401(c)-1, the Department again notes that the petitioner has not shown how these federal regulations apply to the Ohio SBD. As noted above, Ohio has its own definition of “business income.” However, the petitioner contends the Department is bound to follow federal definitions and treatments because of the preamble to R.C. 5747.01. This is not correct. The preamble to R.C. 5747.01 states, in relevant part:

Except as otherwise expressly provided or clearly appearing from the context, any *term used in this chapter that is not otherwise defined* in this section has the same meaning as when used in a *comparable context* in the laws of the United States relating to federal income taxes or if not used in a comparable context in those laws, has the same meaning as in section 5733.40 of the Revised Code.

*Id.* (Emphasis added). The preamble does not bind the Commissioner to federal income tax characterizations. Instead, this provision, which appears at the beginning of the definition section of Chapter 5747 of the Revised Code, states that Ohio’s income tax uses the Internal Revenue Code (or other laws related to federal income tax) to define any *undefined* term in the chapter. As noted above, the issue in this case is whether the petitioner’s guaranteed payments are “business income”. The term business income *is* defined under Ohio law at R.C. 5747.01(B). As such, the petitioner’s reliance on treasury regulations, as opposed to Ohio’s own definition of business income, to determine what is “business income” under Ohio law is misplaced.

#### C. GUARANTEED PAYMENTS AS SOLE PROPRIETOR INCOME

The petitioner next contends that the guaranteed payment is business income under R.C. 5747.01(B) because she is not an employee of the firm, but rather a sole proprietor providing her services to the firm. However, as

part of this contention, the petitioner admits that: “Each Subject Partner is a partner in Partnership. Each Subject Partner actively participates in Partnership’s day to day business operations”. Thus, the petitioner acknowledges that she is not a sole proprietor, but is in fact a partner in the firm. Thus, the idea that the petitioner is a sole proprietor is not well taken.

Black’s Law Dictionary defines “Sole Proprietorship” as: “A business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity.” Black’s Law Dictionary (11th ed. 2019). In this case, the petitioner does not own all the assets, owe all the liabilities, nor operate the firm in her personal capacity. The petitioner does not own the business by herself; in fact, she provided a “partnership agreement” between herself and the firm. There are also other partners in the partnership. Additionally, a sole proprietor is required to report the income and losses from a sole proprietorship on a federal Schedule C. In this case, the petitioner did not file a federal Schedule C for the tax year in question, but instead reported her income on federal Schedule E under the section for “Income or Loss from *Partnerships* and S Corporations.” (Emphasis added).

The firm is a limited liability partnership and has a partnership agreement signed by all the partners of the firm. The petitioner is a partner in the firm and is subject to the partnership agreement. The partnership agreement details the annual draw amount as well as policies regarding business decisions, retirement, expulsion of partners, and a restriction against nepotism. A sole proprietor would not be subject to a partnership agreement or any of the types of policies contemplated by the firm’s partnership agreement. Therefore, the petitioner is not a sole proprietor, but rather is a partner in the firm. As such, this contention is without merit.

#### D. R.C. 5733.40(A)(7) HISTORY AND HBD INDUSTRIES

The petitioner contends that R.C 5733.40(A)(7) does not convert the payments from business income to nonbusiness income.<sup>8</sup> She continues that the requirements of R.C. 5733.40(A)(7) apply only to situations in which a taxpayer has at least a 20% ownership interest, and do not contemplate situations in which a taxpayer owns less than 20% of the entity; put another way, she contends guaranteed payments to an investor owning less than 20% could be either business or nonbusiness income depending on how the partnership derived the income used to make said guaranteed payments. The petitioner concludes that the Department’s position is speculating regarding legislative intent and applying the law incorrectly. This contention is not well taken.

R.C. 5733.40(A)(7) reclassifies guaranteed payments made to an investor holding at least a 20% ownership interest in an entity as business income. If the 20% ownership threshold is not met, the guaranteed payments are not reclassified as business income. As noted above, guaranteed payments by those who own less than 20% of a qualifying entity are not inherently business income without showing these payments are business income under R.C. 5747.01(B). Additionally, R.C. 5733.40(A)(7) serves to reclassify certain guaranteed payments as a distributive share of business income from a PTE if the investor owns 20% or more of the PTE. The logical operation of this statute for an investor who owns less than 20% simply means that the guaranteed payment is *not* reclassified as a distributive share of business income.

The petitioner cites tax forms, tax return instructions, informal guidance, and a Department-hosted webinar to support the contention that the Department is misapplying R.C. 5733.40(A)(7). Specifically, the petitioner notes the Department did not specifically address this issue until a 2015 webinar. Thus, the petitioner seems

---

<sup>8</sup> The Commissioner does not dispute this; instead, as analyzed above, guaranteed payments do not meet the definition of business income in R.C. 5747.01(B), and, thus, are *nonbusiness income*. That is why R.C. 5733.40(A)(7) was enacted by the Ohio General Assembly, to reclassify guaranteed payments for certain investors, which are otherwise *nonbusiness income* as a distributive share of *business income* from a PTE if certain criteria are met.

to contend that because the Department was silent on the issue in its forms and instructions, then that somehow means guaranteed payments to these investors must be business income.<sup>9</sup> Cutting against this contention, the petitioner concedes that Department guidance allows only investors owning at least 20% to claim the guaranteed payments as business income. In fact, the Department could not assert that guaranteed payments to investors owning less than 20% are business income, as that would render the reclassification in R.C. 5733.40(A)(7) meaningless. Since the Department did not assert guaranteed payments to a less than 20% investor were business income, the petitioner cannot contend that she detrimentally relied on Department guidance when she classified the guaranteed payments as business income. Thus, this contention is not well taken.

The petitioner attempts to analyze the history of R.C. 5733.40(A)(7) to determine its intent and bolster her case. However, the petitioner does not cite any authority or present anything other than conclusory statements that R.C. 5733.40(A)(7) does not apply to situations of less than 20% ownership. The petitioner has not shown that R.C. 5733.40(A)(7) is ambiguous. The statute specifically addresses investors owning at least 20% of a qualifying entity. For such investors, guaranteed payments shall be considered a distributive share of the entity's income and are therefore business income to the investor. When the meaning of the statute is "clear and unambiguous," the statute must be applied "as written." *Cheap Escape Co*, 1900 N.E.2d 601 at 604. In this case, the meaning and language of R.C. 5733.40(A)(7) is clear and unambiguous. For the purposes of R.C. Chapters 5733. and 5747., certain guaranteed payments and compensation are reclassified as a distributive share of income from a PTE when the investor receiving the income owns at least 20% of the entity making the payment. R.C. 5733.40(A)(7). There is no ambiguity in R.C. 5733.40(A)(7) and it must be applied as written. Additionally, portions of the statute would be rendered meaningless if guaranteed payments to those owning less than 20% of a qualifying entity were already classified as business income. For example, why would a taxpayer need to reclassify guaranteed payments as business income if such amounts are already business income? Accordingly, because the petitioner does not own at least 20% of the firm, R.C. 5733.40(A)(7) does not convert her guaranteed payments into business income.

The petitioner's contention that the payments at issue qualify for the Ohio SBD is not well taken. Regardless of the petitioner's choice of definition regarding "guaranteed payments," she owns less than 20% of the firm's capital or profit share and is not entitled to claim either deduction. R.C. 5733.40(A)(7) only applies to guaranteed payments paid to an investor that holds at least 20% direct or indirect interest in the profits or capital of the qualifying entity. In this case, according to the firm's partnership agreement and its tax filings, the petitioner owned a vested capital interest of less than 20% in the partnership's profits during the years in question, which falls short of the required 20% threshold.

Finally, the petitioner contends that the holding of *HBD Industries, Inc. v. Levin* does not affect the analysis of this case. Specifically, the petitioner contends *HBD Industries* involved the meaning of "compensation" and not "guaranteed payments". While the Commissioner does not concede that *HBD Industries* has no effect on the outcome of this case, none of the billings, assessments, or guidance related to this matter directly cited or referenced this case. Furthermore, the case was not cited in any of the Commissioner's above analysis.

## V. PENALTY ABATEMENT

---

<sup>9</sup> This cannot be so. The Ohio Board of Tax Appeals ("BTA") has routinely held that "Taxpayers are required to follow the law of the state of Ohio.... *Ricchuiti v. Limbach* (Oct. 23, 1992), BTA No. 1989-K-1124, unreported. The instructions to the returns are not the law." *Benedetti v. Zaino*, BTA No. 2003-R-1817, 2004 WL 1488191 (June 25, 2004). Additionally, the BTA has noted "[i]t would be unreasonable for a taxpayer to expect that the intricacies of Ohio's income tax laws encompassed within R.C. Chapter 5747 could be reduced to a single line on a form." *Ricchuiti* at \*5. Similarly, it is unreasonable to expect the Department to provide guidance on every possible situation or on every position that a taxpayer could possibly take.

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

VI. CONCLUSION

The petitioner's guaranteed payments are not eligible for the Ohio SBD. She did not have the necessary 20% or greater ownership of the firm to reclassify the guaranteed payments as a distributive share of business income under R.C. 5733.40(A)(7). Despite numerous assertions to the contrary, the petitioner's contentions are not well taken, and the guaranteed payments at issue are not business income under R.C. 5747.01(B). However, the petitioner is granted a penalty abatement in this matter.

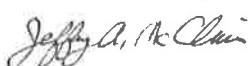
Accordingly, the assessments are adjusted as follows:

Assessment	Year	Tax	Interest	Penalties	Total
02201704726854	2013	\$1,224.00	\$106.94	\$0.00	\$1,330.94
02201704726853	2014	\$1,776.84	\$101.94	\$0.00	\$1,878.78

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

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

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



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

000000341  
**FINAL  
DETERMINATION**

Robert T. & Karen M. Hawksley  
10848 Omaha Trace  
Union, KY 41091

Date:

OCT 26 2022

Re: Refund Claim No.: 2014700927  
Individual Income Tax - 2019

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

Tax Year	Refund Claimed
2019	\$32,091.00

Robert and Karen Hawksley (the “claimants”) timely filed their 2019 Ohio individual income tax return claiming a refund amount of \$32,091.00.<sup>1</sup> The Department reduced the claimants’ nonresident credit after determining the claimants overstated the portion of their Ohio adjusted gross income not allocable or apportionable to Ohio, and adjusted the claimants’ refund accordingly. The claimants initially objected to the adjustment; however, the claimants’ authorized representative withdrew the refund claim in a written correspondence dated July 29, 2022. Thus, no further action is required.

Accordingly, the remaining refund claim is denied.

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

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02.



Department of  
Taxation

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

7000000339

# FINAL DETERMINATION

Date:

OCT 26 2022

Joseph and Brenda Hertanu  
5501A 14<sup>th</sup> Avenue  
Brooklyn, New York 11219

Re: Refund Claim No. 2028901255  
Individual Income Tax - 2019

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

Tax Year	Refund Claimed
2019	\$3,015.00

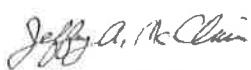
Joseph and Brenda Hertanu (the “claimants”) filed a 2019 Ohio individual income tax return (form “IT 1040”) reporting an overpayment of \$3,015.00 and requesting a refund of that amount.<sup>1</sup> The Department denied the pass-through entity (“PTE”) credit reported by the claimants, and thus their refund, because it could not verify the credit. In response, the claimants submitted additional documentation related to their claim and requested administrative review of the denial. The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

R.C. 5747.08(I) allows a refundable credit to certain PTE investors equal to the investor’s proportionate share of the lesser of the tax due or tax paid by the PTE on behalf of the investor. In this case, claimants submitted an Ohio IT K-1 reporting Ohio Group Home of Middletown LLC paid \$3,015.00 of tax on behalf of Joseph Hertanu; however, the PTE did *not* file a PTE return *nor* pay the tax due.<sup>2</sup> Therefore, the claimants’ proportionate share of the lesser of the PTE’s tax due (which the Commissioner is unable to determine because of the lack of filing) or tax paid by the PTE (which is nothing to date) is \$0.00; thus the claimants are not entitled to this PTE credit.

Accordingly, the refund claim is denied.

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

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

  
JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02(A)(1).

<sup>2</sup> Additionally, Ohio Group Home of Middletown LLC does not have a PTE account with the Department.



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

0000000356  
**FINAL  
DETERMINATION**

Date:

OCT 26 2022

Baruch & Chana L. Jeremias  
8 Primrose Dr.  
Lakewood, NJ 08701

Re: Refund Claim No. 2029001274  
Individual Income Tax – 2019

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

Tax Year	Refund Claimed
2019	\$38,471.00

Baruch and Chana Jeremias (the “claimants”) filed their 2019 Ohio individual income tax return<sup>1</sup> claiming \$21,234.00 in pass-through entity (“PTE”) credits and requesting a refund in the above amount.<sup>2</sup> The Ohio Department of Taxation denied the claimants’ PTE credits because the PTEs from which the credits were claimed never paid their 2019 Ohio PTE tax; this reduced the claimants’ refund to \$17,237.00. The claimants contend the Department erroneously denied their PTE credits and request their 2019 Ohio income tax return be accepted as filed. The claimants did not request a hearing; therefore, the matter is decided based on the information currently in the Commissioner’s possession.

R.C. 5747.08(I) provides a refundable credit to certain PTE investors equal to the investor’s proportionate share of the tax paid by the PTE on behalf of the investor. The claimants provided Ohio IT K-1s with their request for administrative review, which report PTE credits totaling \$21,234.00 to Mrs. Jeremias. However, even though those PTEs *reported* credits to their investors (e.g., Mrs. Jeremias), the PTEs have not paid their underlying 2019 tax obligation as of the date of this final determination. Thus, the claimants’ proportionate share of the Ohio tax paid by those PTEs is \$0.00, and the Department correctly adjusted the claimants’ PTE credit and corresponding refund as such.

Accordingly, the claimants’ remaining refund is denied.

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

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

JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02.

<sup>2</sup> That amount was requested to be carried forward as a credit against their Ohio tax liability in subsequent years.



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

Department of  
Taxation

100000360  
**FINAL  
DETERMINATION**

Date:

OCT 26 2022

James and Catherine Kassouf  
C/O Bederson LLP  
100 Passaic Ave, Suite 310  
Fairfield, NJ 07004

Re: Refund Claim No. 1026300102  
Individual Income Tax - 2019

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

Tax Year	Refund Claimed
2019	\$61,256.00

James and Catherine Kassouf (the “claimants”) filed a 2019 Ohio individual income tax return (form “IT 1040”) reporting an overpayment of \$61,256.00 and requesting a refund of that amount.<sup>1</sup> The Department denied the pass-through entity (“PTE”) credit reported by the claimants because it could not verify the credit amount. In response, the claimants submitted additional documentation related to the claim and requested administrative review. The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

R.C.5747.08(I) allows a refundable credit to certain PTE investors equal to the investor’s proportionate share of the lesser of the tax due or tax paid by the PTE on behalf of the investor. At the time of the initial review of the claimants’ 2019 IT 1040, the underlying PTE had not paid the tax amount due with its PTE filing. The PTE has since paid its tax due, and thus the Commissioner is able to verify the PTE credit claimed on the claimants’ return.

Accordingly, a refund of \$61,256.00 plus statutory interest is granted.

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

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

  
JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm.Code 5703-7-02(A)(1).



0000000337

# FINAL DETERMINATION

Date: OCT 26 2022

Paul R. & Kathy J. Kelley  
1642 Fairground Rd.  
Lucasville, OH 45648

Re: Refund Claim No. 2108335078  
Individual Income Tax –2020

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

Tax Year	Refund Claimed
2020	\$13,272.00

Paul and Kathy Kelly (the “claimants”) timely filed their 2019 Ohio individual income tax return<sup>1</sup> claiming a refund of \$13,272.00. The claimants based part of their refund on a \$6,500.00 credit carryforward from tax year 2019. The Ohio Department of Taxation adjusted the claimants’ refund to \$6,772.00 because the \$6,500.00 from tax year 2019 was partially offset toward a debt owed by the claimants pursuant to R.C. 5747.12 and partially refunded. The claimants contend they are entitled to their claimed credit carryforward on their 2020 IT 1040, and provided a 2019 Ohio IT 1040 indicating the \$6,500.00 credit to be carried forward.<sup>2</sup> The claimants did not request a hearing; therefore, the matter is decided based on the information currently in the Commissioner’s possession.

R.C. 5747.12 allows amounts subject to refund under R.C. 5747.11 to be carried forward to the next tax year and applied toward future tax liability. However, R.C. 5747.12 also empowers the Commissioner to offset Ohio income tax refunds, including requested credit carryforwards, against the taxpayers’ debts. Additionally, R.C. 5747.12(B) requires any refundable amount greater than the debt be refunded to the taxpayer. The claimants’ 2019 refund of \$1,274.00 and requested credit carryforward of \$6,500.00 were offset against a \$1,497.38 debt collected by the Office of the Ohio Attorney General; the remaining \$6,276.62 was refunded to the claimants via a check issued in May 2020. Thus, the Department correctly denied the claimants’ 2020 Ohio individual income tax credit carryforward, as the amount was previously applied against their state debt and/ or refunded to them. As such, their refund was properly adjusted to \$6,772.00.

Accordingly, the claimants’ requested additional refund is denied.

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02.

<sup>2</sup> This 2019 Ohio IT 1040 is dated April 6, 2021.

2017000338

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



Department of  
Taxation

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

1000000318

FINAL  
DETERMINATION

Date:

OCT 26 2022

Alex Kloepfer  
2033 Franklin Street  
Covington, Kentucky 41014

Re: Refund Claim No. 0136300963  
Individual Income Tax – 2019

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

Tax Year	Refund Claimed
2019	\$952.00

Alex Kloepfer (the “claimant”) filed a 2019 Ohio individual income tax return (form “IT 1040”) requesting a refund of \$952.00.<sup>1</sup> The Department granted a refund of \$139.00 after adjusting the claimant’s tax liability based on the applicable tax rate. The claimant objects to the reduction in his refund and requests administrative review.<sup>2</sup> The claimant did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

Ohio’s individual income tax is imposed on Ohio adjusted gross income (“OAGI”), less taxable business income and exemptions. R.C. 5747.02(A)(3). In tax year 2019, the tax rate for an OAGI less taxable business income and exemptions of more than \$108,700.00 but not more than \$217,400.00 was \$3,202.91 plus 4.413% of the amount in excess of \$108,700. Former R.C. 5747.02(A)(3).

In this case, the claimant reported a tax liability before credits of \$2,848.00. However, using the above formula, the claimant’s correct tax liability before credits is \$3,671.00.<sup>3</sup> The claimant does not explain how he calculated his tax liability before credits, nor does he contest the Department’s calculation is in error. Instead, he makes contentions related to his nonresident credit despite the Department increasing that amount. The claimant’s tax liability before credits (\$3,671.00), minus his nonresident credit (\$1,671.00) resulted in a total Ohio income tax liability of \$2,000.00. After applying his \$2,139.00 in employer withholding, he was due a refund of \$139.00. Therefore, the Department refunded the proper amount to the claimant.

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02(A)(1).

<sup>2</sup> The claimant’s contentions center around being a part-year resident of Ohio and thus the calculation of his nonresident credit for the portion of the year when he lived in Kentucky. However, the Department actually *increased* his nonresident credit from \$1,661.00 to \$1,671.00. The Department also added a personal exemption not claimed on the claimant’s return when calculating the adjusted refund.

<sup>3</sup> The claimant reported an OAGI of \$121,168.00. The claimant’s OAGI, less his taxable business income (\$0.00) and personal exemption (\$1,850.00) was \$119,318.00. The claimant’s tax liability was calculated by adding \$3,202.91 plus 4.413% of the amount in excess of \$108,700, resulting in a tax due of \$3,671.00.

000000319

Accordingly, the remainder of the refund claim is denied.

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

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



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

0000000320  
**FINAL  
DETERMINATION**

Date:

OCT 26 2022

Michael A. & Elizabeth Klump  
3060 Peachtree Rd. NW, Ste. 425  
Atlanta, GA 30305

Re: Refund Claim No. 2028610657  
Individual Income Tax - 2019

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

Tax Year	Refund Claimed
2019	\$28,828.00

Michael and Elizabeth Klump (the “claimants”) filed a 2019 Ohio individual income tax return reporting a \$355,395.00 federal conformity deduction and requesting a refund of \$28,828.00.<sup>1</sup> The Department denied the claimants’ federal conformity deduction because Ohio was in conformity with federal law for tax year 2019 and adjusted their refund to \$11,892.00. The claimants object to the refund denial, stating their federal conformity deduction was calculated based on “losses allocated to the state of Ohio in 2018 that were carried forward to 2019.” The claimants did not request a hearing; therefore, this matter is decided based on the information currently in the Commissioner’s possession pursuant to R.C. 5703.70.

Ohio’s starting income tax base is Ohio adjusted gross income (“OAGI”), which is federal adjusted gross income (“FAGI”) adjusted pursuant to R.C. 5747.01(A), less exemptions. FAGI is defined by federal law. When federal laws affecting the definition or computation of FAGI are changed, Ohio law requires the Ohio General Assembly to pass legislation to adopt, or *conform* to, those changes for Ohio income tax purposes. *See* R.C. 5701.11. Without “conformity”, any reference to FAGI means the version of FAGI that existed the last time R.C. 5701.11 was amended. *Id.*

Ohio’s income tax return (form IT 1040) requires taxpayers to start with the FAGI reported on their federal return. However, if Ohio does not conform to federal changes affecting FAGI, then Ohio’s definition of FAGI differs from the federal definition of FAGI. The federal conformity deduction on the Ohio Schedule A is for adjustments that are necessary to change the federal version of FAGI reported on line 1 of the Ohio IT 1040 to the Ohio definition of FAGI when Ohio law is out of conformity with federal income tax law.

However, since Ohio *was in conformity* with federal law for the tax year 2019, there are no federal conformity adjustments available to the claimants. Thus, there is not an acceptable amount for the claimants to include on the “federal conformity deduction” line of Ohio Schedule A. *See* R.C. 5701.11; *see also* R.C. 5747.01. Additionally, while Ohio does integrate federal net operating losses (“NOLs”)

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

into its tax calculation, that is because they impact the taxpayer's FAGI, and thus change the taxpayer's OAGI; there is nothing in Ohio law that allows for an adjustment in computing OAGI based on prior year, Ohio-specific business losses. *See* R.C. 5747.01(A)(17) and (18); *see also* R.C. 5747.01(A). Here, the claimants are attempting to adjust their 2019 OAGI by deducting business losses reported on their 2018 Ohio IT NRC (the Ohio form used to calculate the Ohio nonresident credit under R.C. 5747.05(A)). Since no legal authority exists to allow the adjustment they are seeking,<sup>2</sup> the claimants are not entitled to it; thus, the Department correctly adjusted their 2019 refund.

Accordingly, the claimants' remaining refund is denied.

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

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

/s/ Jeffrey A. McClain



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner

---

<sup>2</sup> Under Ohio law, “[s]tatutes granting deductions from taxation must be strictly construed [sic] in favor of taxation. *In re Estate of Strock*, 29 Ohio App.3d 232 (9<sup>th</sup> Cir. 1986); *see also Cincinnati v. Testa*, 143 Ohio St.3d at 374 (2015) (“In Ohio, taxation is the rule, and exemption is the exception”). The burden is on the taxpayer to show a statute’s language entitled them to a deduction. *See Cincinnati v. Testa* (2015); *see also Ohio Children’s Soc., Inc. v. Porterfield*, 26 Ohio St.2d at 32 (1971); *see also Anheuser-Busch, Inc. v. Tracy*, 85 Ohio St.3d at 515 (1999).



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

Department of  
Taxation

000000317

FINAL  
DETERMINATION

Date:

OCT 26 2022

Patricia Matheny  
208 W. 2<sup>nd</sup> Avenue  
Columbus, OH 43201

Re: Refund Claim No. 2105055326  
Individual Income Tax - 2020

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

Tax Year	Refund Claimed
2020	\$788.00

Patricia Matheny (the “claimant”) filed a 2020 individual income tax return (form “IT 1040”) reporting an overpayment of \$788.00 and requesting that amount be credited against her 2021 income tax liability.<sup>1</sup> The Department adjusted her claimed credit carryforward to \$327.00 because it could not verify the reported estimated payments and credit carryforward amount from the 2019 return. In response, the claimant did not raise any specific objections but submitted additional documentation related to her claim. This matter is now decided based upon the evidence available to the Commissioner.

In this case, the claimant reported \$1,972.00 in estimated payments and credit carryforward on her 2020 IT 1040; however, Department records only show estimated payments totaling \$1,050.00, and a 2019 credit carryforward of \$461.00, for a total of \$1,511.00. The documents provided by the claimant support the amount determined by the Department (i.e., \$1,511.00). The claimant has not provided evidence of an additional \$461.00 payment related to tax year 2020.

Accordingly, the remainder of the refund claim is denied.

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

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

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02(A)(1).



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

Department of  
Taxation

000000360  
**FINAL  
DETERMINATION**

Date:

**OCT 26 2022**

Kevin Mccollum and Lynnette Perry-Mccollum  
160 Riverside Drive Apt 15B  
New York, NY 10024

Re: Refund Claim No. 2028931391  
Individual Income Tax - 2019

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

Tax Year	Refund Claimed
2019	\$6,099.00

Kevin Mccollum and Lynnette Perry-Mccollum (the “claimants”) filed a 2019 Ohio individual income tax return (form “IT 1040”) reporting an overpayment of \$6,099.00 and requesting a refund of that amount.<sup>1</sup> The Department denied \$806.00 of pass-through entity (“PTE”) credit reported by the claimants because it could not verify the credit amount, which reduced the claimants’ refund to \$5,293.00. In response, the claimants submitted additional documentation related to the claim and requested administrative review. The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

R.C. 5747.059(B) allows a refundable credit to certain PTE investors equal to the investor’s proportionate share of the lesser of the tax due or tax paid by the PTE on behalf of the investor. In this case, the claimants are claiming a PTE credit from Touring Goes Wrong LP. However, Touring Goes Wrong LP did **not pay** the tax due with its entity-level filing (form “IT 1140”), and therefore the claimants are not entitled to a PTE credit for that entity (i.e., the lesser of the tax due or **tax paid** is \$0).

Accordingly, the remaining 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

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02(A)(1).



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

Department of  
Taxation

0000000306

FINAL  
DETERMINATION

Date:

OCT 26 2022

Jean E. Metzger  
7814 Wareham Circle NW  
North Canton, OH 44720

Re: Refund Claim No. 2108627818  
Individual Income Tax – 2020

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

Tax Year	Refund Claimed
2020	\$985.00

Jean Metzger (the “claimant”) filed a 2020 Ohio individual income tax return (form “IT 1040”) reporting an overpayment of \$985.00 and requesting that amount be credited against the following year’s income tax liability (commonly referred to as a “credit carryforward”). *See* R.C. 5747.12. The Department adjusted the claimed credit carryforward to \$490.00 because it could not verify the reported estimated payments. In response, the claimant submitted additional documentation related to her claim and requested administrative review. The claimant did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

The claimant reported \$2,000.00 in estimated payments on her 2020 IT 1040; however, Department records only show estimated payments totaling \$1,505.00. While the claimant provided canceled check #4224 as evidence of her claim of an additional \$500.00 payment, the written portion of the check only says, “five and xx/100 dollars”. If an instrument contains contradictory terms, words prevail over numbers. R.C. 1303.17 (Uniform Commercial Code 3-114). Therefore, the Ohio Treasurer of State was only able to cash the check for \$5.00, rather than \$500.00; this \$5.00 was reported to the Department and applied to the claimant’s 2020 IT 1040. The claimant has not provided evidence of an additional check for \$495.00 related to tax year 2020. As such, the Department’s recalculation of the claimant’s estimated payments was correct.

Accordingly, the remainder of the refund claim is denied.

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

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



100000361

# FINAL DETERMINATION

Date:

OCT 26 2022

Michael and Stephanie Oros  
2 Barstann Ct  
Long Valley, NJ 07853

Re: Refund Claim No. 2027201423  
Individual Income Tax – 2019

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

Tax Year	Refund Claimed
2019	\$305.00

Michael and Stephanie Oros (the “claimants”) filed a 2019 Ohio individual income tax return (form “IT 1040”) reporting \$305.00 on line 15 as an estimated or extension payment or credit carryforward from the previous year’s return and requested a refund of that amount.<sup>1</sup> The Department denied this amount because the claimants did not make an estimated or extension payment with their IT 1040, nor did they have a credit carryforward from their 2018 IT 1040. In response, the claimants submitted additional documentation stating that the payment at issue was made by the James B Germain Trust U/D FBO Stephanie Oros on a 2019 Ohio fiduciary income tax return (form “IT 1041”). The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

The Ohio Supreme Court has often held that “taxation is the rule, and exemption is the exception.” *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104, 554 N.E.2d 1310, 1312 (1990). Since an exemption, deduction, or credit “depends on legislative grace, the statute must clearly express the exemption \* \* \* and a taxpayer must show his entitlement to it.” *Id.* (internal citations omitted).<sup>2</sup> Ohio’s individual income tax credits are listed in R.C. 5747.98. Ohio law does not allow a credit for fiduciary income taxes paid by an estate or trust on the IT 1041. While Ohio does allow a credit for taxes paid by a pass-through entity (“PTE”) or trust on the PTE and Trust Withholding Tax Return (form “IT 1140”) and by a PTE on the PTE Composite Income Tax Return (form “IT 4708”), these provisions do not apply to fiduciary income tax reported on the IT 1041. *See* R.C. 5747.059 (the credit for the withholding taxes on the IT 1140) and 5747.08(I) (the credit for composite taxes on the IT 4708); *see also* R.C. 5747.08 and 5747.02(A)(1), (2), and (3) (showing Ohio’s fiduciary income tax is separate and distinct from Ohio’s individual income tax). Additionally, the trust is not a PTE. *See* R.C. 5733.04(O) via 5747.01(K).

In this case, the claimants are not entitled to a credit for fiduciary income taxes paid by a trust on the IT 1041, as no such credit exists against Ohio’s individual income tax. While Ohio’s PTE taxes exist to

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

<sup>2</sup> *See Cleveland v. Bd. of Tax Appeals*, 153 Ohio St. 97, 99–100, 41 O.O. 176, 178, 91 N.E.2d 480, 482, (1950) paragraph one of the syllabus, and *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, 47 O.O. 313, 105 N.E.2d 648, (1952), paragraph two of the syllabus.

“complement and reinforce” Ohio’s individual income tax, the fiduciary income tax is its own separate and distinct income tax. *See* R.C. 5747.40 and 5747.02(A). Therefore, the claimants have failed to present evidence to refute the denial of the credit and thus the refund claim in this matter.

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

/s/ Jeffrey A. McClain

  
JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner



# FINAL DETERMINATION

Date:

**OCT 26 2022**

Kendrick T. Price  
6447 Banyan Way  
Canal Winchester, OH 43110

Re: Assessment No. 04202102179100  
School District Income Tax – 2018

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

Tax	Interest	Penalty	Total
\$73.00	\$6.28	\$150.00	\$229.28

The Department assessed Kendrick Price (the “petitioner”) for failing to file a 2018 school district income tax return (form “SD 100”) for Reynoldsburg City School District (2509). The petitioner objected to the assessment but did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

Department records demonstrate that the petitioner received income while a resident of a taxing school district and therefore was subject to the school district income tax. *See* R.C. 5748.01(G). The petitioner does not dispute being a resident of the school district during the tax year or that he earned income subject to school district income tax.<sup>1</sup> Thus, he was required to file a SD 100 to determine the amount of tax, if any, that is due. *See* R.C. 5747.08.

Pursuant to R.C. 5747.13(E)(3) an individual filing a petition for reassessment “shall pay the assessed amount, including assessed interest and assessed penalties,” on or before the last day a petition for reassessment may be filed, if “[t]he person fails to file a tax return”. *Id.* Here, the Commissioner has determined that the petitioner failed to file a 2018 SD 100 as required by R.C. 5747.08. He does not contend that his correctly calculated tax liability is less than \$1.01, or that he lacks nexus with the Ohio or the school district at issue. Additionally, the petitioner did not pay the total amount of tax, interest, and penalty with the petition. Unless the petitioner makes the required payments, the Commissioner must dismiss the petition.

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

Current records indicate that no payment has been applied to this assessment, leaving the full balance due. However, due to payment processing and posting time lags, payments may have been made that are

<sup>1</sup> For 2018, Reynoldsburg levied its school district income tax on Ohio adjusted gross income less exemptions. *See* former R.C. 5748.01(E)(1)(a). The petitioner reported an Ohio adjusted gross income less exemptions on his Ohio individual income tax return of \$14,583.00. This amount was used to calculate the school district assessment here at issue.

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

/s/ Jeffrey A. McClain



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner



# FINAL DETERMINATION

Date:

OCT 26 2022

Satinder Puri  
 13217 Cooley Avenue  
 Cleveland, OH 44111

Re: Assessment No. 02202113115041  
 Individual Income Tax – 2018<sup>1</sup>

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

Tax	Interest	Penalty	Total
\$318.00	\$30.34	\$60.68	\$409.02

The Department assessed Satinder Puri (the “petitioner”) for reporting the incorrect federal adjusted gross income (“FAGI”) on his 2018 Ohio individual income tax return (form “IT 1040”). This information was reported to Ohio by the Internal Revenue Service (“IRS”) under authorization of IRC 6103(d). The petitioner objected to the assessment, contending his social security benefits are not taxable. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Commissioner.

For Ohio income tax purposes, the starting tax base is Ohio adjusted gross income which is federal adjusted gross income (“FAGI”) as adjusted pursuant to R.C. 5747.01(A). Taxpayers receiving social security benefits may have to pay federal income tax (referred to as the “taxable amount” of such benefits) on a portion of those benefits depending on the taxpayer’s income and filing status. The portion of social security benefits not subject to federal income tax are not included in FAGI. Since the non-taxable amount is not included in FAGI, the amount is already excluded from Ohio’s tax base. Ohio law then allows a deduction for any “taxable amount” of social security benefits reported on the federal return. This deduction is taken on line 14 of Ohio Schedule A (now referred to as the “Ohio Schedule of Adjustments”). Therefore, Ohio does not tax social security benefits whether or not they are included in FAGI; however, only the amount *included* in FAGI is *deductible* on the Ohio return. R.C. 5747.01(A)(5).

In this case, the petitioner filed his 2018 IT 1040 reporting a FAGI of \$29,475.00, which is less than the \$39,543.00 reported to Ohio by the IRS. The petitioner’s return was adjusted to reflect the FAGI reported by the IRS, which resulted in the assessment. However, the petitioner did not report any deductions on the Ohio income tax return he filed, despite having taxable social security benefits that were deductible

<sup>1</sup> The petitioner makes arguments related to a billing notice he received for tax year 2017. The petitioner paid the 2017 billing notice before it was assessed. The petitioner cannot file a petition for reassessment against a bill; therefore, tax year 2017 is not at issue in this appeal.

under R.C. 5747.01(A)(5). Based on the information now available to the Commissioner, the petitioner's return has been adjusted to reflect the correct FAGI and the appropriate deduction for his taxable social security benefits.

Accordingly, the assessment is canceled.

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

/s/ Jeffrey A. McClain



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

0000000314  
**FINAL  
DETERMINATION**

Date: OCT 26 2022

Mohammad A. & Farhat N. Qazi  
6405 Middlebelt Rd.  
West Bloomfield, MI 48322

Re: Refund Claim No. 0311350901  
Individual Income Tax –2019

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

Tax Year	Refund Claimed
2019	\$58,069.00

Mohammad and Farhat Qazi (the “claimants”) timely filed their 2019 Ohio individual income tax return, claiming a refund in the above amount.<sup>1</sup> The Department adjusted the claimants’ reported nonresident credit based on an IT K-1 from Laurel Acquisition Holding Company showing Ohio apportioned income; this adjustment resulted in a reduced refund of \$15,716.00. The Department issued an Income Tax Refund Notice Variance on December 9, 2020 reporting this change. The claimants object to the adjustment, and requested administrative review in a letter dated March 3, 2021 that was mailed on that date via certified mail. The claimants did not request a hearing; therefore, the matter is now decided based on the information currently in the Commissioner’s possession.

Pursuant to R.C. 5703.70(A), a taxpayer has 60 days from the date a refund denial notice is mailed to “provide additional information to the [C]ommissioner or request a hearing, or both.” If such a request for administrative review is received outside of that 60-day window, the request is not timely, and the refund denial or adjustment becomes final. R.C. 5703.70(B). Here, the claimants had until February 8, 2021 to provide additional information or request a hearing, or both.<sup>2</sup> See R.C. 5703.70(B). As noted above, their request for administrative review was mailed on March 3, 2021<sup>3</sup>, and is thus not timely. The Department’s adjustment to the claimants’ refund is therefore final.

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02.

<sup>2</sup> The request for administrative review would still have been considered timely if it was postmarked on or prior to February 8, 2021. R.C. 5703.053(A).

<sup>3</sup> The date such a request is mailed (its postmark date) is considered the date the Department received it. R.C. 5703.056(C)(1).

000000315

Accordingly, the claimants' additional 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



# FINAL DETERMINATION

Date:

OCT 26 2022

Carolyn A. Rafaelian  
907 Hibiscus Lane  
Delray Beach, Florida 33444

Re: Refund Claim No. 2029000571  
Individual Income Tax – 2019

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

Tax Year	Refund Claimed
2019	\$16,514.00

Carolyn Rafaelian (the “claimant”) filed a 2019 Ohio individual income tax return (form “IT 1040”) reporting an overpayment of \$16,514.00 and requesting a refund of that amount.<sup>1</sup> The refund was based on an estimated payment of \$1,810.00 and a credit carryforward from tax year 2018 of \$14,703.00. *See generally* R.C. 5747.12(F) (allowing a taxpayer to request a refund from one tax year be applied to the next tax year). The Department granted a refund of \$8,176.00, which was comprised of the \$1,810.00 estimated payment and a credit carryforward from tax year 2018 of \$6,366.00, which was the amount allowed for that year; the rest of the refund was accordingly denied. The claimant requested administrative review of her 2019 refund denial and submitted documentation related to her claim. The claimant did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

While the claimant is objecting to the denial of her 2019 refund, her contentions and documentation relate to adjustments made to her 2018 IT 1040. As an initial matter, the Department adjusted the claimant’s 2018 credit carryforward from \$14,703.00 as claimed to \$6,366.00<sup>2</sup>; the claimant did not timely appeal these changes. R.C. 5703.70(A) requires a claimant to contest any refund adjustments within 60 days of the date the Commissioner mails the notice. The claimant was sent notice regarding changes to the 2018 credit carryforward on November 6, 2019. The claimant failed to respond to this adjustment, and thus it became final. It was not until the refund claimed on her 2019 IT 1040 was adjusted that she finally responded; such response was received on December 3, 2020. Thus, pursuant to R.C. 5703.70(B), the Commissioner lacks jurisdiction to consider the arguments related to the claimant’s 2018 refund application (i.e., her 2018 IT 1040) because it was previously finalized due to her failure to timely respond to the refund adjustment notice for that tax year.

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

<sup>2</sup> This adjustment was based on a denial of certain refundable pass-through entity credits claimed on her 2018 IT 1040.

Because the 2018 adjustment was not appealed and is now final, the Department's adjustment of the claimant's 2019 IT 1040 was proper. Department records indicate that the credit carryforward from 2018 was \$6,366.00, instead of the \$14,703.00 reported on the claimant's 2019 IT 1040.

Accordingly, the remaining 2019 refund claim is denied.

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

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

/s/ Jeffrey A. McClain



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner

0000000316

# FINAL DETERMINATION

Date:

OCT 26 2022

Saad and Linda Roumaya  
3140 Shoreland Avenue  
Toledo, Ohio 43611

Re: Refund Claim No. 2029038057  
Individual Income Tax – 2019

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

Tax Year	Refund Claimed
2019	\$70,514.00

Saad and Linda Roumaya (the “claimants”) filed a 2019 Ohio individual income tax return (form “IT 1040”) reporting an overpayment of \$70,514.00<sup>1</sup> and requesting a credit carryforward of \$25,000.00<sup>2</sup> and a refund of \$45,514.00. The Department denied \$13,112.00 of pass-through entity (“PTE”) credit reported by the claimants because it could not verify the credit amount, which reduced the claimants’ refund to \$32,402.00. In response, the claimants submitted additional documentation related to the claim. This matter is now decided based upon the evidence available to the Commissioner.

The claimants did not raise any specific objections to the Department’s adjustment; instead they simply provided page 2 of their Ohio Schedule of Credits and an Ohio IT K-1 from 1540 E. Wooster, LLC. Division (I) of R.C. 5747.08 allows a refundable credit to certain PTE investors equal to the investor’s proportionate share of the lesser of the tax due or tax paid by the PTE on behalf of the investor. In this case, the claimants are claiming a PTE credit from 1540 E. Wooster, LLC. However, 1540 E. Wooster, LLC. did not pay the tax due when filing its PTE return (form “IT 4708”), and therefore the claimant is not entitled to a PTE credit from that entity (i.e., the lesser of the tax due or tax paid by the PTE is \$0).

Accordingly, the remaining 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

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02(A)(1).

<sup>2</sup> This amount was credited to the claimants’ 2020 tax liability as requested.



# FINAL DETERMINATION

Date: OCT 26 2022

Jason & Jenifer Scott  
2332 Whites Ferry Ct.  
Henderson, NV 89044

Re: Assessment No. 02201901663726  
Individual Income Tax – 2014

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

Tax	Interest	Penalty	Total
\$1,545.28	\$208.21	\$416.42	\$2,169.91

The petitioners filed a 2014 individual income tax return (form “IT 1040”) requesting a refund of \$5,052.00.<sup>1</sup> Thereafter, the Department assessed the petitioners after adjusting their Ohio Small Business Investor Deduction (“SBD”), finding the petitioners included rental and loss income from non-Ohio sources. The adjusted SBD reduced the petitioners’ refund to \$3,506.72.<sup>2</sup> The petitioners submitted documentation related to their contentions, but did not advance any contentions or request a hearing; therefore, this matter is decided based upon the evidence available to the Commissioner and the evidence supplied with the petition.

R.C. 5747.13(B) requires taxpayers that are filing a petition for reassessment for individual income tax to “indicate the objections” in the petition. In this case, the petitioners sent a fax with Ohio and federal tax forms, but failed to state objections to the assessment, specifically or otherwise. *See Brazen Investments, et. al. v. McClain*, BTA No. 2019-755, 2022 WL 789850 (Mar. 7, 2022).

A taxpayer’s SBD income is “the portion of the taxpayer’s adjusted gross income that is business income reduced by deductions from business income and apportioned or allocated to” Ohio “to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year.” Former R.C. 5747.01(A)(31). Here, the petitioners incorrectly included rental income and loss from non-Ohio sources when calculating their SBD. As noted, the SBD only applied to *Ohio-sourced business income*. *See id.* As such, the Commissioner’s adjustment was proper.

Presumably, the petitioners are claiming their IT 1040, and thus their SBD, was correct as filed. However, when it comes to identifying the petitioners’ objections and making sense of the evidence

<sup>1</sup> The petitioners requested that \$1,000 of the refund be applied toward their 2015 individual income tax liability.

<sup>2</sup> The petitioners received their originally requested refund and credit carryforward, totaling \$5,052.00, prior to the adjustment. Thus, the assessment aims to recoup the amounts previously erroneously refunded to the petitioners.

submitted, the Commissioner will not make assumptions or inferences. The petitioners bear the burden of articulating their objections to the assessment and supporting their position with evidence. They have not done so in this matter.

Accordingly, since the assessment was validly issued, and their no objections to consider, the assessment must stand as issued.

Current records indicate that no payments have been applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (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.

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



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

000000311  
**FINAL  
DETERMINATION**

Date:

OCT 26 2022

Darrell L. Seibert II & Laura A. Seibert  
77 Myrtle Rd.  
Naples, FL 34108

Re: Refund Claim No. 2028805469  
Individual Income Tax - 2019

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

Tax Year	Refund Claimed
2019	\$84,605.00

Darrell and Laura Seibert (the “claimants”) filed their 2019 Ohio individual income tax return claiming a \$84,605.00 pass-through entity (“PTE”) credit and requesting a refund of that amount.<sup>1</sup> The Ohio Department of Taxation denied the claimants’ PTE credit/ refund because the PTE from which the credit was claimed had not paid the underlying tax. The claimants contend the Department erroneously denied their PTE credit and request their 2019 Ohio income tax return be accepted as filed. The claimants did not request a hearing in this matter; therefore, it is decided based on the information currently in the Commissioner’s possession.

R.C. 5747.059 provides a refundable credit to certain PTE investors equal to the proportionate share of the lesser of the PTE’s tax liability or the tax paid by the PTE on behalf of the investor. Department records show the PTE at issue has since paid its Ohio tax liability for the relevant period. The claimants are thus allowed their PTE credit as requested.

Accordingly, the claimants’ refund is granted 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

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02.



FINAL 000000307  
DETERMINATION

Date:

OCT 26 2022

Nfn Tara & Santosh Kumari  
202 Autumn Leaves Way  
Johnstown, OH 43031

Re: Assessment No. 04202104080931  
School District Income Tax – 2019

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

Tax	Interest	Penalty	Total
\$916.00	\$24.88	\$49.76	\$990.64

The Department assessed Nfn Tara and Santosh Kumari (the “petitioners”) for failing to remit the school district income tax due as they reported on the Ohio school district income tax return (form SD 100) they filed for the Johnstown-Monroe Local School District (4503). The petitioners responded to the assessment by providing W-2 forms, but did not provide any specific objections or request a hearing. Therefore, this matter is decided based upon information currently available to the Commissioner.

The petitioners did not provide any objections to the assessment as required by R.C. 5747.13(B). Division (B) of R.C. 5747.13 requires that a petition for reassessment “indicate the objections of the party assessed....” *See also Brazen Investments, et. al. v. McClain*, BTA No. 2019-755, 2022 WL 789850 (Mar. 7, 2022). Therefore, if the petitioners do not actually raise any specific contentions, there are “no issues to decide.” *Id.* As noted above, the petitioners only submitted copies of their 2019 W-2 forms. Therefore, the Commissioner is limited in what he can consider as part of this appeal under R.C. 5747.13. However, information now available to the Department indicates the petitioners did have \$240.08 in withholding for school district 4503 that was not reported on their 2019 SD 100.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
\$675.92	\$18.41	\$0.00	\$694.33

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

0000000308

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

/s/ Jeffrey A. McClain



JEFFREY A. MCCLAIN  
TAX COMMISSIONER

Jeffrey A. McClain  
Tax Commissioner



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

Department of  
Taxation

# FINAL DETERMINATION

Date:

OCT 26 2022

Amanda Vance  
823 44<sup>th</sup> Street NW  
Canton, OH 44709

Re: Assessment No. 02202027347932  
Individual Income Tax – 2019

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

Tax	Interest	Penalty	Total
\$653.00	\$7.58	\$15.16	\$675.74

The Department assessed Amanda Vance (the “petitioner”) after adjusting the federal adjusted gross income and Ohio earned income tax credit she reported on her 2019 Ohio individual income tax return. Specifically, the Department disallowed federal Schedule C expenses the petitioner claimed on her federal 1040 because the Commissioner could not verify she conducted a trade or business in 2019. The petitioner initially objected to the assessment; however, the petitioner withdrew her appeal via written correspondence dated October 17, 2022. Thus, no further action is required.

Accordingly, the assessment stands as issued.

Current records indicate payments totaling \$675.74 have been applied to the assessment, leaving no balance due.

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

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

*Jeffrey A. McClain*

JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner



Department of  
Taxation

Office of the Tax Commissioner  
4485 Northland Ridge Blvd • Columbus, OH 43229  
(614) 466-6750 Fax (614) 466-7979

1000000310  
**FINAL  
DETERMINATION**

Date:

OCT 26 2022

Daniel J. & Patricia R. Walsh, C/O MJMS  
190 S. Lasalle St. 1700  
Chicago, IL 60603

Re: Refund Claim No. 1928734304  
Individual Income Tax - 2018

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

Tax Year	Refund Claimed
2018	\$2,474.00

Daniel and Patricia Walsh (the “claimants”) filed their 2018 Ohio individual income tax return claiming \$2,474.00 in pass-through entity (“PTE”) credits and requesting that amount be carried forward and applied to their 2019 Ohio income tax liability.<sup>1</sup> See R.C. 5747.12. This is commonly referred to as a “credit carryforward”. The Ohio Department of Taxation adjusted the claimants’ PTE credits, and thus their credit carryforward, to \$1,678.00 because one of the underlying PTEs from which the credit was claimed had not filed a 2018 Ohio PTE return or paid any Ohio tax. Nevertheless, the claimants contend the Department erroneously denied that portion of their PTE credit and request their 2018 Ohio income tax return be accepted as filed. The claimants did not request a hearing; therefore, this matter is decided based on the information currently in the Commissioner’s possession.

R.C. 5747.059 allows a refundable credit to certain PTE investors equal to the investor’s proportionate share of the lesser of tax paid by the PTE or the tax liability of the PTE. The PTE at issue still has not filed a 2018 Ohio tax return or paid any Ohio PTE tax; until the PTE files its 2018 PTE (either form IT 1140 or IT 4708), return the Department cannot grant the claimants a credit for their proportion of tax paid or tax liability due for that PTE.<sup>2</sup>

Accordingly, the refund claim is denied.

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

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

  
Jeffrey A. McClain

JEFFREY A. MCCLAIN  
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner

<sup>1</sup> This return meets the definition of a refund application under R.C. 5747.11. See Ohio Adm. Code 5703-7-02.

<sup>2</sup> To support their contention, the claimants provided a federal Schedule K-1 showing the PTE reported income to them in 2018. However, this federal K-1 does not evidence that 2018 Ohio PTE taxes were due from, or paid by, that PTE.



Department of  
Taxation

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

# FINAL DETERMINATION

Date: OCT 27 2022

Yazin Place Inc.  
560 Norton Ave.  
Barberton, OH 44203

Re: Assessment No. 100001955513  
Sales Tax  
Audit Period: 07/01/2017 – 06/30/2020

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13.

In resolution of this matter, 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

/s/ Jeffrey A. McClain

Jeffrey A. McClain  
Tax Commissioner