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Department of
Taxation

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

FINAL DETERMINATION

Date: **AUG - 5 2020**

Ares Sportswear, Ltd.,
3704 Lacon Rd.
Hilliard, OH 43026-1207

Re: Ohio Tax Account #: 93024253
Tax Type: Commercial Activity Tax
Assessment No. 100001213943
Reporting Period: 01/01/2015-12/31/2017

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$33,377.00	\$2,711.48	\$5,006.55	\$41,095.03

The Ohio Department of Taxation assessed the petitioner after conducting an audit of its CAT account for the period in question. Through that audit, the Department's audit staff identified that the petitioner failed to include and report all its taxable gross receipts pursuant to R.C. 5751.01(F) and R.C. 5751.033. Based on the findings of the audit, the Department assessed the petitioner tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner does not contest the CAT liability as assessed, but requests an abatement of the penalty assessed. The petitioner did not request a hearing on the matter; therefore, this matter is decided based upon information available to the Tax Commissioner.

As to penalty abatement, R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The evidence and circumstances, including the petitioner's partial payment of the tax assessed and its partial compliance with its CAT filing obligations following the assessment, support a partial abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total Due</u>
\$33,377.00	\$2,711.48	\$4,005.24	\$40,093.72

Current records indicate that a \$25,000.00 payment has been made on this assessment, leaving an adjusted balance due. However, due to processing and posting time lags, other payments may have been

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made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to the "Ohio Treasurer" Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

AUG 12 2020

John Burns
John Burns Construction Co.
5750 Branding Iron Ct.
Galloway, OH 43119-9400

Re: Commercial Activity Tax
Tax Period: 01/01/2015 – 12/31/2015
Assessment.: 100000608059

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

<u>Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$3,100.00	\$75.46	\$620.00	\$3,795.46

The Department of Taxation assessed petitioner for failing to file its CAT return for the period above referenced. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner did not request a hearing on this matter; therefore, it is decided based upon the evidence currently available to the Tax Commissioner.

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

Therefore, the assessment shall be adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$150.00	\$7.55	\$65.00	\$222.55

Current records indicate that a payment of \$222.55 has been made on the above-referenced assessments, leaving no balance due. Due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THESE MATTERS. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY

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AUG 12 2020

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
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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date:

AUG 19 2020

Cox, Dale Edward
Cox Trucking
1228 W Florence Campbellstown Rd
Eaton, OH 45320-8613

Re: Assessment #: 100000601445
Commercial Activity Tax
Reporting Period: 01/01/2015 – 12/31/2015

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

<u>Tax Due</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$3,100.00	\$74.78	\$620.00	\$3,794.78

The Ohio Department of Taxation assessed Dale Edward Cox (hereinafter referred to as “the petitioner”) for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment and included a payment in the amount of \$312.00 dated March 27, 2017. That payment, however, was applied to the petitioner’s outstanding tax liability for tax year 2014. The petitioner did not request a hearing on the matter; therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

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

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

interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

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Accordingly, the assessment is affirmed as issued.

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

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL DETERMINATION

Date: AUG 19 2020

Gustman Chevrolet-Pontiac
P.O. Box 800
Kaukuana, WI 54130

Re: Ohio Tax Account #: 96019163
Tax Type: Commercial Activity Tax
Assessment No.: 100001122107
Period: 01/01/2018 – 03/31/2018

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

<u>Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$27,414.84	\$791.86	\$5,482.96	\$33,689.66

The Department of Taxation assessed because the petitioner, Gustman Chevrolet-Pontiac, (hereinafter “the petitioner”) did not file a return and remit its CAT for the period in question. Consequently, the petitioner was assessed an estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed a late penalty and an additional tax penalty. R.C. 5751.06(A); R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner objects to the assessment but did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

During the petition period, the petitioner filed the required CAT return for the period in question. Pursuant to R.C. 5751.051(A), “every taxpayer other than a calendar year taxpayer shall file with the tax commissioner a tax return in such form as the commissioner prescribes. The return shall include * * * the amount of the taxpayer’s taxable gross receipts for the calendar quarter and shall indicate the amount of tax due under section 5751.03 of the Revised Code for the calendar.” The records reflect that the petitioner had no taxable gross receipt for the tax period in question. Since the petitioner had no taxable gross receipt, the petitioner’s annual minimum tax (“AMT”) must report nothing for the calendar quarter pursuant to R.C. 5751.051(A) and 5751.03. Considering the petitioner has filed its CAT return, the Department shall adjust this assessment to reflect the information reported on the petitioner’s untimely filed CAT return.

As to penalty abatement, R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The evidence and circumstances, including the petitioner’s payment of tax and interest amount assessed and its compliance with its CAT obligation following the assessment support a partial

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abatement of the penalty. However, the interest assessed cannot be abated, as the accrual of interest is mandatory pursuant to R.C. 5751.06(G).

Therefore, the assessment shall be adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$2,600.00	\$111.76	\$520.00	\$3,231.76

Current records indicate that a payment of \$3,231.76 has been applied to this assessment, in full satisfaction of the assessment.

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain,

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date: **AUG 31 2020**

Molecke, Melvyn L
Innovative Printing
958 Belwood Dr
Highland Heights, OH 44143-3242

Re: Ohio Tax Account #: 95252254
Tax Type: Commercial Activity Tax
Assessment #: 100000777870
Reporting Period: 01/01/2016 – 12/31/2016

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

<u>Tax Due</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$3,100.00	\$38.71	\$620.00	\$3,758.71

The Department of Taxation assessed the petitioner for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.01(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G).

In response to the assessment, the petitioner returned the notice of assessment with the phrase “GROSS SALES LESS THAN \$150,000” typed on the notice. Additionally, the petitioner submitted a request to cancel its CAT registration effective 09/06/2017. The Department informed the petitioner that the response provided did not resolve the matter of its missing 2016 CAT return. Further, the petitioner was instructed to file the missing return and pay the corresponding tax, if any.

The typed, unsigned statement written on the notice of assessment and returned to the Department cannot be accepted in lieu of the required return. Furthermore, the request to cancel its registration with an effective date in calendar year 2017 does not relieve the petitioner of its obligation to file a 2016 CAT return. Finding no indication in the Department’s records or the petitioner’s response that the return has been filed, the Commissioner finds that the estimated tax and corresponding penalty and interest are appropriate.

Accordingly, the assessment is affirmed.

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

made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 1090, Columbus OH 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.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

0000000514

FINAL DETERMINATION

Date: **AUG 26 2020**

Monroe Douglas, Inc.
4142 Monroe St
Toledo, OH 43606-2066

Re: Assessment #: 100001128817
Commercial Activity Tax
Reporting Period: 01/01/2014 – 12/31/2017

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

<u>Tax Due</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$50,400.00	\$4,231.07	\$10,080.00	\$64,711.07

The Ohio Department of Taxation assessed Monroe Douglas, Inc (hereinafter referred to as “the petitioner”) after conducting an audit for the period in question. During the audit, the Department’s audit staff identified that the petitioner was not registered for the CAT even though it was discovered after a review of sales tax returns that the petitioner was subject to CAT. Consequently, the Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment and contends that CAT returns were filed, and all CAT tax liability was paid. The petitioner did not request a hearing on the matter; therefore, this matter is now decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return which shall include, but is not limited to, the amount of the taxpayer’s taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.¹ The petitioner was required under R.C. 5751.051(A)(5) to file a 2014, 2015, 2016, and 2017 CAT returns reporting its taxable gross receipts, for each year, regardless of whether or not it incurred \$150,000.00 or more of gross receipts for the calendar year. Current records indicate that no CAT returns have been filed for the tax years in question and no payment has been received for this assessment. Furthermore, the petitioner has not provided any evidence to substantiate its assertion that CAT returns were filed and that its tax liability was paid.

Information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Moreover, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and

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

circumstances. Finally, the petitioner has failed to meet its burden of proof of showing that CAT returns were filed for the period in question and that its tax liability was paid.

Accordingly, the assessment is affirmed as issued.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL
DETERMINATION
AUG - 5 2020

Date:

Network Dynamics, Inc.
401 E. Jackson Street, Suite 2425
Tampa, FL 33602-5205

Re: Ohio Tax Account #: 95093644
Tax Type: Commercial Activity Tax
Assessment No. 100001292674
Reporting Period: 07/01/2015 – 12/31/2018

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$24,631.00	\$1,431.39	\$2,463.07	\$28,525.46

The Ohio Department of Taxation assessed the petitioner after conducting a field audit of its CAT account. Department records reflect that the petitioner was part of a combined taxpayer group for the tax period in question. The records further show that Global Convergence, Inc. (“GCI”) wholly owned the petitioner and several other entities. GCI failed to register for the CAT, which caused the Department to audit the petitioner. Through that audit, the Department’s audit staff identified that the petitioner erroneously registered as a single entity taxpayer for CAT when it should have registered as a combined taxpayer group for the tax period in question. R.C. 5751.012(A). Additionally, the audit staff concluded that the petitioner had substantial nexus with the State of Ohio through the bright-line presence in accordance with R.C. 5751.01(H)(3) and R.C. 5751.01(I). Further, the audit staff identified that that the petitioner had receipts situsable to Ohio pursuant to R.C. 5751.033(E).

Based on the findings of the audit, the Department assessed the petitioner tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner does not contest the CAT liability as assessed but requests an abatement of the penalty assessed. The petitioner did not request a hearing on the matter; therefore, this matter is decided based upon information available to the Tax Commissioner.

As to penalty abatement, R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The evidence and circumstances, including the petitioner’s payment of the tax and interest

amounts assessed and its partial compliance with its CAT filing obligations following the assessment, support a partial abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$24,631.00	\$1,431.39	\$615.77	\$26,678.16

Current records indicate that a payment of \$28,525.46 has been applied to this assessment, leaving a refund of \$1,847.30 to the petitioner. This overpayment will be refunded to the petitioner. If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **AUG 19 2020**

Gustman Chevrolet-Pontiac
P.O. Box 800
Kaukuana, WI 54130

Re: Ohio Tax Account #: 96019163
Tax Type: Commercial Activity Tax
Assessment No.: 100001127871
Period: 04/01/2018 – 06/30/2018

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

<u>Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$20,921.44	\$396.38	\$4,184.28	\$25,502.10

The Department of Taxation assessed because the petitioner, Gustman Chevrolet-Pontiac, (hereinafter “the petitioner”) did not file a return and remit its CAT for the period in question. Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner objects to the assessment, but did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

During the petition period, the petitioner filed the required CAT return for the period in question. As the petitioner has filed its CAT return, the Department shall adjust this assessment to reflect the information reported on the petitioner’s untimely filed CAT return.

Therefore, the assessment shall be adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$0.00	\$0.00	\$50.00	\$50.00

Current records indicate that a payment of \$50.00 has been applied to this assessment in full satisfaction of the assessment.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of Taxation

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

FINAL DETERMINATION

Date: **AUG 31 2020**

Troyer, Wayne J
Troyer's Country Furniture
4525 Twp Rd 606
Fredericksburg, OH 44627

Re: Ohio Tax Account #: 95020717
Tax Type: Commercial Activity Tax
Assessment #: 100000601466
Reporting Period: 01/01/2015 – 12/31/2015

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

<u>Tax Due</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$3,100.00	\$74.78	\$620.00	\$3,794.78

The Department of Taxation assessed the petitioner for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.01(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G).

In response to the assessment, the petitioner submitted three confirmation numbers that it offered as evidence of its filing the missing return and paying the delinquent tax. However, two of the confirmation numbers related to the filing of the petitioner's 2014 annual CAT return and the corresponding tax payment, while the other confirmation number related to a tax payment that was made with the filing of the 2016 annual CAT return. The Department informed the petitioner multiple times that these confirmation numbers did not resolve the matter of its missing 2015 CAT return. Further, the petitioner was instructed multiple times to file the missing return and pay the corresponding tax, if any. Finding no indication in the Department's records or the petitioner's evidence that the return has been filed, the Commissioner finds that the estimated tax and corresponding penalty and interest are appropriate.

Accordingly, the assessment is affirmed.

Current records indicate that no payment has been made for the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 1090, Columbus OH 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.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date:

AUG 31 2020

US Healthworks of Ohio, Inc.
3655 N Point Pkwy Ste 150
Alpharetta, GA 30005-7838

Re: Assessment No. 100001113804
Commercial Activity Tax
Reporting Period: 01/01/2017 – 12/31/2017

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

<u>Tax Due</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$650.00	\$15.24	\$130.00	\$795.24

The Ohio Department of Taxation assessed US Healthworks of Ohio, Inc (hereinafter referred to as “the petitioner”) for failing to file its CAT return for the period in question. Consequently, the Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner contends that it was not required to file a CAT return for the year in question because it completed a CAT account cancellation request form on December 21, 2018, asking for a retroactive cancellation date of December 31, 2016. Upon initial review, the Department declined to process the cancellation request. The petitioner objects to the assessment and filed a petition for reassessment. The petitioner did not request a hearing on the matter; therefore, this matter is now decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer’s taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.¹ R.C. 5751.012 allows taxpayers, having more than fifty per cent of the value of their ownership interest owned or controlled by common owners, to be members of a combined taxpayer group if the taxpayers are not members of a consolidated elected taxpayer group. The combined taxpayer group designation allows the taxpayers to file returns and pay taxes under Chapter 5751 as a single taxpayer. *Id.* Ohio Administrative Code (“OAC”) 5703-29-19(B)(1) states in relevant part that “[a]ny time the ownership structure changes such that a common owner no longer owns and controls [an entity] by the requisite percentage chosen, that [entity] shall be removed

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

from the group.” The code further clarifies that “[t]he group shall notify the commissioner of this change at the time it files its next return or in writing prior to the due date of that return.” *Id.* Additionally, “the [entity] no longer meeting the requirements shall register for the commercial activity tax as a stand-alone taxpayer or be added as a member of another group.” *Id.*

In the instant case, records show that the petitioner is registered as a combined taxpayer group as of July 1, 2005. Records also show that the tax account includes one other commonly owned entity, US Healthworks Holding Co., Inc (hereinafter referred to as “the secondary entity”). Department records indicate that the petitioner attempted to cancel the combined taxpayer account as of calendar year 2016 and submitted documentation suggesting that the petitioner’s business ceased to operate in 2015. However, no information was provided as to the status of the secondary entity of the combined taxpayer group. Having evidence that the secondary entity continued to engage in commercial activity after 2016, the account was not cancelled as of the requested date.² The Department contacted the petitioner through multiple letters and phone calls to advise them of their CAT compliance obligations with respect to the secondary entity but received no response. Furthermore, on July 10, 2020, the Department’s hearing officer sent a letter to the petitioner requesting additional information related to the secondary entity, particularly, detailed information related to the value of ownership interest and registration status of the secondary entity of the combined taxpayer group. This information was requested to be submitted by August 6, 2020. The petitioner, however, did not respond to the letter or provide the additional information requested.

The petitioner notified the Department that it ceased operations as of December 17, 2015, when a Business Account Update Form was completed and submitted to the Department requesting a retroactive cancellation date of December 2016. Pursuant to OAC 5703-29-19(B)(1), the petitioner was eligible to cancel its CAT account as a combined taxpayer group but the petitioner should have notified the Department, on or before May 10, 2016, that it had ceased to operate in 2015. Furthermore, also pursuant to OAC 5703-29-19(B)(1) and having evidence that the secondary entity had continued to engage in commercial activity after 2016, the petitioner has failed to provide information about the secondary entity’s CAT registration status after the petitioner ceased to operate. The petitioner has not provided evidence showing the secondary entity has registered its CAT account as a stand-alone taxpayer or that it has joined another group. For the above stated reasons, the petitioner’s retroactive cancellation request of December 2016 was correctly declined by the Department. Therefore, the petitioner’s 2017 annual CAT return and 2018 annual minimum tax (“AMT”) payment were due by May 10, 2018.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payments have been applied to this assessment, leaving the full adjusted balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to “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.

² Departmental records show that US Healthworks Holding Co., Inc., had employer and school district tax withholdings for tax years 2016, 2017, and 2018.

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

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


JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date:

AUG 31 2020

Wayne Partin
Wayne Partin Frame & Body Inc.
1120 Old State Route 74
Batavia, OH 45103-1502

Re: Ohio Tax Account #: 95175263
Tax Type: Commercial Activity Tax
Assessment No. 100001055183
Reporting Period: 01/01/2017 – 12/31/2017

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

<u>Tax Due</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$650.00	\$11.47	\$130.00	\$791.47

The Department of Taxation assessed Wayne Partin Frame & Body, Inc., (hereinafter “the petitioner”) for failing to file its CAT return for the period in question. Consequently, the Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner objects to the assessment but did not request a hearing on this matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Records reflect that the petitioner filed the required CAT return during the pendency of the petition period. As the petitioner has filed its CAT return, the Department shall adjust this assessment to reflect the information reported on the petitioner’s untimely filed CAT return. In addition, R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The evidence and circumstances, including the petitioner’s untimely filing of the required return, support a partial abatement of the penalty.

Therefore, the assessment shall be adjusted as follows:

<u>Tax Due</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$0.00	\$0.00	\$25.00	\$25.00

Current records indicate that a payment of \$50.00 has been made on this assessment, leaving a refund of \$25.00 due to the petitioner. This overpayment will be refunded to the petitioner. If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date:

AUG 26 2020

Wirick, David
Forest Hill Garden
7858 Hillgrove Southern Road
Union City, OH 45390

Re: Ohio Tax Account #: 95135175
Tax Type: Commercial Activity Tax
Assessment #: 100000769258
Reporting Period: 01/01/2016 – 12/31/2016

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

<u>Tax Due</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$3,100.00	\$37.69	\$620.00	\$3,757.69

The Department of Taxation assessed the petitioner for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.01(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G).

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

Therefore, the assessment shall be adjusted as follows:

<u>Tax Due</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$150.00	\$1.83	\$65.00	\$216.83

Current records indicate that a payment of \$225.36 has been made in full satisfaction of the assessment, including \$8.53 of accrued post-assessment interest, leaving no balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY

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AUG 26 2020

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

FINAL DETERMINATION

Date: **AUG 26 2020**

BHC Staffing, LLC
575 Lovers Ln.
Steubenville, OH 43953

Re: Assessment No. 100001012000
Employer Withholding Tax: 01/01/2015 – 12/31/2017

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$31,129.71	\$1,923.18	\$10,895.42	\$43,948.31

The Department of Taxation issued this assessment because the petitioner failed to timely file and remit its Ohio employer withholding tax for the period at issue. The petitioner does not contest the tax amount assessed but request an abatement of the penalty and interest amounts assessed. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

The Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The petitioner contends that the failure to comply was due to reasonable cause. A review of the record indicates that the petitioner has remitted the tax and interest amounts assessed for tax years 2016 and 2017 and a portion of tax amount assessed for tax year 2015. The petitioner has also remitted its employer withholding taxes for the periods after this assessment. The evidence and circumstances in this matter support a partial abatement of the penalty.

Under R.C 5747.08(G), “all taxes imposed under this chapter or Chapter 5748 of the Revised Code and remaining unpaid after they become due * * * bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code until paid or until the day an assessment is issued under section 5747.13 of the Revised Code, whichever occurs first.” Accordingly, the Tax Commissioner does not have authority to abate properly assessed interest.

Accordingly, the assessment shall be adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$8,913.94	\$675.39	\$5,447.71	\$15,037.04

Current records indicate that \$5,963.10 has been applied towards this assessment, leaving an adjusted balance due of \$9,073.94. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to “Treasurer – State of

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Ohio.” Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of Taxation

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

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FINAL DETERMINATION

Date: **AUG 26 2020**

R & J Realty Holding Company, LLC
575 Lovers Ln.
Steubenville, OH 43953-3311

Re: Assessment No. 100001510737
Employer Withholding Tax: 01/01/2015 – 12/31/2017

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Payments</u>	<u>Total</u>
\$41,948.11	\$5,594.27	\$20,973.86	(\$18,050.71)	\$50,465.53

The Department of Taxation issued this assessment because the petitioner failed to timely file and remit its Ohio employer withholding tax for the period at issue. The petitioner does not contest the tax amount assessed but request an abatement of the penalty and interest amounts assessed. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

The Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The petitioner contends that the failure to comply was due to reasonable cause. A review of the record indicates that the petitioner has remitted a portion of the tax amount assessed. The petitioner has also remitted its employer withholding taxes for the periods after this assessment. The evidence and circumstances in this matter support a partial abatement of the penalty.

Under R.C 5747.08(G), “all taxes imposed under this chapter or Chapter 5748 of the Revised Code and remaining unpaid after they become due * * * bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code until paid or until the day an assessment is issued under section 5747.13 of the Revised Code, whichever occurs first.” Accordingly, the Tax Commissioner does not have authority to abate properly assessed interest.

Accordingly, the assessment shall be adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Payments</u>	<u>Total</u>
\$41,948.11	\$5,594.27	\$10,486.93	(\$18,050.71)	\$39,978.60

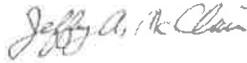
Current records indicate that \$20,900.57 has been applied towards this assessment, leaving an adjusted balance due of \$37,128.74. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to “Treasurer – State of

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Ohio.” Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158

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

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


JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date: **AUG 26 2020**

Steubenville Country Club Manor, Inc.
575 Lovers Ln.
Steubenville, OH 43953-3311

Re: Assessment No. 100001307938
Employer Withholding Tax: 01/01/2015 – 12/31/2018

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Payments</u>	<u>Total</u>
\$52,791.34	\$4,781.08	\$26,395.56	(\$59,654.08)	\$24,313.90

The Department of Taxation issued this assessment because the petitioner failed to timely file and remit its Ohio employer withholding tax for the period at issue. The petitioner does not contest the tax amount assessed but request an abatement of the penalty and interest amounts assessed. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

The Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The petitioner contends that the failure to comply was due to reasonable cause. A review of the record indicates that the petitioner has remitted the tax and interest amounts assessed and a portion of the penalty. The petitioner has also remitted its employer withholding taxes for the periods after this assessment. The evidence and circumstances in this matter support a partial abatement of the penalty.

Under R.C 5747.08(G), "all taxes imposed under this chapter or Chapter 5748 of the Revised Code and remaining unpaid after they become due * * * bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code until paid or until the day an assessment is issued under section 5747.13 of the Revised Code, whichever occurs first." Accordingly, the Tax Commissioner does not have authority to abate properly assessed interest.

Accordingly, the assessment shall be adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Payments</u>	<u>Total</u>
\$52,791.34	\$4,781.08	\$13,197.78	(\$59,654.08)	\$11,116.12

Current records indicate that \$59,654.08 has been applied towards this assessment, leaving an adjusted balance due of \$11,116.12. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of

Ohio.” Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-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
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

AUG 26 2020

James Bolger
149 Hiddenwood Dr.
Steubenville, OH 43953-3417

Re: Assessment No. 100001514359
Employer Withholding Tax – Responsible Party: 01/01/2015 – 12/31/2017

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$23,897.40	\$5,594.27	\$20,973.86	\$50,465.53

The Department assessed the petitioner as a responsible party of R & J Realty Holding Company, LLC (hereinafter “R & J Realty”) under R.C. 5747.07(G). R & J Realty failed to fully remit Ohio income tax withholding for the periods identified above. R.C. 5747.07(G) holds officers or employees who are responsible for the filing and payment of withholding tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of the company has been derivatively assessed against the petitioner, James Bolger, because he was identified as a responsible party. The petitioner does not contest liability but request an abatement of the penalties assessed. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

The only issue that can be considered in this matter is whether the petitioner is a responsible party under R.C. 5747.07(G) for the period assessed. The petitioner may not challenge the merits of the underlying assessment against the company in a proceeding under R.C. 5747.07(G). Accordingly, the objection cannot be considered if it is an attack on the validity of the underlying company assessment. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976). Substantive arguments regarding the tax liability assessed against the company can only be raised during company assessment proceedings.

Subsequent to the assessment, R & J Realty remitted a portion of the tax amount assessed with intent to pay the remaining balance due.¹ Accordingly, the petitioner’s sole objection is to the penalties assessed. As stated above, pursuant to R.C. 5747.07(G) and R.C. 5747.13, the only issue that can be considered is whether the petitioner is a responsible party. The petitioner does not object to being assessed as a responsible party for the periods in question. However, the underlying entity, R & J Realty, was granted a partial abatement of the penalties assessed. Any reduction or credit to R & J Realty’s assessment will be applied to this assessment.

¹ The Department issued a Final Determination which adjusted R&J Realty’s Assessment No. 100001510737 to reflect a total balance due of \$37,128.74.

Accordingly, the assessment is affirmed.

Current records indicate that \$2,849.86 has been applied towards this assessment, resulting in a balance due of \$37,128.74. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-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
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

AUG 26 2020

Rena Bolger
149 Hiddenwood Dr.
Steubenville, OH 43953-3417

Re: Assessment No. 100001514360
Employer Withholding Tax – Responsible Party: 01/01/2015 – 12/31/2017

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$23,897.40	\$5,594.27	\$20,973.86	\$50,465.53

The Department assessed the petitioner as a responsible party of R & J Realty Holding Company, LLC (hereinafter “R & J Realty”) under R.C. 5747.07(G). R & J Realty failed to fully remit Ohio income tax withholding for the periods identified above. R.C. 5747.07(G) holds officers or employees who are responsible for the filing and payment of withholding tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of the company has been derivatively assessed against the petitioner, Rena Bolger, because she was identified as a responsible party. The petitioner does not contest liability but request an abatement of the penalties assessed. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

The only issue that can be considered in this matter is whether the petitioner is a responsible party under R.C. 5747.07(G) for the period assessed. The petitioner may not challenge the merits of the underlying assessment against the company in a proceeding under R.C. 5747.07(G). Accordingly, the objection cannot be considered if it is an attack on the validity of the underlying company assessment. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976). Substantive arguments regarding the tax liability assessed against the company can only be raised during company assessment proceedings.

Subsequent to the assessment, R & J Realty remitted a portion of the tax amount assessed with intent to pay the remaining balance due.¹ Accordingly, the petitioner’s sole objection is to the penalties assessed. As stated above, pursuant to R.C. 5747.07(G) and R.C. 5747.13, the only issue that can be considered is whether the petitioner is a responsible party. The petitioner does not object to being assessed as a responsible party for the periods in question. However, the underlying entity, R& J Realty, was granted a partial abatement of the penalties assessed. Any reduction or credit to R & J Realty’s assessment will be applied to this assessment.

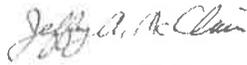
¹ The Department issued a Final Determination which adjusted R&J Realty’s Assessment No. 100001510737 to reflect a total balance due of \$37,128.74.

Accordingly, the assessment is affirmed.

Current records indicate that \$2,849.86 has been applied towards this assessment, resulting in a balance due of \$37,128.74. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158

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

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ENTRY RECORDED IN THE TAX COMMISSIONER'S JOURNAL



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL DETERMINATION

Date:

AUG 26 2020

Denise Boyle
223 August Dr.
Coraopolis, PA 15108-3492

Re: Assessment No. 100001012059
Employer Withholding Tax – Responsible Party: 01/01/2015 – 12/31/2017

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$31,129.71	\$1,923.18	\$10,895.42	\$43,948.31

The Department assessed the petitioner as a responsible party of BHC Staffing LLC (hereinafter “BHC Staffing”) under R.C. 5747.07(G). BHC Staffing failed to fully remit Ohio income tax withholding for the periods identified above. R.C. 5747.07(G) holds officers or employees who are responsible for the filing and payment of withholding tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of the company has been derivatively assessed against the petitioner, Denise Boyle, because she was identified as a responsible party. The petitioner does not contest liability but request an abatement of the penalties assessed. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

The only issue that can be considered in this matter is whether the petitioner is a responsible party under R.C. 5747.07(G) for the period assessed. The petitioner may not challenge the merits of the underlying assessment against the company in a proceeding under R.C. 5747.07(G). Accordingly, the objection cannot be considered if it is an attack on the validity of the underlying company assessment. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976). Substantive arguments regarding the tax liability assessed against the company can only be raised during company assessment proceedings.

Subsequent to the assessment, the BHC Staffing remitted a portion of the tax and interest amounts assessed with intent to pay the remaining balance.¹ Accordingly, the petitioner’s sole objection is to the penalties assessed. As stated above, pursuant to R.C. 5747.07(G) and R.C. 5747.13, the only issue that can be considered is whether the petitioner is a responsible party. The petitioner does not object to being assessed as a responsible party for the periods in question. However, the underlying entity, BHC Staffing, was granted a partial abatement of the penalties assessed.

Accordingly, the assessment is affirmed.

¹ The Department issued a Final Determination which adjusted BHC Staffing’s Assessment No. 100001012000 to reflect a total balance due of \$15,037.04.

0000000501

Current records indicate that \$5,963.10 has been applied towards this assessment, resulting in a balance due of \$9,073.94. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-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
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: **AUG 26 2020**

Denise Boyle
223 August Dr.
Coraopolis, PA 15108-3492

Re: Assessment No. 100001308417
Employer Withholding Tax - Responsible Party: 01/01/2015 – 12/31/2018

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$0.00	\$0.00	\$24,313.90	\$24,313.90

The Department assessed the petitioner as a responsible party of Steubenville Country Club Manor, Inc. (hereinafter “Steubenville Country Club Manor”) under R.C. 5747.07(G). Steubenville Country Club Manor failed to fully remit Ohio income tax withholding for the periods identified above. R.C. 5747.07(G) holds officers or employees who are responsible for the filing and payment of withholding tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of the company has been derivatively assessed against the petitioner, Denise Boyle, because she was identified as a responsible party. The petitioner does not contest liability but request an abatement of the penalties assessed. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

The only issue that can be considered in this matter is whether the petitioner is a responsible party under R.C. 5747.07(G) for the period assessed. The petitioner may not challenge the merits of the underlying assessment against the company in a proceeding under R.C. 5747.07(G). Accordingly, the objection cannot be considered if it is an attack on the validity of the underlying company assessment. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976). Substantive arguments regarding the tax liability assessed against the company can only be raised during company assessment proceedings.

Subsequent to the assessment, Steubenville Country Club Manor remitted the tax and interest amounts assessed. Accordingly, the petitioner’s sole objection is to the penalties assessed.¹ As stated above, pursuant to R.C. 5747.07(G) and R.C. 5747.13, the only issue that can be considered is whether the petitioner is a responsible party. The petitioner does not object to being assessed as a responsible party for the periods in question. However, the underlying entity, Steubenville Country Club Manor, was

¹ The Department issued a Final Determination which abated the penalty imposed on Steubenville Country Club Manor in Assessment No. 100001307938 from \$26,395.56 to \$13,197.78. Records reflect that the total outstanding balance on Assessment No. 100001307938 is \$11,116.12.

granted a partial abatement of the penalties assessed. Any reduction or credit to Steubenville Country Club Manor's assessment will be applied to this assessment.

Accordingly, the assessment is affirmed.

Current records indicate no payment has been applied towards this assessment, resulting in a balance due of \$11,116.12. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-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
30 E. Broad St., 22nd Floor • Columbus, OH 43215

0000000502

FINAL DETERMINATION

Date: **AUG 26 2020**

Denise Boyle
223 August Dr.
Coraopolis, PA 15108-3492

Re: Assessment No. 100001514358
Employer Withholding Tax – Responsible Party: 01/01/2015 – 12/31/2017

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$23,897.40	\$5,594.27	\$20,973.86	\$50,465.53

The Department assessed the petitioner as a responsible party of R & J Realty Holding Company, LLC (hereinafter “R & J Realty”) under R.C. 5747.07(G). R & J Realty failed to fully remit Ohio income tax withholding for the periods identified above. R.C. 5747.07(G) holds officers or employees who are responsible for the filing and payment of withholding tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of the company has been derivatively assessed against the petitioner, Denise Boyle, because she was identified as a responsible party. The petitioner does not contest liability but request an abatement of the penalties assessed. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

The only issue that can be considered in this matter is whether the petitioner is a responsible party under R.C. 5747.07(G) for the period assessed. The petitioner may not challenge the merits of the underlying assessment against the company in a proceeding under R.C. 5747.07(G). Accordingly, the objection cannot be considered if it is an attack on the validity of the underlying company assessment. *Rowland v. Collins, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976)*. Substantive arguments regarding the tax liability assessed against the company can only be raised during company assessment proceedings.

Subsequent to the assessment, R & J Realty remitted a portion of the tax amount assessed with intent to pay the remaining balance due.¹ Accordingly, the petitioner’s sole objection is to the penalties assessed. As stated above, pursuant to R.C. 5747.07(G) and R.C. 5747.13, the only issue that can be considered is whether the petitioner is a responsible party. The petitioner does not object to being assessed as a responsible party for the periods in question. However, the underlying entity, R & J Realty, was granted a partial abatement of the penalties assessed. Any reduction or credit to R & J Realty’s assessment will be applied to this assessment.

¹ The Department issued a Final Determination which adjusted R&J Realty’s Assessment No. 100001510737 to reflect a total balance due of \$37,128.74.

Accordingly, the assessment is affirmed.

Current records indicate that \$2,849.86 has been applied towards this assessment, resulting in a balance due of \$37,128.74. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158

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

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

AUG 12 2020

Dror Paz
29949 Oranewood Dr.,
Beachwood, OH 44122 – 4718

Re: Ohio Tax Account #: xxxxx1643
Tax Type: Employer Withholding – Responsible Party
Assessment #: 100000882408
Reporting Period: 01/01/2016 – 12/31/2016

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$4,408.56	\$221.60	\$2,204.28	\$6,834.44

I. BACKGROUND

The Ohio Department of Taxation assessed the petitioner as a responsible party of Pulmone USA, Inc., (hereinafter “the company”) under R.C. 5747.07(G). The company failed to fully remit Ohio income tax withholding for the applicable tax period. Under such circumstances, R.C. 5747.07(G) holds officers or employees who are responsible for the filing and payment of withholding tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. The outstanding liability of the company has been derivatively assessed against the petitioner, Dror Paz, because he was identified as a responsible party.

The petitioner contends that although he was the Vice President of the Sales and Business development for the company, he had little to do with the financial or filing responsibilities of the company. The petitioner further asserts that the CEO of the company was the responsible party for the unremitted Ohio income tax withholding. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

II. AUTHORITY AND ANALYSIS

Former Division (B) of R.C. 5747.07, applicable for the period at issue, stated in pertinent part, that “every employer required to deduct and withhold any amount under section 5747.06 of the Revised Code shall file a return and pay the amount required by law.” If the required returns are not filed or the

withholding trust taxes are not timely paid, R.C. 5747.07(G) indicates, in relevant part, that: “an officer, member, manager, or trustee of [the entity] who is responsible for the execution of [the entity’s] fiscal responsibilities, shall be personally liable for the failure to file the report or pay the tax due as required by this section.”

To the extent that the petitioner challenges the assessment the company, such contentions cannot be considered. The only issue that can be considered in this matter is whether the petitioner is a responsible party under R.C. 5747.07(G) for the period assessed. The petitioner may not challenge the merits of the underlying assessment against the company in a proceeding under R.C. 5747.07(G). Accordingly, the objection cannot be considered if it is an attack on the validity of the underlying company assessment. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E. 2d 582 (1976). “In other words, the officer cannot challenge the assessment on the grounds of substantive tax-law error when the corporation itself failed to do so; the only substantive argument the officer has against the assessment is to ‘assert that he is not one of the class of persons chargeable under R.C. 5739.33, “i.e., not a responsible person under the statute.” *Cruz v. Testa*, 144 Ohio St.3d 221, 2015-Ohio-3292, 41 N.E.3d 1213, ¶ 36 (2015). Therefore, substantive arguments regarding the tax liability assessed against the company can only be raised during the company’s assessment proceedings. The only issue that can be considered in this matter is whether the petitioner was a responsible party for the period in question.

Former Division (A)(1) of Ohio Adm.Code 5703-7-15, applicable for the period in question, clarified R.C. 5747.07 by further defining “officer” and “corporate officer” to mean “the president, vice president, treasurer, secretary, chief executive officer of a corporation, or any person holding a similar title or position in a corporation or business trust.” Generally, personal liability for officers of a corporation for failure of a corporation to file returns or pay taxes is limited to those officers who have control or supervision or are charged with the responsibility of filing returns and making payments. *Weiss v. Porterfield* (1971), 27 Ohio St.2d 117; *Spithogianis v. Limbach* (1990), 53 Ohio St.3d 55. However, even if an individual does not actually participate in or supervise the corporation’s fiscal operations, if his or her position is one that would ordinarily be responsible for such duties, then the officer may be found to be responsible to the state. *Spithogianis*, supra.

In *McGlothlin v Limbach*, 57 Ohio St.3d 72 (1991), the Court held that a corporate officer who had nothing to do with the day-to-day operation of the business was nonetheless personally liable. *McGlothlin v Limbach* (1991), 57 Ohio St.3d 73. Specifically, the Court stated: “[i]n that case the corporate officer had the authority to control or supervise the tax return and tax payment activities of the corporation.” *Id.* Furthermore, division (A) of R.C. 5747.13 authorizes the Tax Commissioner to make an assessment against any person liable for a tax deficiency based upon any information in the Commissioner’s possession.

In the present case, the petitioner held himself out to be the Vice President of the Sales and Business Development for the company on his personal LinkedIn profile page for the duration of the tax period at issue in the Cleveland/Akron area.¹ Although the petitioner contends that he did not have any financial responsibility, as the Vice President the petitioner had the authority to exercise control over the corporation’s financial affairs, whether he exercised that control or not. *Spithogianis*, supra. Since the

¹ Dror Paz, *Personal Profile*, <https://www.linkedin.com/in/drorepaz> (accessed August 10, 2020).

petitioner had the authority to exercise control over the fiscal operations of the company during the period assessed, it is appropriate that the outstanding liability of the corporation has been derivatively assessed against the petitioner.

The petitioner further contends that Avi Lazar, President and CEO of the company, was more responsible for running the business. While others may have had responsible roles with the company, the Commissioner can assess multiple persons under R.C. 5747.07(G). Additionally, under Ohio Adm. Code 5703-9-49(H), “[i]f more than one person is personally liable under section 5739.33 * * * of the Revised Code for the unpaid liability of a * * * limited liability company * * *, their liability shall be joint and several.” Such joint and several liability does not affect the underlying merits of this matter.

III. CONCLUSION

Based on information available to the Tax Commissioner, the petitioner was the responsible party for the unpaid employer withholding taxes assessed. The petitioner has failed to submit evidence sufficient to support a finding that he was not a responsible party. Therefore, the petitioner can be held responsible for the company’s failure to file an Ohio income tax withholding return for the period assessed.

Accordingly, the assessment is affirmed.

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

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



FINAL DETERMINATION

Date: **AUG 31 2020**

Kimble Company
Attn: Keith Walker
3596 State Route 39NW
Dover, OH 44622

Re: Application No.: 051805W
Application Type: Water
County: Tuscarawas
Taxing Districts: 79-0100

This is the final determination of the Tax Commissioner on a request for reconsideration of an application, dated October 4, 2018, for an exempt facility certificate filed with the Ohio Department of Taxation (hereinafter “Department”).

I. BACKGROUND INFORMATION

Kimble Company (hereinafter “applicant”) does business as Kimble Sanitary Landfill, and operates a landfill in Tuscarawas County, Dover, Ohio. Kimble Sanitary Landfill and its sister companies transport nonhazardous industrial and solid waste to the landfill. The Ohio Environmental Protection Agency (“OEPA”) approved Kimble’s Permit to Install in 1995, then later approved an expansion in 1998.

The applicant describes Kimball Sanitary Landfill’s operations in its May 4, 2018 application narrative statement as follows:

Once accepted by Kimble Sanitary Landfill, the waste is placed into a treatment/disposal cell designed with a composite liner system comprised of a minimum of five feet of clay soils recompacted to obtain a minimum permeability of 1×10^{-7} cm/sec, in combination with a 60 mil HDPE synthetic liner. The waste is carefully pretreated via compaction to reduce waste volume and void spaces as it is prepared for final disposal. All liquids coming into contact with or generated by the disposed waste is collected by a leachate collection network which traverses the bottom of each cell. This contaminated liquid (industrial waste leachate) is pumped into temporary storage tanks where it is tested and pretreated as required before it is transported to an approved wastewater treatment plant for discharge.

* * *

At the end of each workday all waste is covered with soil or other approved materials so leachate generate is minimized. When the cells become full, Kimble Sanitary Landfill covers each area with an impermeable cap to prevent rainwater infiltration and the

further generation of leachate. The importance of these steps is to divert as much rainwater as possible away from the waste in order to avoid contact thereby generating contaminated water, i.e., leachate.

The applicant also operates a Solidification/Treatment facility for processing oil and gas exploration and production (E&P) materials at the facility. Nonhazardous E&P materials are accepted at the Solidification/Treatment facility. E&P wastes that are semi-liquid are emptied into the solidification/treatment pits. Solidification materials are added to solidify the free liquids. The Solidification/Treatment facility is covered with a structure that prevents it from becoming wet and prevents any runoff from entering the environment.

The applicant submitted its application to certify as an industrial water pollution control facility certain property located at the Kimble Sanitary Landfill. Pursuant to R.C. 5709.211, the Department forwarded the application to the Ohio Environmental Protection Agency (hereinafter OEPA) for an opinion of the Director of the OEPA regarding the subject property.

The Department received the opinion of the Director of the OEPA, which provided that some of the property included on the subject application qualified as an industrial water pollution control facility. After reviewing the opinion of the Director of the OEPA, the Department issued a Proposed Finding on July 30, 2018, following the OEPA opinion and allowing some of the requested exemption.

The OEPA recommendation letter recommends for exemption as exempt facility property the leachate system. Also, the recommendation letter allows exemption for many parts of the solidification basin: the lumber and steel used to construct the basin, other parts, the truss building, electrical parts, hose, steel liner, metal parts, silo fluidizer, and other items. The recommendation letter denies exemption for landfill cells 2B, 2C, and 2D, and the silo dust collection system and ladder system for the solidification facility.

The applicant, through its representative, filed a timely request for reconsideration with the Department. In addition, the applicant requested a personal appearance hearing was held on this matter which was held at the Department's offices in Columbus, Ohio. The applicant's tax representative submitted a memorandum at the hearing, which stated its arguments.

II. APPLICANT'S CONTENTIONS

The applicant contends that Landfill Cell 2B/2C and Landfill Cell 2D should be found to be exempt facility property. The applicant argues that the following items from the landfill cells should be exempted: piping, electrical supplies, liners, gravel, sand, grits (small gravel), and heavy equipment used in cell construction and day-to-day landfill operation. It also seeks exemption for various other items.

III. AUTHORITY

Pursuant to R.C. 5709.21(B), "[i]f the commissioner finds that the property [included on an application for an exempt facility certificate] was designed primarily as an exempt facility and is suitable and reasonably adequate for such purpose and is intended for such purpose, the commissioner shall enter a finding and issue a certificate to that effect." An exempt facility is defined by R.C. 5709.20(E) and includes an "industrial water pollution control facility," as defined by R.C. 5709.20(L). R.C. 5709.20(L) defines an "industrial water pollution control facility" as follows:

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

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

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

Ohio Adm.Code 5703-1-06(A) provides that:

Application for certification of an exempt facility as defined in division (E) of section 5709.20 of the Revised Code shall be made by the person owning the facility at the time of application. The application shall contain plans and specifications of the property, including all materials incorporated or to be incorporated into the property and the associated costs of the materials, and a descriptive list of all equipment acquired or to be acquired by the applicant for the exempt facility and the associated costs of the equipment. The application shall include details of how the applicant determined the cost of any auxiliary property under section 5709.21 of the Revised Code. [Emphasis added.]

IV. ANALYSIS OF THE FACTS & CIRCUMSTANCES PRESENTED

A. LANDFILL CELLS 2B/2C AND 2D

In the proposed finding, the OEPA and the Department of Taxation denied exemption for landfill cells 2B/2C and 2D. The applicant contends that these landfill cells and certain other costs are exempt facility equipment that qualify as a water pollution control facility under R.C. 5709.20(L). This contention is well taken in part. Items that are found exempt herein include piping for construction of cell 2B, geosynthetic material used in construction of cell 2C, grits used in construction of cell 2C, gravel used in construction of cell 2C, sand used in construction of cell 2D, textured liner used in construction of cell 2D, gravel used in construction of cell 2D, and a liner patch for cell 2B.

B. RENTAL LIGHTS AND RENTAL EQUIPMENT FOR CONSTRUCTION OF CELLS

At the hearing, the petitioner stated that it was withdrawing its claim for exemption of the lights that it rented to facilitate construction of the landfill cells.

Information in the file shows that certain charges for which exemption is sought, such as the Caterpillar excavator and a Van Dale spreader, are for equipment which is rented by the applicant. Pursuant to Ohio Adm.Code 5703-1-06(A), only the entity owning the equipment may claim exempt facility status for equipment. Therefore, none of the equipment which is rented by the applicant is eligible for exemption.

Likewise, tank rental and rental of a tractor for construction of cell 2C from vendor Chris Finton cannot be granted exemption as these are rental items owned by another party. Further, all other equipment on the list of equipment for which exemption is sought that is rented cannot be granted exemption.

C. SOLIDIFICATION BASIN

In the Proposed Finding, most costs pertaining to the solidification basin were granted exemption as water pollution control equipment. At the hearing, the petitioner stated that it was not contesting the items denied for the solidification facility, which are the silo dust collection for the solidification facility as well as the ladder system related to the solidification facility.

D. ITEMS WITHOUT RECOMMENDATION

As explained in the OEPA's recommendation letter, equipment used in the construction of the leachate system, service costs, and repairs to a truck used in cell construction are costs that belong in the "Items Without Recommendation" section of the recommendation. R.C. 5709.20(L) requires that equipment be installed for the primary purpose of water pollution control to qualify as an industrial water pollution control facility.

Likewise, regarding equipment used in construction, the petitioner seeks exemption for a D118 Dozer (hereinafter "dozer") and repairs to the dozer. This contention is denied. R.C. 5709.20(L) requires that equipment be installed for the primary purpose of water pollution control to qualify as an industrial water pollution control facility. This dozer was used in cell construction, but it does not qualify under R.C. 5709.20(L), as "property designed, constructed, or installed for the primary purpose of collecting or conducting industrial waste to a point of disposal or treatment". The petitioner also seeks exemption for other equipment and supplies used in construction of the cells, including electrical supplies, a liquid manure spreader to spread clay, a Bomag roller used in cell construction, an excavator used in cell construction, and disposal well work. However, since these items are used in the construction of the cells and don't meet the definition in R.C. 5709.20(L), they do not qualify for exemption.

V. CONCLUSION

Based upon the foregoing reasons, the Tax Commissioner modifies his Proposed Finding issued on July 18, 2018 to allow exemption for portions of Cells 2B/2C and 2D and other items as identified above. Accordingly, the subject application is approved in part.

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

THIS MATTER. NOTICE OF THIS FINAL DETERMINATION WILL BE SENT TO THE APPROPRIATE COUNTY AUDITOR IN ACCORDANCE WITH R.C. 5703.37, AS SET FORTH IN R.C. 5709.22(B). UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED, AND THE FILE APPROPRIATELY CLOSED.

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **AUG 19 2020**

Ronald B. Alford
36 Windsor Village Dr.,
Westerville, OH 43081-2537

Re: Refund Claim No. 1809732188
Individual Income Refund Tax - 2017

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

<u>Tax Year</u>	<u>Refund Claimed</u>
2017	\$27,200.00

I. BACKGROUND:

The claimant, Ronald Alford, filed a timely 2017 Ohio individual income tax return. On his Ohio individual income tax return, the claimant reported a refund of \$27,200.00.¹ The refund was primarily the result of a nonresident credit that the claimant reported on his 2017 return. However, upon initial review, the Department disallowed the nonresident credit claimed by the claimant based on the un rebutted presumption that the claimant was an Ohio resident for the tax period in question. On October 30, 2018, the claimant submitted the Affidavit of Non-Ohio Residency/Domicile for Taxable Year 2017. On the Affidavit of Non-Ohio Residency/Domicile form submitted, the petitioner stated he had at least one abode outside of Ohio for the entire 2017 – Sarasota, Florida. Therefore, the claimant contends that he is entitled to a full nonresident credit for the tax period in question and is now seeking an administrative review of his denied refund claim. The claimant did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the application for refund pursuant to R.C. 5703.70.

II. APPLICABLE STATUTORY LAW:

For Ohio income tax purposes, the starting tax base is Ohio adjusted gross income, which is federal adjusted gross income as adjusted pursuant to R.C. 5747.01(A). A resident of Ohio is always subject to the individual income tax, regardless of where the individual earns or receives income.² Division (I) of R.C. 5747.01 defines a “resident” as an individual who is domiciled in this state, subject to R.C. 5747.24. Under R.C. 5747.01(J), a “nonresident” is an individual who is not a resident.

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

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

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

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

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

If the individual timely files the Affidavit of Non-Ohio Residency/Domicile as required, and the affidavit does not contain any false statements, the presumption that the individual was not domiciled in this state is irrebuttable. In the present case, the claimant was required to file an Affidavit of Non-Ohio Residency/Domicile ("Affidavit") for the tax year in question by April 15, 2018. Former R.C. 5747.24(B). However, the Department records shows that he submitted the Affidavit on October 30, 2018. Nevertheless, the Affidavit was submitted five months after the prescribed due date; therefore, the Affidavit was not timely filed, and the claimant is not entitled to an irrebuttable presumption of non-domicile under former R.C. 5747.24(B). Even if the claimant had filed a timely affidavit, the evidence available to the Tax Commissioner and discussed below demonstrates that it contained a false statement, i.e., that the claimant was domiciled in Sarasota, Florida.

If an individual fails to timely file the Affidavit or makes a false statement, the burden shifts to the individual to prove that they were not domiciled in Ohio during the taxable year. Former R.C. 5724.24(C) & (D). Former Division (C) of R.C. 5747.24, applicable for the tax period at issue, states that an individual who has less than 213 contact periods with Ohio and who is not irrebutably presumed under division (B) of this section to be not domiciled in this state is presumed to be domiciled in Ohio for the entire taxable year. An individual can rebut the presumption set forth in R.C. 5747.24(C) with a preponderance of the evidence to the contrary. The preponderance of the evidence standard has been described as that quantum of proof which produces in the mind of the trier of fact belief that what is sought to be proved is more likely true than not true. *In re Agler*, 19 Ohio St. 2d 70 (1969). In this case, the evidence currently available to the Tax Commissioner reflects that the claimant had fewer than 212 contact periods with Ohio in 2017. Therefore, he must demonstrate that he was not domiciled in Ohio by a preponderance of the evidence.

III. COMMON-LAW DOMICILE:

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

Revised Code does not define “domicile,” but the definition of domicile has been set forth in previous Ohio decisions, including *Cunningham*.

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

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

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

IV. FACTS & CIRCUMSTANCES:

The claimant contends he severed his Ohio domicile for tax year 2017 and established residency in Florida. As mentioned, the claimant had fewer than 212 contact periods with Ohio in 2017; therefore, the claimant must rebut the presumption of domicile with a preponderance of the evidence to the contrary. R.C. 5747.24(C).

Although the claimant contends that he abandoned his Ohio domicile and affirmatively established a domicile in Florida, his actions and availments during 2017 not only show that he maintained significant connections with Ohio, but he also has reinforced them and continued to enjoy the rights and privileges afforded to Ohio residents. The intent to abandon one’s domicile is shown by evidentiary factors

including where the individual files federal income tax returns, where the individual votes, registers their vehicle, and maintains a driver's license. *Davis*, at *5-7.

Physical presence is not, in and of itself, a determinative factor for the purpose of determining domicile. In this case, in addition to identifying his physical presence in Florida during 2017, the claimant states that he registered a vehicle in Florida, had two homes in Florida, and belonged to a social club in Florida in 2017. The vehicle registration, social club membership, and abodes in Florida are not individually or collectively sufficient to show that he was not domiciled in Ohio.

Notwithstanding the claimant's contentions, the evidence currently available to the Tax Commissioner indicates that the claimant maintained significant connections to Ohio in 2017. For instance, as indicated by the Franklin County Auditor's Office, evidence shows that, in July 2008, Windstone Properties, an Ohio limited liability company, granted a general warranty deed for the property located at 36 Windsor Village Drive, Westerville, Ohio 43081 to Barry H. Wolinetz, Trustee of the Barry H. Wolinetz Trust for the *benefit of Ronald B. Alford*.³(Emphasis added). The fact that the Westerville property was held for the benefit of the claimant is indicative that he maintained an abode in Ohio during the tax period in question. Additionally, it demonstrates that the claimant had an intent to retain his Ohio domicile.

There is further evidence that claimant returned to Ohio during the period in question to exercise benefits available to Ohio residents. For example, the claimant obtained his Ohio driver's license in April 2017 and used his current mailing address - 36 Windsor Village Drive, Westerville, Ohio. Additionally, records reflect that the claimant re-registered two vehicles in 2017, his 2003 Jeep and 2014 Lexus, in Ohio using two Ohio mailing address. The evidence available to the Tax Commissioner also reflects that the claimant was registered to vote in Ohio during the period in question.

V. CONCLUSION:

The totality of the evidence available to the Tax Commissioner shows that the claimant's actions during 2017 are consistent with those of individuals maintaining an Ohio domicile. Even though the claimant asserts that he did not have a domicile in Ohio for the tax period in question, he failed to provide evidence indicating that he took affirmative steps to establish a new domicile somewhere other than Ohio. As discussed above, the claimant obtained an Ohio's driver license in 2017, registered several vehicles with an Ohio mailing address, and voted in Ohio. Furthermore, the claimant failed to provide any evidence that demonstrate that he resided in Florida during the 2017 tax year.

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

Accordingly, the refund claim is denied in full.

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

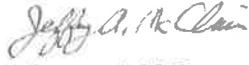
³ Michael Stinziano, Franklin County Auditor. Real Estate Property Search for Parcel ID: 080-011550-00. Retrieved from: http://property.franklincountyauditor.com/web/datalets/datalet.aspx?mode=sales_summary&sIndex=1&idx=1&LMparent=20 (last accessed on August 11, 2020).

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5717.02, THIS MATTER WILL BE CONCLUDED, AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

AUG 19 2020

James J. & Patricia R. Coviello
4144 Carroll Blvd
University Heights, OH 44118

Re: Refund Batch No. 8302305415
Individual Income Tax – 2013

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

<u>Tax Year</u>	<u>Refund Claimed</u>
2013	\$10,787.00

I. BACKGROUND

James J. and Patricia R. Coviello (hereinafter referred to as “the claimants”) filed a refund request for tax year 2013 on October 15, 2018, with their untimely-filed Ohio 2013 IT 1040 Individual Income Tax return. The return reported a \$10,787.00 overpayment and the claimants requested a refund in the same amount by way of carryforward to tax year 2014.¹ Upon initial review, however, the Department denied the overpayment reported on their 2013 return because the request was not filed within four years of the date of the illegal, erroneous, or excessive payment of tax pursuant to former R.C. 5747.11(B), applicable to the period in question. The claimants object to the denial of their full refund claim and request an administrative review of the denial in accordance with R.C. 5703.70. The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim.

Department records indicate the claimants requested a federal income tax filing extension for the tax period in question. Department records further reflect that the claimants made an estimated payment in the amount of \$3,500.00 deemed paid on April 15, 2014, for tax year 2013. In tax year 2012, the claimants had an estimated payment of \$13,921.35 and had Ohio income tax withholding of \$3,752.00 which resulted in a credit carryforward for tax year 2013 in the amount of \$10,169.35. As described below, the credit carryforward applied for tax year 2013 was deemed to have been paid on the unextended due date for the 2013 individual income tax return, i.e., April 15, 2014.

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

II. THE CLAIMANTS' CONTENTION

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The claimants contend that the time frame to file the 2013 refund request for the overpayment ran through October 15, 2018, the date they filed an untimely 2013 Ohio individual tax return, and not the tax payment due date. As such, the claimants assert that their refund request for the overpayment was filed timely and within the four-year statute of limitation.

III. RELEVANT AUTHORITY

Every taxpayer must make an annual return for any taxable year for which he or she is liable for the Ohio personal income tax or a school district income tax. R.C. 5747.08. The return must be filed on or before April 15 on forms prescribed by the Tax Commissioner together with a remittance payable to the State Treasurer for the combined amount of state and school district income taxes due.² Ohio Adm. Code 5703-7-05 provides guidance to the application of R.C. 5747.08 and permits an extension for personal income tax returns. The current rule provides, in pertinent part, as follows:

For any taxable year, a taxpayer that receives an extension for filing the taxpayer's federal income tax return shall automatically receive an extension for filing the taxpayer's corresponding Ohio tax return under this chapter to the same due date, provided that the federal extension due dates is beyond the unextended due date for the corresponding Ohio return.

Ohio Adm. Code 5703-7-05(B)(1)(a).

While a taxpayer may qualify for a filing extension for its annual return, paragraph (C)(1) of the same rule states that:

An extension of time to file under paragraph (B)(1) or (B)(2) of this rule does not extend the due date for payment of any tax due or for the purposes of imposing interest on any tax due, unless the tax commissioner expressly extends the due date for payment of tax.

Ohio Adm. Code 5703-7-05(C)(1).

Former Division (B) of R.C. 5747.11, applicable to the period in question, governed applications for income tax refunds, and stated, in pertinent part, that "applications for refund shall be filed with the tax commissioner, on the form prescribed by the commissioner, within four years from the date of the illegal, erroneous, or excessive payment of the tax * * *." Former division R.C. 5747.09(A)(3), also applicable for the period in question, stated that "taxes paid" includes "payments of estimated taxes made under division (C) of this section, taxes withheld from the taxpayer's compensation, and tax refunds applied by the taxpayer in payment of estimated taxes."

² Authorized by former R.C. 5747.08(G) which was effective for tax year 2013.

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IV. ANALYSIS

The claimants contend that they are entitled to a refund of an overpayment of \$10,787.00 as reported on their Ohio 2013 Individual Income Tax return. Specifically, the claimants assert that because they applied for and received a federal income tax return extension in their 2013 return, they have four years from October 15, 2014, to file a timely application for refund claiming the \$10,787.00 credit carryforward.

The claimants further contend that their prepaid income tax, which was remitted in the form of a credit carryforward and payment of estimated taxes, should be considered paid on October 15, 2014, the final date of filing of the federal extension for the tax year in question. However, the claimants have not provided any evidence to indicate that the Internal Revenue Service ("IRS") has granted them a federal extension for the tax period in question. Specifically, the claimants have not submitted a copy of their IRS extension, IRS acknowledgment, or extension confirmation number. Likewise, nothing in the Department's records indicates that the claimants filed their 2013 Ohio individual income tax return on October 15, 2014. According to Departmental records, the claimants' Ohio 2013 individual income tax return was postmarked and deemed received on October 15, 2018. Most importantly, under former R.C. 5747.08(G) and Ohio Adm. Code 5703-7-05(C)(1), the claimants' tax refund applied by the claimants in payment of estimated taxes were deemed paid on April 15, 2014, without regard to any extension of time for filing.

As described above, the \$10,169.35 overpayment from tax year 2012 was credited towards the claimants' 2013 tax liability as a credit carryforward and deemed paid on April 15, 2014. The estimated payment of estimated taxes in the amount of \$3,500.00 for tax year 2013 was deemed paid on April 15, 2014. As such, the payments the claimants seek to have refunded are deemed to have been paid on April 15, 2014. Former division of R.C. 5747.11(B) requires a refund claim to be filed "within four years from the date of the illegal, erroneous, or excessive payment of the tax." The claimants' 2013 refund request was not deemed postmarked and received by the Department until October 15, 2018. Since the refund applied by the claimants in payment of estimated taxes were deemed paid on April 15, 2014, the claimants had four years from the date of the alleged erroneous payment of tax or until the unextended filing date of April 15, 2018, to timely file an application for personal income tax refund pursuant to former R.C. 5747.11(B). Because the claimants' refund request for the tax period in question was not postmarked and deemed received until October 15, 2018, it was outside the four years from the date of the purported illegal, erroneous, or excessive payment of tax which was April 15, 2014. Therefore, the refund cannot be granted under former R.C. 5747.11(B).

V. CONCLUSION

The claimants failed to provide documentation that they received a federal extension for the tax period in question. Even if the claimants received a federal extension for their 2013 federal income tax return, such an extension would not extend the due date for the payment of tax. Rather, the claimants' credit carryforward and the estimated tax paid by the claimants were deemed paid on April 15, 2014, pursuant to former R.C. 5747.08(G) and Ohio Adm. Code 5703-7-05(C)(1). The claimants had four years from the payment due date, until April 15, 2018, to file for a timely refund. The claimants, however, did not file a refund request with their 2013 IT 1040 Individual Income Tax return until October 15, 2018, which was outside the four-year period to file a timely refund claim pursuant to

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former R.C. 5747.11(B). Consequently, the claimants are not entitled to a refund because the claimants' refund request was not filed within the four years of the illegal or erroneous payment.

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



Department of
Taxation

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

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FINAL DETERMINATION

Date: AUG 19 2020

William C. & Bren K. Duvall
2000 McKinney Ave., Ste. 1000
Dallas, TX 75201

Re: Assessment No. 02201807448684
Individual Income Tax – 2016

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$1,333,558.00	\$45,741.04	\$91,482.08	\$1,470,781.12

The Department assessed William C. & Bren K. Duvall (hereinafter referred to as “the petitioners”) after making adjustments to the individual income tax return that they filed for the period at issue. Specifically, the Department disallowed the nonresident credit that the petitioners claimed on their 2016 return¹ because there was insufficient information to support the amount of income earned outside of Ohio reported on their Form IT NRC Nonresident Schedule. The petitioners objected to the assessment and filed a timely petition for reassessment. The petitioners did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner.

During the administrative appeal period, the petitioners filed an amended 2016 individual income tax return. The petitioners also submitted information to support the accuracy of the nonresident credit claimed on the amended return, including a copy of their 2016 federal income tax return, schedules, wage and income statements, and documentation otherwise verifying the apportionment and allocation of their income for the tax year at issue. Upon further review, considering the information provided by the petitioners during the petition period and the evidence currently available to the Tax Commissioner, the petitioners’ contention is well taken.

Accordingly, the assessment is cancelled.

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

¹ A nonresident credit was permitted by former R.C. 5747.05(A), applicable for tax year 2016, which allowed nonresidents who must file an Ohio return to remove all Ohio income tax that is associated with any income that was not earned or received in this state.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

Rosalind E. Fultz
783 Greenwood Ave.
Cincinnati, OH 45229

AUG 12 2020

Re: Assessment No. 02201807848734
Individual Income Tax - 2013

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$500.00	\$65.44	\$130.88	\$696.32

I. BACKGROUND

The Ohio Department of Taxation assessed the petitioner after adjusting her individual income tax return that she filed for the 2013 tax year. Specifically, the Department disallowed the petitioner's Ohio Schedule B, line 57 displaced worker training credit. The petitioner objects to the assessment and requests an abatement of the penalties and interest amounts assessed. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

II. PETITIONER'S CONTENTION

The petitioner states that she was unemployed from 2009 through 2014 to take care of her ill parents. Thereafter, she states that she attended school at Cincinnati State and Technical College to upgrade her computer skills for the job market. The petitioner also states that she did not receive a scholarship or financial aid from the college. Therefore, the petitioner contends that she is entitled to the displaced worker credit.

III. AUTHORITY AND ANALYSIS

Revised Code 5747.27 states, in pertinent part, that "[a] nonrefundable credit is allowed against the aggregate tax liability * * * of a displaced worker who pays for job training to enhance the displaced worker's ability to get a new job." A displaced worker is defined as "an individual who lost his or her job due to the abolishment of the individual's position or the closure or moving of the individual's place of work and who does not obtain another job in which the individual works more than twenty hours per week." R.C. 5747.27. (Emphasis added). A displaced worker may claim a credit for the lesser of \$500.00 or half the cost actually paid less any reimbursement during the twelve-month period immediately following the date an individual becomes a displaced worker. *Id.* "Job training" as used in this context,

generally does not include: (1) amounts paid for professional organization fees; (2) expenses for classes to meet continuing professional requirements or minimum professional standards; (3) expenses that improve job skills for the individual's current job; and (4) amounts paid to an out-placement firm to help develop skills used to find a job (such as career planning, resume writing, and marketing action plans).

In this case, the petitioner contends that she was unemployed from 2009 until 2014 to take care of her ill parents. However, to be eligible to claim the displaced worker credit, the petitioner must have lost or left her job due to the closing or moving of the facility or the abolishment of the petitioner's position or shift. R.C. 5747.27. Here, the petitioner has not provided sufficient documentation or evidence to suggest that she lost or left her job due to the closing or moving of the facility or the abolishment of her position or shift. Rather, it appears that the petitioner voluntarily left her previous place of employment in August 2008.

Additionally, as stated above, the displaced worker credit is available for amounts the taxpayer pays for qualified displaced worker training during the 12-month period immediately following the date the individual becomes a displaced worker. R.C. 5747.27. The petitioner states that she stopped working in August 2008 but did not seek training at Cincinnati State and Technical College until 2013 which is more than 12 months after leaving her previous place of employment. Therefore, based on the information currently available to the Tax Commissioner, the petitioner is not entitled to the displaced worker credit under R.C. 5747.27.

IV. PENALTY ABATEMENT

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

V. CONCLUSION

Ultimately, the petitioner has failed to demonstrate that she is entitled to the displaced worker credit that she claimed on her 2013 Ohio Schedule B - Nonbusiness Credits. Specifically, the petitioner has failed to prove that she lost her left or left her job due to the closing or moving of the facility or the abolishment of her position or shift. The petitioner has also failed to demonstrate that she paid for displaced worker training during the twelve-month period immediately following the date she lost or left her job. However, based on the facts and circumstances, the Commissioner shall abate the penalty related to this issue in full.

Accordingly, the assessment is adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$500.00	\$65.44	\$0.00	\$565.44

Current records indicate that no payments have been made on this assessment, leaving the adjusted balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the**

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

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL DETERMINATION

Date: **AUG 12 2020**

Richard M. & Kathleen J. Garwood
2018 Abner Lane
Hudson, OH 44236

Re: Refund Claim No. 1900613
Individual Income Tax – 2013

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

<u>Tax Year</u>	<u>Refund Claimed</u>
2013	\$1,267.00

On February 14, 2019, Richard and Kathleen Garwood (“the claimants”) filed an application for refund for tax year 2013. The claimants’ application for refund came in the form of an untimely filed 2013 individual income tax return.¹ The untimely return reported a refund in the amount of \$1,267.00. However, upon initial review, the Department denied the refund claimed on the 2013 return because the request was not filed within four years of the date of the illegal, erroneous, or excessive payment of tax pursuant to former R.C. 5747.11(B). The claimants object to the denial of their refund claim and request an administrative review of the denial in accordance with R.C. 5703.70. The claimants did not request a hearing on the matter; therefore, this matter is decided upon information available to the Tax Commissioner and the evidence supplied with the application for refund.

Every taxpayer must make an annual return for any taxable year for which he or she is liable for the Ohio personal income tax or a school district income tax. R.C. 5747.08. The return must be filed on or before April 15 on forms prescribed by the Tax Commissioner together with a remittance payable to the State Treasurer for the combined amount of state and school district income taxes due.²

Former Division (B) of R.C. 5747.11, applicable to the period in question, governed applications for income tax refunds, and stated, in pertinent part, that “applications for refund shall be filed with the tax commissioner, on the form prescribed by the commissioner, within four years from the date of the illegal, erroneous, or excessive payment of the tax * * *.” Former division R.C. 5747.09(A)(3), also applicable for the period in question, stated that “taxes paid” includes “payments of estimated taxes made under

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

² Authorized by former R.C. 5747.08(G) which was effective for tax year 2013.

division (C) of this section, taxes withheld from the taxpayer's compensation, and tax refunds applied by the taxpayer in payment of estimated taxes.”

In the present case, former division of R.C. 5747.11(B) required a refund claim to be filed “within four years from the date of the illegal, erroneous, or excessive payment of the tax.” The claimants’ refund request was not received by the Department until February 14, 2019. Since the refund sought by the claimants stems from payments in the form of income tax withholdings, which are deemed to have paid on April 15, 2014, the claimants had four years from the date of the payment of tax to timely file an application for personal income tax refund pursuant to former R.C. 5747.11(B). Because the claimants’ refund request for the tax period in question was not received until February 14, 2019, it was outside the four years from the date of the purported illegal, erroneous, or excessive payment of tax which was April 15, 2014. Notably, even if the claimants were given four years from the extended due date, their February 14, 2019 would still be untimely. Consequently, the refund cannot be granted under former R.C. 5747.11(B) because the claimants’ refund request was not filed within the four years of the illegal or erroneous payment.

Accordingly, the application for refund is denied.

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

FINAL DETERMINATION

Date: AUG 26 2020

Yabin C. He
C/O K Fristch, TE-3,
2 P & G Plaza
Cincinnati, OH 45202

Re: Assessment No. 02201828946732
Individual Income Tax – 2016

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

<u>Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$95.00	\$5.66	\$61.32	\$161.98

I. BACKGROUND

The Ohio Department of Taxation assessed Yabin C. He (hereinafter “the petitioner”) after making corrections to the untimely Ohio individual income tax return that she filed for the tax period in question. Specifically, the Department disallowed the nonresident credit reported on the untimely return, which resulted in the assessment currently considered. The Department identified that the petitioner earned nonqualified stock option compensation for personal services she performed in Ohio, but failed to provide sufficient evidence showing that compensation was appropriately allocated to Ohio as required under Ohio law.¹ The stock option compensation at issue relates to two grants of options which were both granted in 2001 and 2006, and both exercised in 2016. In response to the assessment, the petitioner filed a timely petition for reassessment objecting to the assessment.

Records reflect that the petitioner resided at several residences in Ohio while she worked for The Proctor & Gamble Company (“P&G”) from 2000 to 2005. Evidence further reflects that the stock option compensation identified by the Department’s audit staff was earned through personal services that the petitioner earned as an employee for P&G. The petitioner’s personal LinkedIn profile reflects that she was the Senior Manager for the Global Trends Group, Global Baby Care in the United States, and for

¹ A stock option is an option to buy or sell a specific quantity of stock at a designated price for a specified period regardless of shifts in market value during the period. Black’s Law Dictionary (10th ed. 2014). A nonqualified stock option plan is one that allows a person to buy stock for a period at or below the market price *Id.* “Stock options are granted with the expectation that the stock will increase in price during the intervening period, thus allowing the grantee the right to buy the stock significantly below its market price.” (Internal quotation marks omitted.) *Scully v. US WATS, Inc.*, 238 F.3d 497, 507 (3d Cir. 2001). It is undisputed that the stock options at issue in this matter did not have a readily ascertainable fair market value at the time that P&G granted them to Ms. He.

Fabric & Home Care.² The petitioner objects to the assessment and contend that the amount assessed should be adjusted to account for the personal services that Ms. Ye performed for P&G in Ohio. For the reasons discussed below, the petitioners' contention is well taken, and the amounts assessed shall be adjusted to account for Ms. Ye's personal services performed in Ohio.

II. RELEVANT AUTHORITY

A. TAX TREATMENT OF COMPENSATION EARNED BY A NONRESIDENT FOR PERSONAL SERVICES PERFORMED IN OHIO

Compensation is "any form of remuneration paid to an employee for personal services," and is specifically allocated to the place where the services were performed. R.C. 5747.01(D); *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶ 22 (citing R.C. 5747.20(B)(1)). Ohio law specifically requires all items of compensation paid for services performed in Ohio by a nonresident to be allocated to Ohio. R.C. 5747.20(B)(1) provides that "(a)ll items of compensation paid to an individual for personal services performed in this state who was a nonresident at the time of payment and all items of deduction directly allocated thereto shall be allocated to this state." It is not disputed that salary, wages, and commissions are compensation for personal services. In addition, as laid out herein, stock option income is compensation for personal services. Nonresidents therefore must allocate all the aforementioned forms of compensation to Ohio to the extent that it resulted from personal services performed in Ohio. Nonresidents allocate compensation to Ohio by filing an Ohio nonresident income tax return claiming a nonresident credit for these items of compensation with no situs to Ohio.³

When the specific activities that give rise to the payment of compensation to a nonresident are readily identifiable, the individual's Ohio allocation of that compensation is calculated by aggregating those amounts that represent compensation directly attributable to services performed in Ohio or for compensation received in Ohio. In other words, if the Department or the taxpayer can identify that certain compensation was earned specifically for services performed in a state, then such compensation shall be specifically allocated to the state in which the services were performed.

When the specific instances giving rise to the payment of compensation to the nonresident are not readily identifiable, the Department utilizes the days-worked method of allocation to reasonably calculate the amount of compensation earned by a nonresident that resulted from personal services performed in Ohio. The allocation is represented by a fraction, the numerator of which is the number of days that the individual worked for the employer in Ohio during the relevant period. The denominator of the fraction is the total number of days that the individual worked for the employer during the relevant period. In order to most reasonably and accurately represent the services performed by an individual, the Department defaults to using 260 days in the denominator.⁴

² *Yabin He, Individual Profile*, <http://www.linkedin.com/in/yabin-he-8a331924> (accessed on August 17, 2020).

³ R.C. 5747.05(A)(1) allows nonresidents to claim a credit, against an Ohio income tax liability, equal to the amount of Ohio income tax that would otherwise be due on the portion of the nonresident's income that is not allocable to Ohio.

⁴ The United States Office of Personnel Management, the United States General Accounting Office, and the United States Congress all recognize that average full-time employees work 2,087 hours (approximately 261 work days) during a calendar year. 5 U.S.C.A. 5504. United States Office of Personnel Management, *Fact Sheet: Computing Hourly Rates of Pay Using the 2,087-Hour Divisor* <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/computing-hourly-rates-of-pay-using-the-2087-hour-divisor/>. In absence of evidence identifying the exact number of days a resident worked within its boundaries, many jurisdictions default to a presumption that the resident was a regular full-time employee working within the district. In Ohio, many municipal jurisdictions presume that the average full-time employee works 260 days per calendar year. City of London Income Tax Rules and Regulations – Article X(B)(5); City of Germantown Income

In *Hillenmeyer v. Cleveland Bd. of Rev.*, the Ohio Supreme Court recognized that the power to tax can only reach to that portion of a nonresident's compensation that was earned by work performed within the jurisdiction, so as to comply with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.⁵ The Court further recognized that "(d)ue process requires an allocation that reasonably associates the amount of compensation taxed with work the individual performed within the city" and affirmed the notion that "compensation must be allocated to the place where the employee performed the work." The Ohio Supreme Court in *Hillenmeyer* ultimately ruled that the duty-days method of allocation, whereby the numerator represented the number of days spent in the taxing district and denominator represented the total number of work days, properly included as taxable income only that compensation earned in the tax district by accounting for all the work for which the nonresident was paid. The Court stated that the duty-days method comports with Due Process and ensures that the tax collected is not disproportionate to the income received for work in the jurisdiction.

The duty-day/days-worked method has been endorsed and adopted by other Ohio courts. Ohio's 12th District Court of Appeals adopted a days-worked method of allocating compensation when it ruled that nonresident former executives of a company located in Ohio were entitled to have their income realized from the exercise of stock options allocated according to the number of days they worked inside and outside of the municipal corporation. This approach to compensation earned over a multi-year period was adopted by the 10th District Court of Appeal which held that income from stock options could be taxed by a municipality on the basis of the days-worked within the municipality, even if the income was paid long after employment ended.

For compensation earned over a multi-year period, courts have held that "(t)he event triggering operation of the taxing power is realization of gain * * *. The legislative body, enjoying the constitutional power to tax the gain, and having laid down a tax policy, may choose for the incidence and measurement of the tax the moment that the gain and the amount are realized." *McCann v. Limbach*, 9th Dist. Summit C.A. NOS. 16040, 16041, 16042, 1993 Ohio App. LEXIS 4378, at *8-9 (Sep. 1, 1993) citing *Chope v. Collins* (1976), 48 Ohio St.2d 297, 302-303, 358 N.E.2d [*9] 573 (citation omitted). With R.C. 5747.20(B)(1), the Ohio General Assembly required that all items of compensation paid to a nonresident for personal services performed in Ohio to be allocated to Ohio.

B. ALLOCATING STOCK OPTION COMPENSATION

Ohio adheres to the federal approach of determining when income from a stock option is realized, and further recognizes that it is compensation for personal services. The principles that stock options are compensation paid for personal services, and further that a jurisdiction can tax the compensation earned within that jurisdiction were both addressed by the Ohio Board of Tax Appeals ("BTA") in *Boyer v. St. Bernard Bd. of Rev.*⁶ The issue before the BTA in *Boyer* was whether stock options became subject to municipal income tax when the stock options were earned or when the stock options were exercised. In its analysis, the BTA examined several opinions from Ohio Courts of Appeal that upheld municipalities'

Tax Rules & Regulations – Article 10(B)(5); City of Brookville Income Tax Rules and Regulations §IV(A)(B)(c); Village of Evendale Ohio Rules and Regulations – Article V(A)(8)(c)(i); Village of Richfield Rules and Regulations – Article VIII(B)(5).

⁵ See, *Hillenmeyer v. Cleveland Bd. of Rev.*, 144 Ohio St.3d 165, 2015-Ohio-1623 (2015) ¶ 46. See, also *Saturday v. Cleveland Bd. of Rev.*, 142 Ohio St.3d 528, 2015-Ohio-1625 (2015).

⁶ *Boyer v. St. Bernard Municipal Board of Appeal and St. Bernard Tax Administrators*, BTA No. 2007-Z-139, 2009 Ohio Tax LEXIS 874 (Ohio B.T.A. June 23, 2009)

authority to tax stock option income earned within their jurisdiction.⁷ In *Boyer*, the BTA relied heavily on *Wardrop v. Middletown Income Tax Rev. Bd.*, noting that the income tax code at issue in *Wardrop* was similar to the income tax provision in *Boyer*.⁸ The BTA summarized *Wardrop* as:

[a] case with striking similarities to the instant matter, the court considered when the appreciated value of nontransferable stock options was subject to city income tax. In *Wardrop*, two employees received stock options during the course of their employment but did not exercise them until after resigning from their respective positions. While both employees worked at the company's headquarters in the city of Middletown, neither employee resided within the city limits of Middletown. The court explained that the critical issue was when the employees “earned the income, not when they received it. *** Compensation earned by a nonresident employee cannot evade municipal taxation by the simple expedient of being deferred into a subsequent year when the nonresident no longer works in the taxing jurisdiction.” Furthermore, the court explained that the employees earned compensation in the form of stock options while working for their employer and that Middletown could tax this compensation to the extent it constituted income earned by nonresidents for work done or services performed or rendered in the city. Middletown necessarily had to wait until the option-exercise date to assign a value to the compensation, however, because the value of the options could not be determined until then. Although the employees did not reside or work in Middletown when they exercised the options, the fact remains that they earned the stock-option compensation while working for their employer. Therefore, Middletown was authorized to tax the resulting gain, which could be calculated only when the employees exercised the options. A municipality may wait until the stock options are exercised to assign a value to the compensation. The fact that the two employees neither resided nor worked in Middletown when they exercised the options was immaterial.

In *Boyer*, the BTA ultimately found that the appellant earned compensation in the form of stock options while he worked in St. Bernard and therefore the municipal corporation had the authority to tax the compensation because it constituted wages earned in the municipal corporation by a nonresident. Thus, although the appellant did not reside or work in St. Bernard at the time when he exercised the options, St. Bernard was authorized to tax the stock option income at the time that the taxable event occurred.⁹

It is worth noting that, the Butler County Court of Common Pleas, in its *Wardrop* decision, looked to R.C. 5747.20(B)(1), stating “(t)he ability of a municipality to levy a tax on income earned within its borders is similar to that of the state, which designates, as taxable in Ohio, ‘all items of compensation paid to an individual for personal services in this state who was a nonresident at the time of payment.’ R.C. 5747.20(B)(1) (emphasis added). Thus, as a general principle, the ability of a municipality to tax

⁷ *Rice & Wardrop*.

⁸ Both provisions provided for the imposition of municipal income tax on income “earned or received” by non-residents for work done or services performed or rendered in the municipality. Section 181.03 of the St. Bernard Municipal Income Tax Code states that “an annual tax, shall be, and is hereby levied on ... (o)n all qualifying wages, including sick, vacation and severance pay, other compensation, commissions, and any pay as part of an employee buyout or wage contribution plan or other taxable income *earned or received* by nonresidents for work done or services performed or rendered, in the Municipality.”

⁹ The Court of Appeals in *Wardrop* stated that, “St. Bernard necessarily had to wait until the option-exercise date to assign a value to the compensation because the value of the options could not be determined until then.” *Wardrop* at 30.

the income of a non-resident depends not on *when* it was earned, but *where* it was earned.”¹⁰ Ohio’s application of R.C. 5747.20(B)(1) similarly focuses on where the compensation was earned by nonresident taxpayers.

In a recent decision regarding a municipality’s ability to tax stock option compensation earned by a nonresident for personal services performed within the municipality, the Ohio Supreme Court indicated that “(t)he fact that income was not received until some period after the income-producing work was performed does not change the fact that the income arose from the income-producing work.” *Willacy v. Cleveland Bd. of Income Tax Rev.*, 2020-Ohio-314 (2020) at ¶ 28. The Court in *Willacy* further stated that “(i)n essence, what Willacy received was deferred compensation for her Cleveland-based work. Neither the form of the compensation—stock options—nor the timing of the compensation—after she left the state—undercuts the fact that it is fairly attributable to her work in Cleveland and hence subject to taxation by the city.” *Id.* at ¶ 29.

C. TAX TREATMENT OF STOCK OPTION INCOME AT THE FEDERAL LEVEL & OTHER STATES

For federal income tax purposes, the tax consequences associated with a stock option arise when the option is exercised. This approach avoids the difficulty and speculation involved in trying to assess the anticipated appreciation in stock price at the time of the option’s grant. 26 U.S.C. § 83 (e) (3); *see Commissioner of Internal Revenue v. LoBue*, 351 U.S. 243, 249, 76 S. Ct. 800, 100 L. Ed. 1142 (1956). Since the option at the time of grant does not have a readily ascertainable fair market value, taxation is deferred until the individual exercises the option. 26 C.F.R. § 1.83-7(a). Indeed, “the uniform Treasury practice since 1923 has been to measure the compensation to employees given stock options subject to contingencies of this sort by the difference between the option price and the market value of the shares at the time the option is exercised.” *LoBue*, at 249. It is well-settled that the gain from the exercise of stock options is compensation for personal services and is treated as ordinary income. When an employee exercises a stock option, both §83 of the Internal Revenue Code and long-standing judicial precedent require that the difference between the fair market value of the stock and the option exercise price be included in the employee’s gross income as compensation.

Across the nation, a majority of states that impose an income tax have adopted days-worked methods of allocation whereby stock option income is allocated based on where the services that generated the compensation were performed. *See, Department of Revenue - Arizona Individual Income Tax Ruling No. 02-5; California Code of Regulations, Title 18 - Section 17951-5(b), California Franchise Tax Board - Chief Counsel Ruling 2014-01, Cal. Franchise Tax Bd., Legal Div., May 13, 2014; Department of Revenue Regulations - Section 100.3120 Allocation of Compensation Paid to Nonresidents; Oregon Administrative Rule 150-316.127(A)(3)(d); Revenue Notice # 08-10 Individual Income Tax and Withholding – Wages of Nonresident Individuals Assigned to Minnesota for Work Performed in Minnesota.* The days-worked methods utilized by Ohio and the other jurisdictions mentioned above apply to income earned by a nonresident regardless of where the individual is a resident at the time that the stock options are exercised.

III. ANALYSIS OF THE FACTS & CIRCUMSTANCES

As discussed in detail above, a jurisdiction’s authority to tax a nonresident for compensation that was earned through work performed within the jurisdiction is both well-established and widely applied. For

¹⁰ *Wardrop v. City of Middletown Income Tax Rev. Bd.*, C.P. No. CV 2006 07 2519, 2007 Ohio Misc. LEXIS 4556 (Ohio Aug. 30, 2007) at 10 – 12.

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Ohio income tax purposes, R.C. 5747.02 and R.C. 5747.20(B)(1) collectively act to require nonresidents to allocate stock option compensation to the extent that it is was earned in Ohio irrespective of whether the taxpayer was a nonresident at the time that the options were granted or exercised. The crucial examination in determining whether stock option compensation is allocable and therefore taxable is to identify where the compensation was earned, not where the taxpayer resides at the grant or exercise date. In this matter, records reflect that, although the petitioner did not reside or work in Ohio when she exercised her options, the fact remains that she earned the stock option compensations in 2001 while working for P & G in Ohio. As a result, and in accordance with the relevant authority, the petitioner was statutorily required to report and allocate the portions of her stock option compensation which were earned through personal services she performed in Ohio.

During the audit, the Department disallowed the nonresident credit because the petitioner failed to provide sufficient evidence showing that her stock option compensation was appropriately allocated to Ohio. However, during the administrative appeal period, the petitioner and her authorized representative provided sufficient evidence regarding the stock option compensation calculation to the Tax Commissioner. The petitioner's evidence supports the Ohio adopted days-worked methodology which allocates approximately 25.64% of the set of options granted in 2001 and 0.21% for the set of options granted in 2006. Moreover, these allocation calculations are equivalent to the calculations provided by the petitioner and comport with the evidence available to the Tax Commissioner. Ultimately, this days-worked allocation methodology accounts for personal services that Ms. He performed in Ohio between the time P&G granted the stock options in 2001 and 2016, and when she exercised her stock options in 2016. Thus, the tax and interest amounts assessed will be adjusted in a manner that reasonably and accurately reflects the extent to which the compensation was earned for the performance of personal services in Ohio.

IV. PENALTY ABATEMENT

The Tax 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 show that the petitioners' failure to initially comply support a full abatement of the penalty imposed.

V. CONCLUSION

R.C. 5747.02, R.C. 5747.20(B)(1), and the relevant authority require nonresidents to allocate stock option compensation to the extent that it is was earned through personal services performed in Ohio. There is no dispute that Ms. He performed services for P&G in Ohio and earned portions of her stock option compensation through the performance of services in Ohio. The evidence available to the Tax Commissioner indicates that a days-worked allocation representing that Ms. He performed personal services in Ohio 25% of the time between the grant and exercise dates of the options in question is rooted in the authority discussed above and represents a reasonable and accurate reflection of the amounts of compensation that Ms. He earned for personal services she performed for P&G in Ohio.

Accordingly, the assessments are adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$25.00	\$3.97	\$0.00	\$28.97

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AUG 26 2020

Current records indicate that no payments have been made on this assessment, leaving the adjusted balance due. However, due to processing and posting time lags, other payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to the "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



Department of
Taxation

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

FINAL DETERMINATION

Date:

'AUG 12 2020

Shelley A. Kouba
388 Marlee Ct.,
Brunswick, OH 44212

Re: Assessment No. 02201804338930
Individual Income Tax - 2015

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$117.00	\$7.82	\$15.64	\$140.46

The Ohio Department of Taxation assessed Shelley Kouba (“the petitioner”) after making corrections to her Ohio individual income tax return for tax year 2015. Specifically, the Department disallowed the Miscellaneous Federal Income Deduction on her Schedule A which resulted in the assessment currently considered. The petitioner objects to the denial, but did not request a hearing. Therefore, this matter is decided upon information available to the Tax Commissioner and the evidence supplied with the petition for reassessment.

The miscellaneous federal income tax deduction on the Ohio Schedule A is for adjustments that are necessary when Ohio law fails to conform with changes made to federal income tax law. Ohio's conformity statute is found in R.C. 5701.11 and division (A) states that any reference in the tax chapters of the Revised Code to the "Internal Revenue Code" means the Internal Revenue Code as it exists on the effective date of the statute. Further, former 5701.11(B)(1), applicable to the period in question, states in pertinent part that:

“For purposes of applying * * * 5747.01 of the Revised Code to a taxpayer's taxable year ending after March 22, 2013, and before the effective date, a taxpayer may irrevocably elect to incorporate the provisions of the Internal Revenue Code or other laws of the United States that are in effect for federal income tax purposes for that taxable year if those provisions differ from the provisions that, under division (A) of this section, would otherwise apply.”

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

AUG 12 2020

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In the present case, Ohio was in conformity with federal income tax law for tax years 2015 and prior. The most current legislative amendment was effective March 30, 2018. Accordingly, there is no valid amount that can be claimed as a miscellaneous federal income tax deduction on the Ohio Schedule A for the tax year at issue. Additionally, because the miscellaneous federal income tax deduction is for federal conformity adjustments, federal Schedule A adjustments are also disallowed on this line. Therefore, the petitioner is prohibited from claiming any amount on Line 23 on Schedule A.

Based on the totality of the evidence, since Ohio was in conformity with federal income tax for the tax period in question, the petitioner is unable to claim any amount on the miscellaneous federal income tax deduction line.

Accordingly, the assessment is affirmed.

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

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
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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



FINAL 00000000322
DETERMINATION

Date: **AUG - 5 2020**

Robert B. & Patricia K. Kramer
13372 W. Union Rd.
Spencerville, OH 45887

Re: Two Assessments
Individual Income Tax – Multiple Periods

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

Assessment No.	Tax Year	Tax	Interest	Penalty	Total
02201720262379	2013	\$647.25	\$67.49	\$134.98	\$849.72
02201720562385	2014	\$132.05	\$9.85	\$19.70	\$161.60

The Ohio Department of Taxation assessed the petitioners, Robert and Patricia Kramer (hereinafter the “petitioners”), after making adjustments to the individual income tax returns that they filed for the 2013 and 2014 tax years. Specifically, the Department partially disallowed Small Business Investor Income Deductions (“SBD”)¹ that they claimed for the periods in question. The SBDs related to income derived from their interests in Northside Del Properties, LLC (hereinafter “Northside”), an Ohio Limited Liability Company, and B & K Trucking, Inc. (“B & K”), an Ohio S Corporation. The petitioners filed a timely petition for reassessment. In the petition for reassessment, the petitioners contend that the SBDs in question were properly claimed and calculated on their original return.

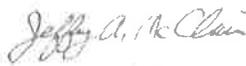
During the administrative appeal period, the petitioners submitted information and documentation which supports the accuracy of the SBDs claimed on their originally filed return. Therefore, upon further review, the petitioners’ contention is well taken.

Accordingly, the assessments are cancelled.

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

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

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


JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

¹ Authorized under former R.C. 5747.01(A)(31), applicable for the periods in question.



Department of
Taxation

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

FINAL DETERMINATION

Date: **AUG 12 2020**

Luisa M Navarro Dominguez &
Jose R Cerda Arria
1590 Abbotsford Green Dr
Powell, OH 43065

Re: Refund Batch No. 4004303903
Individual Income Tax – 2012

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

<u>Tax Year</u>	<u>Refund Claimed</u>
2012	\$2,720.00

I. BACKGROUND

Luisa M. Navarro Dominguez and Jose R. Cerda Arria (hereinafter referred to as “the claimants”) initially filed a timely 2012 Ohio individual income tax return on April 9, 2013, and an amended return on December 13, 2013. On May 25, 2018, the claimants filed an Application for Personal Income Tax Refund request form (IT AR) for tax year 2012 claiming an overpayment of \$2,720.00.¹ Upon initial review, however, the Department denied the overpayment reported on their refund request because the request was not filed within four years of the date of the illegal, erroneous, or excessive payment of tax pursuant to former R.C. 5747.11(B). The claimants object to the denial of their full refund claim and request an administrative review of the denial in accordance with R.C. 5703.70. The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim.

II. RELEVANT AUTHORITY

Every taxpayer must make an annual return for any taxable year for which he or she is liable for the Ohio personal income tax or a school district income tax. R.C. 5747.08. The return must be filed on or before April 15 on forms prescribed by the Tax Commissioner together with a remittance payable to the State Treasurer for the combined amount of state and school district income taxes due.²

Former Division (B) of R.C. 5747.11, applicable to the period in question, governed applications for income tax refunds, and stated, in pertinent part, that “applications for refund shall be filed with the tax commissioner, on the form prescribed by the commissioner, within four years from the date of the

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

² Authorized by former R.C. 5747.08(G) which was effective for tax year 2012.

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illegal, erroneous, or excessive payment of the tax * * *." Former division R.C. 5747.09(A)(3), also applicable for the period in question, stated that "taxes paid" includes "payments of estimated taxes made under division (C) of this section, taxes withheld from the taxpayer's compensation, and tax refunds applied by the taxpayer in payment of estimated taxes."

III. ANALYSIS

The claimants contend that they are entitled to an overpayment of \$2,720.00 as reported on their IT AR form. The claimants' 2012 amended return was postmarked and deemed received on December 13, 2013 and included a payment in the amount of \$31,147.00 which was postmarked and deemed received on December 23, 2013. The claimants' IT AR form was postmarked and deemed received on May 25, 2018. Pursuant to R.C. 5747.08(G), the claimants' Ohio withholding that they seek to have refunded was deemed to have been paid on December 23, 2013. Since the claimants' Ohio tax payment was deemed paid on December 23, 2013, the claimants had four years from the date of the alleged erroneous payment of tax, December 23, 2017, to timely file an application for personal income tax refund pursuant to R.C. 5747.11(B). Accordingly, because the claimants' overpayment request on their 2012 Ohio return and IT AR form were postmarked and deemed received after December 23, 2017, it was outside the four years from the date of the purported illegal, erroneous, or excessive payment of tax.

The claimants further allege that their 2012 IT AR request was "triggered" by a notice they received from the Department dated October 2, 2017. That notice, however, was related to the claimants 2013 tax year filing denying their lump sum pension credit they claimed in their 2013 tax year return. The claimants' assumption, that a tax credit denial for a subsequent tax year return restarts the clock on their four-year limitation to file a refund claim, is mistaken and not well taken. The Department's notice the claimants received was related to their 2013 tax year return.

IV. CONCLUSION

The claimants had four years to file for a timely refund. However, the claimants did not file their 2012 Ohio IT AR form until May 25, 2018, which was outside the four-year period to file a timely refund claim pursuant to R.C. 5747.11(B). Consequently, the claimants are not entitled to a refund because the claimants' IT AR form was not filed within the four years of the illegal or erroneous payment.

Accordingly, the application for refund is denied.

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date: **AUG 26 2020**

Larry L. & Judith T. Scott
31207 Lake Rd
Bay Valley, OH 44140

Re: Refund Batch No. 1810312835
Individual Income Tax – 2017

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

<u>Tax Year</u>	<u>Refund Claimed</u>
2017	\$19,852.00

I. BACKGROUND

Larry L. Scott and Judith T. Scott (hereinafter referred to as “the claimants”) initially filed a timely 2017 Ohio individual income tax return on April 15, 2018.¹ On the return initially filed return, the claimants claimed a refund of \$19,926.00. Upon initial review, the Department granted a partial refund of \$74.00 and disallowed the remaining \$19,852.00 claimed.² The partial denial was due to the Department’s partial disallowance of the Ohio Business Income Deduction (“BID”) that the claimants reported on their 2017 return.

The claimants filed a timely objection in response to the partial denial. Specifically, the claimants contend that the Department erroneously disallowed an Ohio Business Income Deduction (“BID”) that the claimants indicate was earned from a covenant not to compete agreement (hereinafter referred to as “non-compete agreement”) Mr. Scott entered into as part of the sale of an Ohio veterinary business during the tax year in question. The claimants objected to the denial of their refund claim and requested an administrative review of the denial in accordance with R.C. 5703.70. The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim.

II. RELEVANT AUTHORITY

A. THE OHIO BUSINESS INCOME DEDUCTION (“BID”)

R.C. 5747.01(A)(31) allows individuals jointly filing the Ohio IT 1040 to claim a deduction for the taxpayer’s Ohio business income up to \$250,000.00, to the extent it is included in federal adjusted gross income. Any remaining business income above this amount is then taxed at a flat 3% rate.

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

² The claimants reported a total overpayment of \$25,926.00 on their 2017 return. In addition to granting the \$74.00 refund, the Department credited \$6,000.00 to the claimants’ 2018 liability as they requested.

Additionally, taxpayers are required to complete and file an Ohio Schedule IT BUS (“IT BUS”) in order to claim the BID. The IT BUS is used in determining taxable business income and business income tax liability for purposes of completing the Ohio IT-1040 individual income tax return. *See* R.C. 5747.01(A)(31), 5747.01(B), and 5747.01(HH).

B. BUSINESS & NONBUSINESS INCOME

Ohio’s income tax distinguishes “business income” from “nonbusiness income.” As a general matter, business income is defined as income from “the regular course of a trade or business” and is apportioned to Ohio according to the percentage of the business’s property, payroll, and receipts located in Ohio. *See* R.C. 5747.01(B) (definition of business income) and 5747.21(B) (providing for the apportionment of business income by reference to the apportionment statutes of the former corporate franchise tax, R.C. Chapter 5733). *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶ 21 (2016).

Under R.C. 5747.01(B), business income is defined as:

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

In *Kemppel v. Zaino*, the Supreme Court of Ohio reviewed the “transactional” and “functional” test used to classify income. *Kemppel v. Zaino*, 91 Ohio St.3d 420, 2001-Ohio-92, 746 N.E.2d 1073 (2001). In *Kemppel*, 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.* at ¶ 422. Under the functional test, the Court found 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. In addition to the “transactional” and “functional” tests, Ohio defines business income to also include the liquidation of a business. R.C. 5747.01(B). In general, income, deductions, gains and losses recognized by a sole proprietorship or a pass-through entity are items of business income.

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

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

C. INCOME EARNED FROM A COVENANT NOT TO COMPETE IS ORDINARY INCOME

For Ohio income tax purposes, income earned from a covenant not to compete is ordinary income analogous to compensation for foregone personal services. A covenant not to compete is “[a] promise, * * * in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer.” Black’s Law Dictionary (11th ed. 2019). Covenants not to compete are also termed “noncompetition agreement; noncompete covenant; noncompetition covenant; restrictive covenant; covenant in restraint of trade; promise not to compete; contract not to compete.” *Id.*

In *Haberman v. Tracy*, the Ohio Board of Tax Appeals (“BTA”) addressed the issue of how income received from a covenant not to compete is treated for tax purposes. The Court held that:

It appears to be undisputed that, generally speaking, compensation received by the grantor of a covenant not to compete is treated as ordinary income, as compensation for lost earnings. *Patterson v. Commissioner of Internal Revenue* (6th Cir. 1987), 810 F.2d 562. Further, “from the standpoint of a seller or individual grantor of a covenant not to compete, the covenant not to compete represents no asset at all and is in the nature of an independent undertaking, foregone compensation income, or a foregone opportunity to enter a particular market. Consequently, from the standpoint of a seller or grantor of a covenant not to compete, such a covenant creates ordinary income analogous to compensation for foregone personal services.” Cross, 209—4th T.M., Purchase Price Allocations and Amortization of Intangibles, p. A—14.

Haberman v. Tracy, BTA Case No. 91-A-1639, 1993 WL 94508.

D. THE DEDUCTIBILITY OF COMPENSATION PAID TO AN INVESTOR

Wages, guaranteed payments, and other compensation paid by a pass-through entity (“PTE”) to an investor that directly or indirectly holds a 20% or greater interest in the entity are generally considered to be a distributive share of business income. R.C. 5733.40(A)(7). As business income, such wages, guaranteed payments and other compensation may be deductible in accordance with either the small business deduction or BID. R.C. 5747.01(A)(31). PTEs include partnerships, Subchapter S corporations (S-Corps), and Limited Liability Companies (LLCs). R.C. 5733.04(O). R.C. 5733.40(A)(7) states, in pertinent part, that:

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

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

E. INCOME FROM THE LIQUIDATION OF A BUSINESS

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

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). Taken together, this is a clear indication that the cessation of business operations is a material fact in determining what can be considered liquidation under R.C. 5747.01(B). The converse implication is that the sale of an ownership interest in an entity that continues to operate after the sale is not a liquidation under Ohio law, but rather is simply the sale of an intangible asset.

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

III. ANALYSIS

The claimants contend that the income received from their execution of a non-compete agreement, as part of the sale of an Ohio veterinary business, should be considered business income; therefore, it should qualify for the BID because the income reflects ordinary taxable income for both federal and state purposes and because it was the result of the operation of a business transaction within the State of Ohio. The claimants reported their alleged business income in line 5 of their 2017 Ohio Schedule IT

³ The amendment did not, however, define “partial or complete liquidation of a business.”

⁴ Pursuant to R.C. 1.49, if a statute is ambiguous, the court may consider, among other things, the “object sought to be attained,” the “circumstances under which the statute was enacted,” and the “legislative history.”

⁵ See Ohio Legislative Service Commission Final Bill Analysis for Am. Sub. Senate Bill 261 at 4 (2003) (stating “In a recent case, gains from the liquidation of an Ohio pass-through entity * * *.” See *Kemppel v. Zaino*, 91 Ohio St.3d 420 (2001).

BUS return.⁶ In support of their claim, the claimants provided the Tax Commissioner with information primarily limited to a copy of 2017 Form 1099-MISC reporting the alleged business income received from MedVet Associates, LLC., (hereinafter referred to as “MedVet”) as “other income” in line 3 of the form, and a copy of their 2017 Ohio Schedule IT BUS return. It must be noted, that the claimants have not provided information regarding the nature of Mr. Scott’s veterinary business prior to the sale, a copy of the covenant not to compete, or details regarding the sale of Mr. Scott’s practice to MedVet.

Ohio law treats remuneration for services rendered by an employee as compensation; compensation is generally nonbusiness income. R.C. 5747.01(C) and (D). R.C. 5733.40(A)(7) states that wages, guaranteed payments, and other compensation paid by a PTE to an investor that directly or indirectly holds a 20% or greater interest in the entity are generally considered to be a distributive share of business income. As business income, such wages, guaranteed payments, and other compensation may be deductible in accordance with either the BID. R.C. 5747.01(A)(31). The claimants, however, did not provide the Tax Commissioner with any evidence that would indicate they are investors who held, directly or indirectly, a 20% or greater interest in MedVet nor did they provide evidence showing that Mr. Scott was a partner, member, shareholder, or investor of MedVet (e.g., copies of K-1 Federal Schedules) during tax year 2017. Therefore, the claimants’ income reported on Form 1099-MISC for the tax year in question cannot be reclassified as a distributive share of business income pursuant to R.C. 5733.40(A)(7).

Furthermore, the claimants failed to substantiate their contention that their income reported on their 2017 1099-MISC Form was business income under the relevant authority. Providing a 2017 1099-MISC Form showing income as “other income” and claiming that the income received was a result of an executed non-compete agreement is insufficient to demonstrate that the income received is business income under Ohio law. Instead, for the claimants to prevail, they must show that the income (1) meets the transactional test, (2) meets the functional test, or (3) is related to a “partial or complete liquidation of a business.” R.C. 5747.01(B).

Income is business income under the “transactional test” only if it is derived from a transaction in which the taxpayer regularly engages. *Kemppel* at 422. As discussed above, the claimants have not provided evidence that shows an ownership interest in MedVet nor have they shown that they engage in regular transactions involving the execution of non-compete agreements. The claimants have presented insufficient evidence to show that either Mr. Scott regularly entered into covenants not to compete or received income therefrom. Nevertheless, the record reflects that Mr. Scott’s entry into a covenant not to compete was a one-time occurrence and, therefore, did not arise from transactions or activities in the normal course of his, or even common veterinary practices or business. As such, the gains from this extraordinary and unusual event do not meet the transactional test.

Secondly, income is business income under the “functional test” only “if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer’s regular trade or business operations.” R.C. 5747.01(B) and *Kemppel* at 423. Here, the claimants have not demonstrated that the purported business income Mr. Scott received was part of an acquisition, management, and disposition of property. Instead, the record reflects that the claimants executed a non-compete agreement with MedVet which the BTA previously held that such income received by a grantor of a covenant not to

⁶ Line 5 of 2017 Ohio Schedule IT BUS is used for reporting guaranteed payments, compensation and/or wages from each pass-through entity in which taxpayer has at least a 20% direct or indirect ownership interest.

compete is treated as ordinary income and as compensation. Moreover, the covenant not to compete represents no asset at all. *See Haberman v. Tracy, supra*. Thus, the income Mr. Scott received from the non-compete does not meet the functional test.

Third, income is also business income if it is generated from the “partial or complete liquidation of a business * * *.” R.C. 5747.01(B). As previously stated, the claimants have not provided evidence that they held an ownership interest in MedVet, therefore, a partial or complete liquidation of MedVet does not factor into the business income analysis for the claimants. Rather, the limited information provided by the claimants would seem to indicate that the noncompete was part of the sale of Mr. Scott’s veterinary practice which continued to operate. In other words, the business was not dissolved but continued to operate. Therefore, income from the noncompete did not arise from the partial or complete liquidation of a business.

IV. CONCLUSION

The totality of the evidence available to the Tax Commissioner shows that the income received by Mr. Scott from his execution of a non-compete agreement with MedVet is nonbusiness income. The evidence shows that the claimants’ income received from the non-compete agreement was not in the form of wages, guaranteed payments, and other compensation paid by a PTE to an investor that directly or indirectly holds a 20% or greater interest in MedVet. The claimants have not provided evidence showing they are a partner, member, shareholder, or investor of MedVet. Furthermore, the income received by the claimants from Mr. Scott’s execution of a non-compete agreement with MedVet is not business income under either the transactional or functional tests of R.C. 5747.01(B) nor have the claimants demonstrated that this income is from “a partial or complete liquidation,” as that phrase is used in R.C. 5747.01(B). That income was not generated as part of a trade or business nor by property that is an integral part of a trade or business operation.

Finally, under Ohio law, as was held by the BTA in *Haberman*, the income reported by the claimants from their execution of a non-compete agreement with MedVet is treated as ordinary income and as compensation for lost earnings; therefore, it is nonbusiness income under the relevant authority described above. Ultimately, the claimants have not provided evidence or demonstrated that their income received from the execution of a non-compete agreement with MedVet was business income. Therefore, the claimants’ income reported in their 2017 1099-MISC Form is nonbusiness income and does not qualify for Ohio’s business income deduction.

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



FINAL DETERMINATION

Date:

AUG 26 2020

Louis F. & Linda A. Slangen
243 Daniel Dr.
Sanibel, FL 33957

Re: Three Assessments
Individual Income Tax – Multiple Periods

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

Assessment No.	Tax Year	Tax	Interest	Penalty	Total
02201532974445	2012	\$19,660.96	\$1,556.13	\$3,112.26	\$24,329.35
02201532974444	2013	\$12,231.81	\$598.17	\$1,196.34	\$14,026.32
02201533779014	2014	\$45,248.72	\$814.44	\$1,628.88	\$47,692.04

I. BACKGROUND

The Department assessed the petitioners after making adjustments to the individual income tax returns that they filed for tax years 2012, 2013, and 2014. Specifically, the Department identified that, in calculating their nonresident credit claimed on each return for the tax years at issue, the petitioners under-allocated compensation for personal services performed in, and thus allocable to, Ohio. The Department increased the amount of the petitioners’ compensation allocable to Ohio, which reduced the petitioners’ nonresident credit in each year and resulted in the assessment at issue.

Records reflect that Mr. Slangen was employed by Invacare Corporation (“Invacare” or “the company”) until February 28, 2014. Invacare is headquartered in Elyria, Ohio, and describes itself as “the global leader in the manufacture and distribution of innovative home and long-term care medical products that promote recovery and active lifestyles”.¹ Prior to his retirement in 2014, Mr. Slangen acted as Invacare’s Executive Vice President of Marketing and Chief Product Officer and performed personal services for the company in Ohio. Mr. Slangen received compensation, in several forms, from Invacare during the periods in question including base salary and compensation resulting from the exercise of nonqualified stock option shares (“stock options”).²

The petitioners filed a petition for reassessment objecting to the assessments and contending that they initially appropriately allocated and apportioned income to Ohio for the periods at issue. While the

¹ Invacare – About Us. Retrieved from <http://www.invacare.com/cgi-bin/imhqprd/about.jsp> (last accessed on August 24, 2020)

² A stock option is an option to buy or sell a specific quantity of stock at a designated price for a specified period regardless of shifts in market value during the period. A nonqualified stock option plan is one that allows a person to buy stock for a period at or below the market price. Black’s Law Dictionary (10th ed. 2014). “Stock options are granted with the expectation that the stock will increase in price during the intervening period, thus allowing the grantee the right to buy the stock significantly below its market price.” (Internal quotation marks omitted.) *Scully v. US WATS, Inc.*, 238 F.3d 497, 507 (3d Cir. 2001). It is undisputed that the stock options at issue in this matter did not have a readily ascertainable fair market value at the time that Invacare granted them to Mr. Slangen.

petitioners did not initially request a hearing on their petition for reassessment, their authorized representative did request a hearing on these matters during the administrative appeal period. The requested hearing was conducted via teleconference.

Based on information provided during the administrative appeal period and for the reasons discussed below, the petitioners' contention is well taken.

II. RELEVANT AUTHORITY

A. TAX TREATMENT OF COMPENSATION EARNED BY A NONRESIDENT FOR PERSONAL SERVICES PERFORMED IN OHIO

Compensation is "any form of remuneration paid to an employee for personal services," and is specifically allocated to the place where the services were performed. R.C. 5747.01(D); *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶ 22 (citing R.C. 5747.20(B)(1)). Ohio law specifically requires all items of compensation paid for services performed in Ohio by a nonresident to be allocated to Ohio. R.C. 5747.20(B)(1) provides that "(a)ll items of compensation paid to an individual for personal services performed in this state who was a nonresident at the time of payment and all items of deduction directly allocated thereto shall be allocated to this state." It is not disputed that salary, wages, and commissions are compensation for personal services. In addition, as laid out herein, stock option income is compensation for personal services. Nonresidents therefore must allocate all the aforementioned forms of compensation to Ohio to the extent that it resulted from personal services performed in Ohio. Nonresidents allocate compensation to Ohio by filing an Ohio nonresident income tax return claiming a nonresident credit for these items of compensation with no situs to Ohio.³

When the specific activities that give rise to the payment of compensation to a nonresident are readily identifiable, the individual's Ohio allocation of that compensation is calculated by aggregating those amounts that represent compensation directly attributable to services performed in Ohio or for compensation received in Ohio. In other words, if the Department or the taxpayer can identify that certain compensation was earned specifically for services performed in a state, then such compensation shall be specifically allocated to the state in which the services were performed.

When the specific instances giving rise to the payment of compensation to the nonresident are not readily identifiable, the Department utilizes the days-worked method of allocation to reasonably calculate the amount of compensation earned by a nonresident that resulted from personal services performed in Ohio. The allocation is represented by a fraction, the numerator of which is the number of days that the individual worked for the employer in Ohio during the relevant period. The denominator of the fraction is the total number of days that the individual worked for the employer during the relevant period. In order to most reasonably and accurately represent the services performed by an individual, the Department defaults to using 260 days in the denominator.⁴

³ R.C. 5747.05(A)(1) allows nonresidents to claim a credit, against an Ohio income tax liability, equal to the amount of Ohio income tax that would otherwise be due on the portion of the nonresident's income that is not allocable to Ohio.

⁴ The United States Office of Personnel Management, the United States General Accounting Office, and the United States Congress all recognize that average full-time employees work 2,087 hours (approximately 261 work days) during a calendar year. 5 U.S.C.A. 5504. United States Office of Personnel Management, *Fact Sheet: Computing Hourly Rates of Pay Using the 2,087-Hour Divisor* <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/computing-hourly-rates-of-pay-using-the-2087-hour-divisor/>. In absence of evidence identifying the exact number of days a resident

In *Hillenmeyer v. Cleveland Bd. of Rev.*, the Ohio Supreme Court recognized that the power to tax can only reach to that portion of a nonresident's compensation that was earned by work performed within the jurisdiction, so as to comply with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.⁵ The Court further recognized that "(d)ue process requires an allocation that reasonably associates the amount of compensation taxed with work the individual performed within the city" and affirmed the notion that "compensation must be allocated to the place where the employee performed the work." The Ohio Supreme Court in *Hillenmeyer* ultimately ruled that the duty-days method of allocation, whereby the numerator represented the number of days spent in the taxing district and denominator represented the total number of work days, properly included as taxable income only that compensation earned in the tax district by accounting for all the work for which the nonresident was paid. The Court stated that the duty-days method comports with Due Process and ensures that the tax collected is not disproportionate to the income received for work in the jurisdiction.

The duty-day/days-worked method has been endorsed and adopted by other Ohio courts. Ohio's 12th District Court of Appeals adopted a days-worked method of allocating compensation when it ruled that nonresident former executives of a company located in Ohio were entitled to have their income realized from the exercise of stock options allocated according to the number of days they worked inside and outside of the municipal corporation. This approach to compensation earned over a multi-year period was adopted by the 10th District Court of Appeal which held that income from stock options could be taxed by a municipality on the basis of the days-worked within the municipality, even if the income was paid long after employment ended.

For compensation earned over a multi-year period, courts have held that "(t)he event triggering operation of the taxing power is realization of gain * * *. The legislative body, enjoying the constitutional power to tax the gain, and having laid down a tax policy, may choose for the incidence and measurement of the tax the moment that the gain and the amount are realized." *McCann v. Limbach*, 9th Dist. Summit C.A. NOS. 16040, 16041, 16042, 1993 Ohio App. LEXIS 4378, at *8-9 (Sep. 1, 1993) citing *Chope v. Collins* (1976), 48 Ohio St.2d 297, 302-303, 358 N.E.2d [*9] 573 (citation omitted). With R.C. 5747.20(B)(1), the Ohio General Assembly required that all items of compensation paid to a nonresident for personal services performed in Ohio to be allocated to Ohio.

B. ALLOCATING STOCK OPTION COMPENSATION

Ohio adheres to the federal approach of determining when income from a stock option is realized, and further recognizes that it is compensation for personal services. The principles that stock options are compensation paid for personal services, and further that a jurisdiction can tax the compensation earned within that jurisdiction were both addressed by the Ohio Board of Tax Appeals ("BTA") in *Boyer v. St.*

worked within its boundaries, many jurisdictions default to a presumption that the resident was a regular full-time employee working within the district. In Ohio, many municipal jurisdictions presume that the average full-time employee works 260 days per calendar year. City of London Income Tax Rules and Regulations – Article X(B)(5); City of Germantown Income Tax Rules & Regulations – Article 10(B)(5); City of Brookville Income Tax Rules and Regulations §IV(A)(B)(c); Village of Evendale Ohio Rules and Regulations – Article V(A)(8)(c)(i); Village of Richfield Rules and Regulations – Article VIII(B)(5).

⁵ See, *Hillenmeyer v. Cleveland Bd. of Rev.*, 144 Ohio St.3d 165, 2015-Ohio-1623 (2015) ¶ 46. See, also *Saturday v. Cleveland Bd. of Rev.*, 142 Ohio St.3d 528, 2015-Ohio-1625 (2015).

*Bernard Bd. of Rev.*⁶ The issue before the BTA in *Boyer* was whether stock options became subject to municipal income tax when the stock options were earned or when the stock options were exercised. In its analysis, the BTA examined several opinions from Ohio Courts of Appeal that upheld municipalities' authority to tax stock option income earned within their jurisdiction.⁷ In *Boyer*, the BTA relied heavily on *Wardrop v. Middletown Income Tax Rev. Bd.*, noting that the income tax code at issue in *Wardrop* was similar to the income tax provision in *Boyer*.⁸ The BTA summarized *Wardrop* as:

[a] case with striking similarities to the instant matter, the court considered when the appreciated value of nontransferable stock options was subject to city income tax. In *Wardrop*, two employees received stock options during the course of their employment but did not exercise them until after resigning from their respective positions. While both employees worked at the company's headquarters in the city of Middletown, neither employee resided within the city limits of Middletown. The court explained that the critical issue was when the employees "earned the income, not when they received it. *** Compensation earned by a nonresident employee cannot evade municipal taxation by the simple expedient of being deferred into a subsequent year when the nonresident no longer works in the taxing jurisdiction." Furthermore, the court explained that the employees earned compensation in the form of stock options while working for their employer and that Middletown could tax this compensation to the extent it constituted income earned by nonresidents for work done or services performed or rendered in the city. Middletown necessarily had to wait until the option-exercise date to assign a value to the compensation, however, because the value of the options could not be determined until then. Although the employees did not reside or work in Middletown when they exercised the options, the fact remains that they earned the stock-option compensation while working for their employer. Therefore, Middletown was authorized to tax the resulting gain, which could be calculated only when the employees exercised the options. A municipality may wait until the stock options are exercised to assign a value to the compensation. The fact that the two employees neither resided nor worked in Middletown when they exercised the options was immaterial.

In *Boyer*, the BTA ultimately found that the appellant earned compensation in the form of stock options while he worked in St. Bernard and therefore the municipal corporation had the authority to tax the compensation because it constituted wages earned in the municipal corporation by a nonresident. Thus, although the appellant did not reside or work in St. Bernard at the time when he exercised the options, St. Bernard was authorized to tax the stock option income at the time that the taxable event occurred.⁹

⁶ *Boyer v. St. Bernard Municipal Board of Appeal and St. Bernard Tax Administrators*, BTA No. 2007-Z-139, 2009 Ohio Tax LEXIS 874 (Ohio B.T.A. June 23, 2009)

⁷ *Rice & Wardrop*.

⁸ Both provisions provided for the imposition of municipal income tax on income "earned or received" by non-residents for work done or services performed or rendered in the municipality. Section 181.03 of the St. Bernard Municipal Income Tax Code states that "an annual tax, shall be, and is hereby levied on ... (o)n all qualifying wages, including sick, vacation and severance pay, other compensation, commissions, and any pay as part of an employee buyout or wage contribution plan or other taxable income *earned or received* by nonresidents for work done or services performed or rendered, in the Municipality."

⁹ The Court of Appeals in *Wardrop* stated that, "St. Bernard necessarily had to wait until the option-exercise date to assign a value to the compensation because the value of the options could not be determined until then." *Wardrop* at 30.

It is worth noting that, the Butler County Court of Common Pleas, in its *Wardrop* decision, looked to R.C. 5747.20(B)(1), stating “(t)he ability of a municipality to levy a tax on income earned within its borders is similar to that of the state, which designates, as taxable in Ohio, ‘all items of compensation paid to an individual for personal services in this state who was a nonresident at the time of payment.’ R.C. 5747.20(B)(1) (emphasis added). Thus, as a general principle, the ability of a municipality to tax the income of a non-resident depends not on *when* it was earned, but *where* it was earned.”¹⁰ Ohio’s application of R.C. 5747.20(B)(1) similarly focuses on where the compensation was earned by nonresident taxpayers.

In a recent decision regarding a municipality’s ability to tax stock option compensation earned by a nonresident for personal services performed within the municipality, the Ohio Supreme Court indicated that “(t)he fact that income was not received until some period after the income-producing work was performed does not change the fact that the income arose from the income-producing work.” *Willacy v. Cleveland Bd. of Income Tax Rev.*, 2020-Ohio-314 (2020) at ¶ 28. The Court in *Willacy* further stated that “(i)n essence, what Willacy received was deferred compensation for her Cleveland-based work. Neither the form of the compensation—stock options—nor the timing of the compensation—after she left the state—undercuts the fact that it is fairly attributable to her work in Cleveland and hence subject to taxation by the city.” *Id.* at ¶ 29.

III. FACTS & CIRCUMSTANCES IN THIS MATTER

As discussed in detail above, a jurisdiction’s authority to tax a nonresident for compensation that was earned through work performed within the jurisdiction is well-established. For Ohio income tax purposes, R.C. 5747.02 and R.C. 5747.20(B)(1) collectively act to require nonresidents to allocate base salary and stock option compensation to the extent that it is was earned in Ohio irrespective of whether the taxpayer was a nonresident at the time that the options were granted or exercised. The crucial examination in determining whether these types of compensation are allocable and therefore taxable is to identify where the compensation was earned, not where the taxpayer resides when they receive it. In this matter, records reflect that the petitioners earned and received compensation for personal services performed in Ohio. As a result, and in accordance with the relevant authority, the petitioners were statutorily required to report and allocate those portions of base salary and stock option compensation which were earned through personal services that Mr. Slangen performed in Ohio.

The returns that the petitioners filed included Ohio Form IT 2023 Income Allocation and Apportionment Nonresident Credit schedules that allocated their compensation for the periods in question. However, upon initial review, the Department could not verify the allocation methodologies used by the petitioners based on the evidence available at that time. During the administrative appeal period, the petitioner’s and their authorized representative submitted information sufficient to show that their compensation and income was reported and calculated in accordance with the relevant authority.

IV. CONCLUSION

For the reasons discussed above, the petitioners’ contentions are well taken.

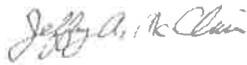
¹⁰ *Wardrop v. City of Middletown Income Tax Rev. Bd.*, C.P. No. CV 2006 07 2519, 2007 Ohio Misc. LEXIS 4556 (Ohio Aug. 30, 2007) at 10 – 12.

Accordingly, the assessments are cancelled.

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.

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

FINAL DETERMINATION

Date: **AUG - 5 2020**

Wayne & Teresa Stephens
6041 Luwista Ln.
Cincinnati, OH 45230

Re: Assessment No. 02201800923018
Individual Income Tax - 2016

This is the final determination of the Tax Commissioner with regard to the 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>
\$3,013.00	\$87.17	\$87.17	\$3,187.34

I. BACKGROUND

The Ohio Department of Taxation assessed the petitioners after making adjustments to their individual income tax return that they filed for the 2016 tax year. Specifically, the Department disallowed the petitioners' Ohio Schedule A, line 21 deduction for repayment of income reported in a prior year. The petitioners object to the assessment and requests an abatement of the penalties and interest amounts assessed. The petitioners did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

II. PETITIONERS' CONTENTION

The petitioners state that from 1998 to 2009 they paid approximately \$5,000 in Ohio income tax to the Department for income totaling \$107,375.00 which has since been discovered to be fraudulent and originating from a Ponzi scheme. The petitioners contend that they qualify for the Ohio Schedule A, line 21 deduction because they claimed an itemized deduction on their federal Schedule A, line 28 for Ordinary Loss Debt Instrument of \$69,000 which was further detailed on Form 4684, Casualties and Thefts. Second, the petitioners state they did not deduct this amount on any other line on their 2016 Ohio income tax return or any other year. Lastly, the petitioners contend that in the years that they received the income, the income did not qualify for either the resident or nonresident/part-year resident credit on their Ohio return.

III. AUTHORITY

The Ohio Schedule A deduction for repayment of income reported in a prior year is found in former R.C. 5747.01(A)(13), applicable for the period in question, which provided:

Deduct any portion of the deduction described in section 1341(a)(2) of the Internal Revenue Code, for repaying previously reported income received under a claim of right, that meets both of the following requirements:

- a) It is allowable for repayment of an item that was included in the taxpayer's adjusted gross income for a prior taxable year and did not qualify for a credit under division (A) or (B) of section 5747.05 of the Revised Code for that year;
- b) It does not otherwise reduce the taxpayer's adjusted gross income for the current or any other taxable year.

IRC section 1341(a)(2) provides a deduction for taxpayers who repay money that was included in gross income in a previous tax year because the taxpayer received the income under a claim of right. IRC section 1341(a)(2) states that “a deduction is allowable for the taxable year because it was established after the close of such prior taxable year (or years) that the taxpayer did not have an unrestricted right to such item or to a portion of such item[.]” To satisfy the requirements of IRC section 1341(a)(2), a deduction must arise because the taxpayer is under an obligation to restore the income. Section 1.1341-1(a)(1)-(2); *Alcoa, Inc. v. United States*, 509 F.3d 173, 179 (3d Cir. 2007); *Kappel v. United States*, 437 F.2d 1222, 1226 (3d Cir.), cert. denied, 404 U.S. 830 (1971). However, since a defrauded investor is not obligated to restore income, the investor is not entitled to the tax benefits of IRC section 1341 regarding the theft loss deduction. See Rev. Rul. 2009-9, 2009-14 I.R.B. 735, Issue 6, *Restoration of amount held under claim of right*.

Revenue Ruling 2009-9 and Revenue Procedure 2009-20 outline the deduction of theft losses available to victims of fraudulent investment arrangements or Ponzi schemes. Ruling 2009-9 addresses the tax treatment of theft losses and provides guidance when the safe harbor treatment is not utilized. Alternatively, Revenue Procedure 2009-20 provides an optional safe harbor treatment for taxpayers that experienced losses in certain investment arrangements discovered to be criminally fraudulent. Revenue Ruling 2009-9 states that a theft loss deduction from a Ponzi scheme is not a deemed repayment of Ponzi income that is eligible for IRC section 1341. Additionally, Revenue Procedure 2009-20, Section 6.02(3), requires taxpayers to agree to not apply the alternative computation in IRC section 1341 with respect to the theft loss deduction allowed by the safe harbor provisions. Accordingly, a taxpayer that attempts to claim an IRC section 1341 treatment for all or part of a theft loss deduction cannot use the safe harbor treatment in Revenue Procedure 2009-20.

IV. ANALYSIS

The petitioners contend that they have met all the criteria outlined under former R.C. 5747.01(A)(13) and are entitled to the Ohio Schedule A, line 21 deduction for repayment of income reported in a prior year. The petitioners have provided evidence that the amount in question was included in their adjusted gross income in prior years, the amount did not qualify for either the resident or nonresident/part-year resident credit on their Ohio return, and the amount hasn't been otherwise deducted in calculating the petitioners' Ohio adjusted gross income for the current or any other taxable year. However, the petitioners have not established that the fraudulent income was received under a claim of right pursuant to IRC section 1341.

As stated above, a theft loss deduction from a Ponzi scheme is not a deemed repayment of Ponzi income that is eligible for IRC section 1341 treatment. Rev. Rul. 2009-9. Thus, the petitioners' theft loss resulting from being the victim of Ponzi scheme does not give rise to an obligation to restore the amount of the theft. Additionally, since the petitioners made a safe harbor election on their federal return pursuant to Revenue Procedure 2009-20, the petitioner agreed to not apply the alternative computation pursuant to IRC section 1341 with respect to the theft loss deduction. As stated above, a taxpayer that attempts to claim an IRC section 1341 treatment for all or part of a theft loss deduction cannot use the safe harbor

treatment in Revenue Procedure 2009-20. Therefore, since the petitioners have failed to prove that they paid an amount for previously reported income under IRC section 1341(a)(2), they are not eligible for the Ohio Schedule A deduction for repayment of income reported in a prior year.

V. PENALTY ABATEMENT

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

VI. CONCLUSION

Ultimately, the petitioners have failed to demonstrate how the deduction they claimed on their 2016 Ohio Schedule A, line 21 meets the criteria outlined in former R.C. 5747.01(A)(13). Specifically, the petitioners have not established that they are repaying previously reported income received under a claim of right pursuant to IRC section 1341(a)(2). However, based on the facts and circumstances, the Commissioner shall abate the penalty related to this issue in full.

Accordingly, the assessment is adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$3,013.00	\$87.17	\$0.00	\$3,100.17

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

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

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


JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **AUG 19 2020**

Robert E. & Lisa A. Wagner
315 Dunes Blvd., Apt. 301
Naples, FL 34110

Re: Assessment No. 02201828951973
Individual Income Tax – 2017

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$3,572.00	\$70.07	\$140.14	\$3,782.21

The Ohio Department of Taxation assessed Robert and Lisa Wagner (hereinafter “the petitioners”) after making adjustments to the Ohio individual income tax return for the tax period in question. Specifically, the Department disallowed the nonresident credit claimed by the petitioners. The petitioners contend that since they were not domiciled in Ohio during the 2017 tax year, they should be entitled to a full nonresident for the tax period in question. The petitioners object to the denial of the nonresident credit but did not request a hearing. Therefore, this matter is decided upon the information available to the Tax Commissioner and the evidence supplied with the petition for reassessment.

In the present case, the petitioners were registered to vote in Florida, registered a vehicle in Florida, had an abode in Florida, and paid utility and homeowner association fees in Florida during the tax period in question. Based on the evidence now available to the Tax Commissioner, the petitioners’ contention is well taken.

Accordingly, the assessment is cancelled.

Current records indicate that a payment of \$3,782.21 has been applied to this assessment, leaving a refund of \$3,782.21 to the petitioner. This overpayment will be refunded to the petitioners. If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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

FINAL DETERMINATION

Date: **AUG 19 2020**

Michael L. & Rebecca R. Webber
310 Foliage Lane
Springboro, OH 45066

Re: Assessment No. 02201833857390
Individual Income Tax – 2015

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$382.23	\$37.57	\$75.14	\$494.94

The Ohio Department of Taxation assessed Michael and Rebecca Webber (hereinafter “the petitioners”) for incorrectly reporting their federal adjusted gross income (“FAGI”) on their 2015 individual income tax return. Information regarding the petitioners’ FAGI was reported to Ohio by the IRS under authorization of Section 6103(d) of the Internal Revenue Code. The petitioners subsequently filed an amended Ohio return to report their FAGI. The petitioners contend that, based on facts and figures reported on the amended return, they should be entitled to a refund for the tax period in question. The Department has been able to verify the accuracy of the petitioners’ amended return and the petitioners’ request is well taken. After verifying the petitioners’ amended return, the Department issued a refund of \$1,285.00 in March 2013. Department records reflect that the petitioners deposited the refund on or around April 4, 2019.

For the reasons above, the assessment is cancelled.

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

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

FINAL DETERMINATION

Date: AUG 19 2020

Cobra Pipeline Company, LLC
ATTN: Stephen Rigo, President
7001 Center Street
Mentor, OH 44060

Re: Case No. 17-00332
Public Utility Property Tax
Various Ohio Counties
Tax Year: 2016

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

In an email correspondence to the Department's hearing examiner dated August 12, 2020, the petitioner withdrew its petition for reassessment.

Accordingly, this matter is dismissed, and the assessment stands as issued.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND NOTICE WILL BE SENT PURSUANT TO R.C. 5711.31 TO THE APPROPRIATE COUNTY AUDITORS, WHO SHALL PROCEED IN ACCORDANCE WITH R.C. 5711.32(C).

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

JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date: **AUG 26 2020**

Emerald Bioenergy, LLC
c/o Renergy, Inc.
461 State Route 61
Marengo, OH 43334

Re: Case No. 16-01292
Public Utility Property Tax
Morrow County
Tax Year: 2015

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5727.47 concerning a public utility property tax assessment for tax year 2015.

The petitioner contends that the assessed amount overstated the value of its public utility property. Upon further review, this contention is well taken. The Tax Commissioner has reviewed the materials submitted by the petitioner during the administrative appeal period, as well as information in the file, including a solid waste energy conversion facility exemption granted for the petitioner, and has determined that the assessed value should be reduced.

The Tax Commissioner hereby adjusts the assessment at issue, as shown below.

Tax Year	Taxing District	Total Taxable Value as Originally Assessed	Total Taxable Value as Determined Herein
2015	59-0420	\$239,650	\$560

In all other respects, the assessment shall stand as issued.

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **AUG 26 2020**

Afzaal LLC
4 E. Scioto St.
Commercial Point, OH 43116

Re: Assessment No. 100000553222
Sales Tax
Account No. 65-015536

This is the final determination of the Tax Commissioner on a petition for reassessment filed 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>
\$130,699.21	\$9,620.49	\$65,349.52	\$205,669.22

The assessment is the result of an audit of the petitioner's sales from February 1, 2013 through December 31, 2015. A hearing was held on July 22, 2020.

The petitioner operates as a convenience store that offers taxable and exempt products for sale such as food, cigarettes, beer, wine, and other taxable items. The petitioner is required to maintain primary and secondary records of sales. R.C. 5739.11 and Ohio Adm.Code 5703-9-02. At the commencement of the audit, the petitioner did not provide z-tapes or other primary sales records for the period at issue. Audit Remarks, p. 5. Therefore, a mark-up analysis was conducted using inventory purchase information provided by the taxpayer and its suppliers. The Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. R.C. 5739.13. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

Assessments are presumptively valid. *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983); *Automotive Warehouse, Inc. v. Limbach*, BTA No. 87-D-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to show an error in the assessment. It should be noted at the outset that the petitioner does not allege an alternative amount of sales tax liability and has not submitted new evidence in support of their objections.

AUG 26 2020

Audit Methodology

A mark-up analysis was used to calculate taxable sales based upon a block sample period of January 1, 2014 through December 31, 2014. Inventory purchase invoices maintained by the petitioner were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period. Where complete inventory purchase records were not available, the information was obtained directly from the distributors. Audit Remarks, p. 8.

The auditor calculated the taxable sales of beer, wine, cigarettes, other tobacco, pop & soft drinks, energy drinks & other beverages, and taxable merchandise. The purchases allocated to each category were totaled and multiplied by the applicable mark-up percentage to calculate taxable sales for each inventory category. The remaining calculated taxable sales were then totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the petitioner for the entire sample period. The resulting taxable percentage of reported gross sales (88.0275%) was then applied to gross sales for each period of the audit to arrive at a calculated taxable sales figure for each reporting period. The appropriate tax rate was then applied to arrive at the sales tax liability. Since the taxpayer was registered to accept food stamps, the pop & soft drink and energy drink categories were reduced by 25 percent. The petitioner was given credit for sales tax paid with its sales tax returns. The unpaid tax liability was assessed.

Memorandum of Agreement

The proposed audit methodology was hand-delivered on July 19, 2016, along with a letter requesting that an alternative methodology be submitted within ten days if the petitioner disagreed with the proposal. Audit Remarks, p. 6. The petitioner did not sign the agreement or suggest an alternative methodology. The petitioner contends the lack of a signed agreement concerning the audit methodology voids the results of the audit. The Board of Tax Appeals has stated:

Criticisms as to the timing/length of the purchase markup, its application to a multi-year assessment period, and the estimates made ignore the fact that such efforts became necessary due to appellant's own failure to maintain complete and accurate records. When this occurred, the commissioner was not only entitled to, but was required to gather information from other sources and estimate the amount of taxes which should have been collected and remitted.

Dorsz v. Wilkins, BTA No. 2007-K-68, 2007 WL 2634238 (August 18, 2009). Vendors are required to maintain records of sales and records of tax collected on those sales. R.C. 5739.11. The Commissioner may make an assessment based on a sample audit if adequate records are not maintained. Ohio Adm.Code 5703-9-02(D). In doing so, the Commissioner is required to make a good faith effort to come to an agreement with the taxpayer concerning the sample period. R.C. 5739.13(A). The statute does not require an agreement to be reached. The Board of Tax Appeals has upheld mark-up assessments conducted without a signed memorandum of agreement. *Castle Gas & Deli LLC v. Testa*, BTA No. 2015-1477, 2016 WL 3577464 (June 29, 2016). The petitioner contends they maintained adequate records but has never submitted primary sales records despite requests from the auditor and hearing officer. The lack of primary sales records forced the auditor

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to rely on a mark-up sample audit of the petitioner's purchases. The auditor made a good faith effort to come to an agreement about the sample methodology with the petitioner. The auditor and petitioner agreed on a sample period of 2014 during a phone conversation on July 15, 2016. Audit Remarks, p. 6. The auditor also discussed mark-up percentages to be employed during the audit with the petitioner and several mark-up percentages were adjusted in the petitioner's favor after that conversation. *Id.* Those discussions show a good faith effort to come to an agreement with the petitioner concerning the audit methodology. The Commissioner has met the requirements to carry out a sample audit. A taxpayer cannot avoid liability based on a sample audit by simply not signing an agreement as to the methodology. Additionally, the petitioner has not submitted evidence demonstrating an alternative amount of liability or showing the sample period was inadequate. The objection is denied.

Mark-Up Methodology Application

The petitioner contends that the application of the mark-up analysis was flawed because it relies on improper inventory totals. The Commissioner may make an assessment based on any information in his possession. R.C. 5739.13(A). The Commissioner may rely on distributor information when the taxpayer's records appear incomplete as part of "any information."

The petitioner maintains that distributor information was improperly utilized because using it would lead to a higher liability. This contention is not well taken. The auditor notes in the Audit Workbook that the distributor purchase totals utilized are higher than the totals from the taxpayer's records in some instances. However, the auditor also notes that the distributor totals are higher because entire months are missing from the taxpayer's submitted records for several accounts. The higher distributor purchase totals were utilized because the taxpayer's records are incomplete. The auditor also utilized the petitioner's invoices to arrive at total purchases when the distributor did not provide information. The Department used the petitioner's incomplete records when distributor records were unavailable. The objection is denied.

Supporting Documentation

The petitioner contends that R.C. 5717.02 requires that the Commissioner provide all evidence that was considered by the Commissioner to the petitioner and that the petitioner did not receive such information. This section of the Ohio Revised Code applies to appeals from a final determination to the Board of Tax Appeals. This statute does not apply to the petition for reassessment process. The rest of the sentence quoted by the petitioner reads: "Upon the filing of a notice of appeal, the tax commissioner, county auditor, or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner, auditor, or director, together with all evidence considered by the commissioner, auditor, or director in connection with the proceedings." R.C. 5717.02(D). The statute requires all evidence considered by the Commissioner to be submitted to the Board of Tax Appeals when appealing a final determination, not on the issuance of an assessment. This argument is inapplicable to this situation. Additionally, the petitioner has been supplied with the complete audit file. The objection is denied.

Additionally, the petitioner contends the auditor failed to provide copies of the petitioner's returns and purchase records. A recap of returns relied upon by the auditor was contained in the audit file

transferred to the petitioner as marked "Recap of Vendor Returns" and the petitioner's purchase invoice figures used by the auditor are in the Audit Workbook contained in the audit file. In addition, the petitioner-signed "Receipt of Taxpayer Records" shows the petitioner's purchase invoices were returned on August 25, 2016. The petitioner did not point to any specific errors in the returns or purchases invoice data used by the auditor. The objection is denied.

Taxable Percentage of Gross Sales Application

The petitioner contends that the application of the taxable percentage of gross sales was flawed for several reasons. First, the petitioner contends that the taxable percentage of gross sales does not account for exempt and nontaxable sales. The methodology of calculating the taxable percentage of gross sales employed during the audit inherently accounts for exempt and nontaxable sales. The auditor calculated the estimated taxable sales for the sample period and divided that by the reported gross sales during the sample period. The resulting percentage is the taxable percentage of the gross sales reported by the taxpayer. The sales used to arrive at this percentage are taxable sales. Basing the taxable percentage of gross sales on estimated taxable sales in this manner means the resulting estimate, after applying the taxable percentage of gross sales to the reported gross sales, is comprised only of estimated taxable sales. The application of the taxable percentage of gross sales is the step of the audit process which accounts for exempt and nontaxable sales. The objection is denied.

Inventory Build Up

The petitioner contends that not all of the purchased inventory was sold during the sample period and that this fact should be accounted for in the calculation of the taxable percentage of gross sales. While the Tax Commissioner acknowledges that it is probably true that not all inventory purchased during the sample period was resold during the sample period, it is probably also true that goods already held in inventory were sold during the sample period. Therefore, it stands to reason that the method used in calculating the sales tax liability already incorporates any inventory buildup into the calculation. Moreover, the Board of Tax Appeals rejected a similar argument in *Markho, Inc., d/b/a One Stop Carry Out and One Stop Mini Mart v. Tracy*, BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999). The objection is denied.

Theft, Losses, and Employee Consumption

The petitioner contends the audit failed to take into consideration theft of inventory, losses, and employee consumption. The burden is on the petitioner to provide sufficient evidence to demonstrate a basis for adjusting the audit. The petitioner must do more than merely state a general conclusion. The petitioner alleges theft, loss, and employee consumption but does not provide evidence from the sample period to support this figure. In order to sufficiently demonstrate that the audit produced inaccurate results, the petitioner must present evidence that relates to the reliability of the sample period. See *Shaheen, Inc., dba Abe's Quick Shoppe v. Tracy*, BTA No. 96-M-1231, 1998 WL 127061 (Mar. 20, 1998). The petitioner has not met their burden. The objection is denied.

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Expired Inventory

The petitioner contends that some inventory was expired or damaged and not sold. The burden is on the petitioner to provide evidence sufficient to show error in the assessment. The petitioner merely makes the general assertion that spoilage and breakage occurred. The petitioner did not provide evidence to support this contention or allege any specific losses. The petitioner has not met their burden to provide evidence showing error in the assessment. The objection is denied.

Due Process

The petitioner contends that the time taken to issue a final determination is a violation of the petitioner’s constitutional right to due process. As an administrative agency, the Department of Taxation is not empowered to make decisions on constitutional claims and acts only as a receiver of evidence. The Commissioner is without statutory authority to grant equitable or constitutional claims. The objection is denied.

Interest

The petitioner contends that the interest should be removed from the assessment and that the Department has received an improper benefit from the accrual of interest. The imposition of interest on delinquent tax is mandated by the Ohio Revised Code. R.C. 5739.132(A). The Tax Commissioner is without jurisdiction to reduce the statutory interest promulgated by the General Assembly under R.C. 5739.132 and 5739.13(C).

The petitioner contends the interest must be waived because a written description of the audit was not provided. The Commissioner is required to provide a written description of the basis for the assessment with or before the issuance of an assessment. R.C. 5703.51(C). On August 25, 2016, the auditor hand-delivered the Letter of Confirmation detailing the preliminary audit results. Audit Remarks, p. 7. This document provided a description of the basis for the assessment. Along with this written description, the petitioner was provided with various documents showing more detailed figures involved in the assessment including the “Recap of Taxpayer’s Returns”, “Adjusted Gross Sales”, “Sample Period Adjusted Gross Sales”, “Inventory Purchase Details”, “Taxable % of Gross Sales Calculation”, “Tax Liability by Period”, “Comprehensive Transactions Detail Report”, “State and County Allocation Report”, “Pre-Assessment Interest Report”, “Audit Summary by Measure”, and “Summary for Recommending Assessment”. *Id.* The required written description of the basis for the assessment was provided to the petitioner. The objection is denied.

Penalty Abatement

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

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Therefore, the assessment is adjusted as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$130,699.21	\$9,620.49	\$0.00	\$140,319.70

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

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

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


JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date:

Centerburg Sunoco LLC
20 Johnsonville Road
Centerburg, OH 43011

AUG - 5 2020

RE: Assessment No.: 100000464517
Sales Tax
Account No. 42-021224

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$67,055.07	\$4,634.96	\$33,527.42	\$105,217.45

The petitioner operates as a gas station. This assessment is the result of a mark-up audit of the petitioner's sales from October 1, 2012 through December 31, 2015. A hearing was scheduled; however, no one appeared on behalf of the petitioner.

The evidence available indicates that the petitioner failed to keep complete and accurate records as required by R.C. 5739.11. Therefore, a mark-up analysis was conducted using the records supplied by the petitioner and the petitioner's suppliers. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, tobacco, pop & soft drinks, energy drinks, and taxable merchandise. The purchases for each category were totaled and then multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The calculated taxable sales were divided by the reported gross sales to determine the taxable percentage of reported sales. Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. See, *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

The petition for reassessment fails to raise a specific objection. The petition merely states that "we have additional documents to provide to your office, these documents will help lower our tax liability." The petitioner has a duty to be specific with its objection. *A.K.J., Inc. v. Wilkins*, BTA No. 2006-K-929, 2009 WL 5171713 (Dec 29, 2009). In addition, the petitioner failed to provide any documents or any evidence to support its position.

The assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-

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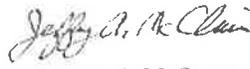
J-1508, 1999 WL 195629 (Apr. 5, 1999, citing, *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983); *Automotive Warehouse, Inc v. Limbach*, BTA No. 87-D-652, (Jan. 13, 1989). This places an affirmative duty upon the petitioner to raise specific objections and to provide sufficient evidence to prove its objections. The petitioner has failed to do that.

Accordingly, the assessment is affirmed as issued.

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

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-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
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: **AUG 26 2020**

Chaney, Larry G.
24255 Westwood Rd.
Westlake, OH 44145

RE: Assessment No.: 100001269461
Sales Tax
Account No.: 13-036120

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Additional Charge</u>	<u>Additional Charge Penalty</u>	<u>Penalty</u>	<u>Total</u>
\$9,549.36	\$149.03	\$954.94	\$334.23	\$3,342.28	\$14,329.84

On May 20, 2019, the petitioner was issued an assessment after the petitioner failed to timely file a sales tax return for the period of July 1, 2018 through December 31, 2018. A telephone hearing was requested but the petitioner waived the hearing via email on August 8, 2020.

Each vendor is required to file a return for the preceding month on or before the twenty-third day of each month as stated in R.C. 5739.12(A)(1). If the taxes shown to be due on the return are not submitted by the twenty-third day of each month, then taxes are not properly remitted in the manner prescribed by the Ohio Revised Code, which subjects the vendor to additional charges pursuant to R.C. 5739.12(D). Sales tax returns must be filed for each period even if no taxable sales are made. Additionally, the law does not distinguish between taxpayers who fail to remit taxes and those who simply remit the liabilities late. The petitioner filed the sales tax return showing zero sales on August 7, 2020. The petitioner seeks remission of the additional charge, additional charge penalty, and penalty. The evidence and circumstances support abatement. The request for abatement is granted.

Therefore, this matter 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



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

Department of
Taxation

FINAL DETERMINATION

Date: **AUG 19 2020**

Chatta Inc.
2991 Sullivant Ave.
Columbus, OH 43204

Re: Assessment No.: 100000920173
Sales Tax
Account No.: 25-314816
Audit Period: 07/01/2014 – 06/30/2017

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

<u>Tax</u>	<u>Pre-Assessment</u> <u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$33,324.86	\$2,378.28	\$16,662.18	\$52,365.32

The petitioner operates a convenience store in Columbus, Ohio. This assessment is the result of an audit of the petitioner's sales for the period shown above. A hearing was held.

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

Therefore, the assessment shall be modified as follows:

<u>Tax</u>	<u>Pre-Assessment</u> <u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$33,324.86	\$2,378.28	\$3,332.48	\$39,035.62

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

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

AUG 12 2020

Michael Council
1670 N. Dixie Highway
Fort Lauderdale, FL 33305

Re: Assessment No.: 100001356247
Sales Tax (Responsible Party)
RGB LLC
Vendor's License No.: 25-311975
Reporting Period: 07/01/2009 – 07/30/2012

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

<u>Tax</u>	<u>Pre-Assessment</u> <u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$155,000.00	\$64,270.49	\$35,000.00	\$254,270.49

This is a responsible party assessment. RGB LLC incurred sales tax liability resulting in an assessment for the period shown above. This assessment has not been satisfied by RGB LLC and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns and those in charge of the execution of fiscal responsibilities personally liable for the unpaid amount. Accordingly, the outstanding liability of RGB LLC has been derivatively assessed against Michael Council. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period shown above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was held on July 30, 2020.

The petitioner contends that he was not a responsible party during the period at issue. The petitioner contends that he was a minority-interest owner, owning only 4 percent of RGB LLC. The petitioner contends that he was simply a passive investor who was never employed by RGB LLC. The petitioner contends that he was not a signatory on any bank accounts, nor did he have any sort of fiscal responsibilities within RGB LLC. The petitioner contends that he was never an officer within the company or held any positions. The petitioner's contentions are well taken.

Accordingly, the assessment is cancelled.

This final determination is intended to bind the Tax Commissioner only in the absence of evidence supporting a finding of responsibility under R.C. 5747.07(G). Should additional evidence become available which contradicts the testimony presented by the petitioner or any

other information relied upon in the final determination, the petitioner may be subject to future reassessment.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO 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
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: **AUG 26 2020**

Mitchum Limited
2462 Old U.S. Hwy. 35 N.W.
Washington Court House, OH 43160

RE: Assessment No.: 100001328540
Sales Tax
Account No.: 24-013286

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

<u>Tax</u>	<u>Pre-Assessment</u>	<u>Penalty</u>	<u>Total</u>
\$78,886.49	<u>Interest</u> \$6,909.79	\$39,443.15	\$125,239.43

The petitioner operates as a bar and restaurant. This assessment is the result of a mark-up audit of the petitioner's sales from July 1, 2015 through December 31, 2018. The petitioner filed a petition for reassessment and seeks penalty abatement. A hearing was held on May 21, 2020.

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

Audit Methodology

The petitioner failed to maintain primary records as required by R.C. 5739.11. Accordingly, the Department sent a letter of agreement to the petitioner that specified the methodology of the audit. Adjustments were made to the methodology during the audit in an attempt to improve the accuracy of the mark-up calculations. Audit Remarks, p. 4. A sample period of January 1, 2017 through December 31, 2017 was used to calculate taxable sales using a mark-up analysis. It is agreed that the taxpayer's activity for this sample period is representative of the business activity for the entire period.

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Distributor inventory purchase summaries were the primary documents utilized to determine the total taxable inventory purchases for sale during the sample period. In instances where confirmation of the total amount of taxable inventory purchases could not be obtained from the distributor, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a comparable distributor used by the taxpayer. The mark-up percentages for all inventory categories were calculated as weighted averages of a representative sample of the most popular premium, standard, and economy products for each inventory category.

The mark-up percentages for each product were determined by calculating a weighted average of the product sales prices, subtracting the product cost per serving, and dividing the difference by the product cost per serving. No cash register receipts, or detailed sales records, were provided by the taxpayer. The taxpayer's sales prices for bottled beer, canned beer, draft beer, mixed drinks, and wine were derived from price lists provided by the owner. The fluid ounce serving size of poured single-serving liquor drinks was determined to be 1.50 ounces per serving, derived from information provided by the owner. Since draft beer was sold by both the glass and the pitcher, multiple listings of the products were made using the predominant glass and pitcher serving sizes and sales prices. The product sales volume weights for those brands were divided among the glass and pitcher entries at the ratio 75% glass and 25% pitcher.

The inventory purchase summaries obtained directly from some of the taxpayer's beer distributors did not delineate the amount of inventory purchases allocable to draft kegs versus bottles and cans. Therefore, a blended mark-up rate was calculated for the beer purchases from these distributors. The blended rate was calculated by weighing the purchases of canned, bottled, and draft beer from all other distributors for the period of January 1, 2017 through December 31, 2017.

Due to the absence of any records documenting inventory sales or pricing structures, it was not possible to determine whether the taxpayer utilized different mark-up percentages for liquor sales involving one serving of liquor, defined as a mixed drink, and multiple servings of liquor, defined as a cocktail. Therefore, all liquor purchases were marked up as mixed drinks. The cost per serving for a mixed drink consisted of the calculated cost of one serving of liquor only. Mixers, such as pop, juice, garnishes, and other non-alcoholic drinks, were not factored into the cost per serving. In return, these mixers were not listed as taxable inventory purchases to which the resulting weighted mark-up percentages were applied when calculating the taxpayer's taxable sales.

All purchases of liquor, beer, and other alcoholic beverage products during the sample period were listed by categories. The taxable sales for each category were determined by marking up the categorical inventory purchase totals by multiplying them by one plus the applicable calculated weighted mark-up percent. The calculated taxable sales for the audit sample period for the categories of draft beer, blended rate beer, blended rate liquor, and wine were reduced to account for potential losses of inventory due to spillage and over-pours. Due to a lack of inventory controls on behalf of the taxpayer, as well as the inconsistent nature of these inventory losses, the exact percentage of inventory losses could not be determined. Therefore, based upon industry

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averages and prior audit history, the calculated taxable sales for the affected categories were reduced by set spillage and over-pour allowance percentages.

The petitioner did not maintain detailed records supporting its taxable food sales; therefore, total food sales made during the audit sample period were determined by projecting guest check food sales from the period of April 17, 2019 through May 2, 2019.

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

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

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

General Objections

The petitioner contends that the Supreme Court of Ohio has held that audits "must be conducted under conditions under which the business was operated during the audit period." *Burger Chef Sys., Inc. v. Lindley*, 1st Dist. No. C-810137, 1982 WL 4643 at *3 (Feb. 17, 1982) citing *Servomation Corp. v. Kosydar*, 46 Ohio St.2d 67, 346 N.E.2d 290 (Apr. 28, 1976). The petitioner contends that the First District Court of Appeals held that the Department's "failure to adjust price changes, menu additions, and facility changes occurring during the audit period, where the Tax Commissioner admittedly knew of them and expert testimony revealed methods for such adjustments, renders the test check unrepresentative." *Burger Chef Sys., Inc.* at *3.

The petitioner further contends that the Supreme Court of Ohio made it clear that "a decision of the Board of Tax Appeals affirming a sales tax assessment of the Tax Commissioner is unreasonable and unlawful where the Tax Commissioner disregarded the vendor's books and records, and determined the amount of such assessment by a partial audit and computations resulting from the application of a so-called 'usual accepted mark-up' to the costs of the vendor's purchases and of the 'usual percentages employed for exempted articles sold and food consumed off the premises,' without evidence supporting the validity or correctness of such mark-up or percentages." *Bloch v. Glander*, 151 Ohio St. 381, 86 N.E.2d 318 (May 11, 1949).

The petitioner cited to *Burger Chef* and *Bloch* to support its contention that the Department erred during the audit by not utilizing the records that the petitioner provided. However, *Burger Chef* is distinguishable from the case at hand in many ways. In *Burger Chef*, the Department had actual knowledge that the data it was relying on might not be entirely representative of the whole audit period. *Burger Chef* at *3. The court noted that R.C. 5739.10 requires that test checks of a vendor's business be for a representative period. *Id.* The court then determined that the record indicated that price increases and product additions were affected during and after the audit, menu price changes resulted in changes in the effective tax rate, and menu additions of salad bars and rancher platters affected the balance of on-site consumption to off-site consumption. *Id.* at *2. However, no adjustment reflecting such changes was applied to the test period. *Id.* Therefore, the court found that "failing to adjust for the variances in appellant's operation is unreasonable and renders the test check performed by the Tax Commissioner unrepresentative of the audit period." *Id.*

Here, the petitioner failed to submit evidence that shows price changes or menu additions were not accounted for during the audit period. The petitioner was asked to track sales data for a two-week period to augment the incomplete records provided by the petitioner, to assist the auditor's determination of accurate mark-up percentages, and to determine the ratio of dine-in versus carryout orders. Audit Remarks, p. 8. However, the petitioner failed to retain all of the requested data during the test check. The records provided to the auditor from the test check failed to show individual item prices and, at times, failed to show check totals. *Id.* The petitioner failed to submit any additional evidence that illustrates that the sample period was not representative of the audit period.

The petitioner also alleges that the Department disregarded the petitioner's books and records to instead conduct a mark-up analysis, in violation of *Bloch*. The court in *Bloch* found that there was no evidence offered to substantiate the Department's inference that the books offered by the taxpayer were fraudulent, and therefore, the Department erred by not utilizing them as the sources of information during the audit. *Bloch v. Glander*, 151 Ohio St. at 388, 86 N.E.2d 318.

Unlike in *Bloch*, the records provided by the petitioner were reviewed and determined to be incomplete and inadequate. All of the records that were submitted by the petitioner have been reviewed. Since *Bloch* was decided, the Board of Tax Appeals has repeatedly approved the use of mark-up audits to determine tax liability when incomplete records were kept by the taxpayer. See *Lindsey Enterprises*, BTA No. 95-K-1209, 1996 WL 283944, at *4. Therefore, these contentions are denied.

The Petitioner's Records

The petitioner objects to many aspects of the audit methodology, including the fact that the Department failed to use the petitioner's actual records in performing the audit. In addition, the petitioner contends that the Department erred by not using its distributors' actual records instead of using the block sample to determine the ratio of taxable versus non-taxable sales during the audit period. These contentions are not persuasive. R.C. 5739.11 requires vendors to keep complete and accurate records of sales, as well as records regarding the tax collected on the

sales. The petitioner provided incomplete records, so the Department was not able to rely solely on those records while conducting the audit. Audit Remarks, p. 3. In addition, the record shows that, in 2016, the petitioner purchased \$39,474.88 more alcohol than its total reported taxable sales. Audit Remarks, p. 4. The record shows that, again in 2017, the petitioner purchased \$41,227.24 more alcohol than its total reported taxable sales. *Id.* That is proof that the actual taxable sales of alcohol were not properly reflected and included in the petitioner's reported sales during the audit period. That evidence, in addition to the petitioner's failure to keep all required records, required the Department to use a sample period to determine taxable versus non-taxable sales, rather than relying solely on the petitioner's incomplete records.

Mark-up Methodology

The petitioner contends that the mark-up percentages were not reflective of the petitioner's actual prices, thereby grossly inflating the assessment. The petitioner also contends that the Department calculated the total final weighted mark-up percentages by using the total amount due after sales tax had already been applied to the price. The petitioner contends that the Department multiplied the taxable percentage of adjusted gross sales against the petitioner's gross sales, not adjusted gross sales, which inflated the amount of tax owed. The petitioner contends that the Department erred in creating a weighted average of canned and bottled beer sales, because there is no evidence that the actual taxable sales of these items were not properly reflected on, and included in, the petitioner's actual sales during the audit period. Finally, the petitioner contends that the Department erred in using inventory mark-up procedures, as those procedures are not reflective of the sales that were actually subject to tax during the audit period.

The petitioner has provided no evidence that the sample period is not representative of the audit period or that the audit methodology did not capture the sales tax liability for the audit period. The petitioner was provided an opportunity to suggest an alternative audit methodology and failed to do so. The petitioner has failed to provide any evidence that the inventory mark-up procedures were not reflective of its actual sales. The petitioner provided no evidence to prove its contention that the Department calculated the total final weighted mark-up percentages by using the total amount due after sales tax had already been applied to the price. The request to adjust the assessment based upon these arguments is denied.

Shrinkage & Theft

The petitioner contends that it did not receive proper credits for shrinkage, over-pours, employee theft, and employee waste during the audit. The petitioner contends that the sample period was not representative of its actual sales during the audit period. These contentions are not well taken. The Department did provide credits to the petitioner for the potential spillage and over-pours. Audit Remarks, p. 10. The petitioner did not provide any evidence to show the actual amount of spillage or over-pours to show error in the amount of credit provided. The petitioner provided no evidence of employee theft, and therefore, no credit was provided for theft. A generalized description of losses incurred from theft and spoilage does not meet the appellant's burden to prove error in an assessment. *24 Hours, Inc. v. Tracy*, BTA No. 97-M-1389, 1999 WL 349220 (May 21, 1999). The loss must be quantifiable from the evidence presented by the

petitioner. *R & K Entertainment, Inc. v. Zaino*, BTA No. 2003-B-103, 2004 WL 1631689 (July 16, 2004) at *5.

Taxable Percentage of Gross Sales Calculation

The petitioner contends that the Department's calculations of the taxable percentage of gross sales were overstated. The petitioner contends that it never agreed to the mark-up percentages used. The petitioner contends that the Department erred in using a standard serving size of 1.5 ounces for liquor. The petitioner contends that it serves double shots and mixed drinks, which the Department did not accurately capture during the audit. The petitioner believes that the failure to use these accurate measures caused the Department's mark-up percentages for liquor to be grossly overstated, meaning that they were not reflective of the petitioner's actual sales. The petitioner next contends that the Department errantly added an additional 100 percent to each mark-up percentage. The petitioner contends that the Department failed to include the petitioner's daily specials, happy hour pricing, and liquor specials in its calculations, which account for 25 percent of the petitioner's sales. The petitioner contends that the Department failed to account for its wholesale beer pricing, which is discounted from the regular price. Finally, the petitioner contends that the Department erred by using the total amount for each drink as the foundation for calculating the mark-up percentages because those prices already included sales tax, and therefore, this increased the price of all items by at least another 7.5 percent.

During the course of the audit, the auditor made multiple attempts to obtain additional records from the petitioner. The auditor was initially provided with four boxes of taxpayer records containing purchase information, credit card receipts, and bank statements, among other documents. Audit Remarks, p. 7. At this time, the auditor requested that the petitioner keep accurate sales records and z-tapes for a 2-week period in order to increase the accuracy of the audit results. *Id.* The petitioner provided the auditor with z-tapes and guest checks as requested. However, the z-tapes that the petitioner provided to the auditor for that period did not contain all of the requested information. Audit Remarks, p. 8. The guest checks specified if each order was dine-in or take-out, and contained information on food items purchased, without item prices, as well as alcoholic beverage prices, without item descriptions. *Id.* Only a few guest checks contained check totals, so the auditor used the petitioner's menu to determine the food totals for each check. *Id.* The audit remarks note that liquor is sold in single servings and multiple serving drinks and states the serving size of liquor to be 1.5 ounces. Audit Remarks, p. 7. The petitioner failed to supply additional evidence in support of its contentions. As such, the petitioner has failed to meet its burden to prove error in the assessment, and these contentions are denied.

Penalty

The petitioner contends that the Department erroneously imposed a penalty on it and seeks abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax required under R.C. Chapter 5739. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner.

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Jennings & Churella Constr. Co. v. Lindley, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The surrounding facts and circumstances do not warrant an abatement of the penalty.

Accordingly, the assessment is affirmed as issued.

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

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

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


JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

Department of
Taxation

FINAL DETERMINATION

Date: AUG 19 2020

Paraj Inc.
501 Vienna Ave.
Niles, OH 44446

RE: Assessment No.: 100001430332
Sales Tax
Account No.: 78-802066

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$46,237.16	\$3,179.64	\$23,118.45	\$72,535.25

The petitioner operates a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from January 11, 2017 through March 31, 2019. The petitioner filed a petition for reassessment seeking penalty abatement. A hearing was deemed unnecessary.

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

Accordingly, the assessment is amended as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$46,237.16	\$3,179.64	\$0.00	\$49,416.80

Current records indicate that payments have been made in full satisfaction of the assessment.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (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
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: **AUG 31 2020**

Rasier, LLC
Attn: Brian Kuntz
1455 Market St. Fl. 4
San Francisco, CA 94103-1355

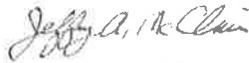
Re: Ohio Tax Account #: 92200136
Tax Type: Sales
Assessment #: 100001252868
Reporting Period: 01/01/2012-08/31/2019

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2020-42, dated August 20, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

Accordingly, the matter has been resolved and payment has been made in full satisfaction of the liability for the periods listed.

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

FINAL DETERMINATION

Date: **AUG 26 2020**

RBL, Inc.
d.b.a. Aces Grille
12220 Catalpa Dr.
Chardon, OH 44024

RE: Assessment No.: 100001484679
Sales Tax
Account No.: 47-076700

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$190,277.06	\$25,616.28	\$95,138.40	\$311,031.74

The petitioner operates as a bar and restaurant. This assessment is the result of an audit of the petitioner's sales for the period from January 1, 2015 to January 31, 2018. The petitioner filed a petition for reassessment with multiple contentions, including a request for penalty abatement. A hearing was held on Wednesday, August 5, 2020. The petitioner's objections are addressed below.

Audit Methodology

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).

A mark-up analysis was conducted using the petitioner's inventory purchases or summaries obtained directly from the petitioner's distributors, as the petitioner failed to maintain primary sales records as required by R.C. 5739.11. Audit Remarks, p. 14. Utilizing these records, the auditor calculated the taxable beer – bottle and can, beer – draft, liquor, mixed beverages – bottle and can, and wine. The purchases for each category were totaled and then multiplied by the applicable mark-up percentage to determine the categorical sales totals for the sample period. Invoice dates were used to determine which inventory purchase transactions occurred within the

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sample period of January 1, 2017 through December 31, 2017. The amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a comparable distributor. The auditor allowed a percentage reduction of beer – draft and liquor to account for spillage and over-pours. The categorical sales totals for the sample period were reduced by the percentages for these categories to calculate the categorical taxable sales.

The markup percentages for all inventory categories were calculated as weighted averages of a representative sample of the most popular premium, standard, and economy products for each inventory category. The markup percentages for each product were determined by calculating a weighted average of the product sales prices, subtracting the product cost per serving, and dividing the difference by the product cost per serving. The weighted average sales prices accounted for different pricing structures such as happy hour. The petitioner's sales prices were derived from its drink price list. The weights for various sales prices were based upon an analysis of the petitioner's detailed sales records for the sample period. Serving sizes, including the fluid ounce serving sizes of poured alcoholic drinks, were derived from the Bar and Restaurant Product Workpaper completed by the petitioner. Individual product mark-up percentages were weighted based upon product sales volume, which were determined from an analysis of the total dollar cost of product inventory purchased for the period of January 1, 2017 through December 31, 2017. In instances where the petitioner lacked documentation to calculate customized weighted markup percentages, the markup percentages were derived from a prior audit of a comparable business.

The petitioner utilized different pricing structures and different mark-up percentages for liquor sales involving one serving of liquor – defined as a "Mixed Drink." Separate weighted markup percentages were calculated to account for the cost per serving of the liquor used. Non-alcoholic mixers were not factored into the cost per serving and were not listed as taxable inventory or sales in the audit. The weighted markup percentage was calculated by subtracting the cost per serving from the weighted average price of all products purchased during the sample period and dividing the difference by the cost per serving.

The markup percentage for the beer – draft category was determined by using the standard pint size of 16 ounces. The cost per serving was determined by dividing the purchase cost by the number of ounces per bottle then multiplying the number of ounces per serving. The procedure to determine the final weighted markup for the beer – draft category was the same procedure used to determine the weighted markup for the categories of liquor and beer – bottle and can. Audit Remarks, p. 9.

The petitioner also did not maintain detailed records supporting its taxable food sales. The food sales made during January 1, 2017 through December 31, 2017 were classified as ninety percent taxable sales and ten percent of food sales determined as to-go exempt food sales. The calculated taxable food sales made during the sample period were added to the calculated taxable sales for sample period.

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The calculated taxable sales for the audit sample period from all categories were totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the taxpayer for the entire audit sample period to determine the taxable percentage of gross sales (115.97 percent). The reported gross sales for each month of the audit period were multiplied by that percentage to determine the calculated taxable sales. The calculated taxable sales for each month were multiplied by the applicable tax rate to determine the sales tax liability. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability.

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

Sales Tax Calculation

Happy Hour Pricing

The petitioner objects to this assessment and contends that the assessment was grossly inflated. The petitioner contends that happy hour pricing in the audit was inaccurate as the auditor only reduced the happy hour pricing by \$.50, rather than \$1.00 off regular pricing. The petitioner provided information regarding its happy hour pricing, happy hour times, and what percentage of happy hour accounted for total sales. However, there are discrepancies between the information provided in the petition for reassessment and the information provided by the petitioner during the audit. During the audit, the petitioner completed the Ohio Department of Taxation Liquor Permit Operations Questionnaire indicating a reduction of \$.50 for happy hour pricing and happy hours were from Monday through Friday from 3:00 p.m. to 7:00 p.m. Audit Remarks, p. 7. This is contrary to the information provided in support of the petition for reassessment which lists happy hour from 11:00 a.m. to 7:00 p.m., with a reduction of \$1.00 for happy hour. Petition for Reassessment, Exhibit II. Following the hearing, the petitioner was provided an opportunity to submit documentation to support the happy hour pricing discrepancy. The petitioner did not provide any evidence to establish an additional reduction for happy hour pricing.

The petitioner also contends that the percentage of happy hour sales was understated in the audit. The petitioner contends that the percentage of beverages sold at happy hour pricing accounts for 35 percent of total sales; however, the auditor only categorized happy hour sales as 10 percent of total sales. The petitioner attests that it did not have a point of sale system in place during the audit. Petition for Reassessment, p. 1. Since the petitioner did not have a point of sale system, the petitioner was unable to produce any sales information regarding sales for happy hour. Audit Remarks, p. 7. The auditor derived the percentage of sales from happy hour from the information provided by the petitioner in the Ohio Department of Taxation Liquor Permit Operations Questionnaire in which the petitioner listed four hours of happy hour for five days a week. *Id.* Based on this information, the auditor calculated that happy hour sales account for ten percent of

total sales. *Id.* This information is contrary to the hours of happy hour reported by the petitioner in its petition for reassessment.

Since there are discrepancies between the information provided in the petition for reassessment and the information provided by the petitioner during the audit and the petitioner did not maintain primary records, the Department cannot verify the information provided on appeal. The petitioner failed to provide sufficient evidence to establish happy hour sales. Accordingly, this objection is denied.

Total Taxable Sales

The petitioner contends that its total taxable sales for the period was \$1,487,283.77; therefore, the assessment should be reduced by \$146,219.59. The petitioner provided a revised taxable sales calculation that included its contentions for reduced happy hour pricing, lengthened hours for happy hour, and additional spillage allowances. However, the petitioner failed to provide primary records to support its calculations. Since the petitioner did not comply with its statutory duty under R.C. 5739.11 to maintain and provide complete and accurate primary records to calculate sales tax liability during the audit period, the Department sent a memorandum of agreement to the petitioner that specified the methodology of the audit. The agreement was provided to the petitioner with a ten-day correspondence requesting that if the petitioner disagreed with the audit methodology, an alternative methodology must be submitted in written form within ten days. The petitioner did not sign the memorandum of agreement or submit an alternate audit methodology within the ten-day period. The petitioner failed to timely provide evidence of an alternative calculation or dispute how the calculation was inaccurate. The petitioner also failed to provide any evidence that the mark-up percentages used were inaccurate. Accordingly, this objection is denied.

Shrinkage

The petitioner objects to the assessment and contends that employee theft significantly contributed to loss of inventory and sales. The petitioner also contends that the spillage allowance provided by the auditor was significantly lower than the industry average for shrinkage and spillage. The petitioner requests a reduction in spillage of five percent less than the industry standard for keg loss, over pouring, broken bottles, and spilling. The petitioner provided an industry report that sampled shrinkage in multiple bars and restaurants. The petitioner uses this report as support for its calculations. The petitioner also included a blog referencing waste levels for draft beer to support its contentions. However, these references do not support the petitioner's contentions as the petitioner failed to state what inventory the petitioner lost due to shrinkage. Additionally, the petitioner failed to meet its statutory duty of maintaining primary records under R.C. 5739.11. The petitioner has an affirmative duty to provide sufficient evidence to prove its objections. The petitioner has not put forth supporting documentation or evidence to prove its objections. The petitioner attests that it cannot prove its actual shrinkage due to poor internal controls.

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Following the hearing, the petitioner was provided an opportunity to submit documentation such as police reports and insurance claims regarding the employee theft. The petitioner submitted a letter stating that no police reports or insurance claims were filed. The petitioner submitted a Certificate of Judgment in favor of an affiliated entity against the affiliated entity's employee for theft. Since this case does not concern the petitioner, this matter lacks merit.

A generalized description of losses incurred from shrinkage does not meet the petitioner's burden. The petitioner has not provided any evidence to support this contention or demonstrate error in the assessment; therefore, the objection is denied.

Penalty

The evidence and circumstances support abatement of the penalty. Accordingly, the request for a penalty abatement is granted.

Therefore, the assessment is adjusted as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$190,277.06	\$25,616.28	\$0.00	\$215,893.34

Current records indicate that no payments have been made toward the assessment, leaving a balance due of \$215,893.34. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **AUG 19 2020**

Jane Savoie
1526 Red Pine Tr.
Wellington, FL 33414

Re: 8 Assessments
Sales Tax (Responsible Party)
Equisense, Inc.
Vendor's License No. 91-256794

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

<u>Assessment No.</u>	<u>Time Period</u>	<u>Total</u>
100000647557	7/1/12 – 12/31/12	\$1,512.53
100000647558	4/8/12 – 6/30/12	\$262.36
100000647559	7/1/13 – 12/31/13	\$1,504.56
100000647560	1/1/13 – 6/30/13	\$1,499.39
100000647561	7/1/14 – 12/31/14	\$3,625.22
100000647562	1/1/14 – 6/30/14	\$2,990.20
100000647563	1/1/15 – 6/30/15	\$4,181.87
100000647564	7/1/15 – 12/31/15	<u>\$4,840.54</u>
Total:		\$20,416.67

These are responsible party assessments. Equisense Inc. incurred sales tax liability resulting in multiple assessments. These assessments were never satisfied and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Equisense Inc. has been derivatively assessed against Jane Savoie. A hearing was held on July 14, 2020.

Responsible Party

The petitioner contends that she is not a responsible party and had no knowledge of her status as a responsible party. However, the evidence indicates that the petitioner was the president of the corporation. Mrs. Savoie's LinkedIn page indicates that she was previously employed by Equisense Inc. as the president. Further, she is listed as the corporation's president on the vendor's license application, which is dated March 12, 2012. The petitioner submitted a copy of a letter

resigning from the company, dated September 24, 2014, to support the contention that she is not a responsible party.

The petitioner contends that her signature was forged on a corporation account by the successor president and that she never had signature authority over corporation accounts. The petitioner provided no evidence to support these contentions. The vendor's license application was dated prior to the date of her letter of resignation.

During the hearing, the petitioner provided the name of another individual who she contends was the actual president and ran the day to day operations of the company. The petitioner contends that she lent her celebrity status in the equestrian world to the business but had no actual role in running the business. Additionally, the petitioner cites *Weiss v. Porterfield* in which the Supreme Court of Ohio held that "personal liability of officers of a corporation for failure of the corporation to file returns or pay Ohio sales tax, provided by R.C. 5739.33, is limited to those officers who have control or supervision of or are charged with the responsibility of filing returns and making payments." 27 Ohio St.2d 117, 271 N.E.2d 792 (1971). The petitioner also cited *Kihm v. Lindley*, which affirmed the decision in *Weiss v. Porterfield* because there was no proof that the petitioners in that case were responsible for filing tax returns. 70 Ohio St.2d 76, 434 N.E.2d 1354 (1982). However, those cases are distinguished from this case because the court found that the record was devoid of any evidence that either petitioner was responsible for filing returns. Here, there is significant evidence of the petitioner's role and her responsibility to the corporation. Further, the petitioner has provided no proof that she was not in control of the organization or had an arrangement with another individual to be the face of the organization while someone else managed the day to day operations.

Additionally, the Supreme Court of Ohio has subsequently held that "R.C. 5739.33 does not permit responsible officers or employees to escape liability by delegating those duties to others." *Spithogianis v. Limbach*, 53 Ohio St. 3d 55, 559 N.E.2d 449 (1990). Therefore, even though the petitioner contends that there was an arrangement whereby another party managed the day to day operations of the company, the facts indicate that she was legally the president and as such, had the authority to control the company finances. Sufficient evidence has not been presented supporting the contention that the petitioner is not a responsible party for each filing period. However, based on the date of the resignation letter submitted by the petitioner, all responsible party assessments after September 24, 2014 have been cancelled.

Therefore, assessment numbers 100000647557, 100000647558, 100000647559, 100000647560, and 100000647562 are affirmed as issued and assessment numbers 100000647561, 100000647563, and 100000647564 are cancelled.

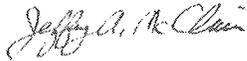
Any reduction or credit made to the underlying corporate assessments on appeal or in collection will be applied to the corresponding responsible party assessments. Proper credit for any payments will be given at the collection stage. **Any unpaid balance bears post-assessment interest as provided by 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.

0000000438

AUG 19 2020

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

FINAL DETERMINATION

Date: **AUG 19 2020**

Rhett Savoie
1526 Red Pine Tr.
Wellington, FL 33414

Re: 8 Assessments
Sales Tax (Responsible Party)
Equisense, Inc.
Vendor's License No. 91-256794

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

<u>Assessment No.</u>	<u>Time Period</u>	<u>Total</u>
100000647565	7/1/12 – 12/31/12	\$1,512.53
100000647566	4/8/12 – 6/30/12	\$262.36
100000647568	7/1/13 – 12/31/13	\$1,504.56
100000647570	1/1/13 – 6/30/13	\$1,499.39
100000647574	7/1/14 – 12/31/14	\$3,625.22
100000647576	1/1/14 – 6/30/14	\$2,990.20
100000647578	7/1/15 – 12/31/15	\$4,840.54
100000647579	1/1/15 – 6/30/15	<u>\$4,181.87</u>
Total:		\$20,416.67

These are responsible party assessments. Equisense Inc. incurred sales tax liability resulting in multiple assessments. These assessments were never satisfied and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Equisense Inc. has been derivatively assessed against Rhett Savoie. A hearing was held on July 14, 2020.

Responsible Party

The petitioner contends that he is not a responsible party and had no knowledge of his responsibility. However, the evidence indicates that the petitioner was the vice president of the corporation. He is listed as the corporation's vice president on the vendor's license application, which is dated March 12, 2012. The petitioner submitted a copy of a letter resigning from the company, dated September 26, 2014, to support the contention that he is not a responsible party.

During the hearing, the petitioner provided the name of another individual who he contends was the president and ran the day to day operations of the company. The petitioner contends that he

only became an officer because the organization needed a third officer and further stated that he had no actual role in running the business. Additionally, the petitioner cites *Weiss v. Porterfield* in which the Supreme Court of Ohio held that “personal liability of officers of a corporation for failure of the corporation to file returns or pay Ohio sales tax, provided by R.C. 5739.33, is limited to those officers who have control or supervision of or are charged with the responsibility of filing returns and making payments.” 27 Ohio St.2d 117, 271 N.E.2d 792 (1971). The petitioner also cited *Kihm v. Lindley*, which affirmed the decision in *Weiss v. Porterfield* because there was no proof that the petitioners in that case were responsible for filing tax returns. 70 Ohio St.2d 76, 434 N.E.2d 1354 (1982). However, those cases are distinguished from this case because the court found that the record was devoid of any evidence that either petitioner was responsible for filing returns. The petitioner has provided no proof that he was not in control of the organization or that he joined simply so that the company would have three officers.

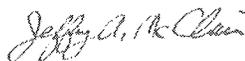
Additionally, the Supreme Court of Ohio has subsequently held that “R.C. 5739.33 does not permit responsible officers or employees to escape liability by delegating those duties to others.” *Spithogianis v. Limbach*, 53 Ohio St. 3d 55, 559 N.E.2d 449 (1990). Therefore, even though the petitioner contends that there was an arrangement whereby another party managed the day to day operations of the company, the facts indicate that he was legally the vice president and as such, had the authority to control the company finances. Sufficient evidence has not been presented supporting the contention that the petitioner is not a responsible party for each filing period. However, based on the date of the resignation letter submitted by the petitioner, all responsible party assessments after September 26, 2014 have been cancelled.

Therefore, assessment numbers 100000647565, 100000647566, 100000647568, 100000647570, and 100000647576 are affirmed as issued and assessment numbers 100000647574, 100000647578, and 100000647579 are cancelled.

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



Department of
Taxation

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

FINAL DETERMINATION

Date:

AUG 19 2020

Sealed Air Corporation
200 Riverfront Boulevard
Elmwood Park, NJ 07407-1037

RE: Assessment No.: 100000306155
Sales Tax
Account No. 99-009050

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

	<u>Amount</u>	<u>Penalty</u>	<u>Total</u>
Sales Tax	\$37,846.18	\$6,623.08	\$44,469.26
Additional Charge	\$1,892.31	\$662.31	\$2,554.62
Preassessment Interest	\$170.97	\$0.00	\$170.97
	Total-----		\$47,194.85
	Payments-----		(\$18,923.09)
	Balance Due-----		\$28,271.76

This estimated assessment was issued based upon the petitioner's failure to file the sales tax return for the period of August 2015. The petitioner maintains that the return and the payment was timely received. Therefore, the petitioner requests waiver of the interest and penalty. The petitioner provides sufficient evidence that the return was timely filed and paid. Thus, the objection is granted.

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

FINAL DETERMINATION

Date: AUG 19 2020

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

RE: Refund Claim No. 201805390
Refund Amount Requested: \$6,152.22
Refund Period: December 1, 2013 – December 31, 2013
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of \$6,152.22 in sales tax filed pursuant to R.C. 5739.07. The claim was initially partially approved in the amount of \$4,342.58. The claimant disagreed with the denial of the remaining amount and requested reconsideration of the matter. A hearing was not requested.

The claimant is an insurance company headquartered in Ohio. The claimant contracts with a vendor to print and mail the insurance policies that they sell to customers. They contend that sales tax was erroneously paid to this vendor on the service of printing, processing, and mailing of these insurance policies. The claimant contends that all the materials involved in this service are exempted from sales tax pursuant to R.C. 5739.02(B)(42)(c). Pursuant to R.C. 5739.02, all sales made in Ohio are subject to sales tax unless an exception or exemption applies. The tax does not apply to sales where the purpose of the purchaser is to resell, hold, use, or consume the thing transferred as evidence of a contract of insurance. R.C. 5739.02(B)(42)(c).

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). Pursuant to R.C. 5739.07 a claimant is allowed to request a refund of tax illegally or erroneously paid. The claimant submitted copies of the invoices to support the refund claim. The invoices contain charges for paper, printing, and envelopes. After reviewing these invoices, the Department of Taxation approved a refund for all charges associated with this service with the exception of the envelopes. The claimant's contention that the envelopes should also be exempted is not well received. R.C. 5739.02(B)(42)(c) provides an exemption for things transferred that are evidence of a contract of insurance. Here, the envelopes are not evidence of the insurance contract between the claimant and their customers. The envelopes are not exempt under the provided revised code because on their own, they cannot be used to prove that a contract exists. In other words, without the actual contract that is mailed inside of the envelopes, the envelope is meaningless. Additionally, the Supreme Court of Ohio has previously held that items that are separate from the actual policies and not sold or resold to anyone are not exempted as "evidence of a contract of insurance." *See Celina Mutual Ins. Co. v. Bowers*, 5 Ohio St.2d 12, 213 N.E.2d 175, 177 (1965). Envelopes are typically only used to send the contracts and documents but play no part in recording the contract. The claimant has not provided any information that would

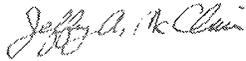
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AUG 19 2020

suggest that these envelopes are connected to the insurance policy. The paper used to print the contracts records the fact that a contract is in existence, but the envelopes have no such purpose. Therefore, they cannot be used as evidence of an insurance contract pursuant to R.C. 5739.02(B)(42)(c). The objection is denied.

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

AUG 19 2020

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

RE: Refund Claim No. 201805810
Refund Amount Requested: \$92,538.07
Refund Period: January 1, 2014 – December 31, 2014
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of \$92,538.07 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant submitted additional information and the claim was partially approved in the amount of \$65,677.53 with applicable interest. The claimant disagreed with the denied portion and requested reconsideration of the matter. A hearing was not requested.

The claimant is an insurance company headquartered in Ohio. The claimant contracts with a vendor to print and mail the insurance policies that they sell to customers. They contend that sales tax was erroneously paid to this vendor on the service of printing, processing, and mailing of these insurance policies. The claimant contends that all the materials involved in this service are exempted from sales tax pursuant to R.C. 5739.02(B)(42)(c). Pursuant to R.C. 5739.02, all sales made in Ohio are subject to sales tax unless an exception or exemption applies. The tax does not apply to sales where the purpose of the purchaser is to resell, hold, use, or consume the thing transferred as evidence of a contract of insurance. R.C. 5739.02(B)(42)(c).

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). Pursuant to R.C. 5739.07 a claimant is allowed to request a refund of tax illegally or erroneously paid. The claimant submitted copies of the invoices to support the refund claim. The invoices contain charges for paper, printing, and envelopes. After reviewing these invoices, the Department of Taxation approved a refund for all charges associated with this service with the exception of the envelopes. The claimant's contention that the envelopes should also be exempted is not well received. R.C. 5739.02(B)(42)(c) provides an exemption for things transferred that are evidence of a contract of insurance. Here, the envelopes are not evidence of the insurance contract between the claimant and their customers. The envelopes are not exempt under the provided revised code because on their own, they cannot be used to prove that a contract exists. In other words, without the actual contract that is mailed inside of the envelopes, the envelope is meaningless. Additionally, the Supreme Court of Ohio has previously held that items that are separate from the actual policies and not sold or resold to anyone are not exempted as "evidence of a contract of insurance." See *Celina Mutual Ins. Co. v. Bowers*, 5 Ohio St.2d 12, 213 N.E.2d 175, 177 (1965). Envelopes are typically only used to send the contracts and documents but

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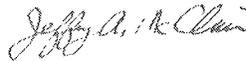
AUG 19 2020

play no part in recording the contract. The claimant has not provided any information that would suggest that these envelopes are connected to the insurance policy. The paper used to print the contracts records the fact that a contract is in existence, but the envelopes have no such purpose. Therefore, they cannot be used as evidence of an insurance contract pursuant to R.C. 5739.02(B)(42)(c). The objection is denied.

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

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL DETERMINATION

Date: **AUG 26 2020**

APC Workforce Solutions II, LLC
420 S. Orange Ave, Ste. 600
Orlando, FL 32801

Re: Assessment No. 100000433777
Sales Tax
Account No. 99-048202

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

The assessment was modified to \$325,000.00 in resolution of the matter.

Current records indicate that payments of \$325,000.00 have been made in full satisfaction of the assessment.

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

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

JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: AUG 26 2020

Sun Flower Chinese Restaurant, Inc.
7370 Sawmill Rd.
Columbus, OH 43235

RE: Assessment No.: 100001429399
Sales Tax
Account No.: 25-220439

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$269,685.74	\$38,216.84	\$134,842.58	\$442,745.16

The petitioner operates as a restaurant. This assessment is the result of an audit of the petitioner's sales from January 1, 2013 through April 30, 2019. The petitioner filed a petition for reassessment seeking penalty abatement. A hearing was held on August 4, 2020.

Audit Methodology

The taxpayer kept primary records as required by R.C. 5739.11. Audit Remarks, pp. 3-5. As a result, the auditor simply compared the tax liability amounts reported each month by the taxpayer on its UST-1 returns filed with the State, to the amount of tax collected that was shown on the taxpayer's point of sale system's monthly reports. *Id.* The auditor determined that the taxes collected by the taxpayer were greater than the taxes remitted to the State on the taxpayer's UST-1 returns. As a result, the taxpayer's tax liability was determined by simply subtracting the amount of money remitted to the State each month from the amount of money collected by the taxpayer each month. *Id.*

The petitioner makes several arguments regarding the audit methodology, including the inaccuracy of the mark-up percentages, the sample period used, and the Department's failure to allow for theft, over-pour, and happy hour pricing reductions. These contentions are not well taken.

The petitioner's arguments have no relevance to the audit methodology because a mark-up analysis was not conducted to calculate the liability. The auditor used the petitioner's actual records and the returns it filed with the State to determine any outstanding tax liability. Audit Remarks, pp. 3-5. Therefore, the petitioner's contentions are denied.

AUG 26 2020

Penalty

The petitioner seeks abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax required under R.C. Chapter 5739. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The petitioner consistently collected sales tax from its customers but failed to remit it to the State. Audit Remarks, pp. 4-5. Therefore, the surrounding facts and circumstances do not warrant abatement of the penalty.

Current records indicate that payments in the amount of \$21,500.00 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

AUG 19 2020

Superior Metal Products, Inc.
1005 W. Grand Ave.
Lima, OH 45801

RE: Refund Claim No. 20181328678
Refund Amount Requested: \$30,862.57
Refund Period: October 1, 2014 – December 31, 2017
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of \$30,862.57 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied in full. The claimant provided additional information after the denial and it was partially approved in the amount of \$15,912.33. The claimant disagreed with the denial of the remaining amount and requested reconsideration of the matter. A hearing was not requested.

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

Bushur Electric

The claimant requests a refund for sales tax paid on the purchase of services provided by Bushur Electric. The claimant stated that the transaction consists of electrical repairs to a building and is therefore exempt as a construction contract. A review of the invoice provided for this transaction indicates that the service provided was computer repairs. A computer is tangible personal property. Therefore, pursuant to R.C. 5739.01(B)(3)(a), repairs made would be a taxable transaction. While the claimant states that this particular transaction is exempt pursuant to a construction contract, the evidence provided does not support that contention. Therefore, the objection is denied.

Perry's Heating and Air Conditioning

The claimant requests a refund for sales tax paid on the purchase of preventative maintenance for a heating, ventilation, and air conditioning system. The invoice in question was listed twice in the claimant's requested refund transaction list. This transaction has previously been approved by the auditor. Therefore, an additional refund for the same transaction is not warranted. The objection is denied.

AUG 19 2020

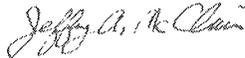
Resource One

The claimant requests a refund for sales tax paid on services provided by Resource One. Based on information submitted by the claimant, these transactions include two services, one of which they contend is tax exempt. The claimant contends that the service in question is pickup and disposal of hazardous waste and other miscellaneous waste items. In support of their position, the claimant cites R.C. 5739.01(B)(3) which enumerates a list of transactions that are considered a sale, and therefore taxable. The claimant also cites R.C. 5739.01(Y)(2) which defines personal and professional services. The claimant does not explicitly state how these two sections of the revised code support their position that the disposal of hazardous waste and other waste items are exempt. The claimant also submitted several invoices to support their claim for refund. These invoices do not sufficiently explain what service is being provided. Further, the claimant did not submit any evidence, such as a contract with the vendor, to corroborate that the service is what they contend. The claimant provided insufficient evidence to support the contention.

Therefore, the claimant's request for refund is denied.

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **AUG 12 2020**

Sweetheart Cafe Inc.
4921 Millhouse Dr.
Broadview Heights, OH 44147

RE: Assessment No.: 100001065627
Sales Tax
Account No.: 18-507642

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$92,599.45	\$10,883.66	\$46,299.66	\$149,782.77

The petitioner operates as a bar and restaurant. This assessment is the result of a mark-up audit of the petitioner's sales from January 1, 2014 through January 31, 2017. The petitioner filed a petition for reassessment objecting to the assessment. A hearing was held on July 22, 2020.

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

Audit Methodology

The petitioner failed to maintain primary records as required by R.C. 5739.11. Audit Remarks, pp. 5, 7-8. Accordingly, the Department sent a letter of agreement to the petitioner that specified the methodology of the audit. A sample period of January 1, 2015 through December 31, 2015 was used to calculate taxable sales using a mark-up analysis. It was agreed that the taxpayer's activity for this sample period is representative of the business activity for the entire audit period. *Id.* at pp. 6-7.

Inventory purchase invoices maintained by the taxpayer and inventory purchase summaries obtained directly from the taxpayer's distributors were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. In the instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon other records such as summaries maintained by the taxpayer or obtained directly from the taxpayer's distributors.

In instances where confirmation of the total amount of taxable inventory purchases could not be obtained from either the taxpayer or the distributor, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a comparable distributor. The mark-up percentages for all inventory categories were calculated as weighted averages of a representative sample of the most popular premium, standard, and economy products for each inventory category. The mark-up percentages for each product were determined by calculating a weighted average of the product sales prices, subtracting the product cost per serving, and dividing the difference by the product cost per serving.

The taxpayer's sales prices were derived from its drink price list. The weights for the various sales prices were determined based upon an analysis of the taxpayer's sales records for the period of January 1, 2015 through December 31, 2015. Serving sizes, including the fluid ounce serving sizes of poured alcoholic drinks, were derived from the Bar and Restaurant Workpapers completed with the assistance of the taxpayer. Resulting individual product mark-up percentages were weighted based upon product sales volume, which was determined from an analysis of the total dollar cost of product inventory purchased, which was derived from inventory vendor purchase invoices for the period January 1, 2015 through December 31, 2015. If adequate records or information were not available to calculate customized weighted mark-up percentages, the mark-up percentages were derived from a prior audit of a comparable business.

The taxpayer utilized different pricing structures and consequentially different mark-up percentages for liquor sales involving one serving of liquor – defined as a “mixed drink.” Separate weighted mark-up percentages were calculated for “liquor single – mixed drink” sales. The cost per serving for “liquor single – mixed drink” consisted of the calculated cost of one serving of liquor only. “Mixers” such as pop, juice, other non-alcoholic drinks, and garnishes were not factored into the cost per serving. In return, these mixers were not listed as taxable inventory purchases to which the resulting mark-up percentages were applied when calculating the taxpayer's taxable sales. The weights were based upon an analysis of a representative sample of detailed sales records for the period of January 1, 2015 through December 31, 2015.

All purchases of liquor, beer, and other alcoholic beverage products during the sample period were listed by categories. The taxable sales for each category were determined by marking up the categorical inventory purchase totals by multiplying them by one plus the applicable calculated weighted mark-up percent. The calculated taxable sales for the audit sample period for the categories of liquor and wine were reduced to account for potential losses of inventory due to spillage and over-pours. Due to a lack of inventory controls on behalf of the taxpayer, as well as the inconsistent nature of these inventory losses, the exact percentage of inventory losses could

not be determined. Therefore, based upon industry averages and prior audit history, the calculated taxable sales for the affected categories were reduced by set spillage and over-pour allowance percentages.

The petitioner did not maintain detailed records supporting its taxable food sales. Letter of Agreement, p. 2. Therefore, taxable food sales were calculated at 50% of total reported gross sales for the audit sample period of January 1, 2015 through December 31, 2015. This amount was then added to the calculated taxable sales for the audit sample period.

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

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

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

Record Keeping

The petitioner contends that the Department failed to consider the petitioner's proper, consistent, and accurate method of determining taxable sales for the audit period. The petitioner contends that it used a subtraction method to determine the total sales each day. Petition for Reassessment, p. 2. Instead of creating sales receipts, the petitioner contends that it simply took the total amount of cash in the register at the end of the day and subtracted from it the amount of cash that was in the register at the beginning of the day to determine the total amount of sales for that day. *Id.* The petitioner then recorded that daily sales total in a ledger. *Id.* The petitioner contends that the Cleveland Police confiscated some of its records during a raid in August 2017, while the rest of its records were destroyed in a flood that occurred the following winter. *Id.* R.C. 5739.11 states that "each vendor shall keep complete and accurate records of sales, together with a record of the tax collected on the sales, which shall be the amount due under sections 5739.01 to 5739.31 of the Revised Code, and shall keep all invoices, bills of lading, and other such pertinent documents." The petitioner provided the search warrant inventory list created by Cleveland Police during the raid. Meyers Roman Fax, pp. 54-56. The list states that the police seized paperwork, bar tabs for 2017, and receipts for 2017. *Id.* However, the petitioner has since stated that the registers used during the audit period were old and did not have sales tapes or any

mechanism to record sales. Petition for Reassessment, p. 2. Even though the inventory list shows that the police seized some sort of 2017 receipts, the petitioner already admitted that it failed to keep complete and accurate records of sales and invoices as required by R.C. 5739.11. The petitioner has provided no evidence that the records used by the Department during the audit were inaccurate. Therefore, these contentions are denied.

Mark-Up Percentages

The petitioner contends that the Department's mark-up percentages overstated the prices it charged. The petitioner contends that while determining the petitioner's actual sale price per drink, the auditor failed to consider that the petitioner operated in an economically depressed area, where the vast majority of residents are at, or near, poverty. Petition for Reassessment, p. 3. The petitioner contends that, given the demographic of its clientele, it is extremely unlikely that the clientele could afford such mark-up percentages. *Id.*; See Letter of Agreement, p. 2. The petitioner stated that seventy-six percent of the local population lives in or near poverty, with a median household annual income of \$17,964. *Id.* The petitioner failed to provide any specific evidence to substantiate its contentions. The petitioner failed to show any inaccuracies in the mark-up percentage calculations. Therefore, these contentions are denied.

Employee Theft

The petitioner contends that the Department erred by not allowing a credit for employee theft during the audit period. However, the petitioner provided no evidence of employee theft, and therefore, no credits were provided for theft. A generalized description of losses incurred from theft and spoilage does not meet the appellant's burden to prove error in an assessment. *24 Hours, Inc. v. Tracy*, BTA No. 97-M-1389, 1999 WL 349220 (May 21, 1999). The loss must be quantifiable from the evidence presented by the petitioner. *R & K Entertainment, Inc. v. Zaino*, BTA No. 2003-B-103, 2004 WL 1631689 (July 16, 2004) at *5. Therefore, this contention is denied.

Liquor Serving Size

The petitioner contends that the average pour per liquor drink is 3 ounces, not 1.5 ounces as stated in the audit remarks. See Audit Remarks, p. 10. The petitioner has provided no evidence to substantiate this claim. Therefore, this contention is denied.

Food Sales

The petitioner contends that the amount of food sales calculated by the Department was arbitrary and capricious. The petitioner contends that there is no support for the Department's determination, and there is no basis to determine that the petitioner failed to report the proper amount of food sales. Petition for Reassessment, p. 3. The petitioner contends that food sales were accounted for using the petitioner's above-described method of accounting. *Id.* The petitioner further contends that the Department did not attempt to develop any analysis of food purchases made by the petitioner. *Id.* The Tax Commissioner is statutorily authorized to utilize

any information at his disposal that would reasonably estimate the taxpayer's sales. R.C. 5739.13. The petitioner submitted no proof in support of its contentions that the percentage of gross sales allocated to food sales is inaccurate. Therefore, the petitioner has failed to meet its burden, and these contentions are denied.

Penalty

The petitioner seeks abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax required under R.C. Chapter 5739. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The surrounding facts and circumstances warrant a partial abatement of the penalty.

Accordingly, the assessment is amended as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$92,599.45	\$10,883.66	\$23,149.74	\$126,632.85

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

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL DETERMINATION

Date: **AUG 26 2020**

T-Mobile Central LLC
12920 S.E. 38th St.
Newport 5, 7th Fl.
Bellevue, WA 98006

RE: Assessment No.: 100000916559
Sales Tax
Account No.: 89-038107

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

<u>Tax</u>	<u>Pre-Assessment</u> <u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$17,837,002.95	\$2,352,986.07	\$0.00	\$20,189,989.02

The petitioner operates as a mobile telecommunications and internet services provider. This assessment is the result of an audit of the petitioner's sales from May 1, 2012 through June 30, 2015. The petitioner objected to the assessment as issued. The petitioner requested a hearing but waived their request in an email dated July 28, 2020.

The petitioner requested that the Department perform a re-audit and submitted additional documentation. The Department granted the request for a re-audit. The petitioner agreed with the result of the re-audit.

Accordingly, the assessment is amended as follows:

<u>Tax</u>	<u>Pre-Assessment</u> <u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$464,333.93	\$61,465.25	\$0.00	\$525,799.18

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

AUG 26 2020

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
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Office of the Tax Commissioner
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FINAL DETERMINATION

Date: **AUG 31 2020**

Trident Restaurants LLC
3690 Main St.
Hilliard, OH 43026

RE: Refund Claim No: 201902687
Refund Period: 05/01/2018 – 05/31/2018
Sales Tax
Account No.: 25-324797

This is the final determination of the Tax Commissioner on an application for refund, in the amount of \$624.74, of sales tax filed pursuant to R.C. 5739.07. The Department contacted the claimant on February 5, 2019 about a potential unrequested overpayment that existed in the Department's records. The claimant filed its response to the overpayment notification on February 19, 2019 but submitted no records to substantiate the refund amount. The Department issued a denial letter on May 23, 2019, to which the claimant responded with a printout of its Ohio Business Gateway Account.

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

In order for a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid. The claimant must first show that tax was remitted to the State of Ohio. Ohio Adm.Code 5703-9-07(A)(3). If the claim is due to an amended return, proof must be provided of the original and amended figures for the periods claimed on the refund application. The proof may consist of sales journals, cash register receipts, summary reports or any other document used to prepare the tax return. Ohio Adm.Code 5703-9-07(A)(3)(e).

The request for a refund was denied due to a lack of evidence submitted. The claimant failed to submit any of the required records that were used by the claimant to determine its original amended sales tax liabilities. Instead, the claimant simply provided a screen printout from its Ohio Business Gateway account. The Department informed the claimant that this type of record was insufficient proof of its amended figures. *See* Initial Denial Letter, dated May 23, 2019.

Therefore, the claimant has failed to prove it is entitled to a refund for sales tax paid erroneously to the state.

Accordingly, the claim for a refund is denied.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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**FINAL
DETERMINATION**

Date:

AUG 31 2020

Uber Technologies, Inc.
555 Market Street
San Francisco, CA 94103

Re: Ohio Tax Account #: 94015236
Tax Type: Sales
Assessment #: 100000463987
Reporting Period: 01/01/2012-08/31/2019

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2017-2009, dated August 20, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

Accordingly, the matter has been resolved and payment has been made in full satisfaction of the liability for the periods listed.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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12
**FINAL
DETERMINATION**

Date: **AUG 31 2020**

Uber USA, LLC
Attn: Brian Kuntz
1455 Market St. Fl 4
San Francisco, CA 94103-1355

Re: Ohio Tax Account #: 92200137
Tax Type: Sales
Assessment #: 100001252878
Reporting Period: 01/01/2012-08/31/2019

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2020-41, dated August 20, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

Accordingly, the matter has been resolved and payment has been made in full satisfaction of the liability for the periods listed.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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FINAL DETERMINATION

Date: **AUG 26 2020**

YFH, LLC
2991 Indianola Ave.
Columbus, OH 43202

RE: Assessment No.: 100001363529
Sales Tax
Account No.: 25-313948

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$92,509.27	\$7,950.22	\$23,127.14	\$123,586.63

The petitioner operates as a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from January 1, 2016 through December 31, 2018. The petitioner filed a petition for reassessment seeking penalty abatement. A hearing was held on June 22, 2020.

The petitioner seeks abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax required under R.C. Chapter 5739. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The surrounding facts and circumstances warrant total abatement of the penalty.

Accordingly, the assessment is amended as follows:

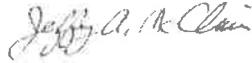
<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$92,509.27	\$7,950.22	\$0.00	\$100,459.49

Current records indicate that payments have been made in full satisfaction of the assessment.

AUG 26 2020

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
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FINAL DETERMINATION

Date:

AUG 3 1 2020

Circleville Rural King Supply, Inc.
4216 Dewitt Ave.
Mattoon, IL 61938

Re: Assessment No.: 100000630407
Use Tax
Account No.: 97-809110
Audit Period: 3/1/12 – 12/31/14

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the above-referenced use tax assessment.

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$36,076.08	\$7,875.50	\$0.00	\$43,951.58

Current records indicate that payment of \$43,951.58 has been made in full satisfaction of the assessment.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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FINAL DETERMINATION

Date:

AUG 31 2020

Crestline Paving & Excavating Co., Inc.
1913 Nebraska Ave.
Toledo, OH 43607

RE: Assessment No.: 100001328268
Use Tax
Account No. 97-307882

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$31,196.98	\$4,069.25	\$4,679.24	\$39,945.47

The petitioner operates as an excavation company that works on road construction, pavement repairs, waterline installations, sewer installations, bridge installations, and equipment rentals. This assessment is the result of an audit of the petitioner's sales for the period January 1, 2013 through December 31, 2018. The petitioner filed a petition for reassessment. A hearing was not requested.

The petitioner requests abatement of the pre-assessment interest and penalty. The request for remission of the pre-assessment interest cannot be considered. The Tax Commissioner lacks jurisdiction to abate assessment interest added to an assessment pursuant to R.C. 5739.133(B) and 5741.14. While the accrual and assessment of interest is mandatory and cannot be abated, the Tax Commissioner may abate all or a portion of any penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. Based on the facts and circumstances, a full penalty abatement is warranted.

Therefore, the assessment is modified as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$31,196.98	\$4,069.25	\$0.00	\$35,266.23

Current records indicate that \$31,472.96 of payments have been made toward the assessment, leaving a balance due of \$3,793.27. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of

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

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
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Office of the Tax Commissioner
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FINAL DETERMINATION

Date: **AUG 19 2020**

DCA of Cincinnati, LLC
5851 Legacy Cir., Ste. 900
Plano, TX 75024

Re: Refund Claim No. 201702068
Refund Amount Requested: \$13,346.02
Refund Period: July 1, 2015 – March 31, 2016
Use Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of \$13,346.02 in use tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was held on July 16, 2020

The claimant contends that use tax was erroneously accrued and remitted to Ohio for the purchase of exempt prescription drugs. Sales of drugs for human consumption purchased pursuant to a prescription are tax exempt. R.C. 5739.02(B)(18). 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).

During the hearing, the claimant explained that they perform dialysis services and the drugs they contend are exempt are used in kidney dialysis treatment. The drugs at issue, Aranesp and Epogen, were purchased several times over the course of the refund period. In support of this refund claim, the claimant submitted a spreadsheet containing each transaction, invoices, and an excel and worksheets detailing how much use tax was accrued and the period in which it was remitted. The claimant also provided sufficient information to show that the purchases of Aranesp and Epogen were pursuant to a prescription as described in R.C. 5739.02(B)(18).

The invoices submitted by the petitioner do not support the full refund amount requested. Based on the evidence provided by the claimant, a refund in the amount of \$12,502.61 with applicable interest is granted.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: **AUG 19 2020**

DCA of Delaware County, LLC
5851 Legacy Cir., Ste. 900
Plano, TX 75024

Re: Refund Claim No. 201703608
Refund Amount Requested: \$9,474.60
Refund Period: July 1, 2015 – March 31, 2016
Use Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of \$9,474.60 in use tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was held on July 16, 2020

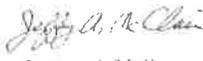
The claimant contends that use tax was erroneously accrued and remitted to Ohio for the purchase of exempt prescription drugs. Sales of drugs for human consumption purchased pursuant to a prescription are tax exempt. R.C. 5739.02(B)(18). The burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E. 2d 648 (1952).

During the hearing, the claimant explained that they perform dialysis services and the drugs they contend are exempt are used in kidney dialysis treatment. The drugs at issue, Aranesp and Epogen, were purchased several times over the course of the refund period. In support of this refund claim, the claimant submitted a spreadsheet containing each transaction, invoices, and an excel and worksheets detailing how much use tax was accrued and the period in which it was remitted. The claimant also provided sufficient information to show that the purchases of Aranesp and Epogen were pursuant to a prescription as described in R.C. 5739.02(B)(18).

The invoices submitted by the petitioner do not support the full refund amount requested. In addition, the petitioner's calculations contained errors including using an incorrect tax rate on some transactions. Based on the evidence provided by the claimant, a refund in the amount of \$8,564.40 with applicable interest is granted.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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FINAL DETERMINATION

Date: AUG 19 2020

DCA of Eastgate, LLC
5851 Legacy Cir., Ste. 900
Plano, TX 75024

Re: Refund Claim No. 201703607
Refund Amount Requested: \$7,805.24
Refund Period: July 1, 2015 – March 31, 2016
Use Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of \$7,805.24 in use tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was held on July 16, 2020

The claimant contends that use tax was erroneously accrued and remitted to Ohio for the purchase of exempt prescription drugs. Sales of drugs for human consumption purchased pursuant to a prescription are tax exempt. R.C. 5739.02(B)(18). 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).

During the hearing, the claimant explained that they perform dialysis services and the drugs they contend are exempt are used in kidney dialysis treatment. The drugs at issue, Aranesp and Epogen, were purchased several times over the course of the refund period. In support of this refund claim, the claimant submitted a spreadsheet containing each transaction, invoices, and an excel and worksheets detailing how much use tax was accrued and the period in which it was remitted. The claimant also provided sufficient information to show that the purchases of Aranesp and Epogen were pursuant to a prescription as described in R.C. 5739.02(B)(18).

The invoices submitted by the petitioner do not support the full refund amount requested. Based on the evidence provided by the claimant, a refund is granted in the amount of \$7,727.01 with applicable interest.

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

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

JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000427



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

FINAL DETERMINATION

Date: **AUG 19 2020**

DCA of Kenwood, LLC
5851 Legacy Cir., Ste. 900
Plano, TX 75024

Re: Refund Claim No. 201703611
Refund Amount Requested: \$26,098.29
Refund Period: July 1, 2015 – March 31, 2016
Use Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of \$26,098.29 in use tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was held on July 16, 2020

The claimant contends that use tax was erroneously accrued and remitted to Ohio for the purchase of exempt prescription drugs. Sales of drugs for human consumption purchased pursuant to a prescription are tax exempt. R.C. 5739.02(B)(18). 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).

During the hearing, the claimant explained that they perform dialysis services and the drugs they contend are exempt are used in kidney dialysis treatment. The drugs at issue, Aranesp and Epogen, were purchased several times over the course of the refund period. In support of this refund claim, the claimant submitted a spreadsheet containing each transaction, invoices, and an excel and worksheets detailing how much use tax was accrued and the period in which it was remitted. The claimant also provided sufficient information to show that the purchases of Aranesp and Epogen were pursuant to a prescription as described in R.C. 5739.02(B)(18).

The invoices submitted by the petitioner do not support the full refund amount requested. Based on the evidence provided by the claimant, a refund in the amount of \$24,691.20 with applicable interest is granted.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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FINAL DETERMINATION

Date:

AUG 19 2020

DCA of Norwood, LLC
5851 Legacy Cir., Ste. 900
Plano, TX 75024

Re: Refund Claim No. 201703609
Refund Amount Requested: \$16,507.45
Refund Period: July 1, 2015 – March 31, 2016
Use Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of \$16,507.45 in use tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was held on July 16, 2020

The claimant contends that use tax was erroneously accrued and remitted to Ohio for the purchase of exempt prescription drugs. Sales of drugs for human consumption purchased pursuant to a prescription are tax exempt. R.C. 5739.02(B)(18). 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).

During the hearing, the claimant explained that they perform dialysis services, and the drugs they contend are exempt are used in kidney dialysis treatment. The drugs at issue, Aranesp and Epogen, were purchased several times over the course of the refund period. In support of this refund claim, the claimant submitted a spreadsheet containing each transaction, invoices, and an excel and worksheets detailing how much use tax was accrued and the period in which it was remitted. The claimant also provided sufficient information to show that the purchases of Aranesp and Epogen were pursuant to a prescription as described in R.C. 5739.02(B)(18).

The invoices submitted by the petitioner do not support the full refund amount requested. Based on the evidence provided by the claimant, a refund is granted in the amount of \$16,462.38 with applicable interest.

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **AUG 19 2020**

DCA of Toledo, LLC
5851 Legacy Cir., Ste. 900
Plano, TX 75024

Re: Refund Claim No. 201703610
Refund Amount Requested: \$16,957.28
Refund Period: July 1, 2015 – March 31, 2016
Use Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of \$16,957.28 in use tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was held on July 16, 2020

The claimant contends that use tax was erroneously accrued and remitted to Ohio for the purchase of exempt prescription drugs. Sales of drugs for human consumption purchased pursuant to a prescription are tax exempt. R.C. 5739.02(B)(18). 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).

During the hearing, the claimant explained that they perform dialysis services and the drugs they contend are exempt are used in kidney dialysis treatment. The drugs at issue, Aranesp and Epogen, were purchased several times over the course of the refund period. In support of this refund claim, the claimant submitted a spreadsheet containing each transaction, invoices, and an excel and worksheets detailing how much use tax was accrued and the period in which it was remitted. The claimant also provided sufficient information to show that the purchases of Aranesp and Epogen were pursuant to a prescription as described in R.C. 5739.02(B)(18).

The invoices submitted by the petitioner do not support the full refund amount requested. The petitioner's calculations contained errors including using an incorrect tax rate on some transactions. Based on the evidence provided by the claimant, a refund in the amount of \$15,486.01 with applicable interest is granted.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL DETERMINATION

Date:

AUG 31 2020

Elyria Rural King Supply, Inc.
4216 Dewitt Ave.
Mattoon, IL 61938

Re: Assessment No.: 100000421477
Use Tax
Account No.: 97-809109
Audit Period: 6/1/11 – 12/31/14

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the above-referenced use tax assessment.

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$61,312.64	\$19,846.14	\$0.00	\$81,158.78

Current records indicate that payment of \$81,158.78 has been made in full satisfaction of the assessment.

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

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

JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Department of
TaxationOffice of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215**FINAL
DETERMINATION**Date: **AUG 19 2020**Exel, Inc.
570 Polaris Pkwy., Dept. 275
Westerville, OH 43082Re: Refund Claim No. 201602085
Filed on November 19, 2015
Use Tax
Account No. 95-501914

This is the final determination of the Tax Commissioner on an application for refund, in the amount of \$2,062,097.60 in use tax filed pursuant to R.C. 5739.07. The claim was initially partially granted in the amount of \$1,145,501.30, plus applicable interest. The claimant disagreed with the denial and provided additional information concerning the remaining \$916,596.30 of sales tax paid on software purchases. A hearing was not requested.

All sales made in Ohio are presumed taxable until an exemption is established. R.C. 5739.02(C). It is also presumed that any use, storage, or other consumption of tangible personal property is subject to taxation. R.C. 5741.02(G). Tangible personal property includes prewritten computer software. R.C. 5739.01(YY). Sales and use tax exemptions are to be strictly construed and a taxpayer must affirmatively establish their right to an exemption. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). Therefore, in order to justify a refund, a claimant must affirmatively demonstrate the transaction is exempt from taxation.

Multiple Points of Use

The claimant submitted evidence concerning usage of purchased software. A consumer may apportion usage of software available in multiple locations among multiple taxing districts. R.C. 5739.033(D). The allocation must be based on a consistent, uniform method reflected by the consumer's records at the time of the purchase. R.C. 5739.033(D)(1)(b).

The claimant submitted additional evidence concerning their purchases of software from OpenText, Manhattan Associates, and Kronos. The claimant provided a breakdown of licensed users and their physical locations for the Kronos and Manhattan Associates transactions. The claimant did not provide information for the OpenText transactions. Without this breakdown of users, it is impossible to determine a percentage of the transaction to allocate as taxable in Ohio. Additionally, there is no way to show any potential allocation is supported by the claimant's records from the time of the purchase. As the burden is on the claimant to demonstrate a transaction is exempt, the refund for the OpenText transactions is denied.

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AUG 19 2020

The refund on the other multiple points of use transactions is based on the software licenses used by Exel in different locations. The percentage of licenses used outside of Ohio represent the exempt portion of the sales tax, and the percentage of the licenses allocated to Ohio represent the taxable portion of the sales tax. A refund is denied on the percentage of sales tax equal to the percentage of Ohio allocated licenses, as the tax on that percentage was properly paid. The claimant submitted information showing 21.3302% of Kronos licenses were allocated to Ohio. The refund is denied for 21.3302% of sales tax paid on Kronos transactions.

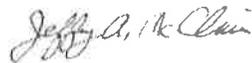
The claimant submitted information regarding most of the allocated Manhattan Associates licenses. However, the claimant did not submit user data for 91 of the purchased licenses from Manhattan Associates. These 91 licenses were for an account referred to as "3 sites." This account had three locations, one of which was in Ohio. The claimant arbitrarily allocated 30, or roughly one third, of these licenses to Ohio as it was one of the three locations. This method of allocation is not supported by information from the claimant's records at the time of the purchase and is inconsistent with the method of allocation used throughout the rest of the refund. This information is not enough to show that this software was used at locations outside of Ohio. As there is no information on the location of the users for these 91 licenses, all 91 licenses will be added to the denied percentage for each Manhattan Associates transaction. The percentage of Ohio licenses for Manhattan Associates is 2.6179% and the use of these licenses will be considered properly taxable.

Therefore, a refund in the reduced amount of \$409,683.73 with appropriate interest is hereby authorized.

If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **AUG 19 2020**

Exel, Inc.
570 Polaris Pkwy., Dept. 275
Westerville, OH 43082

Re: Refund Claim No. 201700544
Filed on July 26, 2016
Use Tax

This is the final determination of the Tax Commissioner on an application for refund filed pursuant to R.C. 5739.07 in the amount of \$293,951.14 of use tax. The claim was initially partially granted in the amount of \$201,142.48, plus applicable interest. The claimant disagreed with a portion of the denied transactions and provided additional information concerning \$73,258.35 of the denied transactions. A hearing was not requested.

All sales made in Ohio are presumed taxable until an exemption is established. R.C. 5739.02(C). Any use, storage, or other consumption of tangible personal property is presumed taxable until the contrary is established. R.C. 5741.02(G), Sales and use tax exemptions are to be strictly construed and a taxpayer must affirmatively establish their right to an exemption. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). Therefore, in order to justify a refund, a claimant must affirmatively demonstrate the transaction is exempt from taxation. The claimant submitted sufficient additional evidence to show that the claimant qualifies for the distribution center exemption for most of the transactions included in the claim.

R.C. 5739.02(B)(42)(j). However, the claimant did not submit evidence to support the claimed exemption for eight transactions related to locations labeled distribution centers 4110, 5135, and 5137 totaling \$139.52 in sales tax.

Therefore, a refund in the reduced amount of \$73,118.83, plus applicable interest, is hereby authorized.

If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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AUG 19 2020

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL DETERMINATION

Date:

AUG 31 2020

Hamilton Rural King Supply, Inc.
4216 Dewitt Ave.
Mattoon, IL 61938

Re: Assessment No.: 100000642397
Use Tax
Account No.: 97-808397
Audit Period: 2/1/12 – 12/31/14

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the above-referenced use tax assessment.

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$20,800.34	\$5,943.98	\$0.00	\$26,744.32

Current records indicate that payment of \$26,744.32 has been made in full satisfaction of the assessment.

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

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ENTRY RECORDED IN THE TAX COMMISSIONER'S JOURNAL.

JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL DETERMINATION

Date: **AUG 31 2020**

Huber Heights Rural King Supply, Inc.
4216 Dewitt Ave.
Mattoon, IL 61938

Re: Assessment No.: 100000630598
Use Tax
Account No.: 97-809113
Audit Period: 3/1/12 – 12/31/14

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the above-referenced use tax assessment.

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$29,868.47	\$8,004.95	\$0.00	\$37,873.42

Current records indicate that payment of \$37,873.42 has been made in full satisfaction of the assessment.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **AUG 26 2020**

ITW Food Equipment Group LLC
701 S. Ridge Ave.
Troy, OH 45374

Re: Assessment No.: 100000433327
Use Tax
Account No.: 98-002777
Audit Period: 01/01/2009 – 12/31/2013

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 and R.C. 5741.14.

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

<u>Tax</u>	<u>Interest</u>	<u>Total</u>
\$250,000.00	\$0.00	\$250,000.00

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

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

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

FINAL DETERMINATION

Date:

AUG 31 2020

Glen W. Jamison
264 Sturbridge Rd.
Columbus, OH 43228

Re: Assessment No. 100000393337
Use Tax

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$1,050.00	\$21.74	\$157.50	\$1,229.24

This assessment was issued based upon the conduct of a special audit of the purchase of a motor vehicle. The petitioner purchased the vehicle without the payment of tax. It is the petitioner's contention that the purchase is exempt because the vehicle is used in transportation for hire. The Department was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. A hearing was not requested.

The petitioner contends the vehicle is exempt under R.C. 5739.02(B)(32). The evidence in file supports the petitioner's contention.

Accordingly, the assessment is cancelled.

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.

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

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ENTRY RECORDED IN THE TAX COMMISSIONER'S JOURNAL.

JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner