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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 29 2020

Apple Leisure Group
FKA Atkinson & Mullen
ATTN: Tax Department
7 Campus Boulevard, Suite 100
Newton Square, PA 19703

Re: Assessment No. 100000692517
Commercial Activity Tax: January 1, 2012 through December 31, 2015

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

Tax	Annual Minimum Tax (AMT)	Preassessment. Interest	Penalty	Total
$2,589,600.00	$7,650.00	$258,479.00	$1,298,625.00	$4,154,354.00

Apple Leisure Group (hereinafter "petitioner" or "Apple") is the parent company of various entities which sell travel and vacation packages, manage resorts, and operate tours. Records reflect that the petitioner operates a vertically integrated organization. The petitioner's main travel destinations are in Mexico, the Caribbean, and Hawaii. The petitioner's services can be purchased directly through their various entities or through travel agents. It offers travel packages at resorts which they own and manage. The petitioner also has contractual arrangements with other resorts in which it supplies guests. It supplies many excursions which are booked by travelers prior to their trip. Apple has employees located on site at resorts to book excursions after the travelers arrive at their destination.

The Department assessed the petitioner after conducting a field audit of it for the period in question. That audit revealed that the petitioner filed CAT returns underreporting taxable gross receipts for the periods at issue. Records reflect that the petitioner was uncooperative with the Department's audit staff and did not provide information requested during the audit. Based on the lack of cooperation, the Department's audit staff prepared an estimated assessment pursuant to R.C. 5751.09(A) based upon the best available information at the time. The corresponding interest was assessed pursuant to R.C. 5751.06(G). A fifty percent penalty was assessed pursuant to R.C. 5751.06 (B) and (D). The petitioner filed a timely petition for reassessment objecting to the assessment. In addition, the petitioner requested a personal appearance hearing on this matter, which was held at the Department's offices in Columbus, Ohio.

The petitioner's authorized representative, the accounting firm of KPMG LLP, represented the petitioner during the administrative appeal period. The petitioner contends that the assessment overstates its taxable gross receipts and disagrees with the audit's staff methodology used to situs transportation services in the assessment. To support this contention, the petitioner and its representative have worked with the Department's hearing officer and the audit staff to provide additional information and records that were previously unavailable. The new documentation

submitted shows what the petitioner considers to be its Ohio taxable gross receipts for the period at issue.

After a thorough review of the materials provided during the administrative appeal period, the Department has been able to verify a significant amount of the petitioner's new documentation, including the majority of its calculations pertaining to its taxable gross receipts for the periods in question. However, after reviewing the new documentation, the Department was unable to verify documentation related to taxable gross receipts for co-op advertising services, miscellaneous revenue accounts, and certain amounts that the petitioner sought to exclude as return and allowances. Additionally, the Department decreased the annual minimum tax due for the years at issue. These adjustments are a small portion (less than five percent) of the revised CAT amount assessed. The tax and interest amounts assessed have been revised to reflect these findings.

R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. Based upon the information available to the Tax Commissioner, including the petitioner's lack of cooperation in working with the Department during the audit, the fact that the petitioner has not yet made any payment on this assessment, and the representative's later cooperation by submitting additional information, the Department shall abate the assessed penalty in part, reducing the penalty from 50% of original amount of CAT assessed to 15% of the reduced CAT assessed. Accordingly, the assessment shall be adjusted as follows:

Tax	Annual Minimum Tax	Preassessment Interest	Penalty	Total
$906,363.00	$5,500.00	$64,809.92	$136,779.45	$1,113,452.37

Current records indicate that the petitioner has not made any payments to this assessment. Due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Post-assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Ohio Treasurer of State." Payments should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio, 43216-1090.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 29 2020

AstraZeneca LP
1600 Concord Pike
Wilmington, DE 19580

Re: Three Assessments
Commercial Activity Tax – Multiple Periods

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

Assessment No.	Period	Tax	Interest	Penalty	Total
17201310714698	01/01/2008 - 12/31/2009	$131,709.000	$18,603.00	$1,324.00	$151,636.00
17201419711104	01/01/2010 - 12/31/2011	$802,884.00	$78,677.00	$120,431.00	$1,001,992.00
17201518940384	01/01/2012 – 12/31/2013	$547,252.00	$46,142.00	$120,718.00	$714.112.00

I. BACKGROUND

AstraZeneca LP (hereinafter "Astrazeneca" or "petitioner") is a pharmaceutical manufacturing company located in Wilmington, Delaware. The petitioner is commonly owned by AstraZeneca PLC and filed in a combined group with other members with substantial nexus to Ohio; however, all members of the combined taxpayer group filed separately. In 2015, AstraZeneca LP operations were phased out and integrated into AstraZeneca Pharmaceuticals LP. During the audit periods, the petitioner sold its products to pharmaceutical distributors with operations in Ohio, including Cardinal Health, Inc., McKesson Corporation, and Medco.

The Department assessed the petitioner after performing field audits for the periods at issue. First, the Department found that the petitioner generated sales of tangible personal property which were not sitused to a particular state; therefore, the Department's audit staff used the best available evidence to estimate the petitioner's gross receipts from the unallocated sales and then sitused the sales to Ohio per R.C. 5751.033(E). Second, the audit staff identified that certain intermember service income received by the petitioner is a gross receipt per R.C. 5751.01(F) and should be sitused to Ohio per R.C. 5751.033(I). Third, the Department found that the royalty income received by the petitioner is a gross receipt per R.C. 5751.01(F) and should be sitused to Ohio per R.C. 5751.033(B). Fourth, the Department identified that the petitioner improperly excluded amounts as return and allowances and cash discounts for voluntary and regulatory rebates which were recorded on a contractual basis with customers of its customers.

The petitioner objects to the assessments and requests an abatement of the penalties and interest assessed. The petitioner also requested a telephone hearing on the matter, and further that all three appeals be addressed together. A telephone hearing was conducted in accordance with the petitioner's request, and this matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the petition.

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II. Petitioner's Contentions

First, the petitioner does not contest the Department's determination that a portion of the sales with an unspecified destination should be apportioned to Ohio; however, the petitioner disagrees with the Department's decision not to use the sales ratio previously reported for Ohio corporation franchise tax (CFT) purposes to compute the adjustment. Second, the petitioner disagrees with the situsing methodology used by the Department's audit staff to source its royalty income and service income to Ohio. Third, the petitioner contends that the Department erroneously disallowed its exclusion for its regulatory and voluntary rebates. Finally, the petitioner requests the Department allow it a full abatement of penalties assessed.

III. Authority

A. A Tax Measured by Gross Receipts

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

B. Exclusions From Cat

R.C. 5751.01(F)(2) provides some exclusions from the definition of "gross receipts." The relevant provisions in R.C. 5751.01 that are applicable to this case read as follows:

> Except as otherwise provided in divisions (F)(2), (3), and (4) of this section, "gross receipts" means the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration.
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> * * *
>
> (2) "Gross receipts" excludes the following amounts:
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> * * *
>
> (z) Qualifying distribution center receipts;
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> * * *
>
> (bb) Cash discounts allowed and taken; [and]
>
> * * *
>
> (cc) Returns and allowances[.]

i. Exclusion for Qualifying Distribution Center Receipts

R.C. 5751.01(F)(2)(z) and Ohio Adm.Code 5703-29-16 govern an exclusion for certain sales of tangible personal property flowing through qualified distribution centers (QDCs). Specifically, the relevant authority lays out multiple requirements which, if met, allow taxpayers to situs sales based on

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a verified "Ohio delivery percentage" which accounts for sales of tangible personal property shipped to an Ohio distribution center for purposes of later shipment out of the state.

ii. EXCLUSION FOR CASH DISCOUNTS

For purposes of the CAT, "cash discounts" can be excluded from the taxpayer's "gross receipts" pursuant to R.C 5751.01(F)(2)(bb). Former Ohio Admin Code 5703-29-14(A)(1) and (2)(a)-(c), applicable to the tax years at issue herein, provided:

> For purposes of this rule, 'cash discounts' include the following, provided they are only based on making timely payments or volume purchases: (a) 'X per cent, y-day' discounts, where the purchaser may take a percentage cash discount on the invoice price if payment is made within a specified period of time of the invoice date; otherwise the entire invoice price is due by the net date; (b) Incentive-based rebates received by a purchaser, but not the purchaser's customer; and (c) Discounts allowed and taken by a purchaser, but not the purchaser's customer.

Cash discounts provide an incentive a seller gives to a buyer in return for paying a bill owed before the scheduled due date. Ohio Adm.Code 5703-29-14. A seller will generally reduce the amount that the buyer owes by a small percentage or a set amount. A typical cash discount would normally have the seller offer a 2% discount on an invoice due within 30 days if the buyer were to pay within the first 10 days of receiving the invoice. Ohio Adm.Code 5703-29-14(B)(1). The buyer is given an incentive to render payment early to receive a discount so that the seller may receive remunerations early and have cash-in-hand.

iii. EXCLUSION FOR RETURNS AND ALLOWANCES

When construing a statute, effect must be given to the words used, and words should neither be deleted nor inserted into the statute. *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph one of the syllabus. Because "returns and allowances" are included with each other under R.C. 5751.01(F), it is presumed that the terms govern similar types of transactions. The General Assembly's grouping of the two terms is inferred as legislative intent to define "returns and allowances" by their common business and accounting usage. This inference is supported by the fact that the Legislative Service Commission's Final Bill Analysis for Am.Sub.H.B. No. 66 described the exclusions in question as follows: "If a cash discount is allowed and is actually taken in a transaction, the discount is deductible from gross receipts. Likewise, the value of returns and similar allowances is deductible."

In most business and accounting contexts, the phrase "returns and allowances" refers to sales returns and sales allowances.[1] A sales return occurs when a purchaser returns a purchased good to the seller in exchange for a refund of the amount paid. In essence, it represents a complete undoing of the original sales transaction. Similarly, a sales allowance occurs when a seller refunds a portion of the purchase price to the purchaser because the goods received are damaged, spoiled, defective, or nonconforming. In essence, it represents a partial undoing, or renegotiation, of the original sales transaction. In the case of a sales allowance, the seller refunds some of the purchase price and the purchaser keeps or accepts the damaged, spoiled, defective, or nonconforming goods. Both of these events share a key defining

[1] In accounting terms, allowances generally refer to a reduction in price charged by a seller as a response to or in compensation for a defect in a product or service sold. Bragg, S., *Billing and Collections Best Practices*, Glossary of Definitions, p. 237., 1st Ed.2005.

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characteristic: the concession by the seller is based solely on the purchaser's dissatisfaction with what was purchased. In other words, these are purchaser-demanded refunds. "Returns and allowances" are not incentive-based discounts, rebates, or promotions. "Returns and allowances" are also not consideration for cooperative marketing, trade-spending, or consideration for reciprocal services such as preferential shelving or warranty services.

iv. NARROW CONSTRUCTION OF EXCLUSIONS

Taxpayers claiming an exemption or exclusion from taxation must affirmatively establish their right thereto. *Dayton Sash & Door Co. v. Glander*, 36 Ohio St.2d 120, 304, 304 N.E.2d 388 (1973). Ohio law in this regard is well-established in that exemptions from taxation are strictly construed against the claim of exemption in favor of the taxing authorities. *Natl. Tube Co. v. Glander,* 157 Ohio St. 407, 105 N.E.2d 648 (1952), paragraph two of the syllabus; *Cincinnati College v. State,* 19 Ohio 110, 115 (1850). Thus, in determining whether the petitioner is entitled to the exclusions which it seeks, the facts must be determined under a strict, narrow reading of the relevant definitions. In addition, the petitioner must provide the Tax Commissioner with concrete evidence supporting its request for exclusions and refunds, and mere speculation is insufficient. See, *Greenscapes Home and Garden Products, Inc. v. Testa,* BTA No. 2016-350, (July 19, 2017), citing *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15. In all doubtful cases, exemptions must be denied. *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, 876 N.E.2d 928, ¶ 7.

C. SITUSING GROSS RECEIPTS FROM TANGIBLE PERSONAL PROPERTY – R.C. 5751.033(E)

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

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

The Tenth District Court of Appeals recently affirmed the Board of Tax Appeals' decision in *Greenscapes Home and Garden Products, Inc. v. Testa*, BTA No. 2016-350 (July 19, 2017) agreeing that the location where the property was ultimately received after all transportation has been completed controls where the sales are sitused. *Greenscapes Home and Garden Products, Inc. v. Testa*, 10th Dist. Franklin No. 17AP-593, 129 N.E.3d 1060, 2019-Ohio-384 at ¶ 27 (2019). In *Greenscapes*, the appellant was a wholesaler of lawn and garden products, and many of its sales went to warehouses and distribution centers within Ohio. *Id.* at ¶ 2. The Board of Tax Appeals found that "it may be true that

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the goods appellant sells may be removed from Ohio, after being shipped from appellant to Ohio, for ultimate sale in one of its customers' retail locations, the lack of information about any such further transportation forecloses appellant's argument." *Greenscapes*, BTA No. 2016-350, p. 3. Therefore, the Board of Tax Appeals ended its inquiry in absence of any evidence indicating that the goods were ultimately received elsewhere and noted that "mere speculation is not evidence." *Id.*, quoting *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15. The appellant argued again at the Tenth District Court of Appeals that it had no nexus to Ohio because its transactions with customers occurred outside the state although its retail customers had a presence in Ohio, purchased goods for delivery to their Ohio distribution centers, and the appellant knew that its products were destined for Ohio at the time the orders were placed. *Id.* 2019-Ohio-384 at ¶ 27. The court, like the Board of Tax Appeals, disagreed with the appellant and held that "R.C. 5751.033 creates nexus with Ohio by situsing gross receipts to this state because the tangible personal property involved was ultimately received in this state." *Id* at ¶ 32.

The Supreme Court of Ohio has previously reviewed a substantially similar situsing statute, R.C. 5733.05(B)(2)(c), and found that it provided "ample nexus" for CFT. *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97, 271 N.E.2d 827 (1971). The court concluded that pursuant to R.C. 5733.05, "sales of tangible personal property to an Ohio buyer, delivered by the seller to a common carrier outside Ohio and ultimately received in Ohio after all transportation has been completed, are deemed business done in Ohio * * * regardless of whether the buyer or the seller has designated the common carrier." *House of Seagram* at 101, 271 N.E.2d 827. Thereafter, the Supreme Court of Ohio confronted the opposite argument in *Dupps Co. v. Lindley*, 62 Ohio St.2d 305, 405 N.E.2d 716, 717 (1980). Dupps was an Ohio-based manufacturer that argued that goods received by its customers at its facility in Ohio, and then transported outside Ohio, should be sitused outside Ohio. The court agreed, holding that "[s]ince the equipment herein was 'ultimately received' outside of Ohio, such sales should not have been" sitused to Ohio. *Id.* at 308.

D. SITUSING GROSS RECEIPTS FROM SERVICES – R.C. 5751.033(I)

Unlike the situsing of tangible personal property found in R.C. 5751.033(E) stated above, division (I) of R.C. 5751.033 is a catch-all situsing provision. Accordingly, the situsing of gross receipts that are not otherwise provided for in R.C. 5751.033 is governed by R.C. 5751.033(I), which provides:

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

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R.C. 5751.033(I) requires an inquiry focused on where the purchaser ultimately received the benefit of its services. *Defender Security v. Testa*, 10th Dist. Franklin No. 18AP-238 (Feb. 28, 2019), *appeal allowed sub nom. Defender Security. v. Testa*, 156 Ohio St.3d 1444, 2019-Ohio-2498, 125 N.E.3d 913, (2019). With respect to the situsing of services for CAT, the importance for the taxpayer to submit documentation supporting its proposed method of situsing is clearly identified in both the relevant statute, R.C. 5751.033(I), and the relevant administrative rule, Ohio Adm.Code 5703-29-17(A). Both provisions identify that a taxpayer's method for situsing services must be supported by their business records as they existed at the time of the performance of the service or within a reasonable time thereafter.

E. Situsing Gross Receipts From Intellectual Property – R.C. 5751.033(F)

Division (F) of R.C. 5751.033 governs the situsing of receipts from the sale, exchange, disposition, or other grant of the right to use trademarks, trade names, patents, copyrights, and similar intellectual property which states:

> Gross receipts from the sale, exchange, disposition, or other grant of the right to use trademarks, trade names, patents, copyrights, and similar intellectual property shall be sitused to this state to the extent that the receipts are based on the amount of use of the property in this state. If the receipts are not based on the amount of use of the property, but rather on the right to use the property, and the payor has the right to use the property in this state, then the receipts from the sale, exchange, disposition, or other grant of the right to use such property shall be sitused to this state to the extent the receipts are based on the right to use the property in this state.

F. Importance of Supporting Business Records & Documentation

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

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

IV. Analysis

A. Situsing Unallocated Sales of Tangible Personal Property – R.C. 5751.033(E)

First, the petitioner does not contest the Department's determination that a portion of the sales with an unspecified destination should be apportioned to Ohio; however, the petitioner disagrees with the

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Department's position not to use the sales ratio found in its settled Ohio CFT return to compute the adjustment. The CAT, however, was phased-in over a five-year period starting in tax year 2005 and replaced the CFT and tangible personal property taxes. Since the petitioner did not provide data on the unallocated sales, the Department used the best information available and estimated its gross receipts using the sales percentage of its Ohio sales compared to everywhere sales. Since these unallocated sales were sales of tangible personal property, the Ohio sales used in the calculation were net of the allowed QDC exclusion per R.C. 5751.01(F)(2)(z).

The petitioner contends that the Department should situs receipts from the sale of tangible personal property for CAT purposes using an apportionment factor which was utilized for the purposes of settling previous Ohio CFT matters. While the terms of any such settlement would be confidential, it must be noted that the authority of the CAT and Ohio's former CFT share some similarities but are operationally different. For instance, when it comes to sourcing, the former CFT required corporations to apportion business income and deductions to Ohio by multiplying its net business income by an Ohio apportionment ratio, which was the sum of the property, payroll and sales factors, which is referred to as three factor apportionment. *See* R.C. 5733.05. The CAT does not apply to net income nor does it apply a three-factor apportionment to source business activity. Rather, the CAT applies more broadly to gross receipts, and uses specific situsing provisions to source different types of receipts generated through different transactions.

Here, that differential approach to sourcing would mean that, for CAT purposes, the petitioner would be required to situs tangible personal property receipts according to R.C. 5751.033(E) which relates solely to sales of tangible personal property. On the contrary, R.C. 5733.05(B)(2)(c), the relevant CFT sourcing provision, would have included income generated through transactions producing rents, royalties, and would include sales of real property and electronic transmission and distribution to the extent they existed for that taxpayer and were not otherwise excluded by statute. In other words, the sales factor for CFT purposes captured sales and business activity well beyond just gross receipts generated through the sale of tangible personal property. The differences in approach to sourcing sales of tangible personal property that exist between the CAT and the former CFT notwithstanding, the petitioner has not submitted information or authority sufficient to support or justify its proposal to use the apportionment factor it proposes to situs its tangible personal property.

Similarly, the petitioner has not submitted evidence or arguments which refute the accuracy of the tax amount assessed relating to receipts from the sale of tangible personal property. The Department's audit staff computed the total unallocated sales amount using the difference between Ohio sales shown on the petitioner's federal apportionment sheets and the sales reported on the sales data used to file the CAT. The Department's audit staff then sitused the unallocated sales to Ohio based on the evidence available and in accordance with R.C. 5751.033(E), i.e., where the evidence available demonstrated the property was ultimately received by the purchaser. The audit staff also removed receipts demonstrated to have been subject to the QDC exclusion. The evidence currently available to the Tax Commissioner indicates that the tax assessed relating to the situsing of tangible personal property was calculated based on the best available information and the methodology used by the audit staff to situs the receipts aligns with the relevant authority.

B. SITUSING GROSS RECEIPTS FROM ROYALTY INCOME – R.C. 5751.033(F)

Second, the petitioner disagrees with the situsing methodology used by the Department's audit staff to source receipts related to royalties. Specifically, the petitioner states that it receives royalty income

from purchasers to which it has licensed certain AstraZeneca products. The petitioner also states that if the Department disagrees with its position that the royalties are not taxable gross receipts, the Department should use the QDC exclusion in the computation of the numerator of the sales ratio. In the alternative, the petitioner again contends that the Department should situs receipts for CAT purposes using an apportionment factor which was utilized for the purposes of settling previous CFT matters.

In this matter, the royalty receipts in question are charged by the petitioner, paid by the purchaser, and generated from sales of pharmaceutical intellectual property and, therefore, the resulting gross receipts are situsable per R.C. 5751.01(F). Mainly, the petitioner receives royalties from purchasers when it grants them the right to use its pharmaceutical intellectual property in Ohio and elsewhere. The petitioner has not submitted information or authority to support or justify its proposal to use the proposed CFT apportionment factor to situs its royalty income. Again, the authority and operations of the CAT and Ohio's former CFT are different. In this case, that differential approach to sourcing would mean that, for CAT purposes, the petitioner would be required to situs royalty receipts according to R.C. 5751.033(F) which relates solely to intellectual property. On the contrary and for the reasons laid out in the previous section, the CFT sales factor calculation under R.C. 5733.05(B)(2)(c) captures sales and business activity well beyond gross receipts generated through the sale of royalty receipts. Ultimately, the petitioner has not submitted information or authority sufficient to support or justify its proposal to use the proposed CFT apportionment factor to situs its royalty income. Nevertheless, due to the lack of information provided by the taxpayer, the Department's audit staff calculated the petitioner's royalty by taking the total royalty income on the petitioner's Federal Income Tax Return and then multiplied it by the ratio of gross Ohio sales compared to total everywhere sales to determine the extent the royalties were generated in Ohio per R.C. 5751.033(F). The evidence currently available to the Tax Commissioner indicates that the tax assessed relating to the situsing of intellectual property was prepared with the best available information and the methodology used by the audit staff aligns with the relevant authority.

The petitioner's additional proposed alternative situsing methodology seeks to use the QDC receipts exclusion per R.C. 5751.01(F)(2)(z)(i)(IV) to situs receipts related to royalties or intellectual property. However, the statutory provisions and administrative regulations governing the QDC process lay out multiple requirements which must be met in order to exercise the exclusion. Essentially, the exclusion allows taxpayers to situs based on a verified "Ohio delivery percentage," which accounts for sales of tangible personal property shipped to an Ohio distribution center and later shipped out of the state. To receive QDC certification, the applicant must substantiate that certain amounts of property initially received at the distribution center are further transported to locations outside Ohio during a 12-month period.[1] The Tax Commissioner also requires the QDC applicant to have an independent certified public accountant certify that the calculation of the minimum thresholds required for a QDC by the operator of a distribution center has been made in accordance with generally accepted accounting principles. R.C. 5751.01(F)(2)(z)(i)(IV). The stringent requirements involved in QDC certification are evidence that the Ohio General Assembly understood the difficulty in situsing shipments flowing through Ohio distribution centers, and is further proof that there is a high evidentiary standard for showing where and whether property initially received at an Ohio distribution center is ultimately received outside the state.

[1] Ohio Legislative Service Commission. Bill Analysis of Amended Substitute House Bill 530 of the 126th Ohio General Assembly. Retrieved on April 15, 2020 from: http://archives.legislature.state.oh.us/analysis.cfm?ID=126_HB_530&ACT=As%20Enrolled&hf=analyses126/06-hb530-126.htm

Further, while the petitioner contends that the Department should use the QDC exclusion per R.C. 5751.01(F)(2)(z) to situs receipts related to royalties or intellectual property, the QDC exclusion only applies to certain receipts of a supplier from *qualified property* delivered to a qualified distribution center. (emphasis added). Qualified property is "tangible personal property delivered to a qualified distribution center that is shipped to a qualified distribution center solely for further shipping by the qualified distribution center to another location in this state or elsewhere * * *." R.C. 5751.01(F)(2)(z)(i)(II). The royalty income is derived from the right to use intellectual property and not from the sale of tangible personal property. Assuming, arguendo, the petitioner had filed a timely application for a QDC exclusion, hired an independent certified accountant, and also paid the fee associated with the application, the petitioner's argument still fails because the royalty income does not meet the definition of "qualified property" and, therefore does not meet the QDC exclusion per R.C. 5751.01(F)(2)(z). Since the QDC exclusion does not apply the petitioner's royalties, the total Ohio sales were not reduced by the QDC exclusion when calculating the petitioner's gross sales ratio.

Ultimately, the petitioner has not submitted evidence or arguments which refute the accuracy of the tax amount assessed relating to royalty receipts.

C. SITUSING GROSS RECEIPTS FROM INTERMEMBER SERVICE INCOME – R.C. 5751.033(I)

Third, the petitioner disagrees with the methodology used by the Department's audit staff to situs its service income to Ohio for the periods at issue. The petitioner's trial balances show that the petitioner was charging its partners for services such as distribution, advertising, and clinical trials. The petitioner asserts that this "cross-partner" service income is initiated primarily at its corporate headquarters located in Delaware and should, therefore, be sourced to Delaware not Ohio. The petitioner further contends that if the Department does not agree with its position, the Department should situs intermember service income using an apportionment factor which was utilized for the purposes of settling previous CFT matters. In the alternative, the petitioner asks the Department to situs the service income based on a ratio of Ohio population and U.S. population.

Although the petitioner contends that the service income was generated through services performed at its corporate headquarters in Delaware and should be sitused there, R.C. 5751.033(I) requires an analysis of where the purchaser receives the benefit of the services provided not simply the location of where the income producing activity occurred. The Department requested that the petitioner provide the intermember contracts to determine where services were performed, where purchasers were located, and where the benefit of that service may have been received; however, no contracts were submitted by the petitioner. Additionally, the petitioner failed to present sufficient documentation to prove that apportioning based on Ohio sales does not properly reflect its service income in Ohio. Accordingly, the intermember service income is gross receipts per R.C. 5751.01(F) and was sitused to Ohio per R.C. 5751.033(I) by taking the total of the cross-partner account and multiplying it by the ratio of Ohio sales compared to total everywhere sales. The evidence available to the Tax Commissioner indicates that the tax assessed relating to the situsing of service income was prepared with the best available information and the methodology used by the audit staff aligns with the relevant authority.

D. **EXCLUSION FOR RETURNS AND ALLOWANCES AND CASH DISCOUNTS**

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Fourth, the petitioner contends that the Department erroneously disallowed its exclusions for returns and allowances and cash discounts from its regulatory and voluntary rebates. Specifically, the petitioner alleges that the Department's inclusion of rebates in the computation of its taxable gross receipts is in effect taxing an expense that would not have been taxed had it not been for federal regulations, state guidelines, and industry standards. However, as stated above, "gross receipts" means the total amount realized, without deduction for the costs of goods sold or other expenses incurred, that contribute to the production of gross income, except as otherwise specified in the statute. R.C. 5751.01(F). This definition broadly encompasses all receipts in money or remuneration from activities entered into by taxpayers. Accordingly, these rebates represent amounts analogous to cost of goods sold or other expenses incurred which would be considered a gross receipt per R.C. 5751.01(F).

As stated above, a return generally refers to a return of merchandise sent back by the buyer to the seller, and the seller in turn provides the buyer with a refund or credit in the amount paid. Alternately, an allowance generally refers to a reduction in price charged by a seller as a response to or in compensation for a defect in a product or service sold. However, the petitioner has failed to provide the Department with sufficient evidence to demonstrate that its regulatory and voluntary rebates are generated from a return of merchandise or defects in a product or service sold as required under R.C. 5751.01(F)(2)(cc). Therefore, the petitioner has failed to demonstrate that its rebates should be excluded from its gross receipts as returns and allowances in accordance with R.C. 5751.01(F)(2)(cc).

Under Ohio Adm.Code 5703-29-14(B)(2), a reduction can be considered a cash discount if the purchaser is "making timely payments or volume purchases." Former Ohio Adm.Code 5703-29-14(C)(2)(b), in effect for the years at issue, also required that the rebate or fee be paid to the original purchaser in order to qualify as a cash discount for CAT. In the case at hand, the petitioner provided sample contracts but the purported cash discounts from the petitioner's accounts for voluntary and regulatory rebates are recorded on a contractual basis with the customers of its customers. The petitioner contends that the voluntary rebates are offered based on the petitioner's decision to enter a contractual relationship with a given customer while the regulatory rebates are offered based on state, federal or local regulations. The petitioner states that it negotiates the voluntary rebates with primary Pharmacy Benefit Managers (PBM) and Health Management Organizations (HMO) for products their patients purchase from a retail pharmacy or mail order directly from the PBM or HMO. The PBM or HMO either manage the pharmacy benefit plan for health insurance plans or they are health insurance plans themselves. Pharmacies then contract with the PBM or HMO to accept their patients and insurance plans at a certain price and charge the PBM or HMO for the amount above the patient payment. The PBMs and HMOs accumulate these claims monthly or quarterly and submit them to the petitioner for their rebate.

Since the agreements providing for the rebates are not between the petitioner and its customer, these rebates cannot be excluded as cash discounts in accordance with R.C 5751.01(F)(2)(bb). The purchaser is not taking any action such as paying early or buying something in higher volume to get these rebates. The rebates appear to be for the PBMs and HMOs and, therefore, the discounts are for the purchaser's customer, not the purchaser. During the audit period, the petitioner sold to customers who were pharmaceutical wholesalers or those that obtained a QDC certificate. Accordingly, the petitioner has failed to illustrate how its specific circumstances are covered by the Ohio Administrative Code or R.C. 5751.01(F)(2)(bb) or (cc). Therefore, the petitioner has failed to provide the Department with sufficient evidence to demonstrate that it should receive the cash discount or the returns and allowances exclusion for its rebates.

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V. Conclusion

In the case at hand, the petitioner has failed to submit evidence or arguments sufficient to refute the accuracy of the Department's situsing of its services and sales or the tax and interest amounts assessed in this matter. As explained above, the petitioner has not affirmatively proven that the pharmaceutical products and intellectual property sitused to Ohio by the audit staff were ultimately received outside of Ohio. Moreover, the petitioner has failed to affirmatively establish its right to claim the exclusion for returns and allowances or cash discounts.

Construing its contentions narrowly, the petitioner has provided insufficient evidence to prove that its situation is analogous to any example expounded upon in the Administrative or Revised Code. Therefore, based on the relevant authority and the evidence currently available to the Tax Commissioner, the tax and interest amounts assessed are accurate.

VI. Penalty Abatement

Finally, the petitioner seeks an abatement of the penalties. The Tax Commissioner may abate penalties imposed for the failure to file a return and the failure to pay the full amount of tax due. R.C. 5751.06(F). The evidence and circumstances support a partial reduction of the penalties.

Accordingly, the assessments are adjusted as follows:

Assessment No.	Period	Tax	Interest	Penalty	Total
17201310714698	01/01/2008 - 12/31/2009	$131,709.000	$18,603.00	$662.00	$150,974.00
17201419711104	01/01/2010 - 12/31/2011	$802,884.00	$78,677.00	$60,215.50	$941,776.50
17201518940384	01/01/2012 – 12/31/2013	$547,252.00	$46,142.00	$60,359.00	$653,753.00

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

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

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

Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 29 2020

AstraZeneca Pharmaceuticals LP
1600 Concord Pike
Wilmington, DE 19580

Re: Assessment No. 17201518940385
Commercial Activity Tax
Reporting Period: 01/01/2012 – 12/31/2013

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

Tax	Interest	Penalty	Total
$219,508.00	$14,762.00	$10,976.00	$245,246.00

I. BACKGROUND

AstraZeneca Pharmaceuticals LP (hereinafter "Astrazeneca" or "petitioner") is a pharmaceutical manufacturing company located in Wilmington, Delaware. The petitioner is commonly owned by AstraZeneca PLC and filed in a combined group with other members with substantial nexus to Ohio; however, all members of the combined taxpayer group filed separately. The petitioner was part of a combined taxpayer group with AstraZeneca LP. In 2015, AstraZeneca LP operations were phased out and integrated into AstraZeneca Pharmaceuticals LP. During the audit periods, the petitioner sold its products to pharmaceutical distributors with operations in Ohio, including to Cardinal Health, Inc., McKesson Corporation, and Medco.

The Department assessed the petitioner after performing a field audit for the period at issue. First, the Department found that the petitioner generated sales of tangible personal property which were not sitused to a particular state; therefore, the Department's audit staff used the best available evidence to estimate the petitioner's gross receipts from the unallocated sales and then sitused the sales to Ohio per R.C. 5751.033(E). Second, the audit staff identified that certain intermember service income received by the petitioner are gross receipts per R.C. 5751.01(F) and should be sitused to Ohio per R.C. 5751.033(I). Third, the Department found that the royalty income received by the petitioner is gross receipts per R.C. 5751.01(F) and should be sitused to Ohio per R.C. 5751.033(B). Fourth, the Department identified that the petitioner improperly excluded amounts from voluntary and regulatory rebates as returns and allowances.

The petitioner objects to the assessment and requests an abatement of the penalties and interest assessed. The petitioner did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the petition.

II. PETITIONER'S CONTENTIONS

First, the petitioner disagrees with the situsing method used by the Department to apportion its royalty

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income and service income to Ohio. Second, the petitioner contends that the Department's audit staff erroneously disallowed its exclusion for its regulatory and voluntary rebates. Finally, the petitioner requests that the Department allow it a full abatement of penalties assessed.

III. AUTHORITY

A. A TAX MEASURED BY GROSS RECEIPTS

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

B. EXCLUSIONS FROM CAT

R.C. 5751.01(F)(2) provides some exclusions from the definition of "gross receipts." The relevant provisions in R.C. 5751.01 that are applicable to this case read as follows:

> Except as otherwise provided in divisions (F)(2), (3), and (4) of this section, "gross receipts" means the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration.
>
> * * *
>
> (2) "Gross receipts" excludes the following amounts:
>
> * * *
>
> (z) Qualifying distribution center receipts;
>
> * * *
>
> (bb) Cash discounts allowed and taken; [and]
>
> * * *
>
> (cc) Returns and allowances[.]

i. EXCLUSION FOR QUALIFYING DISTRIBUTION CENTERS RECEIPTS

R.C. 5751.01(F)(2)(z) and Ohio Adm.Code 5703-29-16 govern an exclusion for certain sales of tangible personal property flowing through qualified distribution centers (QDCs). Specifically, the relevant authority lays out multiple requirements which, if met, allow taxpayers to situs sales based on a verified "Ohio delivery percentage" which accounts for sales of tangible personal property shipped to an Ohio distribution center and later shipped out of the state.

ii. EXCLUSION FOR CASH DISCOUNTS

For the purposes of the CAT, "cash discounts" can be excluded from the taxpayer's "gross receipts" pursuant to R.C 5751.01(F)(2)(bb). Former Ohio Admin Code 5703-29-14(A)(1) and (2)(a)-(c), applicable to the tax years at issue herein, provided:

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> For purposes of this rule, 'cash discounts' include the following, provided they are only based on making timely payments or volume purchases: (a) 'X per cent, y-day' discounts, where the purchaser may take a percentage cash discount on the invoice price if payment is made within a specified period of time of the invoice date; otherwise the entire invoice price is due by the net date; (b) Incentive-based rebates received by a purchaser, but not the purchaser's customer; and (c) Discounts allowed and taken by a purchaser, but not the purchaser's customer.

Cash discounts are an incentive that a seller gives to a buyer in return for paying a bill owed before the scheduled due date. Ohio Adm.Code 5703-29-14. A seller will generally reduce the amount that the buyer owes by a small percentage or a set amount. A typical cash discount would normally have the seller offer a 2% discount on an invoice due within 30 days if the buyer were to pay within the first 10 days of receiving the invoice. Ohio Adm.Code 5703-29-14(B)(1). The buyer is given an incentive to render payment early to receive a discount, so that the seller may receive remunerations early and have cash-in-hand.

iii. EXCLUSION FOR RETURNS AND ALLOWANCES

When construing a statute, effect must be given to the words used, and words should neither be deleted nor inserted into the statute. *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph one of the syllabus. Because "returns and allowances" are included with each other under R.C. 5751.01(F), it is presumed that the terms govern similar types of transactions. The General Assembly's grouping of the two terms is inferred as legislative intent to define "returns and allowances" by their common business and accounting usage. This inference is supported by the fact that the Legislative Service Commission's Final Bill Analysis for Am.Sub.H.B. No. 66 described the exclusions in question as follows: "If a cash discount is allowed and is actually taken in a transaction, the discount is deductible from gross receipts. Likewise, the value of returns and similar allowances is deductible."

In most business and accounting contexts, the phrase "returns and allowances" refers to sales returns and sales allowances.[1] A sales return occurs when a purchaser returns a purchased good to the seller in exchange for a refund of the amount paid. In essence, it represents a complete undoing of the original sales transaction. Similarly, a sales allowance occurs when a seller refunds a portion of the purchase price to the purchaser because the goods received are damaged, spoiled, defective, or nonconforming. In essence, it represents a partial undoing, or renegotiation, of the original sales transaction. In the case of a sales allowance, the seller refunds some of the purchase price and the purchaser keeps or accepts the damaged, spoiled, defective, or nonconforming goods. Both of these events share a key defining characteristic: the concession by the seller is based solely on the purchaser's dissatisfaction with what was purchased. In other words, these are purchaser-demanded refunds. "Returns and allowances" are not incentive-based discounts, rebates, or promotions. "Returns and allowances" are also not consideration for cooperative marketing, trade-spending, or consideration for reciprocal services such as preferential shelving or warranty services.

iv. NARROW CONSTRUCTION OF EXCLUSIONS

[1] In accounting terms, allowances generally refer to a reduction in price charged by a seller as a response to or in compensation for a defect in a product or service sold. Bragg, S., *Billing and Collections Best Practices*, Glossary of Definitions, p. 237., 1st Ed.2005.

Taxpayers claiming an exemption or exclusion from taxation must affirmatively establish their right thereto. *Dayton Sash & Door Co. v. Glander*, 36 Ohio St.2d 120, 304, 304 N.E.2d 388 (1973). Ohio law in this regard is well-established in that exemptions from taxation are strictly construed against the claim of exemption in favor of the taxing authorities. *Natl. Tube Co. v. Glander,* 157 Ohio St. 407, 105 N.E.2d 648 (1952), paragraph two of the syllabus; *Cincinnati College v. State,* 19 Ohio 110, 115 (1850). Thus, in determining whether the petitioner is entitled to the exclusions which it seeks, the facts must be determined under a strict, narrow reading of the relevant definitions. In addition, the petitioner must provide the Tax Commissioner with concrete evidence supporting its request for exclusions and refunds, and mere speculation is insufficient. See, *Greenscapes Home and Garden Products, Inc. v. Testa,* BTA No. 2016-350, (July 19, 2017), citing *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15. In all doubtful cases, exemptions must be denied. *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, 876 N.E.2d 928, ¶ 7.

C. SITUSING GROSS RECEIPTS FROM SERVICES – R.C. 5751.033(I)

Unlike the situsing of tangible personal property found in R.C. 5751.033(E), division (I) of R.C. 5751.033 is a catch-all situsing provision. Accordingly, the situsing of gross receipts that are not otherwise provided for in R.C. 5751.033 is governed by R.C. 5751.033(I), which provides:

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

R.C. 5751.033(I) requires an inquiry focused on where the purchaser ultimately received the benefit of its services. *Defender Security v. Testa*, 10th Dist. Franklin No. 18AP-238 (Feb. 28, 2019), *appeal allowed sub nom. Defender Security. v. Testa*, 156 Ohio St.3d 1444, 2019-Ohio-2498, 125 N.E.3d 913, (2019). With respect to the situsing of services for CAT, the importance for the taxpayer to submit documentation supporting its proposed method of situsing is clearly identified in both the relevant statute, R.C. 5751.033(I), and the relevant administrative rule, Ohio Adm.Code 5703-29-17(A). Both provisions identify that a taxpayer's method for situsing services must be supported by their business records as they existed at the time of the performance of the service or within a reasonable time thereafter.

D. SITUSING GROSS RECEIPTS FROM INTELLECTUAL PROPERTY – R.C. 5751.033 (F)

Division (F) of R.C. 5751.033 governs the situsing of receipts the sale, exchange, disposition, or other grant of the right to use trademarks, trade names, patents, copyrights, and similar intellectual property which states:

> Gross receipts from the sale, exchange, disposition, or other grant of the right to use trademarks, trade names, patents, copyrights, and similar intellectual property shall be sitused to this state to the extent that the receipts are based on the amount of use of the property in this state. If the receipts are not based on the amount of use of the property, but rather on the right to use the property, and the payor has the right to use the property in this state, then the receipts from the sale, exchange, disposition, or other grant of the right to use such property shall be sitused to this state to the extent the receipts are based on the right to use the property in this state.

E. Importance of Supporting Business Records & Documentation

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

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

IV. Analysis

A. Situsing Gross Receipts From Royalty Income – R.C. 5751.033(F)

First, the petitioner disagrees with the situsing methodology used by the Department's audit staff to source receipts related its royalties. Specifically, the petitioner states that it receives royalty income from purchasers to which it has licensed certain AstraZeneca products. The petitioner also states that if the Department disagrees with its position that the royalties are not taxable gross receipts, the Department should use the QDC exclusion in the computation of the numerator of the sales ratio. In the alternative, the petitioner contends that the Department should situs receipts for CAT purposes using an apportionment factor which was utilized for the purposes of settling previous Ohio corporation franchise tax ("CFT") matters. While the terms of any such settlement would be confidential, it must be noted that the authority of the CAT and Ohio's former CFT share some similarities but are operationally different. In this matter, the royalty receipts in question are charged by the petitioner, paid by the purchaser, and generated from sales of pharmaceutical intellectual property and, therefore, the resulting gross receipts are situsable per R.C. 5751.01(F). Mainly, the petitioner receives royalties from purchasers when it grants them the right to use its pharmaceutical intellectual property in Ohio and elsewhere. The petitioner has not submitted information or authority

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sufficient to support or justify its proposal to use the proposed CFT apportionment factor to situs its royalty income.

The authority and operations of the CAT and Ohio's former CFT are different. In this case, that differential approach to sourcing would mean that, for CAT purposes, the petitioner would be required to situs royalty receipts according to R.C. 5751.033(F) which relates solely intellectual property. On the contrary and for the reasons laid out in the previous section, the CFT sales factor calculation under R.C. 5733.05(B)(2)(c) captures sales and business activity well beyond gross receipts generated through the sale of royalty receipts. Ultimately, the petitioner has not submitted information or authority sufficient to support or justify its proposal to use the proposed CFT apportionment factor to situs its royalty income. Notwithstanding the lack of information provided by the taxpayer, the Department's audit staff calculated the petitioner's royalty income by taking the total royalty income reported on the petitioner's Federal Income Tax Return and then multiplied it by the ratio of gross Ohio sales compared to total everywhere sales to determine the extent the royalties were generated in Ohio per R.C. 5751.033(F).

The petitioner's additional proposed alternative situsing methodology seeks to use the QDC receipts exclusion per R.C. 5751.01(F)(2)(z)(i)(IV) to situs receipts related to royalties or intellectual property. However, the statutory provisions and administrative regulations governing the QDC process lay out multiple requirements which must be met in order to exercise the exclusion. Essentially, the exclusion allows taxpayers to situs based on a verified "Ohio delivery percentage," which accounts for sales of tangible personal property shipped to an Ohio distribution center and later shipped out of the state. To receive QDC certification, the applicant must substantiate that certain amounts of property initially received at the distribution center are further transported to locations outside Ohio during a 12-month period.[1] The Tax Commissioner also requires the QDC applicant to have an independent certified public accountant certify that the calculation of the minimum thresholds required for a QDC by the operator of a distribution center has been made in accordance with generally accepted accounting principles. R.C. 5751.01(F)(2)(z)(i)(IV). The stringent requirements involved in QDC certification are evidence that the Ohio General Assembly understood the difficulty in situsing shipments flowing through Ohio distribution centers, and is further proof that there is a high evidentiary standard for showing where and whether property initially received at an Ohio distribution center is ultimately received outside the state.

Further, while the petitioner contends that the Department should use the QDC exclusion per R.C. 5751.01(F)(2)(z), the QDC exclusion only applies to certain receipts of a supplier from *qualified property* delivered to a qualified distribution center. (emphasis added). Qualified property is "tangible personal property delivered to a qualified distribution center that is shipped to a qualified distribution center solely for further shipping by the qualified distribution center to another location in this state or elsewhere * * *." R.C. 5751.01(F)(2)(z)(i)(II). The royalty income is derived from the right to use intellectual property and not from the sale of tangible personal property. Assuming arguendo, the petitioner had filed a timely application for a QDC exclusion, hired an independent certified accountant, and also paid the fee associated with the application, the petitioner's argument still fails because the royalty income does not meet the definition of "qualified property" and, therefore, does not meet the QDC exclusion per R.C. 5751.01(F)(2)(z). Since the QDC exclusion does not apply the

[1] Ohio Legislative Service Commission. Bill Analysis of Amended Substitute House Bill 530 of the 126th Ohio General Assembly. Retrieved on April 15, 2020 from:
http://archives.legislature.state.oh.us/analysis.cfm?ID=126_HB_530&ACT=As%20Enrolled&hf=analyses126/06-hb530-126.htm

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petitioner's royalties, the total Ohio sales were not reduced by the QDC exclusion when calculating the petitioner's gross sales ratio.

Ultimately, the petitioner has not submitted evidence or arguments which refute the accuracy of the tax amount assessed relating to royalty receipts.

B. SITUSING GROSS RECEIPTS FROM INTERMEMBER SERVICE INCOME – R.C. 5151.033(I)

Second, the petitioner disagrees with the methodology used by the Department's audit staff to situs its service income to Ohio for the periods at issue. The petitioner's trial balances show that the petitioner was charging its partners for services such as distribution, advertising, and clinical trials on a contract basis. The petitioner asserts that this "cross-partner" service income is initiated primarily at its corporate headquarters located in Delaware and should, therefore, be sourced to Delaware not Ohio. The petitioner further contends that if the Department does not agree with its position, the Department should situs intermember service income using an apportionment factor which was utilized for the purposes of settling previous CFT matters. Or, in the alternative, the petitioner asks the Department to situs the service income based on a ratio of Ohio population and U.S. population.

Although the petitioner contends that the service income was generated through services performed at its corporate headquarters in Delaware and should be sitused there, RC. 5751.033(I) requires an analysis of where the purchaser receives the benefit of the services provided not simply the location of where the income producing activity occurred. The Department requested that the petitioner provide its intermember contracts to determine where services were performed, where purchasers were located, and where the benefit of that service may have been received; however, no contracts were submitted by the petitioner. Additionally, the petitioner failed to present sufficient documentation to prove that apportioning based on Ohio sales does not properly reflect its service income in Ohio. Accordingly, the intermember service income was sitused to Ohio per R.C. 5751.033(I) by taking the total of the cross-partner account and multiplying it by the ratio of Ohio sales compared to total everywhere sales. The evidence available to the Tax Commissioner indicates that the tax assessed relating to the situsing of service income was prepared with the best available information and the methodology used by the audit staff aligns with the relevant authority.

C. EXCLUSION FOR RETURNS AND ALLOWANCES AND CASH DISCOUNTS

Third, the petitioner contends that the Department erroneously disallowed its exclusions for its regulatory and voluntary rebates. Specifically, the petitioner alleges that the Departments inclusion of rebates in the computation of its taxable gross receipts is in effect taxing an expense that would not have been taxed had it not been for federal regulations, state guidelines, and industry standards. However, as stated above, "gross receipts" means the total amount realized, without deduction for the costs of goods sold or other expenses incurred, that contribute to the production of gross income, except as otherwise specified in the statute. R.C. 5751.01(F). This definition broadly encompasses all receipts in money or remuneration from activities entered into by taxpayers. Accordingly, these rebates represent amounts analogous to cost of goods sold or other expenses incurred which would be considered a gross receipt per R.C. 5751.01(F).

As stated above, a return generally refers to a return of merchandise sent back by the buyer to the seller, and the seller in turn provides the buyer with a refund or credit in the amount paid. Alternately, an allowance generally refers to a reduction in price charged by a seller as a response to or in

compensation for a defect in a product or service sold. However, the petitioner has failed to provide the Department with sufficient evidence to demonstrate that its regulatory and voluntary rebates are generated from a return of merchandise or defects in a product or service sold as required under R.C. 5751.01(F)(2)(cc). Therefore, the petitioner has failed to demonstrate that its rebates should be excluded from its gross receipts as returns and allowances in accordance with R.C. 5751.01(F)(2)(cc).

Under Ohio Adm.Code 5703-29-14(B)(2), a reduction can be considered a cash discount if the purchaser is "making timely payments or volume purchases." Former Ohio Adm.Code 5703-29-14(C)(2)(b), in effect for the years at issue, also required that the rebate or fee be paid to the original purchaser in order to qualify as a cash discount for CAT. In the case at hand, the petitioner provided sample contracts but the purported cash discounts from the petitioner's accounts for voluntary and regulatory rebates are recorded on contractual basis with customers of its customers. The petitioner contends that the voluntary rebates are offered based on the petitioner's decision to enter a contractual relationship with a given customer while the regulatory rebates are offered based on state, federal or local regulations. The petitioner states that it negotiates the voluntary rebates with primary Pharmacy Benefit Managers (PBM) and Health Management Organizations (HMO) for products their patients purchase from a retail pharmacy or mail order directly from the PBM or HMO. The PBM or HMO either manage the pharmacy benefit plan for health insurance plans or they are health insurance plans themselves. Pharmacies then contract with the PBM or HMO to accept their patients and insurance plans at a certain price and charge the PBM or HMO for the amount above the patient payment. The PBMs and HMOs accumulate these claims monthly or quarterly and submit them to the petitioner for their rebate.

Since the agreements providing for the rebates are not between the petitioner and its customer, these rebates cannot be excluded as cash discounts in accordance with R.C 5751.01(F)(2)(bb). The purchaser is not taking any action such as paying early or buying something in higher volume to get these rebates. The rebates appear to be for the PBMs and HMOs and, therefore, the discounts are for the purchaser's customer not the purchaser. During the audit period, the petitioner sold to customers who were pharmaceutical wholesalers or those that obtained a QDC certificate. Accordingly, the petitioner has failed to illustrate how its specific circumstances are covered by the Ohio Administrative Code or R.C. 5751.01(F)(2)(bb) or (cc). Therefore, the petitioner has failed to provide the Department with sufficient evidence to demonstrate that it should receive the cash discount or the returns and allowances exclusion for its rebates.

V. CONCLUSION

In the case at hand, the petitioner has failed to submit evidence or arguments sufficient to refute the accuracy of the Department's situsing of its services or the tax and interest amounts assessed in this matter. As explained above, the petitioner has not affirmatively proven that gross receipts assessed related to intellectual property and services were not taxable gross receipts. Moreover, the petitioner has failed to affirmatively establish its right to claim the exclusion for returns and allowances or cash discounts.

Construing its contentions narrowly, the petitioner has provided insufficient evidence to prove that its situation is analogous to any example expounded upon in the Administrative or Revised Code. Therefore, based on the relevant authority and the evidence currently available to the Tax Commissioner, the tax and interest amounts assessed are accurate.

VI. PENALTY ABATEMENT

Finally, the petitioner seeks an abatement of the penalties. The Tax Commissioner may abate penalties imposed for the failure to file a return and the failure to pay the full amount of tax due. R.C. 5751.06(F). The evidence and circumstances support a partial reduction of the penalties.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$219,508.00	$14,762.00	$5,488.00	$239,758.00

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

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

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

Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000128

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:

APR 17 2020

Electrolux Home Products, Inc.
102000 David Taylor Dr.
Charlotte, NC 28262

Re: Four Assessments
Commercial Activity Tax – Multiple Periods

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

Assessment No.	Period	Tax	Interest	Penalty	Total
17201327091563	01/01/2009 – 12/31/2010	$91,557.00	$11,192.00	$0.00	$102,749.00
100000650597	01/01/2012 – 12/31/2014	$3,102.00	$516.00	$0.00	$3,618.00
100000948529	01/01/2014 – 12/31/2014	$122,988.00	$12,965.00	$18,448.00	$154,401.00
100001217641	01/01/2015 – 12/31/2016	$383,775.00	$45,326.21	$57,566.24	$486,667.45

I. BACKGROUND

Electrolux Home Products, Inc. (hereinafter "Electrolux" or "petitioner") engages in the marketing and distribution of home appliances in North America. The petitioner is headquartered in North Carolina, and sells air conditioners, refrigerators, microwave ovens, stoves, electric and gas cook tops, dishwashers, washers, dryers, and vacuum cleaners. As of September 11, 2012, the petitioner is the reporting entity for the 80% consolidated elected taxpayer group permitted under R.C. 5751.011 which currently includes Electrolux Home Care Products, Inc., Electrolux North America, Inc., Electrolux Professional, Inc., Electrolux Puerto Rico Corp, Equinox Insurance Company, and Electrolux Warranty Corporation. Prior to September 11, 2012, the petitioner was registered and filing as part of a combined taxpayer group permitted under R.C. 5751.012. AB Electrolux is the publicly traded Swedish parent company which is not registered for the CAT because it does not meet the substantial nexus standards per R.C. 5751.01(H). The petitioner operates six production facilities in the United States, sells tangible personal property which is ultimately received in Ohio, and, based on the evidence available, meets the aforementioned substantial nexus standards.

The Department assessed the petitioner after performing field audits for the periods referenced above. The Department's audit staff found that the petitioner generated gross receipts from retail sales of tangible personal property ultimately received in Ohio which were not included in its originally filed CAT returns for the periods at issue; therefore, the Department used the best available evidence to estimate the petitioner's gross receipts from the sales and then sitused the sales to Ohio per R.C. 5751.033(E).

The petitioner objects to the assessments and requests an abatement of the penalties and interest amounts assessed. The petitioner also requested a hearing on the matters which was held via telephone. This matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the petition.

II. PETITIONER'S CONTENTIONS

In regard to the assessment for tax period 01/01/2009 – 12/31/2010, the petitioner contends that its revenues were over-reported because it made an error by reporting sales based on the "bill to" address and not the "ship to" address and, therefore, the revenues should not have been sitused to Ohio. However, the petitioner does not contest the audit adjustment of $1,407.00 for the 01/01/2009 – 12/31/2010 period due underreporting its revenues from domestic royalties. For the subsequent assessment periods, the petitioner contends that it filed its CAT returns correctly based on the "ship to" information provided to it by one of its purchasers, Sears, Roebuck and Company (Sears), on a weekly basis. The petitioner contends that the information provided by Sears reflects the "ship to" location after all transportation has been completed. Regarding the assessment for tax period 01/01/2012 – 12/31/2014, the petitioner contends that duplicative data was included in the filing of its CAT returns which resulted in an overstatement of gross receipts and a corresponding overpayment of tax. The petitioner further contends that the Department incorrectly disallowed its 2013 and 2014 volume discounts. Finally, the petitioner requests the Department allow it a full abatement of penalty and interest amounts assessed.

III. AUTHORITY

A. A TAX MEASURED BY GROSS RECEIPTS

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

B. EXCLUSIONS FROM CAT

R.C. 5751.01(F)(2) provides some exclusions from the definition of "gross receipts." The relevant provisions in R.C. 5751.01 that are applicable to this case read as follows:

> Except as otherwise provided in divisions (F)(2), (3), and (4) of this section, "gross receipts" means the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration.
>
> * * *
>
> (2) "Gross receipts" excludes the following amounts:
>
> * * *
>
> (bb) Cash discounts allowed and taken; [and]
>
> * * *
>
> (cc) Returns and allowances[.]

i. EXCLUSION FOR CASH DISCOUNTS

For the purposes of the CAT, "cash discounts" can be excluded from the taxpayer's "gross receipts" pursuant to R.C 5751.01(F)(2)(bb). Ohio Admin Code 5703-29-14(A)(1) and (2)(a)-(c) provides:

> For purposes of this rule, 'cash discounts' include the following, provided they are only based on making timely payments or volume purchases: (a) 'X per cent, y-day' discounts, where the purchaser may take a percentage cash discount on the invoice price if payment is made within a specified period of time of the invoice date; otherwise the entire invoice price is due by the net date; (b) Incentive-based rebates received by a purchaser, but not the purchaser's customer; and (c) Discounts allowed and taken by a purchaser, but not the purchaser's customer.

Cash discounts provide an incentive a seller gives to a buyer in return for paying a bill owed before the scheduled due date. Ohio Adm.Code 5703-29-14. A seller will generally reduce the amount the buyer owes by a small percentage or a set amount. A typical cash discount would normally have the seller offered a 2% discount on an invoice due within 30 days if the buyer were to pay within the first ten days of receiving the invoice. Ohio Adm.Code 5703-29-14(B)(1). The buyer is given an incentive to render payment early to receive a discount so that the seller may receive remunerations early and have cash-in-hand.

ii. EXCLUSION FOR RETURNS AND ALLOWANCES

When construing a statute, effect must be given to the words used, and words should neither be deleted nor inserted into the statute. *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph one of the syllabus. Because "returns and allowances" are included with each other under R.C. 5751.01(F), it is presumed that the terms govern similar types of transactions. The General Assembly's grouping of the two terms is inferred as legislative intent to define "returns and allowances" by their common business and accounting usage. This inference is supported by the fact that the Legislative Service Commission's Final Bill Analysis for Am.Sub.H.B. No. 66 described the exclusions in question as follows: "If a cash discount is allowed and is actually taken in a transaction, the discount is deductible from gross receipts. Likewise, the value of returns and similar allowances is deductible."

In accounting terms, allowances generally refer to a reduction in price charged by a seller as a response to or in compensation for a defect in a product or service sold. Bragg, S., *Billing and Collections Best Practices*, Glossary of Definitions, p. 237., 1st Ed.2005. Allowances provide standards that a business may utilize in the event that its products and/or services received by the buyer are defective because it might not be possible to find a specific good in a reasonable amount of time and, therefore, to ensure a continuing business relationship between buyers and sellers and to prevent a default on sales contracts. An allowance is created after the initial billing to the buyer, but before the buyer pays the seller; thus, it is recorded as a deduction from gross sales. A return generally refers to a return of merchandise sent back by the buyer to the seller, and the seller in turn provides the buyer with a refund or credit in the amount paid. *See*, Ohio Adm.Code 5703-9-11, which relates to the treatment of sales returns for Ohio sales tax purposes.

Receipts connected to an item returned to the taxpayer by its purchaser may be excluded from the taxpayer's gross receipts for purposes of the CAT as long as that receipt was included in the taxpayer's gross receipts initially.

iii. NARROW CONSTRUCTION OF EXCLUSIONS

Taxpayers claiming an exemption or exclusion from taxation must affirmatively establish their right thereto. *Dayton Sash & Door Co. v. Glander*, 36 Ohio St.2d 120, 304, 304 N.E.2d 388 (1973). Ohio law in this regard is well-established in that exemptions from taxation are strictly construed against the claim of exemption in favor of the taxing authorities. *Natl. Tube Co. v. Glander,* 157 Ohio St. 407, 105 N.E.2d 648 (1952), paragraph two of the syllabus; *Cincinnati College v. State,* 19 Ohio 110, 115 (1850). Thus, in determining whether the petitioner is entitled to the exclusions which it seeks, the facts must be determined under a strict, narrow reading of the relevant definitions. In addition, the petitioner must provide the Tax Commissioner with concrete evidence supporting its request for exclusions and refunds, and mere speculation is insufficient. See, *Greenscapes Home and Garden Products, Inc. v. Testa,* BTA No. 2016-350, (July 19, 2017), citing *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15. In all doubtful cases, exemptions must be denied. *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, 876 N.E.2d 928, ¶ 7.

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

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

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

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

¶15. The appellant argued again at the Tenth District Court of Appeals that it had no nexus with Ohio because its transactions with customers occurred outside the state although its retail customers had a presence in Ohio, purchased goods for delivery to their Ohio distribution centers, and the appellant knew that its products were destined for Ohio at the time the orders were placed. *Id.* 2019-Ohio-384 at ¶ 27. The court, like the Board of Tax Appeals, disagreed with the appellant and held that "R.C. 5751.033 creates nexus with Ohio by situsing gross receipts to this state because the tangible personal property involved was ultimately received in this state." *Id* at ¶ 32.

The Supreme Court of Ohio previously reviewed a substantially similar situsing statute, R.C. 5733.05(B)(2)(c), and found that it provided "ample nexus" for corporation franchise tax. *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97, 271 N.E.2d 827 (1971). The court concluded that pursuant to R.C. 5733.05, "sales of tangible personal property to an Ohio buyer, delivered by the seller to a common carrier outside Ohio and ultimately received in Ohio after all transportation has been completed, are deemed business done in Ohio * * * regardless of whether the buyer or the seller has designated the common carrier." *Id.* at 101. Thereafter, the Supreme Court of Ohio confronted the opposite argument in *Dupps Co. v. Lindley*, 62 Ohio St.2d 305, 405 N.E.2d 716, 717 (1980). Dupps was an Ohio-based manufacturer that argued that goods received by its customers at its facility in Ohio, and then transported outside Ohio, should be sitused outside Ohio. The court agreed, holding that "[s]ince the equipment herein was 'ultimately received' outside of Ohio, such sales should not have been" sitused to Ohio. *Id.* at 308.

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

D. IMPORTANCE OF SUPPORTING BUSINESS RECORDS & DOCUMENTATION

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

IV. ANALYSIS

A. THE PETITIONER HAS NOT DEMONSTRATED THAT SALES TO SEARS ARE ULTIMATELY RECEIVED OUTSIDE OF OHIO

The petitioner contends that the Electrolux products that are sold and shipped to an Ohio distribution center owned and operated by Sears and then subsequently transported to Sears retail locations outside the state of Ohio should not be sitused to Ohio. The petitioner states that it uses a common carrier to ship products to the Ohio Sears distribution center and then Sears further transports the goods to their ultimate destination. While the petitioner acknowledges that it does not know the exact transportation destination of each product at the time it ships products to the Sears distribution center, the petitioner contends that it obtains information from Sears at some point after the property is received in Ohio which purportedly shows to which Sears retail location products are subsequently sold. The situs of gross receipts from the sale of tangible personal property, for CAT purposes, is not contingent on the location of the ultimate purchaser. Rather, the situs depends on where the purchaser, in any given sale, ultimately receives the property. Accordingly, since the petitioner only has knowledge based on its own verified records as to which distribution center its products are shipped, the sole issue in this case is where the Ohio distributor received the property pursuant to that sale.

As noted above, the BTA in *Greenscapes* held that "[w]hile it may be true that the goods appellant sells may be removed from Ohio, after being shipped from appellant to Ohio, for ultimate sale in one of its customers' retail locations, the lack of information about any such further transportation forecloses appellant's argument." *Greenscapes*, BTA No. 2026-350 at 3. Similarly, when the petitioner sells goods to Sears, its only knowledge at the time of sale is that the property will be received at the Sears distribution center in Columbus, Ohio. *Greenscapes* also provided, "[at] the time appellant sold products to its customers, it knew their ultimate destination to be Ohio, based on its customer's orders and the bills of lading it provided to the drivers transporting the products. Our inquiry ends here, as did the commissioner's, in the absence of any evidence indicating that goods were ultimately received elsewhere." *Id.* In the case at hand, the facts are very similar to those in *Greenscapes* in that neither the taxpayer in *Greenscapes* nor the petitioner can demonstrate that its property is ultimately received outside of Ohio.

As noted above, in *Mia Shoes, Inc. v. McClain* the Board of Tax Appeals has recently ruled on a similar situsing issue involving the situsing of tangible personal property under R.C. 5751.033(E). *Mia Shoes*, *supra*, BTA No. 2016-282. There are similarities between *Mia Shoes* and the petitioner concerning the defects in the taxpayers' situsing methodologies and arguments. In *Mia Shoes*, the Board held that the sales of goods that were taken to customers' Ohio distribution centers were properly sitused to Ohio for CAT because Mia knew it was shipping its goods to Ohio, and Mia "lost visibility of the goods once they were delivered to Ohio." *Id.* at 3. In the instant case, the petitioner knows it is shipping the goods at issue to its customer's Ohio distribution centers, and, like *Mia Shoes*, does not know, based upon its own records, where or whether its purchasers will be shipping the products from the Ohio distribution centers. The petitioner contends that it obtains information from Sears at some point after the property is received in Ohio, which purportedly shows to which Sears retail location products are subsequently sold.

If the petitioner's argument that it should be able to use its customer's records for situsing were accepted, it would introduce numerous compliance and administrative issues. For example, in addition to auditing the petitioner's records, the Department would need to review and verify the sales and shipping records and data of the many retailers (such as Sears) to which the petitioner sells products in order to verify the secondary records. The proposition of accepting secondary records and data as evidence for situsing purposes is problematic and would force the Department to attempt to verify the accuracy of records and data produced by a company or individual which was not subject to the initial

audit, assessment, or refund claim. Or, as the petitioner here requests, the Department would be forced to accept the secondary records at face value or speculate as to their accuracy regarding purported further transportation based on circumstantial evidence.

These considerations concerning speculation with respect to the situsing of tangible personal property were addressed in the decisions in both *Greenscapes* and *Mia Shoes*. In *Greenscapes*, the lack of reliable information from the taxpayer at the time of the sale regarding what the purchaser did after the property was received in Ohio was critical. *Greenscapes*, 2019-Ohio-384 at ¶ 27. There, as is the case here, the taxpayer could not provide its own records which would definitively show that the property was further shipped or immediately removed from Ohio. What is clear based on the petitioner's records contemporaneous with the sale is that the property it sold to Sears was destined for and received in Ohio. It is entirely possible that, when the property was received at the Ohio distribution center, Sears did not know where, whether, or when the property may be moved. Similarly, the products could have been held at the distribution center until such time it is needed at a location to be determined.

In *House of Seagram*, the Ohio Supreme Court reviewed the concept of property further shipped and noted items on their way to or immediately shipped to locations outside Ohio should not be sitused to this State. *House of Seagram*, 27 Ohio St.2d 97 at 101, 271 N.E.2d 827. In this case, the petitioner has not definitively demonstrated that its products sold to Sears were immediately (or at any subsequent point) shipped out of state. Therefore, the petitioner is not only asking the Department to accept secondary records at face value but also to infer that Sears immediately shipped or intended to remove the property received in Ohio to a retail store outside of Ohio. Ultimately, granting the petitioner's request requires the Department to accept unverified secondary records and speculate where, whether, and when the property would ultimately be removed from Ohio.

B. THE PETITIONER HAS NOT DEMONSTRATED THAT THE DEPARTMENT INCORRECTLY DISALLOWED ITS 2013 AND 2014 CASH DISCOUNTS

The petitioner also alleges that an additional adjustment needs to be made for the 2013 and 2014 tax period to adjust for cash discounts not reported on its originally-filed CAT returns due to the discounts occurring subsequent to the sale. However, the petitioner has failed to provide the Department with sufficient evidence to demonstrate that these discounts were incorrectly disallowed. During the audit for the period in question, the petitioner provided the Department's audit staff with an Ohio sales reconciliation that included a breakdown of the figures that were used to calculate their total sales figures for the year. However, the reconciliation provided by the petitioner removes Sears' sales that were shipped to the Ohio distribution center. The Department requested the original sales by state apportionment data from when the petitioner filed their original returns for 2013 and 2014, but the petitioner failed to provide the requested information. The Department also requested that the petitioner provide more detailed information on the returns and allowances and cash discounts such as an Ohio breakdown of the returns and discounts that the petitioner alleged were not included in it its original CAT filings. However, the petitioner failed to provide the requested information or illustrate how its specific circumstances are covered by the Ohio Administrative Code or R.C. 5751.01(F)(2)(bb) or (cc). Due to the petitioner not providing the requested information concerning sales by state apportionment data, the Department used the best available evidence to estimate the petitioners Ohio taxable gross receipts by sorting the focus gross sales files which included returns, allowances, blemishes, or claims by Ohio destination along with the Ohio divisional sales figures. Accordingly, the petitioner has failed to provide the Department with sufficient evidence to demonstrate that it should

receive additional cash discounts or returns and allowances for the period at issue. Furthermore, the evidence currently available to the Tax Commissioner reflects that the aforementioned audit adjustments were accurate and align the applicable authority.

C. THE PETITIONER HAS NOT DEMONSTRATED THAT THE DEPARTMENT ERRONEOUSLY INCLUDED DUPLICATIVE SEARS DATA WHEN CALCULATING ITS CAT LIABILITY

The petitioner contends that duplicative data regarding sales of tangible personal property to Sears was included in the filing of its CAT returns resulting in an overstatement of gross receipts and corresponding overpayment of tax. The petitioner states that the Department adjusted for some of the duplicative data relating to Sears sales, but not all. However, the petitioner has failed to provide the Department with evidence sufficient to demonstrate what additional data did not relate to sales already sitused to Ohio or that the Department failed to remove any other duplicative data when calculating the petitioner's CAT liability. Therefore, the petitioner's contention is denied.

D. THE TAX COMMISSIONER LACKS JURISDICTION TO DETERMINE THE CONSTITUTIONALITY OF A STATUTE

The petitioner also raised multiple constitutional objections in its petitions for reassessment. However, it is well-established that the Tax Commissioner lacks jurisdiction to determine the constitutionality of a statute. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988). Nevertheless, the legislative enactments of the Ohio General Assembly are entitled to a strong presumption of constitutionality. *N. Ohio Patrolmen's Benevolent Assn. v. Parma*, 61 Ohio St.2d 375, 377, 402 N.E.2d 519 (1980). The Ohio Supreme Court further adheres to the presumption the Tax Commissioner's application of state tax laws is constitutional. *See State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, *Swetland v. Kinney*, 69 Ohio St.2d 567, 433 N.E.2d 217 (1982). Since the petitioner's objections are constitutional in nature, the Tax Commissioner cannot make a determination on those challenges.

E. PENALTY ABATEMENT

Finally, the petitioner seeks penalty remission for the assessments on which penalty was assessed. The Tax Commissioner may abate penalties imposed for the failure to file a return and the failure to pay the full amount of tax due. R.C. 5751.06(F). The evidence and circumstances support a partial reduction of the penalties.

V. CONCLUSION

The petitioner requests that the Department look beyond the bills of lading and invoices which clearly show that the property was received in Ohio, and instead to situs its sales to Sears based upon speculative methodologies and its purchaser's records, which are requested and received at some point after the actual sale and delivery. However, the petitioner has not established the accuracy of its secondary situsing data and the Department cannot independently verify it. Additionally, the petitioner had numerous opportunities to provide the Department with a methodology for calculating its cash discounts or returns and allowances that aligned with the Administrative Code and specific definitions that aligned with the Revised Code, but it failed to do so in a manner sufficient to affirmatively establish its right to claim the exclusions. Furthermore, the petitioner has provided insufficient evidence to prove that the Department failed to remove duplicative data when calculating its CAT

liability. Therefore, based on the relevant authority and the evidence currently available to the Tax Commissioner, the tax and interest amounts assessed are accurate.

Accordingly, the assessments are adjusted as follows:

Assessment No.	Period	Tax	Interest	Penalty	Total
17201327091563	01/01/2009 – 12/31/2010	$91,557.00	$11,192.00	$0.00	$102,749.00
100000650597	01/01/2012 – 12/31/2014	$3,102.00	$516.00	$0.00	$3,618.00
100000948529	01/01/2014 – 12/31/2014	$122,988.00	$12,965.00	$9,224.00	$145,177.00
100001217641	01/01/2015 – 12/31/2016	$383,775.00	$45,326.21	$28,783.12	$457,884.33

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

APR 17 2020

Electrolux Home Products, Inc.
102000 David Taylor Dr.
Charlotte, NC 28262

Re: Two Refund Claims
Commercial Activity Tax – Multiple Periods

This is the final determination of the Tax Commissioner with regard to two applications for commercial activity tax (CAT) refunds file pursuant to R.C. 5751.08:

Period	Refund Claim No.	Refund Claimed
10/01/2007– 12/31/2008	315048556	$343,229.00
01/01/2009 – 12/31/2013	95191997	$1,025,794.00

I. BACKGROUND

Electrolux Home Products, Inc. (hereinafter "Electrolux" or "claimant") engages in the marketing and distribution of home appliances in North America. The claimant is headquartered in North Carolina, and sells air conditioners, refrigerators, microwave ovens, stoves, electric and gas cook tops, dishwashers, washers, dryers, and vacuum cleaners. As of September 11, 2012, the claimant is the reporting entity for the 80% consolidated elected taxpayer group permitted under R.C. 5751.011, which currently includes Electrolux Home Care Products, Inc., Electrolux North America, Inc., Electrolux Professional, Inc., Electrolux Puerto Rico Corp, Equinox Insurance Company, and Electrolux Warranty Corporation. Prior to September 11, 2012, the claimant was registered and filing as a combined taxpayer group permitted under R.C. 5751.012. AB Electrolux is the publicly traded Swedish parent company which is not registered for the CAT because it does not meet the substantial nexus standards per R.C. 5751.01(H). The claimant operates six production facilities in the United States, sells tangible personal property that is ultimately received in Ohio, and, based on the evidence available, meets the aforementioned substantial nexus standards.

Upon initial review, the Department denied the claimant's refund requests. The claimant objects to the denial of its refund claims and requests an administrative review of the initial refund denials in accordance with R.C. 5703.70. The claimant also requested a hearing on the matters which was held via telephone. This matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the applications for refund.

II. CLAIMANT'S CONTENTIONS

The claimant filed refund claims contending that, on its originally-filed CAT returns for the periods in question, it erroneously included sales of tangible personal property to Roebuck and Company (Sears), which were not situsable to Ohio. The claimant contends that at the time of shipment to the Sears distribution center, it is aware that most Electrolux products will be shipped outside of Ohio. The

claimant further contends that the information provided by Sears shows that the products received at Sears' Ohio distribution centers were at some point further shipped out of the state.

III. AUTHORITY

A. APPLICATIONS FOR CAT REFUNDS

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

> An application for refund to the taxpayer of the amount of taxes imposed under this chapter that are overpaid, paid illegally or erroneously, or paid on any illegal or erroneous assessment shall be filed by the reporting person with the tax commissioner, on the form prescribed by the commissioner, within four years after the date of the illegal or erroneous payment of the tax, or within any additional period allowed under division (F) of section 5751.09 of the Revised Code. The applicant shall provide the amount of the requested refund along with the claimed reasons for, and documentation to support, the issuance of a refund

B. A TAX MEASURED BY GROSS RECEIPTS

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

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

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

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

The Tenth District Court of Appeals affirmed the Board of Tax Appeals decision in *Greenscapes Home and Garden Products, Inc. v. Testa*, BTA No. 2016-350, 2017 WL 3183334 (July 19, 2017) agreeing that the location where the property was ultimately received after all transportation has been completed controls where the sales are sitused. *Greenscapes*, 2019-Ohio-384 at ¶ 27. In *Greenscapes*, the appellant was a wholesaler of lawn and garden products, and many of its sales went to warehouses and distribution centers within Ohio. *Id.* at ¶ 2. The Board of Tax Appeals found that "it may be true that the goods appellant sells may be removed from Ohio, after being shipped from appellant to Ohio, for ultimate sale in one of its customers' retail locations, the lack of information about any such further transportation forecloses appellant's argument." *Greenscapes*, BTA No. 2016-350, p. 3. Therefore, the Board of Tax Appeals ended its inquiry in absence of any evidence indicating that the goods were ultimately received elsewhere and noted that "mere speculation is not evidence." *Id.*, quoting *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15. The appellant argued again at the Tenth District Court of Appeals that it had no nexus with Ohio because its transactions with customers occurred outside the state although its retail customers had a presence in Ohio, purchased goods for delivery to their Ohio distribution centers, and the appellant knew that its products were destined for Ohio at the time the orders were placed. *Id.* 2019-Ohio-384 at ¶ 27. The court, like the Board of Tax Appeals, disagreed with the appellant and held that "R.C. 5751.033 creates nexus with Ohio by situsing gross receipts to this state because the tangible personal property involved was ultimately received in this state." *Id* at ¶ 32.

The Supreme Court of Ohio previously reviewed a substantially similar situsing statute, R.C. 5733.05(B)(2)(c), and found that it provided "ample nexus" for corporation franchise tax. *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97, 271 N.E.2d 827 (1971). The court concluded that pursuant to R.C. 5733.05, "sales of tangible personal property to an Ohio buyer, delivered by the seller to a common carrier outside Ohio and ultimately received in Ohio after all transportation has been completed, are deemed business done in Ohio * * * regardless of whether the buyer or the seller has designated the common carrier." *Id.* at 101. Thereafter, the Supreme Court of Ohio confronted the opposite argument in *Dupps Co. v. Lindley*, 62 Ohio St.2d 305, 405 N.E.2d 716, 717 (1980). Dupps was an Ohio-based manufacturer that argued that goods received by its customers at its facility in Ohio, and then transported outside Ohio, should be sitused outside Ohio. The court agreed, holding that "[s]ince the equipment herein was 'ultimately received' outside of Ohio, such sales should not have been" sitused to Ohio. *Id.* at 308.

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

D. IMPORTANCE OF SUPPORTING BUSINESS RECORDS & DOCUMENTATION

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

IV. ANALYSIS

A. THE CLAIMANT HAS NOT DEMONSTRATED THAT SALES TO SEARS ARE ULTIMATELY RECEIVED OUTSIDE OF OHIO

The claimant contends that the Electrolux products that are sold and shipped to an Ohio distribution center owned and operated by Sears and then subsequently transported to Sears retail locations outside the state of Ohio should not be sitused to Ohio. The claimant states that it uses a common carrier to ship products to the Ohio Sears distribution center and then Sears further transports the goods to their ultimate destination. While the claimant acknowledges that it does not know at the time it ships products to the Sears distribution center the exact transportation destination of each product, the claimant contends that it obtains information from Sears at some point after the property is received in Ohio, which purportedly shows to which Sears retail location products are subsequently sold. The situs of gross receipts from the sale of tangible personal property, for CAT purposes, is not contingent on the location of the ultimate purchaser. Rather, the situs depends on where the purchaser, in any given sale, ultimately receives the property. Accordingly, since the claimant only has knowledge based on its own verified records as to which distribution center its products are shipped, the sole issue in this case is where the Ohio distributor received the property pursuant to that sale.

As noted above, the BTA in *Greenscapes* held that "[w]hile it may be true that the goods appellant sells may be removed from Ohio, after being shipped from appellant to Ohio, for ultimate sale in one of its customers' retail locations, the lack of information about any such further transportation forecloses appellant's argument." *Greenscapes*, BTA No. 2026-350 at 3. Similarly, when the claimant sells goods to Sears, its own shipping labels and bills of lading indicate that the property will be received at Sears distribution center in Columbus, Ohio. *Greenscapes* also provided, "[at] the time appellant sold products to its customers, it knew their ultimate destination to be Ohio, based on its customer's orders and the bills of lading it provided to the drivers transporting the products. Our inquiry ends here, as did the commissioner's, in the absence of any evidence indicating that goods were ultimately received elsewhere." *Id.* In the case at hand, the facts are very similar to those in *Greenscapes* in that neither the taxpayer in *Greenscapes* nor the claimant can demonstrate that its property is ultimately received outside of Ohio.

As noted above, in *Mia Shoes, Inc. v. McClain* the Board of Tax Appeals has recently ruled on a similar situsing issue involving the situsing of tangible personal property under R.C. 5751.033(E). *Mia Shoes*, *supra*, BTA No. 2016-282. There are similarities between *Mia Shoes* and the claimant concerning the defects in the taxpayers' situsing methodologies and arguments. In *Mia Shoes*, the Board held that the sales of goods that were taken to customers' Ohio distribution centers were properly sitused to Ohio for CAT because Mia knew it was shipping its goods to Ohio, and Mia "lost visibility of the goods once they were delivered to Ohio." *Id.* at 3. In the instant case, the claimant

knows it is shipping the goods at issue to its customer's Ohio distribution centers, and, like *Mia Shoes*, does not know, based upon its own records, where or whether its purchasers will be shipping the products from the Ohio distribution centers. The claimant acknowledges that it obtains information from Sears after the initial transportation to support what store location every product is sold.

If the claimant's argument that it should be able to use its customers' records for situsing were accepted, it would introduce numerous compliance and administrative issues. For example, in addition to auditing the claimant's records, the Department would need to review and verify the sales and shipping records and data of the many retailers (such as Sears) to which the claimant sells products in order to verify the secondary records. The proposition of accepting secondary records and data as evidence for situsing purposes is problematic and would force the Department to attempt to verify the accuracy of records and data produced by a company or individual which was not subject to the initial audit, assessment, or refund claim. Or, as the claimant here requests, the Department would be forced to accept the secondary records at face value or speculate as to their accuracy regarding purported further transportation based on circumstantial evidence.

These considerations concerning speculation with respect to the situsing of tangible personal property were addressed in the decisions in both *Greenscapes* and *Mia Shoes*. In *Greenscapes*, the lack of reliable information from the taxpayer at the time of the sale regarding what the purchaser did after the property was received in Ohio was critical. *Greenscapes*, 2019-Ohio-384 at ¶ 27. There, as is the case here, the taxpayer could not provide its own records which would definitively show that the property was further shipped or immediately removed from Ohio. What is clear based on the claimant's records contemporaneous with the sale is that the property it sold to Sears was destined for and received in Ohio. It is entirely possible that, when the property was received at the Ohio distribution center, that Sears did not know where, whether, or when the property may be moved. Similarly, the products could have been held at the distribution center until such time it is needed at a location to be determined.

In *House of Seagram*, the Ohio Supreme Court reviewed the concept of property further shipped and noted items on their way to or immediately shipped to locations outside Ohio should not be sitused to this State. *House of Seagram*, 27 Ohio St.2d 97 at 101, 271 N.E.2d 827. In this case, the claimant has not definitively demonstrated that its products sold to Sears were immediately (or at any subsequent point) shipped out of state. Therefore, the claimant is not only asking the Department to accept secondary records at face value but also to infer that Sears immediately shipped or intended to remove the property received in Ohio to a retail store outside of Ohio. Ultimately, granting the claimant's request requires the Department to accept unverified secondary records and speculate where, whether, and when the property would ultimately be removed from Ohio.

B. THE TAX COMMISSIONOR LACKS JURISDICTION TO DETERMINE THE CONSTITUTIONALITY OF A STATUTE

The claimant also raised multiple constitutional objections in its applications for refunds. However, it is well-established that the Tax Commissioner lacks jurisdiction to determine the constitutionality of a statute. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988). Nevertheless, the legislative enactments of the Ohio General Assembly are entitled to a strong presumption of constitutionality. *N. Ohio Patrolmen's Benevolent Assn. v. Parma*, 61 Ohio St.2d 375, 377, 402 N.E.2d 519 (1980). The Ohio Supreme Court further adheres to the presumption the Tax Commissioner's application of state tax laws is constitutional. *See State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, *Swetland v. Kinney*, 69

Ohio St.2d 567, 433 N.E.2d 217 (1982). Since the claimant's objections are constitutional in nature, the Tax Commissioner cannot make a determination on those challenges.

V. CONCLUSION

The claimant requests the Department to look beyond the bills of lading and invoices which clearly show that the property was received in Ohio, and instead situs its sales to Sears based upon speculative methodologies and its purchaser's records which are requested and received at some point after the actual sale and delivery. However, the claimant has not established the accuracy of its secondary situsing data and refund calculations, and the Department cannot independently verify it. Furthermore, the evidence currently available to the Tax Commissioner reflects that the taxpayer's original situsing methodology was consistent with the bills of lading, invoices, and other contemporaneous records and the relevant authority.

For the reasons stated above, the claimant has not demonstrated that the payments it seeks to have refunded were illegal or erroneous.

Therefore, the refund claims are denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

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FINAL DETERMINATION

Date: APR 17 2020

Greenscapes Home and Garden Products Inc.
P O Box 2079
Calhoun, GA 30703

Re: Ohio Tax Account #: 93079431
Tax Type: Commercial Activity
Ten Assessments

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case Nos. 2017-2113, 2017-2114, 2017-2116, 2017-2117, 2017-2118, 2019-1514, 2019-1515, 2019-1517, 2019-1521, and 2019-1522, dated April 7, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, the assessments are modified as follows:

Assessment Number	Period	Tax	Interest	Penalty	Total
17201613434973	10/1/2015-12/31/2015	$195.00	$32.82	$0.00	$227.82
100000612386	1/1/2016-3/31/2016	$2,100.00	$337.88	$0.00	$2,437.88
100000619188	4/1/2016-6/30/2016	$2,810.00	$430.89	$0.00	$3,240.89
100000625577	7/1/2016-9/30/2016	$1,164.00	$169.69	$0.00	$1,333.69
100000702243	10/1/2016-12/31/2016	$583.00	$79.93	$0.00	$662.93
100000870055	4/1/2017-6/30/2017	$2,583.00	$302.79	$0.00	$2,885.79
100000921382	7/1/2017-9/30/2017	$1,323.00	$141.33	$0.00	$1,464.33
100001124412	1/1/2018-3/31/2018	$2,100.00	$183.40	$0.00	$2,283.40
100001124971	4/1/2018-6/30/2018	$2,737.00	$211.45	$0.00	$2,948.45
100001219858	7/1/2018-9/24/2018	$1,385.00	$92.59	$0.00	$1,477.59

A payment in the amount of $18,962.77 has been made in full satisfaction of these assessments.

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

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

Jeffrey A. McClain
JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date:

APR 0 8 2020

Hospitality Furnishings & Design Inc
ATTN: Dale Gilardi CFO
146 Chestnut Street
Zelienople, PA 16063

Re: Ohio Tax Account #: 95258886
Tax Type: Commercial Activity Tax
Assessment No. 100001006710
Reporting Period: 01/01/2015 – 09/30/2017

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

Tax	AMT	Interest	Penalty	Payment	Amount Owed
$17,705.00	$4,100.00	$1,662.00	$1,635.00	($25,102.00)	$0.00

The Ohio Department of Taxation assessed the petitioner after conducting an audit of its CAT account for the period in question. Through the audit, the Department's audit staff identified that the petitioner was basing their CAT off their Ohio Sales Tax S10 Returns. However, pursuant to R.C. 5751.01(F), CAT is based on gross receipts; therefore, the petitioner should have reported CAT based on the Gross Sales and not taxable sales. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed an AMT pursuant to R.C. 5751.03(B). 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 interest and 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.

With regards 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 its payment of tax and interest assessed, and its compliance with its CAT obligation following the assessment, support a full abatement of the penalties. However, the interest cannot be abated, as the accrual of interest is mandatory pursuant to R.C. 5751.06(G).

Accordingly, the assessment is adjusted as follows:

Tax	AMT	Interest	Penalty	Payment	Refund due
$17,705.00	$4,100.00	$1,662.00	$0.00	($25,102.00)	($1,635.00)

Current records indicate that the $25,102.00 reflected above has been made on this assessment, resulting in an overpayment of $1,635.00. 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.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

Michelin North America Inc.
P.O. Box 19001
Greenville, SC 29602

Re: Assessment No. 17201520146669
Commercial Activity Tax – 01/01/2010-12/31/2012

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

Tax	Interest	Penalty	Total
$423,263.00	$48,341.00	$0.00	$471,604.00

I. BACKGROUND

Michelin North America Inc. ("MNA") designs, makes, and sells tires for many types of vehicles, including airplanes, automobiles, bicycles, earthmovers, farm equipment, heavy-duty trucks, motorcycles, spacecraft, and numerous military vehicles. MNA makes and sells tires under the Michelin, BF Goodrich, and Uniroyal brands. The Michelin Corporation is the U.S. parent company to MNA and directly or indirectly owns a group of related entities operating in and around North America and is itself a subsidiary of the France-based ultimate parent company, Cie Generale des Etablissements Michelin.

MNA is the reporting person for the commercial activity tax taxpayer group that includes several Michelin entities. MNA and the related entities registered for the CAT as a combined taxpayer group and did not update or change its registration during any of the periods at issue in the assessment. MNA was contacted for a CAT audit for the tax periods referenced above, which was conducted at its Greenville, South Carolina headquarters. The Ohio Department of Taxation ("Department") audit staff identified four issues that gave rise to the assessment. Those issues are:

A. The petitioner's failure to properly register for the CAT in compliance with the requirements of section 5751.012 of the Revised Code;
B. The incorrect reporting of taxable gross receipts ("TGR") on the petitioner's CAT returns in violation of section 5751.02 of the Revised Code;
C. The petitioner's failure to include on its CAT returns the taxable gross receipts from intellectual property that was used or licensed for use in this state; and
D. The petitioner's failure to include on its CAT returns the TGR of undisclosed members of its taxpayer group resulting from sales to Tire Centers, LLC ("TCi").

The petitioner contests, in whole or in part, each of these issues separately and provided additional documentation and explanation upon petitioning the assessment. However, the petitioner concedes that it owes some portion of the tax amount assessed. Based on the additional information presented during

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the pendency of the petition, the petitioner's contentions regarding issues C and D identified above are well-taken, and the portions of the assessment related to those issues will be adjusted accordingly. Therefore, this determination is limited to the remaining contested issues of correcting errors in the petitioner's registration and petitioner's incorrect reporting of taxable gross receipts on its CAT returns as described in items A and B above.

II. THE PETITIONER'S CONTENTIONS

The petitioner makes the following contentions to the two remaining issues.

A. CORRECTING PETITIONER'S REGISTRATION

In response to the audit adjustment related to the petitioner's registration errors, the petitioner contends that it should be granted a retroactive consolidated taxpayer election in order to correct those errors.

B. INCORRECT REPORTING OF TAXABLE GROSS RECEIPTS ON CAT RETURNS

In response to the audit adjustment for the incorrect reporting of TGR on the petitioner's CAT returns, the petitioner does not contest the underlying reason for the adjustment. Rather, the petitioner believes that the Commissioner should allow a reduction to the amount of those TGR assessed to account for returns and allowances. The petition states:

> One of the more significant adjustments in the assessment was the use of the sales by state apportionment schedules which agree in total to sales reported on Taxpayer's federal return as support for Ohio taxable gross receipts for CAT purposes. Taxpayer agrees with this approach as an appropriate estimate of Ohio taxable gross receipts. However, for 2012 and 2011, the sales by state apportionment schedules provided to the auditor represented sales data prior to deductions for sales returns and allowances.
>
> Ohio Revised Code Section 5751.01(F)(2)(cc) provides that returns and allowances are excluded from the definition of gross receipts.
>
> To support this basis for petition for reassessment, please see the attached sales by state support schedule for the returns and allowances adjustment (Attachment #1) which provides sales by state in total that agree to gross receipts on the federal return after returns and allowances for 2012 and 2011.

III. ANALYSIS

For the following reasons, the petitioner's contentions are not well taken.

A. CORRECTING THE PETITIONER'S REGISTRATION & ANNUAL EXCLUSION AMOUNT

The Department's audit staff identified multiple commonly owned entities that had substantial nexus with Ohio pursuant to R.C. 5751.01(H) and (I) that were not included in the petitioner's combined taxpayer group as required by R.C. 5751.012. Additionally, one such commonly owned entity had registered as a single entity taxpayer (a person that has no common owner for purposes of the CAT) and was filing and paying the CAT under a separate registration in violation of R.C. 5751.012. As a result of

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this unlawful separate registration, this entity claimed its own one million dollar annual exclusion for each of the years that it was separately registered. Accordingly, the Department's audit staff disallowed the additional exclusion for each year during the audit period. The petitioner was given credit for the tax payments made on the separate registration during the audit periods. This issue raised the petitioner's taxable gross receipts by three million dollars.

R.C. 5751.01(D) defines "taxpayer" as "any person, or any group of persons in the case of a consolidated elected taxpayer or combined taxpayer treated as one taxpayer, required to register or pay tax under this chapter." R.C. 5751.012 *requires* certain commonly owned persons to register, file, and pay the CAT as one taxpayer (a "combined taxpayer") pursuant to the requirements and provisions of that statute. Persons meeting the common ownership requirements of a combined taxpayer must register, file, and pay as a single taxpayer as matter of law. Alternatively, certain commonly owned persons *may elect* to file as one taxpayer (a "consolidated elected taxpayer") if they make an election that meets the requirements set out in R.C. 5751.011. Finally, R.C. 5751.03(C)(1) states that "[e]ach taxpayer may exclude the first one million dollars of taxable gross receipts for a calendar year." This annual one million dollar exclusion is available to each "taxpayer" as that term is defined by R.C. 5751.01(D). Accordingly, only one annual one million dollar exclusion may be claimed by a combined taxpayer or a consolidated elected taxpayer each year, regardless of the number of persons in the taxpayer group.

In response to this issue, the petitioner argues that the Commissioner should permit it to make a retroactive election to consolidate its taxpayer group under R.C. 5751.011. However, the Commissioner need not broach the subject of the petitioner's request for a retroactive consolidated election because the audit adjustment eliminating the illegally claimed annual exclusions would be necessary regardless of whether the petitioner was a combined taxpayer or a consolidated elected taxpayer. In other words, even if the Commissioner allowed the petitioner's request for a retroactive application of a consolidated election, the petitioner would still have claimed three million dollars of annual exclusions that it was not entitled to claim. The tax resulting from this adjustment would be due from the petitioner whether or not it was a combined taxpayer or a consolidated elected taxpayer. That is because the entity that had erroneously maintained a separate CAT registration was required to be a member of the combined taxpayer group as a matter of law pursuant to R.C. 5751.012, or, in the alternative, would have been a required member of a consolidated elected taxpayer group pursuant to an election under R.C. 5751.011.

Furthermore, even if the petitioner had made a timely election to consolidate, the taxable gross receipts picked up by the auditor were not receipts between members of the group. In other words, the receipts would have been taxable whether the petitioner was registered as a combined or consolidated elected taxpayer group.

The petitioner's contention on this issue does nothing to address its responsibility for the amount assessed. Because the petitioner's contention, even if it were well taken, cannot absolve the petitioner's obligation to pay the amount assessed, it must fail. For the foregoing reasons, the Commissioner finds that the assessment properly includes these amounts and no adjustment to the assessment is warranted for this issue.

B. INCORRECT REPORTING OF TAXABLE GROSS RECEIPTS ON CAT RETURNS

During the audit, the Department's audit staff attempted to reconcile the amounts reported on the petitioner's CAT returns for the audit period with the petitioner's own records indicating Ohio TGR. The amounts reported on the petitioner's CAT returns were significantly lower than the amounts

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indicated in the petitioner's records. The petitioner was unable to explain or justify the discrepancy. The auditor proposed, and the petitioner agreed, to use the petitioner's state sales apportionment schedules for the years under audit to determine the petitioner's CAT liability. The petitioner now contends that the apportionment schedules provided for 2011 and 2012 should not be used because they include amounts that are deductible from line 1a of the federal corporation income tax return, form 1120.

R.C. 5751.01(F) defines "gross receipts" as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration." Under this broad definition, the full identifiable value of a transaction is generally a gross receipt, absent a specified statutory exclusion.

Notwithstanding the broad definition of "gross receipts," there are a number of enumerated exclusions listed in R.C. 5751.01(F)(2). The petitioner relies on one such exclusion to contend that the assessment should be reduced by an amount that corresponds to its estimated Ohio share of returns and allowances as shown on its federal income tax returns for tax years 2011 and 2012.

Taxpayers claiming exemption or exclusion from taxation must affirmatively establish their right thereto. *Dayton Sash & Door Co. v. Glander*, 36 Ohio St.2d 120, 304, 304 N.E.2d 388 (1973). Ohio law in this regard is well-established; exemptions from taxation are strictly construed against the claim of exemption in favor of the taxing authorities. See *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 409, 105 N.E2d 648 (1952); *Beckwith & Assoc. v. Kosydar*, 49 Ohio St.2d 277, 279, 361 N.E.2d 1060 (1977), and *Canton Malleable Iron Co. v. Porterfield* 30 Ohio St.2d 163, 166, 283 N.E.2d 434 (1972). Also see *Memorial Park Golf Club, Inc. v. Lawrence*, 2000 Ohio Tax LEXIS 471 (BTA No. 99-K-633) Thus, in determining whether the taxpayer is entitled to the exclusions which it seeks, the facts must be determined under a strict, narrow reading of the relevant definitions. In addition, taxpayers must provide the Tax Commissioner with concrete evidence supporting its request for exclusions and refunds, and mere speculation is insufficient. See, *Greenscapes Home and Garden Products, Inc. v. Testa*, BTA No. 2026-350 (July 19, 2017), citing *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059 (2006), ¶15.

R.C. 5751.01(F)(2)(cc) provides that "returns and allowances" are excluded from gross receipts for purposes of the CAT. "Returns and allowances" is not a defined term under Chapter 5751 of the Revised Code. R.C. 5751.01(K) states, in relevant part, that "any term used in this chapter that is not otherwise defined has the same meaning as when used in a comparable context in the laws of United States relating to federal income taxes unless a different meaning is clearly required." The Internal Revenue Code ("IRC"), the laws of the United States relating to federal income taxes, also does not define "returns and allowances." However, that phrase appears on a line on the federal corporation income tax return, form 1120. The use of this phrase, or a similar phrase, on the federal form 1120 appears to be the sole basis for the petitioner's contention. The instructions to the federal form 1120 for tax year 2010 do not describe the amounts to be included on line 1b for that year. In 2010, line 1b reads "less returns and allowances." In 2011 and 2012, the equivalent line on the form 1120 reads "returns and allowances *plus any other adjustments*." (Emphasis added). In 2011, the instruction for line 1d[1] indicates that this line on the return includes "cash and credit refunds the corporation made to customers for returned merchandise, rebates, and other allowances made on gross receipts or sales." The 2012 federal form 1120 moves this adjustment back to line 1b. The instruction for line 1b in 2012 is identical to the 2011 instruction for line 1d. This instruction describes not only amounts that may align with the common usage meaning of

[1] This line of the federal form 1120 changes from line 1b to line 1d in 2011, but then reverts back to line 1b in 2012.

"returns and allowances," i.e., certain refunds, but also extends the deduction to "rebates" and the much broader category of "other allowances made on gross receipts or sales." These various categories of amounts that are deductible on line 1b (1d for 2011) do not define the phrase "returns and allowances" for purposes of federal income tax. Rather, "returns and allowances" are simply a part of a broader group of amounts that are deducted from line 1a of federal form 1120. Further, the association of these various terms on the federal return neither defines "returns and allowances" nor informs of its meaning for purposes of the CAT exclusion from gross receipts. The lack of a federal definition, however, suggest that the common usage of the phrase "returns and allowances" is an appropriate starting point for defining the CAT exclusion.

In most business and accounting contexts, the phrase "returns and allowances" refers to sales returns and sales allowances.[2] A sales return occurs when a purchaser returns a purchased good to the seller in exchange for a refund of the amount paid. In essence, it represents a complete undoing of the original sales transaction. Similarly, a sales allowance occurs when a seller refunds a portion of the purchase price to the purchaser because the goods received are damaged, spoiled, defective, or nonconforming. In essence, it represents a partial undoing, or renegotiation, of the original sales transaction. In the case of a sales allowance, the seller refunds some of the purchase price and the purchaser keeps or accepts the damaged, spoiled, defective, or nonconforming goods. Both of these events share a key defining characteristic: the concession by the seller is based solely on the purchaser's dissatisfaction with what was purchased. In other words, these are purchaser-demanded refunds. "Returns and allowances" are not incentive-based discounts, rebates, or promotions. "Returns and allowances" are not consideration for cooperative marketing, trade-spending, or consideration for reciprocal services such as preferential shelving or warranty services. However, a federal corporation income taxpayer may include all of these varied types of expenses, costs, and fees-for-service on line 1b (1d for 2011) of their federal form 1120. As further explained below, it is because of this that the Commissioner must reject the petitioner's contention.

The original audit adjustment for this issue was based on the state apportionment schedules provided by the petitioner. Those schedules showed the petitioner's gross sales by state. Upon petitioning the assessment, the petitioner provided new state apportionment schedules for 2011 and 2012. The new schedules start with the same gross sales amounts shown on the first set of schedules, but also show a reduction to those amounts for what the petitioner claims are the "returns and allowances" reported on the federal form 1120 line 1b (1d for 2011). The petitioner reconciles the total gross sales amount showing on the new schedules to line 1a of the federal form 1120. The petitioner also reconciles the total reduction to these amounts on the new schedules to line 1b (1d for 2011) of the federal form 1120. The petitioner did not provide an account-level reconciliation showing what amounts contributed to these figures. Such detail would help determine whether, as described above, these amounts were limited to only the "returns and allowances" that are excluded pursuant to R.C. 5751.01(F)(2)(cc), or whether these amounts were comprised, in whole or in part, of the other types of deductions reported on line 1b (1d for 2011) of the federal form 1120.

It is incumbent upon a taxpayer to provide the Tax Commissioner with concrete evidence supporting the nature and extent of its entitlement to an exclusion, or for requests for refunds, and reductions to assessments, and mere speculation is not sufficient. See, *Greenscapes Home and Garden Products, Inc. v. Testa*, BTA No. 2026-350 (July 19, 2017), citing *Lakota Local School Dist. Bd. of Edn. v. Butler Cty.*

[2] In accounting terms, allowances generally refer to a reduction in price charged by a seller as a response to or in compensation for a defect in a product or service sold. Bragg, S., *Billing and Collections Best Practices*, Glossary of Definitions, p. 237., 1st Ed.2005.

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APR 29 2020

Bd. of Revision, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15. The Tenth Appellate District of the Ohio Court of Appeals affirmed *Greenscapes* on February 7, 2019. See *Greenscapes Home and Garden Products, Inc. v. Testa*, No. 17AP-593 (2019).

In arguing that its federal line 1b deductions should be excluded from CAT gross receipts, the petitioner asks the Commissioner to speculate that those amounts constitute "returns and allowances" for purposes of R.C. 5751.01(F)(2)(cc). The Commissioner declines to speculate in this manner. Accordingly, the petitioner has failed to demonstrate the nature and extent of the exclusion to which it contends it is entitled.

For the foregoing reasons, the Commissioner finds that the assessment properly included the unreduced gross sales amounts and no adjustment to the assessment is warranted for this issue.

IV. CONCLUSION

Upon review, the Commissioner adopts the requested adjustments to the petitioner's third and fourth contentions (items C and D in the "Background" section above). However, the petitioner's remaining contentions are not well taken. Therefore, the audit assessment is affirmed in part and modified in part.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$229,811.00	$25,985.00	$0.00	$255,796.00

Current records indicate that no payment has been made on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law**. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, P.O. Box 1090, Columbus, OH 43216-1090.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 17 2020

Mid America Freight Logistics
900 S. Highway Dr., Ste. 202
Fenton, MO 63026-2042

Re: Refund Claim
Commercial Activity Tax – 10/01/2017 – 12/31/2017

This is the final determination of the Tax Commissioner with respect to an application for commercial activity tax ("CAT") refund filed pursuant to R.C. 5751.08.

Refund Claim No.	Refund Claimed
96216108	$4,433.70

I. BACKGROUND

Mid America Freight Logistics (hereinafter "Mid America") filed a claim an application for CAT refund pursuant to R.C. 5751.08. The claimant contends that in compiling its filings for the Fourth Quarter of 2017, it had erroneously included taxable gross receipts for the entire 2017 tax year instead of those for Q4 2017 alone. Mid America contends further that as a result of the error, it overpaid $4,433.70 in CAT and seeks a refund for that amount. The claimant did not request a hearing, so this matter is decided based on the evidence currently available to the Tax Commissioner.

II. CLAIMANT'S CONTENTIONS

Mid America contends that had incorrectly tabulated is Q4 2017 CAT to include gross receipts from the entire tax year, rather than the fourth quarter alone. As a result of the error, the claimant paid $5,045.88[1] by direct debit from its accounts through the Ohio Business Gateway ("OBG"). To correct the error and in accordance with Department requests, the claimant amended its Q3 and Q4 CAT filings through the OBG and submitted copies of its 2017 billing reports. The claimant contends that the amended filings and reports reflect the proper tabulations of Mid America's gross receipts for the tax period at issue, and the Department should issue a refund of the erroneous overpayment to reflect the firm's actual taxable gross receipts pursuant to R.C. 5751.01(F) and R.C. 5751.08.

III. AUTHORITY AND APPLICATION

A. APPLICATIONS FOR CAT REFUNDS

R.C. 5751.08(A) governs CAT applications for refund and states, in pertinent part, as follows:

[1] The CAT due would have been $4,995.00 for the initial tax amount plus $50.88 in interest, which total to the $5,045.88 figure.

> An application for refund to the taxpayer of the amount of taxes imposed under this chapter that are overpaid, paid illegally or erroneously, or paid on any illegal or erroneous assessment shall be filed by the reporting person with the tax commissioner, on the form prescribed by the commissioner, within four years after the date of the illegal or erroneous payment of the tax, or within any additional period allowed under division (F) of section 5751.09 of the Revised Code. The applicant shall provide the amount of the requested refund along with the claimed reasons for, and documentation to support, the issuance of a refund.

Moreover, under R.C. 5751.08(A), an application for refund to the taxpayer of the amount of taxes imposed that are overpaid, paid illegally or erroneously, or paid on any illegal or erroneous assessment shall be filed by the reporting person within four (4) years after the date of the illegal or erroneous payment, or within any additional period allowed under R.C. 5751.09(F). In this case, the claimant properly and timely filed its claim for refund, and it is subject to review by the Tax Commissioner.

B. THE CLAIMANT'S GROSS RECEIPTS FOR Q4 2017 ARE SIGNIFICANTLY LESS THAN THOSE ORIGINALLY REPORTED.

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

The claimant was registered for the CAT during the tax periods at issue and filed its returns quarterly. Department records indicate that the claimant organized as a Foreign For-Profit LLC on July 11, 2017; however, Mid America originally registered as an LLC in Missouri in August 2008. To correct the error made in association with Mid America's Fourth Quarter 2017 filings and in accordance with Department requests, the claimant amended its Q3 and Q4 CAT filings through the OBG and submitted copies of its 2017 billing reports. The reports align with the tabulations submitted with the firm's CAT filings and accounts for the entirety of the firm's 2017 reported gross receipts as reported. In addition to amended filings, the claimant submitted documents that reflect gross receipts generated pursuant to services it rendered to its Ohio-based customers for 2017. The documents depict the entirety of the firm's taxable gross receipts situsable to Ohio for 2017 as well as those for each quarter comprising it. They demonstrate that the original Q4 filings were grossly overreported and are inconsistent with total amount of gross receipts actually generated during the Quarter.

With respect to its original unamended filings, the claimant reported Ohio gross receipts of $480,016.00 for Q3 of 2017 and $1,921,014.20 for Q4 of 2017. The claimant contends its taxable gross receipts for Q4 of 2017 should only have totaled $753,106.00. When the claimant reported the error, the Department requested that it amend its filings to report the proper amount of taxable gross receipts. In response, the claimant provided amended filings that had been generated through the OBG and complete reports for the entirety of its 2017 Ohio taxable gross receipts. The reported amounts align with the amended CAT filings as reported by the taxpayer.

IV. CONCLUSION

Accordingly, pursuant to R.C. 5751.08 and for the foregoing reasons, the Tax Commissioner has determined that the amended filings for Q4 2017 are accurate based on the evidence available. As such, the new tax liability for Q4 2017 is $606.00 with interest of $6.18. When deducted from the totals already submitted by the taxpayer for Q4 2017, the claimant is subject to net refund of $4,433.70.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date:

APR 17 2020

Mitsubishi Motors North America, Inc.
ATTN: Katherine B. Knight, Vice President, General Counsel
Mitsubishi Motors North America, Inc.
P.O. Box 689040
Franklin, TN 37068

Re: Assessment No. 17201419820432
Commercial Activity Tax – 7/1/2008 - 12/31/2010

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 above-referenced commercial activity tax assessment.

In resolution of this matter, this assessment shall be modified pursuant to terms agreed to by the Tax Commissioner and the petitioner.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

Modern Technology Solutions, Inc.
5285 Shawnee Rd.
Ste. 400
Alexandria, VA 22312

Re: Commercial Activity Tax
Assessment No. 100000553588
Reporting Period: 01/01/2012 – 12/31/2015

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

Tax	AMT	Interest	Penalty	Total
$116,989.00	$2,600.00	$12,636.00	$25,704.00	$157,929.00

Modern Technology Solutions, Inc. (hereinafter "MTSI" or "petitioner") provides engineering services to the U.S. government under contracts directly from the U.S. government or under purchase orders from a contractor of the U.S. government. During the period in question, the petitioner operated an office in Beavercreek, Ohio. Of particular relevance to this matter, are services that the petitioner provided to the United States Air Force and its operations at Wright-Patterson Air Force Base.

The Department assessed the petitioner after performing a field audit for the period at issue. The Department's audit staff increased the petitioner's taxable gross receipts from technical services and sitused the receipts to Ohio based on the evidence available to it at the time and in accordance with R.C. 5751.033(I). Notably, the petitioner did not provide sales information requested during the audit. Therefore, the Department's audit staff concluded that 20% of everywhere sales reported on the petitioner's Ohio Pass-Through Entity (PTE) tax return represented a reasonable estimate of the petitioner's annual taxable gross receipts since Ohio sales information was not provided during the audit. The petitioner objects to the assessment and requested a hearing which was conducted via teleconference. Accordingly, this matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the petition.

During the administrative appeal period, the petitioner submitted documentation to support the Ohio sales figures reported on its PTE returns for the period at issue, including information on projects involving Ohio purchasers and services provided in Ohio and related supporting revenue detail. If a taxpayer's records do not allow the taxpayer to determine that location where its purchaser receives the benefit of the services, gross receipts related to those services may be sitused to Ohio using a reasonable, consistent, and uniform method that is supported by the service provider's business records as they existed at the time the service was provided or within a reasonable time thereafter. R.C. 5751.033(I). Accordingly, based on the nature of the services it provided, the petitioner seeks to use the sales factor that it reported for Ohio PTE purposes and multiply it by its everywhere sales reported

on its PTE returns for the periods at issue. Upon further review, the petitioner's proposed method to situs receipts related to services is a reasonable, consistent, and uniform method of situsing that is now supported by the petitioner's business records. Therefore, based on the additional information submitted by the petitioner, the tax and interest amounts assessed will be adjusted. Finally, R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. Based on the facts and circumstances in this matter, the penalty shall be partially abated.

Accordingly, the assessment is adjusted as follows:

Tax	AMT	Interest	Penalty	Total
$25,281.00	$2,600.00	$4,792.00	$11,948.00	$44,621.00

Current records indicate that $39,479.00 has been made on this assessment, leaving a balance due of $5,142.00. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payment to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

Nissan North America, Inc.
P.O. Box 685013
Franklin, TN 37068

Re: Commercial Activity Tax
Assessment No. 100000899473
Reporting Period: 01/01/2014 – 12/31/2016

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

Tax	Interest	Penalty	Total
$565,544.00	$40,527.00	$28,277.00	$634,348.00

The Department assessed the petitioner after performing a field audit for the period at issue. Specifically, the Department's audit staff identified that the petitioner's sale of auctioned vehicles in Ohio generated gross receipts per R.C. 5751.01(F) and taxable gross receipts per R.C. 5151.033(E). The petitioner objects to the assessment and requests a cancellation. Upon further review, and in light of the Ohio Board of Tax Appeal's recent decision in *Hyundai Motor Finance Co. v. McClain*, BTA No. 2015-785, 2020 WL 883134 (Feb. 6, 2020), the petitioner's contention is well taken.

Accordingly, the assessment is cancelled.

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

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

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

Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 08 2020

Starion Energy PA
P.O. Box 845
Middlebury, CT 06762

Re: Ohio Tax Account #: 93097937
Tax Type: Commercial Activity
Assessment #: 100001011954
Reporting Period: 01/01/2016 – 12/31/2017

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

Tax Due	AMT	Interest	Penalty(s)	Payment(s)	Total
$9,870.00	$0.00	$461.71	$1,480.50	($11,812.21)	$0.00

The Ohio Department of Taxation assessed Starion Energy PA (hereinafter referred to as "the petitioner") after conducting an audit of its CAT account for the period in question. During the audit, the Department's audit staff identified that the petitioner did not include all its Ohio situsable sales in its taxable gross receipts. The unreported sales were sitused in accordance with R.C. 5751.033(C). The auditor made adjustments to add back the difference in taxable gross receipts and the gross Ohio sales. The adjustment resulted in an increase of the taxable gross receipts and CAT due for the petitioner. The corresponding interest was assessed pursuant to R.C. 5751.06(G). Additionally, the petitioner was assessed a tax penalty pursuant to R.C. 5751.06(B)(1). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner does not contest the CAT liability as assessed and has paid the assessment in full 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 and the evidence supplied with the petition.

The petitioner seeks an abatement of the penalty. 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 assessed, support a partial reduction of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax Due	AMT	Interest	Penalty(s)	Payment(s)	Refund Due
$9,870.00	$0.00	$461.71	$740.25	($11,812.21)	$740.25

Current records indicate that the payment of $11,812.21 reflected above has been made on this assessment, resulting in an overpayment of $740.25. 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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FINAL DETERMINATION

Date: APR 17 2020

Superior Petroleum Equipment LLC
6314 Seeds Rd.
Grove City, OH 43123

Re: Refund Claim
Commercial Activity Tax – 01/01/2016 – 03/31/2016

This is the final determination of the Tax Commissioner with respect to an application for commercial activity tax ("CAT") refund filed pursuant to R.C. 5751.08.

Refund Claim No.	Refund Claimed
201777689	$650.00

Superior Petroleum Equipment LLC (hereinafter "SPE") filed an application for CAT refund pursuant to R.C. 5751.08. The claimant contends that it overpaid its annual minimum tax ("AMT") associated with its CAT for the above tax period. The taxpayer did not request a hearing, so this matter is decided based on the evidence currently available to the Tax Commissioner.

Department records show that SPE was registered for the Ohio CAT and is subject the annual minimum tax amount for the 2016 tax year. R.C. 5751.03(B). 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. Moreover, a taxpayer with taxable gross receipts ("TGR") for the previous tax year of more than $1,000,000, but less than or equal to $2,000,000 owes an AMT for the current tax year of $800.00. R.C. 5751.03. Where the taxpayer's taxable gross receipts are less than $1,000,000 but more than $150,000 for the previous tax year, the current tax year's AMT is $150. *Id.*

In the present case, the claimant paid AMT of $800 for the 2016 tax year. It contends, however, that it owes only $150 for the tax period and is entitled to a $650 refund because the taxable gross receipts it reported for the 2016 tax year were adjusted to $980,010.00. However, because the AMT is calculated based on the previous tax year's TGR, it is the claimant's 2015 TGR that determines the amount of its 2016 AMT. The claimant reported TGR for 2015 of $1,458,348, which is less than $2,000,000 but greater than $1,000,000. See R.C. 5751.03. Accordingly, the claimant is subject to an AMT of $800 for the 2016 tax year pursuant to R.C. 5751.03.

Therefore, the claimant is not entitled to a refund with respect to its 2016 AMT.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

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

Re:

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

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

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

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

The Department assessed the petitioner after conducting an audit of it for the period in question. That audit revealed that the petitioner had taxable gross receipts pursuant to R.C. 5751.033, but it did not file any CAT returns for the period at issue. Specifically, the Department's audit staff reviewed customs import shipping data and identified that the petitioner had substantial nexus with Ohio pursuant to R.C. 5751.01(H) and a bright line presence within Ohio pursuant to R.C. 5751.01(I). The audit staff prepared the estimated assessment currently considered pursuant to R.C. 5751.09(A) based upon the best available information at the time. The petitioner was also assessed an estimated AMT pursuant to R.C. 5751.03(B). The corresponding interest was assessed pursuant to R.C. 5751.06(G). A fifty percent penalty was assessed pursuant to R.C. 5751.06 (B) and (D), on account of additional tax due and failure to register for the tax and remit payment after being notified by the Department of the need to do so. The petitioner filed a timely petition for reassessment objecting to the assessment. In addition, the petitioner requested a hearing on this matter, which was held via telephone.

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

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misapplication of the annual exclusions permissible under R.C. 5751.03(C) and miscalculation of its annual minimum taxes under R.C. 5751.03(B). Ultimately, the evidence currently available to the Tax Commissioner indicates that the new documentation submitted by the petitioner warrants the adjustments to tax and interest laid out in table below.

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

Tax	Annual Minimum	Preassessment Interest	Penalty	Total
$63,550.00	$9,200.00	$6,266.00	$18,187.50	$97,203.50

Current records indicate that the petitioner has not made any payments to this assessment. Due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Post-assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Ohio Treasurer Josh Mandel." Payments should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio, 43216-1090.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:

APR 29 2020

Chapman Enterprises, Inc.
8392 Coonpath Rd.
Carroll, OH 43112-9735

Re: Four Assessments
Employer Withholding Tax – Multiple Periods
School District Withholding Tax – Multiple Periods

This is the final determination of the Tax Commissioner with regard to petitions for reassessment filed pursuant to R.C. 5747.13 concerning the following employer withholding tax and the school district withholding tax assessments:

Assessment Number	Tax Type	Period	Tax	Total Interest	Penalty	Total
100000722564	Employer Withholding	01/01/2007-12/31/2012	$64,442.61	$17,509.87	$32,221.47	$114,173.95
100000722577	Employer Withholding	01/01/2013 - 03/31/2016	$26,691.92	$2,325.27	$13,346.02	$42,363.21
100000722563	School District Withholding	01/01/2007-03/31/2012	$7,753.61	$2,021.74	$3,877.01	$13,625.36
100000722578	School District Withholding	01/01/2007 – 03/31/2016	$5,091.63	$425.47	$2,545.95	$8,063.05

I. FACTUAL BACKGROUND

The Department assessed the petitioner, Chapman Enterprises, Inc. (hereinafter "Chapman Enterprises" or "the company"), for failing to remit fully its Ohio employer's income tax and school district income tax withheld ("withholding taxes"). The Department assessed the petitioner after conducting an audit of its withholding account for the periods of the first quarter of 2007 through the first quarter of 2016. The audit review revealed that, aside from a partial income tax withholding payment in 2007, the petitioner had not remitted withholding taxes for the tax periods at issue. Subsequent to the audit and assessment, Chapman Enterprises wound up its business operations.

Based on the information in its possession, the Department's audit staff assessed the petitioner in accordance with R.C. 5747.13(A). The pre-assessment interest assessed in this matter was calculated pursuant to R.C. 5747.08(G). Pursuant to R.C. 5747.15(A)(4)(a), the Department imposed the penalties identified above.

The petitioner requested a hearing on the matters which was conducted at the Department's offices in Columbus, Ohio. This matter is now decided based on the information available to the Tax Commissioner.

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II. THE PETITIONER'S CONTENTIONS

The petitioner does not directly dispute the accuracy of the tax and interest assessed; rather, it contends that Chapman Enterprises' bookkeeper, Annette Spence, embezzled large sums from the company and failed to make proper filings and produce accurate records. Accordingly, they contend that Chapman Enterprises should be subject to the entirety of the taxes assessed, and Ms. Annette Spence should be assessed for the entire amount.

The petitioner contends that throughout her tenure as bookkeeper Ms. Spence actively hid tax information from the company's officers, made false and fraudulent tax filings to the state and federal tax authorities, and stole hundreds of thousands of dollars from Chapman Enterprises. Moreover, the petitioner asserts that the company's officers were unaware of any failure to comply with tax obligations or impropriety until it received the Ohio Department of Taxation's assessment on or about July 3, 2017. Ms. Spence began as Chapman Enterprises' bookkeeper October 7, 2002, and the evidence available to the Department indicates that she used the company's QuickBooks accounting system/software to process its accounts payable and receivable. The petitioner also indicates that Ms. Spence was responsible for all company tax payments, posting all bookkeeping and accounting entries, and processing company payroll.

The petitioner contends that Ms. Spence did not inform the company's officers about the commencement of the audit. The petitioner further contends that, when the Department's audit staff subsequently notified Ms. Spence about the withholding tax delinquency in May 2016, she did not deliver the notice to anyone else at the company. The petitioner contends that its corporate officers remained unaware of Spence's impropriety until the Department assessed the company.

Records reflect that Ms. Spence's conduct as bookkeeper of Chapman Enterprises resulted in multiple felony convictions. On April 18, 2019, she was convicted of theft from a person in a protected class—a felony of the second degree—and filing incomplete, false, and fraudulent returns—a felony in the fifth degree—in association with her conduct with Chapman Enterprises. *State of Ohio v. Annette D. Spence*, Franklin C.P., 18CR-766 (Apr. 18, 2019). The Court also concluded that Ms. Spence fraudulently added income to her pay, stole company checks, and made fraudulent purchases on a company credit card. *Id.* The Court, however, was silent as to whether Spence misfiled or filed fraudulent tax returns to either Ohio or federal tax authorities. The Franklin County Court of Common Pleas concluded that Ms. Spence stole $270,589.57 from the company over the span of at least five years from January 2011 to December 2016. The petitioner contends that this figure was arrived at by the prosecution to attain the requisite dollar amount necessary to charge Ms. Spence with a first-degree felony. The petitioner contends that, once the felony threshold was reached, the prosecution discontinued its investigation and filed charges. Thus, the petitioner asserts that the exact dollar amount attributable to Ms. Spence is not in the record. However, aside from court records, the petitioner did not provide additional evidence demonstrating that the amount was greater than $270,589.57. Upon conviction, Ms. Spence was ordered to pay restitution for the entire amount; although, the judge expressed doubt regarding her ability to do so. There is no indication from the record that Ms. Spence has paid any part of the amount owed.

III. RELEVANT AUTHORITY

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Pursuant to R.C. 5747.06(A), employers are charged with the responsibility of withholding from their employees' compensation an amount "substantially equivalent" to the income tax due the state from the employee. Similarly, employers are charged with withholding school district income tax from their employees' compensation. R.C. 5747.06(B).

R.C. 5747.07(B) states that every employer who is required to withhold taxes from employee compensation under R.C. 5747.06 shall file a return and pay any amount required by law. Employers who fail in their withholding and remittance obligations are responsible for the taxes due and may be assessed penalties and interest pursuant to R.C. 5747.13. Additionally, R.C. 5747.07(F)(4) and (5) require the Tax Commissioner to assess interest if remittances of the withheld amounts are not paid to the State in a timely manner. R.C. 5747.15(A)(4)(a) also imposes a penalty of up to 50 percent of the delinquent payment upon an employer if that employer fails to remit the taxes withheld. There is no bar or time limit to an assessment against an employer for failing to file a return. R.C. 5747.13(A); R.C. 5703.58(C)(1).

IV. Analysis

An employer who fails to file a return or fails to remit the full amount due may be assessed an amount "based upon any information in the commissioner's possession." R.C. 5747.13(A). Here, that information was obtained during an audit which revealed that the petitioner withheld income and school district taxes from its employees but failed to report and remit it. Much of the information the Department's audit staff utilized was either provided by the petitioner or obtained through information reported to the Department by the Internal Revenue Service ("IRS") under authorization of Section 6103(d) of the Internal Revenue Code. Specifically, the Department's audit staff used gross wages, W-2 information, and other relevant information reported to the IRS to calculate the tax amounts assessed. For instance, the gross wages to calculate the Ohio withholding taxes due in this matter are consistent with the gross wages that the petitioner reported to federal taxing authorities.

Moreover, Mr. John Siebert, Chapman Enterprises' CPA and an authorized representative of the petitioner, did not dispute the accuracy of the records and filings that gave rise to the assessment. While Ms. Spence's conduct may have contributed to the petitioner's failure to comply with its withholding tax obligations, the petitioner has not submitted evidence that refutes the accuracy of the tax and interest amounts assessed. In fact, there is neither evidence in the record nor any presented by the petitioner to refute the accuracy of the tax and interest amounts assessed in these matters. Ultimately, the evidence currently available to the Tax Commissioner reflects that the tax and interest amounts are accurate and there is no authority or basis upon which to adjust them.

V. Penalty Abatement

The Tax Commissioner may abate penalties when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). This authority to abate penalties has been examined in situations involving employee embezzlement. In *William A. Conti Interiors, Inc. v. Tracy*, BTA No. 1992-K-550 (Dec. 30, 1993), a taxpayer was victimized by an employee's embezzlement. In the *Conti* case, it was established that the failure to pay taxes was not an attempted evasion on the part of the appellant but was rather the victimization of the appellant by an employee. See also *Columbia Gas v. Limbach*, 69 Ohio St. 3d 462, 1994 Ohio 535, 633 N.E.2d 1108 (1994). When the failure to pay was brought out in *Conti*, the taxpayer paid the taxes that had been due and paid the penalty. The BTA found the situation in *Conti* warranted a full penalty abatement. See also

Roth, Blair, Roberts, Strasfeld & Lodge v. Wilkins, 2006 Ohio Tax LEXIS 58, *8-9 (Jan. 9, 2006).

Here, once the failure to pay was discovered by the petitioner, it did not immediately pay the taxes that had been due. It should further be noted that the tax and interest amounts assessed are uncontested and remain outstanding. Even so, as previously mentioned, the Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The evidence and circumstances in this matter support a partial reduction of the penalty.

VI. Conclusion

While there is no dispute that Ms. Spence's actions may have led to the petitioner's failure to remit the required withholding taxes, the petitioner has not demonstrated that the amounts assessed were improperly tabulated or that the assessments were otherwise improper. Moreover, the petitioner did not provide amended filings or alternative accountings. Throughout discussions with the Department's hearing officer, the petitioner's authorized representative communicated that Chapman Enterprises' CPA indicated Department records were in line with his observations, filings were accurate, and there is no evidence to override the records the Department used in assessing the petitioner.

Accordingly, the assessments are adjusted as follows:

Assessment Number	Tax Type	Period	Tax	Total Interest	Penalty	Total
100000722564	Employer Withholding	01/01/2007-12/31/2012	$64,442.61	$17,509.87	$3,222.13	$85,174.61
100000722577	Employer Withholding	01/01/2013 - 03/31/2016	$26,691.92	$2,325.27	$1,334.60	$30,351.79
100000722563	School District Withholding	01/01/2007-03/31/2012	$7,753.61	$2,021.74	$387.68	$10,163.03
100000722578	School District Withholding	01/01/2007 – 03/31/2016	$5,091.63	$425.47	$254.58	$5,771.68

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

APR 29 2020

MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED, AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

Ronald Chapman
8392 Coonpath Rd.
Carroll, OH 43112-9735

Re: Four Assessments
Employer Withholding Tax – Responsible Party: Multiple Periods
School District Withholding Tax – Responsible Party: Multiple Periods

This is the final determination of the Tax Commissioner with regard to petitions for reassessment filed pursuant to R.C. 5747.13 concerning the following employer withholding tax and the school district withholding tax responsible party assessments:

Assessment Number	Tax Type	Period	Tax	Total Interest	Penalty	Total
100000725529	Employer Withholding	01/01/2007-12/31/2012	$64,442.61	$17,509.87	$3,222.13	$85,174.61
100000725527	Employer Withholding	01/01/2013 - 03/31/2016	$26,691.92	$2,325.27	$1,334.60	$30,351.79
100000725494	School District Withholding	01/01/2007-03/31/2012	$7,753.61	$2,021.74	$387.68	$10,163.03
100000725528	School District Withholding	01/01/2007 – 03/31/2016	$5,091.63	$425.47	$254.58	$5,771.68

I. BACKGROUND

The Department assessed the petitioner, Mr. Ronald Chapman as responsible party of Chapman Enterprises, Inc. (hereinafter "Chapman Enterprises"), pursuant to R.C. 5747.07(G). Chapman Enterprises failed to fully remit Ohio employer's income and school district income tax withheld ("withholding taxes") for the periods identified above. The assessments were never fully satisfied by Chapman Enterprises and remain outstanding.[1] 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 Chapman Enterprises has been derivatively assessed against the petitioner because he was identified to be a responsible party. The petitioner requested a hearing on the matters which was conducted at the Department's offices in Columbus, Ohio.

[1] Chapman Enterprises filed petitions for reassessment on the underlying entity employer income tax and school district income tax assessments (100000722564, 100000722577, 100000722563, and 100000722578). The Tax Commissioner issued a Final Determination affirming the tax and interest amounts assessed in those matters and reflected above. The Final Determination also abated the penalties assessed. The adjustments to the penalties are reflected in the financial table above.

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II. THE PETITIONER'S CONTENTIONS

The petitioner does not directly dispute the accuracy of the tax and interest assessed; rather, it contends that Chapman Enterprises' bookkeeper, Annette Spence, embezzled large sums from the company and failed to make proper filings and produce accurate records. Accordingly, they contend that Chapman Enterprises should be subject to the entirety of the taxes assessed, and Ms. Annette Spence should be assessed for the entire amount.

The petitioner contends that throughout her tenure as bookkeeper Ms. Spence actively hid tax information from him, made false and fraudulent tax filings to the state and federal tax authorities, and stole hundreds of thousands of dollars from Chapman Enterprises. Moreover, the petitioner asserts that he was unaware of any failure to comply with tax obligations or impropriety until the company received the Ohio Department of Taxation's assessment on or about July 3, 2017. Ms. Spence began as Chapman Enterprises' bookkeeper on October 7, 2002, and the evidence available to the Department indicates that she used the company's QuickBooks accounting system and software to process its accounts payable and receivable. The petitioner also indicates that Ms. Spence was responsible for all company tax payments, posting all bookkeeping and accounting entries, and processing company payroll.

The petitioner contends that Ms. Spence did not inform him about the commencement of the audit. The petitioner further contends that, when the Department's audit staff subsequently notified Ms. Spence about the withholding tax delinquency in May 2016 she did not deliver the notice to anyone else at the company. The petitioner contends that he remained unaware of Ms. Spence's impropriety until the Department assessed the company.

Records reflect that Ms. Spence's conduct as bookkeeper of Chapman Enterprises resulted in multiple felony convictions. On April 18, 2019, she was convicted of theft from a person in a protected class—a felony of the second degree—and filing incomplete, false, and fraudulent returns—a felony in the fifth degree—in association with her conduct with Chapman Enterprises. *State of Ohio v. Annette D. Spence*, Franklin C.P., 18CR-766 (Apr. 18, 2019). The Court also concluded that Ms. Spence fraudulently added income to her pay, stole company checks, and made fraudulent purchases on a company credit card. *Id.* The Court, however, was silent as to whether Ms. Spence misfiled or filed fraudulent tax returns to either Ohio or federal tax authorities. The Franklin County Court of Common Pleas concluded that Ms. Spence stole $270,589.57 from the company over the span of at least five years from January 2011 to December 2016. The petitioner contends that this figure was arrived at by the prosecution to attain the requisite dollar amount necessary to charge Ms. Spence with a first-degree felony. The petitioner contends that, once the felony threshold was reached, the prosecution discontinued its investigation and filed charges. Thus, the petitioner asserts that the exact dollar amount attributable to Ms. Spence is not in the record. However, aside from court records, the petitioner did not provide additional evidence demonstrating that the amount was greater than $270,589.57. Upon conviction, Ms. Spence was ordered to pay restitution for the entire amount; although, the judge expressed doubt regarding her ability to do so. There is no indication from the record that Ms. Spence has paid any part of the amount owed.

III. RELEVANT AUTHORITY

A. THE OBLIGATION OF AN EMPLOYER TO WITHHOLD & REMIT

Pursuant to R.C. 5747.06(A), employers are charged with the responsibility of withholding from their employees' compensation an amount "substantially equivalent" to the income tax due to the state from

the employee. Similarly, employers are charged with withholding school district income tax from their employees' compensation. R.C. 5747.06(B).

R.C. 5747.07(B) states that every employer who is required to withhold taxes from employee compensation under R.C. 5747.06 shall file a return and pay any amount required by law. Employers who fail in their withholding and remittance obligations are responsible for the taxes due and may be assessed penalties and interest pursuant to R.C. 5747.13. Additionally, R.C. 5747.07(F)(4) and (5) require the Tax Commissioner to assess interest if remittances of the withheld amounts are not paid to the State in a timely manner. R.C. 5747.15(A)(4)(a) also imposes a penalty of up to 50 percent of the delinquent payment upon an employer if that employer fails to remit the taxes withheld. There is no bar or time limit to an assessment against an employer for failing to file a return. R.C. 5747.13(A); R.C. 5703.58(C)(1).

B. RESPONSIBILITY OF CORPORATE OFFICERS

R.C. 5747.07(G) indicates, in relevant part, that:

> [A]n officer, member, manager, or trustee of [the entity] who is responsible for the execution of [the 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.

Former Ohio Adm. Code 5703-7-15(A)(1), in effect for the periods in question, clarified R.C. 5747.07(G) by further defining "officer" or "corporate officer" to mean "the president, vice-president, treasurer, secretary, chief executive officer of a corporation, or any person holding a similar title or position in a corporation or business trust." Divisions (C)(3) and (5) of former Ohio Adm. Code 5703-7-15 also states that an officer of a corporation has demonstrated responsibility for the execution of the corporation's fiscal responsibilities if "[t]he officer or trustee exercises management control or authority over employees whose duties include the preparation, signing, or filing of returns or reports," or "the officer or trustee exercises authority to sign checks *** drawn on the corporation's or trust's accounts, in payment of tax liabilities."

Generally, personal liability for officers of a corporation for failure of a corporation to file returns or pay taxes is limited to those officers who have control or supervision or are charged with the responsibility of filing returns and making payments. *Weiss v. Porterfield*, 27 Ohio St.2d 117 (1971); *Spithogianis v. Limbach,* 53 Ohio St.3d 55 (1990). 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. Specifically, the Court stated: "In that case the corporate officer *had the authority* to control or supervise the tax return and tax payment activities of the corporation." *McGlothin*, supra, (emphasis added), at 73. Therefore, individuals who are owner-officers of a closely held corporation or limited liability company are ordinarily responsible for, or in charge of, a business's fiscal duties, or charged with supervision thereof.

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. Here, the petitioner was the president of Chapman Enterprises during the period assessed. With regard to the payment of trust fund taxes, an officer and director of a business has general fiscal responsibilities for that business and can, therefore, be responsible for the payment of such taxes to the state. *Seibenick v. Tracy*, BTA No. 1993-M-1087, unreported.

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IV. ANALYSIS

To the extent the petitioner challenges the assessments of Chapman Enterprises, such contentions cannot be considered. The only issue that can be considered in this matter is whether the petitioner was a responsible party of Chapman Enterprises under R.C. 5747.07(G) during the periods in question. The petitioner may not challenge the merits of the underlying assessment against the company in a proceeding under R.C. 5747.07(G). Ohio Adm.Code 5703-7-15(A)(1). Substantive arguments regarding the tax liability assessed against the company can only be raised during the company's assessment proceedings.

Furthermore, the petitioner's contention that Ms. Spence should be held fully and solely responsible for the company's failure to remit withholding taxes is inconsistent with the relevant authority. The requirements for exercising fiscal responsibility under Ohio Adm.Code 5703-7-15(C) allows for more than one individual to be held personally liable for any unpaid taxes. Ohio Adm.Code 5703-7-15(D)(2) further explains that if more than one individual is personally liable under R.C. 5747.07, their liability shall be joint and several. Thus, the Department is authorized to assess one or all of the parties responsible for Chapman Enterprises failure to fully remit Ohio income tax withholding for the period at issue.

Because Mr. Chapman was president of Chapman Enterprises throughout the entirety of the tax periods assessed, he is considered an officer with respect to the company's withholding taxes. Former Ohio Adm.Code 5703-7-15(A). Under R.C. 5747.07(G), any outstanding withholding tax liability against an employer-taxpayer entity can be derivatively assessed against an officer as a responsible party. The statute indicates, in relevant part, that: "An officer, member, manager, or trustee of [the entity] who is responsible for the execution of the [the entity's] fiscal responsibilities, shall be personally liable for failure to file the report or pay the tax due as required by this section." R.C. 5747.07(G). Generally, personal liability for a corporation's officers for its failure to file returns or pay taxes is limited to those individuals who have control or supervision or are charged with the responsibility of filing returns and making payments. *Weiss v. Porterfield*, 27 Ohio St.2d 117 (1971); *Spithogianis v. Limbach*, 53 Ohio St.3d 55 (1990). However, even if an individual does not actually participate in or supervise the corporation's fiscal operations, if his or her position is one that would be ordinarily be responsible for such duties, then the individual may be found to be responsible to the state.[2]

Mr. Chapman contends that after Ms. Spence was hired in 2002, she was granted authority over her work within Chapman Enterprises gradually. During that time, the petitioner indicated that Ms. Spence acted deceptively and hid pertinent business information from him, going so far as taking the laptop that contained the business' QuickBooks accounts when she was confronted about her activity. Even so, the petitioner has not submitted any evidence that would demonstrate Mr. Chapman lacked the authority to control or supervise Ms. Spence's activities or, more broadly, the tax return and tax payment activities of the company during the periods in question. In fact, the record reflects that the petitioner, as president of Chapman Enterprises, was one of the primary individuals who had the authority to grant or limit Ms. Spence's duties and ability to withhold, report, and remit withholding taxes. Based on the evidence currently available to the Tax Commissioner, the petitioner was an officer and responsible party of

[2] Refer to *Spithogianis*, supra. In *McGlothlin v. Limbach* (1991), 57 Ohio St.3d 72, 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. Specifically, the Court stated: "In that case the corporate officer *had the authority* to control or supervise the tax return and tax payment activities of the corporation." *McGlothin*, supra, (emphasis added), at 73.

Chapman Enterprises during the periods at issue. Therefore, the petitioner can be held responsible for Chapman Enterprises' failure to remit withholding taxes.

V. Conclusion

Mr. Chapman operated as the president of Chapman Enterprises during the tax periods at issue and had the ability and authority to oversee accounting and bookkeeping matters within the organization. As such, he is a responsible party under R.C. 5747.07(G) against whom Chapman Enterprises' non-remittance may be derivatively assessed for the periods in question.

Accordingly, the assessments are affirmed.

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

Jeffrey A. McClain/80

Jeffrey A. McClain
Tax Commissioner

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

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FINAL DETERMINATION

Date:

APR 17 2020

Country Pure Springwater
203 Wilson Mills Road
Chardon, OH 44024-1344

Re: Ohio Tax Account #: 51902028
Tax Type: Employer Withholding
Assessment Numbers: 03201323321786, 03201323321789, 03201323321790

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2017-928, dated April 2, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, the assessments are modified as follows:

Period	Assessment	Tax	Interest	Penalty	Total
1/1/1988-12/31/1998	03201323321786	$71,743.69	$95063.09	$21,431.24	$188,238.02
1/1/1999-12/31/2003	03201323321789	$39,281.00	$35,568.96	$19,640.51	$94,490.47
1/1/2004-12/31/2008	03201323321790	$38,236.00	$22,705.11	$19,118.00	$80,059.11
Total					$362,787.60

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

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

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

Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:

APR 17 2020

Ronald L. Fisher
dba Fisher Heating & Cooling
P.O. Box 271
Lillington, NC 27546

Re: Assessment No.100000899961
Employer Withholding - 01/01/2012 – 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 assessment.

Tax Due	Interest	Penalty(s)	Total
$31,895.51	$2,525.67	$15,947.76	$50,368.94

The Ohio Department of Taxation assessed Ronald L. Fisher, doing business as Fisher Heating & Cooling (hereinafter referred to as "the petitioner"), after conducting an audit of the petitioner's employer withholding account for the period in question. During the audit process, the Department identified that the petitioner withheld income from its employees but failed to fully remit its Ohio employer's income tax withheld for the tax years at issue. The Department calculated and assessed tax pursuant to R.C. 5747.13(A). The petitioner was assessed a late payment penalty pursuant to R.C. 5747.15(A)(4)(a) and the corresponding interest was assessed pursuant to R.C. 5747.07(F)(4) and (5). The petitioner objects to the assessment and contends that he has not participated in any aspect of the business since 2010. He also contends that another individual has taken over the business. 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.

R.C. 5747.06 charges employers with the responsibility of withholding from their employees' compensation an amount "substantially equivalent" to the income tax due to the State from the employee. Furthermore, R.C. 5747.07 requires every employer who is obligated to deduct and withhold an amount under R.C. 5747.06 to pay that amount to the State of Ohio. Employers who fail in their withholding and remittance obligations are responsible for the taxes due and may be assessed penalties and interest pursuant to R.C. 5747.13. Additionally, R.C. 5747.07(F)(4) and (5) require the Tax Commissioner to assess interest if remittances of the withheld amounts are not paid to the State in a timely manner. R.C. 5747.15(A)(4)(a) also imposes a penalty of up to 50 percent of the delinquent payment upon an employer if that employer fails to remit the taxes withheld. The Department assessed the petitioner, in accordance with R.C. 5747.13, because the Ohio taxable wage amount it reported were unsupported and inconsistent with the information and records available.

While the petitioner has not submitted any evidence demonstrating that its operations were sold or otherwise acquired by a successor party, it is worth noting that R.C. 5747.07(H) lays out the employer withholding requirements for parties involved in the sale of a business. As it relates to the party selling a business, Division (H) of R.C. 5747.07 states that:

> If an employer required to deduct and withhold income tax from compensation and to pay that tax to the state under sections 5747.06 and 5747.07 of the Revised Code sells the employer's business or stock of merchandise or quits the employer's business, the taxes required to be deducted and withheld and paid to the state pursuant to those sections prior to that time, together with any interest and penalties imposed on those taxes, become due and payable immediately, and that person shall make a final return within fifteen days after the date of selling or quitting business.

The same section lays out the obligations of the purchasing, or successor, company, stating that:

> The employer's successor shall withhold a sufficient amount of the purchase money to cover the amount of the taxes, interest, and penalties due and unpaid, until the former owner produces a receipt from the tax commissioner showing that the taxes, interest, and penalties have been paid or a certificate indicating that no such taxes are due. If the purchaser of the business or stock of merchandise fails to withhold purchase money, the purchaser shall be personally liable for the payment of the taxes, interest, and penalties accrued and unpaid during the operation of the business by the former owner. *Id.*

Here, the petitioner objects to the assessment and contends that he has not participated in any aspect of the business since 2010. The petitioner does not directly dispute the amounts assessed, but rather claims that he is not responsible for the assessment because another individual has taken over the business. However, the petitioner has not submitted any evidence showing that he was not required to withhold and remit income tax for the company's employees under the relevant authority, or that some other taxpayer should have been assessed to recover the unremitted income tax withholding. In addition, the evidence currently available to the Tax Commissioner indicates that the tax and interest amounts assessed are accurate and the penalty is reasonable.

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.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 08 2020

James R. Sholtis
49111 Coldwater Creek Rd.
Caldwell, OH 43724

Re: Assessment No. 100000889719
Employer Withholding: 01/01/2005 – 12/31/2011

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:

Tax	Interest	Penalty	Total
$0.00	$3,210.45	$4,552.53	$7,762.98

The Department assessed the petitioner as a responsible party of Jim Sholtis Construction (hereinafter "Sholtis Construction") under R.C. 5747.07(G). Sholtis Construction 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 Sholtis, 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, the petitioner remitted the tax and a portion of the interest amounts assessed. 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. During the audit, however, the petitioner was granted a partial abatement of penalties assessed against the underlying entity, Sholtis Construction.

Accordingly, the assessment is affirmed.

Current records indicate that $7,762.98 has been applied towards this assessment, resulting in a balance due of $0.00. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 08 2020

Jason C. Weaver
10320 Dozer Rd. SW
Stoutsville, OH 43154

Re: Assessment Nos. 100000884295
Employer Withholding: 01/01/2008 – 12/31/2008

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:

Tax	Interest	Penalty	Total
$3,634.00	$1,246.39	$1,817.12	$6,697.71

I. BACKGROUND

The Department assessed the petitioner as a responsible party of National Investigation and Protection Agency, LLC (hereinafter "NIPA) under R.C. 5747.07(G). NIPA allegedly failed to fully remit Ohio income tax withholding for the periods at issue. 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, Jason Weaver, because he was identified as a responsible party.

The petitioner states that although he was a partner of NIPA, due to other obligations, he had little to do with the operation of the business other than sales and marketing. The petitioner states that the other partner of NIPA was responsible for running the business and the financial responsibilities including the management, payroll, taxes, and filing. 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

Division (B) of R.C. 5747.07 states that "every employer required to deduct and withhold any amount under section 5747.06 of the Revised Code shall file a return and pay the amount required by law." If the required returns are not filed or the withholding trust taxes are not timely paid to the state, R.C. 5747.07(G) indicates, in relevant part, that: "[A]n officer, member, manager, or trustee of [the entity] who is responsible for the execution of [the entity's] fiscal responsibilities, shall be personally liable for failure to file the report or pay the tax due as required by this section."

To the extent the petitioner does challenge the assessment against NIPA, such contention cannot be considered. The only issue that can be considered in this matter is whether the petitioner is a responsible

party under R.C. 5747.07(G) for the 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). Accordingly, substantive arguments regarding the tax liability assessed against the company can only be raised during company assessment proceedings. Therefore, the only issue that can be considered in this matter is whether the petitioner was a responsible party for the periods in question.

Division (A)(1) of former Ohio Adm. Code 5703-7-15 clarifies R.C. 5747.07(G) by further defining "officer" or "corporate officer" to mean "the president, vice-president, treasurer, secretary, chief executive officer of a corporation, or any person holding a similar title or position in a corporation or business trust." Division (C)(3) and (5) of former Ohio Adm. Code 5703-7-15 also states that an officer of a corporation has demonstrated responsibility for the execution of the corporation's fiscal responsibilities if "[t]he officer or trustee exercises management control or authority over employees whose duties include the preparation, signing, or filing of returns or reports," or "the officer or trustee exercises authority to sign checks * * * drawn on the corporation's or trust's accounts, in payment of tax liabilities."

The petitioner does not dispute that he was a partner of NIPA prior to March 26, 2009 when he sold all his interest in the company to the other partner, Mr. Sever. Although the petitioner sold his interest in the company in 2009 and participated in other engagements in 2008, the petitioner does not dispute that he was still involved with the company during the period at issue. Additionally, the petitioner does not dispute that he had the authority to sign checks to pay for the business tax liabilities as he provided authorization documentation from Huntington National Bank. The petitioner was also listed as a registered agent on the Articles of Incorporation for NIPA and was the authorized statutory agent according to records from the Ohio Secretary of State during the period at issue. Further, the NIPA Partnership Agreement, states that "a general accounting shall be made and taken by all partners of all sales, purchases, receipts, payments, payroll, and transactions of the partnership" and the "general accounting shall be written in the partnership account books and signed in each book by each partner immediately after it is completed." Accordingly, as a partner, the petitioner had authority to exercise control over the corporation's financial affairs, whether he exercised that control or not. *Spithogianis v. Limbach*, 53 Ohio St.3d 55 (1990). For the reasons stated above, the outstanding liability of the corporation has been derivatively assessed against the petitioner because he had authority to exercise control over the fiscal operations of the company during the periods assessed.

The petitioner further states that although he was a partner of NIPA, the other partner of NIPA, Mr. Sever, was more responsible for running the business. However, the petitioner is mistaken that his liability should be limited based on his contention that another individual is more properly assessed as responsible party of NIPA. While others may have had responsible roles with NIPA, 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

Therefore, according to the information available to the Department, the petitioner is 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 NIPA's failure to file an Ohio income tax withholding return for the periods assessed.

However, this final determination does not reflect any payments or adjustments that may have been made on the assessment against NIPA. Accordingly, any reduction or credit to NIPA's assessment will be applied to this assessment.

Accordingly, the assessment is affirmed.

Current records indicate that $7,030.04 has been applied towards this assessment, resulting in a balance due of $0.00. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

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

Re: Nineteen Assessments
Motor Fuel Tax – Multiple Periods

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

Assessment No.	Tax Period	Tax	Interest	Penalties	Total
100001448404	01/01/2018 – 01/01/2018	$1,932.56	$0.00	$0.00	$1,932.56
100001448405	02/01/2018 – 02/28/2018	$843.08	$0.00	$0.00	$843.08
100001448406	03/01/2018 – 03/31/2018	$420.00	$0.00	$0.00	$420.00
100001449781	04/01/2018 – 04/30/2018	$1,680.00	$0.00	$0.00	$1,680.00
100001449782	05/01/2018 – 05/31/2018	$3,502.24	$0.00	$0.00	$3,502.24
100001456141	07/01/2018 – 07/31/2018	$141.40	$0.00	$0.00	$141.40
100001456074	09/01/2018 – 09/30/2018	$6,999.44	$0.00	$0.00	$6,999.44
100001456127	10/01/2018 – 10/31/2018	$9,247.56	$0.00	$0.00	$9,247.56
100001456137	11/01/2018 – 11/31/2018	$3,779.44	$0.00	$0.00	$3,779.44
100001456140	12/01/2018 – 12/31/2018	$3,364.00	$0.00	$0.00	$3,364.00
100001456128	01/01/2019 – 01/31/2019	$9,110.08	$0.00	$0.00	$9,110.08
100001456138	02/01/2019 – 02/28/2019	$5,187.28	$0.00	$0.00	$5,187.28
100001472988	03/01/2019 – 03/31/2019	$7,241.64	$0.00	$0.00	$7,241.64
100001472989	04/01/2019 – 04/30/2019	$5,040.56	$0.00	$0.00	$5,040.56
100001472990	05/01/2019 – 05/31/2019	$6,328.84	$0.00	$0.00	$6,328.84
100001472991	06/01/2019 – 06/30/2019	$120,146.32	$0.00	$0.00	$120,146.32
100001472992	07/01/2019 – 07/31/2019	$13,258.85	$0.00	$0.00	$13,258.85
100001472997	08/01/2019 – 08/31/2019	$154,634.43	$0.00	$0.00	$154,634.43
100001206149	12/01/2018 – 12/31/2018	$246,404.48	$1,146.86	$65,354.69	$312,906.03

The Department of Taxation assessed the petitioner, NZR Retail of Toledo, Inc., after conducting audits which revealed that the petitioner failed to fully remit its motor fuel tax for the tax periods identified above. The petitioner objects to the assessments and contends that all tax payments had been timely rendered. The petitioner did not request a hearing on these matters; therefore, they are decided based on evidence currently available to the Tax Commissioner.

The Ohio Revised Code imposes an excise tax which applies to all dealers in motor vehicle fuel on the use, distribution, or sale within Ohio of fuel used to generate power for the operation of motor vehicles. *See* R.C. 5735.05. The tax applies to dealers that import motor fuel from another state or foreign country or acquire motor fuel by any means into a terminal in this state, acquire it in bulk for subsequent sale,

refine motor fuel within Ohio, acquire motor fuel from a dealer for subsequent sale and distribution in this state, or possess an unrevoked permissive motor fuel license. *See* R.C. 5735.01 and 5735.05. The base of Ohio's motor fuel tax is gallons of motor vehicle fuel sold, used, or distributed in Ohio. *See* R.C. 5728.06 and 5735.05. For the period at issue, a consolidated rate of 28 cents per gallon is allocated in specified fractions that correspond with the five prior distinct levies. *See* R.C. 5735.05.

During the tax periods in question, the petitioner was a motor fuel seller and distributor with an unrevoked permissive motor fuel license. Accordingly, it was subject to the Ohio motor fuel tax for the periods in question. Prior to issuing the assessments, the Department contacted the petitioner regarding its failure to report and fully remit motor fuel tax, but the petitioner did not respond to those contacts or provide documentation demonstrating that it complied with its motor fuel tax obligations for the periods at issue. The petitioner failed to fully remit its motor fuel tax liabilities. Therefore, the Department used the best evidence available to it, including information from retail dealers and sales information that the petitioner reported on monthly motor fuel dealer's tax returns (MF-2s), to calculate and assess the tax liabilities reflected above.

The petitioner claims that "[a]ll taxes have been filed and paid," but it provided no records or documentation to substantiate that any such payment has been made in full or partial satisfaction of its motor fuel tax liabilities for the periods at issue. Moreover, the evidence currently available to the Tax Commissioner indicates that the tax and interest amounts assessed are accurate, and the penalties imposed are reasonable.

Accordingly, for the foregoing reasons, the assessments are affirmed.

Current records indicate that the petitioner has made a $180,000.00 payment on 100001206149, but no payments have been made on the other assessments referenced above. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessments as provided by law**. Payments shall be made payment to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

Yazeed Qaimari
4944 Hunters Green Dr.
Toledo, OH 43623

Re: Six Assessments
Motor Fuel Tax – Responsible Party: Multiple Periods

This is the final determination of the Tax Commissioner with regard to petitions for reassessment filed pursuant to R.C. 5735.12 concerning the following motor fuel tax responsible party assessments:

Assessment No.	Tax Period	Tax	Interest	Penalty	Payment	Total
100001389116	06/01/2016 – 06/30/2016	$435,914.23	$4.50	$145.76	$(435,709.16)	$355.33
100001389115	10/01/2016 – 10/31/2016	$307,780.76	$1,171.92	$50.00	$(304,704.96)	$4,297.72
100001389127	12/01/2018 – 12/31/2018	$246,404.48	$1,146.86	$65,354.69	$0.00	$312,906.03
100001389118	04/01/2019 – 04/30/2019	$186,095.28	$891.63	$49,372.75	$0.00	$236,359.66
100001389128	05/01/2019 – 05/31/2019	$215,247.76	$707.18	$57,098.16	$0.00	$273,053.10
100001389117	06/01/2019 – 06/30/2019	$85,283.52	$221.82	$22,657.63	$0.00	$108,162.97

I. BACKGROUND

The Department of Taxation assessed the petitioner, Mr. Yazeed Qaimari (hereinafter "the petitioner" or "Mr. Qaimari"), as a responsible party of NZR Retail of Toledo, Inc. (hereinafter "NZR") pursuant to R.C. 5735.12 and 5735.35. During the periods in question, NZR was a licensed Ohio motor fuel dealer permitted by the state of use, distribute, or sell within Ohio fuel used to generate power for the operation of motor vehicles. Accordingly, it was subject to Ohio motor fuel taxes pursuant to R.C. 5735.01 and R.C. 5735.05.

Records reflect that NZR failed to fully remit its motor fuel taxes for the periods in question and the amounts remain outstanding. In such circumstances, R.C. 5735.35(A) 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. Records reflect that the petitioner publicly held himself out as an officer of NZR during the periods at issue. As such, the Department identified the petitioner as a responsible party of and assessed him accordingly. The petitioner objects to the assessments and requested a hearing on the matter. The hearing was conducted via telephone, and this matter is now decided based on the evidence currently available to the Tax Commissioner.

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II. PETITIONER'S CONTENTIONS

Mr. Qaimari disputes the assessments and claims he was not responsible for the motor fuel taxes in question and that he should not be held personally liable for their nonpayment. At hearing, Mr. Qaimari claimed he was not charged with filing taxes for NZR. He claims that his partner, Nick Hasan, was charged with the business's tax and finance duties.

III. AUTHORITY AND ANALYSIS

The Ohio Revised Code imposes an excise tax which applies to all dealers in motor vehicle fuel on the use, distribution, or sale within Ohio of fuel used to generate power for the operation of motor vehicles. *See* R.C. 5735.05. The tax applies to dealers that import motor fuel from another state or foreign country or acquire motor fuel by any means into a terminal in this state, acquire it in bulk for subsequent sale, refine motor fuel within Ohio, acquire motor fuel from a dealer for subsequent sale and distribution in this state, or possess an unrevoked permissive motor fuel license. *See* R.C. 5735.01 and 5735.05. The base of Ohio's motor fuel tax is gallons of motor vehicle fuel sold, used, or distributed in Ohio. *See* R.C. 5728.06 and 5735.05. For the period at issue, a consolidated rate of 28 cents per gallon is allocated in specified fractions that correspond with the five prior distinct levies. *See* R.C. 5735.05.

R.C. 5735.35(A) governs responsible party assessments for motor fuel taxes, and states that:

> If any person, regardless of organizational form, required to file reports and to remit taxes imposed under this chapter fails for any reason to file such reports or pay such taxes, any employees of the person having control or supervision of, or charged with the responsibility of, filing reports and making payments, or any officers or trustees of the person responsible for the execution of the person's fiscal responsibilities, are personally liable for the failure.

R.C. 5735.35 is intended to hold those employees and officers who were in charge of the fiscal operations of the defaulting company liable for unremitted motor fuel tax if such persons filed the dealer's tax report or remitted the tax, or controlled or supervised others who performed those tasks, or had responsibility for such duties. *Armbruster v. Wilkins*, Ohio BTA No. 2006-T-29, 2007 WL 2812324 (Sep. 4, 2007), at *2 citing *Soltesiz v. Tracy*, 75 Ohio St.3d 477 (1996), at 479; *Spithogianis v. Limbach*, 53 Ohio St.3d 55 (1990), at 57. R.C. 5735.35 is not intended to include all corporate officers and employees but only those persons who have a specific connection with the preparation and filing of reports and the remittance of the tax. *Id* citing *Weiss v. Porterfield*, 27 Ohio St.2d 117 (1971).

The main element in determining whether an individual is a responsible party for R.C. 5737.35 purposes is whether he has the authority to control the tax return or supervise the corporation's tax payment activities. Generally, personal liability imputed from a corporation's failure to file returns or pay taxes is limited to those individuals who have control or supervision or are charged with the responsibility of filing returns and making payments. *Weiss, supra*; *Spithogianis, supra*. However, even if an individual does not actually participate in or directly supervise the corporation's fiscal operations, if his or her position is one that would ordinarily be responsible for such duties, then the individual may be found to be responsible to the state. *Spithogianis, supra*. In *McGlothlin v. Limbach*, 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*, 57 Ohio St.3d 72 (1991). Specifically, the Court stated: "In that case the corporate officer had the authority to control or supervise the tax return and tax payment activities of the corporation." *Id.* at 73. Therefore, officers within the organization who are ordinarily responsible for, or

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in charge of, a business's fiscal duties, or charged with supervision thereof, are subject to personal liability arising from failures to file, pay, or remit state taxes.

In this case, Mr. Qaimari was an officer and employee of NZR during the periods at issue. He openly and publicly represented himself as NZR's President and Chief Executive Officers ("CEO"). In his capacity as NZR's CEO, Mr. Qaimari was ultimately responsible for all of the business's operations, including overseeing the reporting and remission of motor fuel tax. Records also reflect that the petitioner had the authority to oversee the company's accounts, finances, taxes, and any employees, staff, or third parties hired to oversee its accounts, finances, and taxes.

Records also show that Mr. Qaimari held himself out as the authorized representative, the business's statutory agent, and the initial director of the entity upon its incorporation in 2004. Further, Mr. Qaimari publicly represents himself as NZR's President and CEO on his LinkedIn profile. In sworn testimony published in a decision handed down by the Sixth District, Court of Appeals of Ohio, in 2019 Mr. Qaimari represented himself as the President of NZR. *CIG Toledo, LLC v. NZR Retail of Toledo, Inc.*, 131 N.E.3d 351, 358, 2019 Ohio 180 (January 18, 2019). Moreover, he attested that he was authorized to settle a lawsuit brought by a creditor of NZR's on the organization's behalf. *Id.* This demonstrates that he retains the capacity to make both legal and financial decisions affecting the business. Accordingly, in addition to being an officer of NZR, he has made consequential financial decisions on the organization's behalf. Therefore, he meets the requisite qualifications necessary to be a responsible party for NZR within the meaning of R.C. 5735.35.

The petitioner's assertion that other individuals involved with NZR were more responsible than himself is not well taken. Specifically, during the administrative hearing on these matters, Mr. Qaimari contended that he was not responsible for the financial aspects of NZR's business operations and that his business partner, Mr. Hasan, was in charge of overseeing NZR's taxes and finances. However, the fact that another employee may have also had the authority to oversee NZR's financial operations does not diminish or negate the fact that Mr. Qaimari was the president and CEO of NZR and had the authority and responsibility both to oversee and participate in the reporting and remission of motor fuel tax and to oversee and control those employees who performed those tasks. Moreover, under R.C. 5735.35(B), where more than one individual is personally liable for unpaid taxes, the liability of all such individuals shall be joint and several. Thus, the relevant authority allows for more than one officer to be held personally responsible for the unpaid taxes

IV. CONCLUSION

For the foregoing reasons, there is sufficient evidence in the record that demonstrates Mr. Qaimari operated was an officer of NZR and retained sufficient control and authority within the organization during the tax periods at issue such that he should be considered a responsible party for the business's motor fuel tax liabilities within the meaning of R.C.5735.35.

Therefore, the assessments are affirmed.

Current records indicate that the petitioner has not made payments other than those identified in the financial grid on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessments as provided by law**. Payments shall be made payment to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158.

APR 29 2020 0000000214

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

0000000537

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 08 2020

Jeremy T. Braley
7875 Hackney Circle
Maineville, OH 45039

Re: Refund Claim No. 8311375130
Individual Income Refund Tax - 2016

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

Tax Year	Refund Claimed
2016	$1,359.00

I. BACKGROUND:

The claimant initially filed an Ohio individual income tax return reporting that he was a full-year resident of Ohio. However, on October 30, 2018, the claimant filed an application for refund on an amended Ohio individual income tax return for tax year 2016.[1] On the amended tax return, the claimant checked he was a part-year resident for 2016. The claimant also filed the 2016 Form IT RE – Reason and Explanation of Corrections and an Affidavit of Non-Ohio Residency/Domicile 2016. On the 2016 Ohio IT RE – the claimant indicated that he filed the amended return in question because his residency status changed and was presumed not be domiciled in Ohio for the entire year of 2016. Additionally, on the Affidavit of Non-Ohio Residency/Domicile 2016 submitted, the claimant stated he had at least one abode outside of Ohio for the entire 2016 – Miami, Florida. Therefore, he contends that he should not have filed a 2016 Ohio Income Tax Return and is now seeking a refund of $1,359.00, which is equivalent to the total tax he remitted for 2016. The claimant did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim pursuant to R.C. 5703.70.

II. 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.

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

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

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

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

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

If the individual timely files the Affidavit of Non-Ohio Residency/Domicile as required, and the affidavit does not contain any false statements, the presumption that the individual was not domiciled in this state is irrebuttable. In the present case, the claimant was required to file an Affidavit of Non-Ohio Residency/Domicile for the tax year in question by May 30, 2017. However, he filed the Affidavit on October 30, 2018. He was late filing the Affidavit by one year and five months; therefore, he is not entitled to an irrebuttable presumption of non-domicile under former R.C. 5747.24(B).

If an individual fails to timely file the Affidavit or makes a false statement, the burden shifts to the individual to prove that they were not domiciled in Ohio during the taxable year. Former R.C. 5724.24(C) & (D). Former Division (C) of R.C. 5747.24, applicable for the tax period at issue, states that an individual who has less than 183 contact periods with Ohio and who is not irrebuttably presumed under division (B) of this section to be not domiciled in this state is presumed to be domiciled in Ohio for the entire taxable year. An individual can rebut the presumption set forth in R.C. 5747.24(C) with a preponderance of the evidence to the contrary. The preponderance of the evidence standard has been described as that quantum of proof which produces in the mind of the trier of fact belief that what is sought to be proved is more likely true than not true. *In re Agler*, 19 Ohio St. 2d 70 (1969). In this case, the evidence currently available to the Tax Commissioner reflects that the claimant had fewer than 183 contact periods with Ohio in 2016. 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 *Shill,* ¶ 24. Therefore, Ohio Courts have held that "a person can have multiple residences, but can have only one domicile." *Schill*, ¶ 25, citing *Grant v. Jones*, 39 Ohio St. 506, 515 (1883).

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

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

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

IV. Facts & Circumstances:

The claimant contends he severed his Ohio domicile for tax year 2016 and established residency in Florida. As mentioned, the claimant had fewer than 183 contact periods with Ohio in 2016; therefore, the claimant must rebut the presumption of domicile with a preponderance of the evidence to the contrary. R.C. 5747.24(C). In support of his claim of not being domiciled in Ohio, the claimant provided the Tax Commissioner with an employment letter and wage statement from Carnival Cruise Line. However, the claimant's own evidence does not support that he established a residency in Florida. The

claimant's 2016 wage and income statement reflect an Alabama address -- 25185 Windward Place, Orange Beach, AL 36561 – as claimant's mailing address.

Although the claimant contends that he abandoned his Ohio domicile and affirmatively established a domicile in Florida, his actions and availments during 2016 not only show that he maintained significant connections with Ohio, but he also has reinforced them and continued to enjoy the rights and privileges afforded to Ohio residents. The intent to abandon one's domicile is shown by evidentiary factors including where the individual files federal income tax returns, where the individual votes, registers their vehicle, and maintains a driver's license. *Davis*, at *5-7.

Physical presence is not, in and of itself, a determinative factor for the purpose of determining domicile. Here, even though the claimant was employed outside of Ohio in 2016, Department records reflect that the claimant retained his Ohio driver's license which continued to be registered to an Ohio address – 2901 Macintosh Lane, Maineville, Ohio 45039. The claimant continued to re-register his driver's license after the tax period in question with an Ohio mailing address. Records further reflect that the claimant's current residential Ohio address located at 7875 Hackney Circle, Maineville, Ohio 45039, which is an indication that the claimant intended, and in fact, returned to Ohio. Moreover, Department records indicate that the claimant in 2015 initially registered a 2009 Ford Focus with an Ohio mailing address. He subsequently registered the same vehicle the following year with his mother-in-law's Ohio mailing address – 9112 Depalma Drive, Cincinnati, Ohio 45241. The claimant continues to register several other vehicles with his current residential Ohio address. The claimant also used his mother-in-law's Ohio mailing address when he filed his federal income tax return for the tax period in question. Records further reflect that the claimant was registered to vote in Ohio during the period in question.

Therefore, the claimant has failed to provide any documents that show any proof that he maintained a Florida abode in 2016.

V. CONCLUSION:

The totality of the evidence available to the Tax Commissioner shows that the claimant's actions during 2016 are consistent with those of individuals maintaining an Ohio domicile while working in another state. Even though the claimant has provided evidence that he worked for Carnival Cruise Line, he has not provided any evidence indicating that he took affirmative steps to establish a new domicile somewhere other than Ohio. As discussed above, the claimant maintained and renewed significant ties to Ohio in the form of retaining his Ohio driver's license and registering several vehicles with his mother-in-law's Ohio mailing address for the tax year in question. Furthermore, the claimant failed to provide any evidence that demonstrate that he resided in Florida during the 2016 tax year.

Therefore, the claimant has failed to rebut the presumption that he was domiciled in Ohio for the entirety of tax year 2016 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 work assignment outside the state. 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.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 29 2020

William J. & Marianne Burke
3240 Hamlet Dr, Apt 4
Naples, FL 34105

Re: Assessment No. 02201828958649
Individual Income Tax – 2017

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

Tax	Interest	Penalty	Total
$2,192.00	$43.00	$86.00	$2,321.00

I. BACKGROUND

The Department assessed William and Marianne Burke (hereinafter referred to as "the petitioners") after making adjustments to the individual income tax return filed for tax year 2017. In response, the petitioners filed an amended 2017 return. Subsequently, the Department identified that, in calculating the nonresident credit claimed on each return for the tax year at issue, the petitioners under-allocated compensation for personal services performed in, and thus taxable to, Ohio. The Department increased the amount of compensation allocable to Ohio, which reduced the petitioner's nonresident credit for tax year 2017 and resulted in the assessment at issue.

During and preceding the tax year in question, Mr. Burke was employed by Nationwide Mutual Insurance Co. (hereinafter referred to as "Nationwide"). Nationwide is an insurance company based in Columbus, Ohio, that focuses on domestic property and casualty insurance. Mr. Burke received compensation, in several forms, from Nationwide during the period in question. Compensation included a base salary, bonus compensation, and compensation resulting from payment of a transition and general release agreement (hereinafter referred to as "the severance agreement"). Records reflect that the petitioners maintained an abode at 6314 Highgate Pl, Lewis Center, OH 43035, and were Ohio residents until on or around December 28, 2016.

At issue in this matter is the compensation Mr. Burke earned from Nationwide as part of the severance agreement. The severance agreement between Nationwide and Mr. Burke was executed on June 15, 2016. The severance agreement stated that "the parties mutually wish to resolve and settle all of Employee's possible disputes and claims pertaining to or arising from Employee's employment and discontinuation of employment with the Company." The severance agreement also included a "claims released" clause in which Mr. Burke agreed to forever acquit, relieve and discharge Nationwide from any "wrongful discharge" and "constructive discharge" claims. In consideration for Mr. Burke signing the severance agreement, Nationwide agreed to keep Mr. Burke employed through January 2, 2017, and to make a severance payment in the amount of $270,504.00, "less applicable tax withholding," on February 3, 2017.

The petitioners filed a petition for reassessment identifying their disagreement with the Department's the allocation of income. They also contend that they did not work or earn any income in Ohio during the period in question and requested a hearing on the matter. The hearing was conducted via telephone with the petitioners' authorized representative and with Mr. Burke on April 9, 2020.

II. PETITIONERS' CONTENTIONS

The petitioners contend that they did not permanently live or reside in the State of Ohio in 2017. The petitioners also contend that they did not work or earn any income in Ohio during the period at issue. The petitioners further contend that the income received from the severance agreement with Nationwide on February 3, 2017, should "not [be] considered earned income or part of any payment for past services or severance package, but a payment to release the company from any future claims of 'wrongful discharge' or 'constructive discharge.'" The petitioners assert that the payment was made and received while they were legal residents and domiciliaries of Florida. In support of their contention, the petitioners submitted a letter from Nationwide dated August 28, 2018, in which Nationwide confirmed that the payment made to Mr. Burke on February 3, 2017, was made under the agreement signed on June 27, 2016, and as a separation payment due to the elimination of Mr. Burke's position. The letter further clarified that "this payment was not made for services rendered by Mr. Burke in 2017."

III. RELEVANT AUTHORITY

A. SEVERANCE PAYMENTS ARE COMPENSATION FOR PERSONAL SERVICES

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. R.C. 5747.02 imposes a tax based on "all the adjusted gross income of resident individuals (minus an exemption), without regard to where that income is earned." *McCann v. Limbach*, 9th Dist. Summit No. 16040, 1993 WL 329958 3 (1993) *citing Brachman v. Limbach*, 52 Ohio St.3d 1, 2 (1990). Ohio law specifically requires all items of compensation paid for services performed in Ohio by a nonresident to be allocated to Ohio. *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E3d 381, ¶22 (citing R.C. 5747.20(B)(1)). R.C. 5747.01(D) states that "'compensation' means any form of remuneration paid to an employee for personal services."

"Severance pay" is money (apart from back wages or salary) that an employer pays to a dismissed employee. Black's Law Dictionary (11th ed. 2019). The payment may be made in exchange for a release of any claims that the employee might have against the employer. *Id.* The United States Supreme Court has held that severance payments are "wages" subject to taxation under the Federal Insurance Contributions Act (FICA). *U.S. v. Quality Stores, Inc.*, 134 S. Ct. 1395 (2014). Specifically, in *U.S. v. Quality Stores*, the Court found that:

> Severance payments are made to employees only. It would be contrary to common usage to describe as a severance payment remuneration provided to someone who has not worked for the employer. Severance payments are made in consideration for

> employment—for a "service * * * performed" by "an employee for the person employing him * * *" *Id.* at 146.

In this case, the severance was reported on W-2s issued to Mr. Burke. The evidence presented and the authority discussed above reflects that the payment made under the severance agreement are compensation pursuant to R.C. 5747.01(D). The petitioners do not appear to dispute this notion, but rather contend that the compensation is not allocable to Ohio.

B. THE PETITIONERS' SEVERANCE PAYMENT IS ALLOCABLE TO OHIO IN ACCORDANCE WITH R.C. 5747.20(B)(1)

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." As a result, nonresidents therefore must allocate compensation, including severance payments, 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.[1]

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. *Hillenmeyer v. Cleveland Bd. Of Rev.*, 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, 2015-Ohio1623 (2015) at ¶ 26. The Court in *Hillenmeyer* 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."[2]

In a recent decision regarding a municipality's ability to tax stock option compensation earned by a nonresident for personals 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.

The principles put forth in *Willacy* and *Hillenmeyer* were also examined in *Wardrop v. Middletown Income Tax Rev. Bd.*, where Ohio's 12th District Court of Appeals explained that the critical issue was when the employees "earned the income, not when they receive it." *Wardrop v. City of Middletown Income Tax Rev. Bd.*, 12th Dist. Butler No. CA2007-09-35, 2008-Ohio-5298 (2008). In *Wardrop*, former executives of a company that was located in Middletown city appealed from a decision of the

[1] 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.
[2] *Hillenmeyer* at 23.

city's income tax review board denying their requests for refund of taxes paid with respect to money received after termination of their employment. The Court of Appeals held that "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" and that income received after termination of employment was subject to city's income tax. In its *Wardrop* decision, the Butler County of Common Pleas 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 the state to tax the income of a non-resident depends not on when it was earned, but where it was earned." *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.

IV. ANALYSIS OF THE FACTS & CIRCUMSTANCES

The petitioners contend that they were not required to allocate the compensation received from the severance agreement with Nationwide because they were nonresidents of Ohio when Mr. Burke received the $270,504.00 severance payment. In support of their claim of not being residents of Ohio in 2017, the petitioners provided the Tax Commissioner with moving records from Ohio to Florida, copies of their Florida Drivers' licenses, Florida vehicles' registrations, and Florida home tax exemption for 2017. The petitioners' Florida domicile for 2017 is not in dispute. Rather, 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 Ohio income tax purposes, R.C. 5747.02 and R.C. 5747.20(B)(1) collectively act to require nonresidents to allocate compensation for personal services to the extent that it was earned in Ohio irrespective of whether the taxpayer was a nonresident at the time that the compensation was paid.

The crucial examination in determining whether compensation for personal services is allocable and therefore taxable is to identify where the compensation was earned, not where the taxpayer resided at the time compensation was received. In this matter, records reflect that Mr. Burke was employed by Nationwide in Ohio for the year leading up to and during 2016, and further that petitioners maintained their primary residence at 6314 Highgate Pl, Lewis Center, OH 43035. Mr. Burke signed the severance agreement with Nationwide in June of 2016, when he was domiciled in Ohio and while he was employed at Nationwide in Ohio. Mr. Burke then remained employed in his position until November 19, 2016, when he ceased performing personal services and went on paid leave from November 19, 2016, through January 2, 2017. Mr. Burke's official position with Nationwide was terminated on November 19, 2016, as per the severance agreement. Furthermore, the petitioners provided a letter from Nationwide that confirmed the compensation received as part of the agreement "was not made for services rendered by Mr. Burke in 2017" and that Mr. Burke "performed no work for Nationwide in 2017." This evidence further confirms that the compensation received in February 2017, as part of the severance agreement, was for personal services, including the execution of the severance agreement, performed in 2016. Reported W-2s provided by the petitioners included the $270,504.00 severance payment in box 1 under Wages, Tips, and other Compensations.

In this matter, Mr. Burke earned the compensation as part of the severance agreement signed during his employment with Nationwide, in Ohio, and while he was a resident of Ohio. Nonetheless, Mr. Burke

received compensation after his termination from Nationwide and while he was a resident of Florida, the income received is subject to Ohio's income tax. Mr. Burke cannot evade Ohio taxation from the compensation earned by the simple reason of being deferred into a subsequent year when Mr. Burke no longer worked in Ohio and was a nonresident of the state. As a result, and in accordance with the relevant authority described above, the petitioners were statutorily required to report and allocate the compensation earned through personal services Mr. Burke performed in Ohio.

V. CONCLUSION

Despite the petitioners' contentions to the contrary, R.C. 5747.20(B)(1) and the relevant authority require nonresidents to allocate compensation to the extent that it was earned through personal services performed in Ohio. There is no dispute that Mr. Burke earned compensation through the performance of personal services for Nationwide in Ohio. Moreover, the petitioners have not submitted evidence or arguments sufficient to show that the severance payment was not related to personal services performed in Ohio or to refute the accuracy of the tax interest amounts assessed.

VI. PENALTY ABATEMENT

Although the interest assessed cannot be abated, as the payment of interest is mandatory pursuant to R.C. 5747.08(G), 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 petitioners assert that the failure to comply was due to reasonable cause and the facts and circumstances in this matter support a full abatement of the penalty assessed.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$2,192.00	$43.00	$0.00	$2,235.00

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 17 2020

James D. Fourman
1645 State Route 503
Arcanum, OH 45304

Re: Assessment No. 02201734111486
Individual Income Tax - 2013

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

Tax	Interest	Penalty	Total
$507.00	$60.58	$121.16	$688.74

The Ohio Department of Taxation assessed the petitioner after making adjustments to his individual income tax return that the petitioner filed for the 2013 tax year. Specifically, the petitioner overstated his Small Business Investor Income Deduction (SBD) on his 2013 individual income tax return. The petitioner objects to the assessment and requests an abatement of the penalties and interest 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.

Former R.C. 5747.01(A)(31), effective for the tax year in question, provided that a taxpayer's SBD income means "the portion of the taxpayer's adjusted gross income that is business income reduced by deductions from business income and apportioned or allocated to" Ohio "to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year." Former R.C. 5747.01(A)(31) permitted a taxpayer to deduct one-half of their SBD income "to the extent not otherwise deducted or excluded in computing federal or adjusted gross income for the taxable year." The 2013 SBD instructions also stated:

> If filing status is married filing jointly or single, head of household, enter $250,000 on this line. If filing status is married filing separately, enter $125,000 on this line. *In either case, the amount on this line also cannot exceed the amount of your Ohio adjusted gross income as if it were calculated prior to taking the Ohio small business investor income deduction.*

(Emphasis added.) 2013 SBD Instructions, Line 14 - Maximum Ohio Small Business Investor Income.

The petitioner contends that he correctly computed his SBD on his 2013 individual income tax return. However, similar to the taxpayer in the recent BTA decision *Gerald Sapadin v. McClain*, BTA No. 2018-1254, 2019 WL 4453430 (Sept. 5, 2019), who overstated his SBD deduction, the petitioner also overstated his SBD by reporting an SBD amount on line 14 that exceeded the amount of his Ohio adjusted gross income as if it were calculated prior to taking the SBD. Here, the petitioner's filing status

is single, and he defaulted to the $250,000 maximum income allowed on line 14 of the Small Business Investor Income Deduction Schedule (IT SBD). However, the petitioner's Ohio adjusted gross income prior to taking the SBD was less than $250,000. Therefore, it was incorrect for the petitioner to include the $250,000 maximum income allowable on line 14 of the IT SBD per the 2013 SBD instructions and former R.C. 5747.01(A)(31). As a result, the petitioner overstated the deduction on line 15 by calculating 50% of line 13 instead of line 14, the lesser amount. Accordingly, the petitioner incorrectly calculated his SBD.

Although the Department computed the petitioner's SBD in accordance with the 2013 SBD instructions and Ohio Revised Code as shown above, it should be noted that the instruction booklet provided by the Department of Taxation is merely a guideline for taxpayers and not the law. *Ricchuiti v. Limbach*, BTA No. 1989-K-1124 (Oct. 23, 1992); see, also, *Benedetti v. Zaino*, BTA No. 2003-R-1817, 2004 WL 1488191 (June 25, 2004).

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 his failure to comply was due to reasonable cause and the evidence and circumstances support a full abatement of the penalty. However, the interest cannot be abated, as the payment of interest is mandatory pursuant to R.C. 5747.08(G).

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$507.00	$60.58	$0.00	$567.58

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 17 2020

Brett R. & Tina B. Garber
505 N. Lutheran Church Rd.,
Dayton, OH 45417

Re: Two Assessments
Individual Income Tax – Multiple Periods

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

Assessment Number	Period	Tax	Interest	Penalty	Total
02201826040241	2014	$3,414.06	$407.72	$815.44	$4,637.22
02201826344266	2015	$1,690.49	$152.14	$304.28	$2,146.91

I. BACKGROUND

The Ohio Department of Taxation assessed the petitioners after making adjustments to the individual income tax returns that they filed for the tax years at issue. Specifically, the Department reduced the petitioners' Small Business Investor Deduction ("SBD") by excluding guaranteed payments and/or compensation received from a pass-through entity in which the petitioners did not have at least a twenty percent direct or indirect ownership interest per R.C. 5733.40(A)(7). The petitioners also overstated their Business Income Deduction (BID) on their 2015 individual income tax return. The petitioners object to the assessments and request an abatement of penalties assessed. The petitioners did not request a hearing on the matters. Therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petitions.

II. PETITIONERS' CONTENTIONS

The petitioners provided a Schedule K-1 showing Mr. Brett Garber (hereinafter referred to as "Mr. Garber") held a 7.5 % direct interest in Garber Electrical Contractors, Inc., (hereinafter referred to as "the company") during the 2014 calendar year and a 9.5% during the 2015 calendar year. However, the petitioners contend that Mr. Garber's guaranteed payments and/or compensation qualifies for the SBD and the BID because he held at least a 20% indirect interest in the company constructively by way of his father, Gary Garber's direct interest. Gary Garber owned 92.49% in 2014 in the company. In other words, the petitioners contend that Mr. Garber qualifies for the SBD and the BID as an indirect owner under R.C. 5733.40(A)(7) by way of the Internal Revenue Code (IRC) "attribution rules."

III. RELEVANT AUTHORITY & ANALYSIS

A. THE DEDUCTIBILITY OF COMPENSATION PAID TO AN INVESTOR

Wages, guaranteed payments, and other compensation paid by a pass-through entity to an investor that directly or indirectly holds a 20% or greater interest in the entity are generally 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 SBD or BID.[1]

The 132nd Ohio General Assembly passed Amended Substitute Senate Bill 8 ("SB 8"), which amended R.C. 5733.40(A)(7) to provide that compensation and guaranteed payments paid by either a pass-through entity, or a professional employer organization ("PEO") on the pass-through entity's behalf, to the owner of the pass-through entity will constitute a distributive share of income. The amendment to R.C. 5733.40 retroactively applies to any tax year beginning on or after January 1, 2013. R.C. 5733.40(A)(7) now states:

> 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 percent **direct or indirect interest** in the profits or capital of the qualifying entity. (Emphasis added.)

It must be noted that, under R.C. 5733.40(A)(7), guaranteed payments or compensation must be paid to an "investor" to be qualify 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 pass-through entity, is a partner, member, shareholder, or investor in that qualifying pass-through entity. Based on the Department's records, Mr. Garber has presented evidence that he was a partner, member, shareholder, or investor of the company for the 2014-2015 tax years. The records reflect that he had a 7.5% direct interest in the company during the 2014 calendar year and a 9.5% direct interest during the 2015 calendar year. As such, Mr. Garber's direct interest in the company for tax period 2014 and 2015 does not, on its own, meet the 20% interest threshold set forth in R.C. 5733.40(A)(7). Rather, as mentioned previously, Mr. Garber claims that, in addition to his direct interest in the company, he also constructively held an indirect interest by way of his father's ownership interest in the company.

B. INDIRECT OWNERSHIP

The petitioners' contentions regarding Mr. Garber's guaranteed payments and/or compensation from Garber Electrical Contractors, Inc., for tax year 2015 are inconsistent with the meaning of the term indirect interest as laid out in R.C. 5733.40(A)(7).

As with investors with direct interests, R.C. 5733.40(A)(7) also instructs investors holding indirect interests exceeding twenty per cent shall consider their compensation, guaranteed payments or compensation distributive shares of income from the qualifying entity. R.C. 5733.40(A)(7) does not expressly define the phrase "direct or indirect interest", and there is no authoritative case law directly on point regarding the meaning of these terms.

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[1] Former R.C. 5747.01(A)(31).

R.C. 1.42 states, in pertinent part, that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." There is no specific reference to IRC 318 in R.C. 5733.40, so the Tax Commissioner can look to the context in which the General Assembly has previously chosen to incorporate IRC 318 or references to constructive ownership. The General Assembly has chosen to specifically incorporate references to the Internal Revenue Code ("IRC") throughout Title 57 of the Ohio Revised Code. For instance, divisions (A)(3) and (A)(4) of R.C. 5733.40 are places where the General Assembly specifically referenced IRC 263(a) and IRC 482 in order to identify certain adjustments that taxpayers must make with respect to related members. These specific references are notable when identifying that the General Assembly has not, on the other hand, chosen to specifically incorporate any such reference to constructive ownership, attribution, or IRC 318 in R.C. 5733.40(A)(7) or R.C. 5733.40 for that matter.

Conversely, R.C. 5747.221 states "[a]n indirect investment includes any interest that a person constructively owns on account of the attribution rules set forth in section 267, 318, or 1563 of the Internal Revenue Code." Sections 267, 318, and 1563 of the IRC relate to attribution rules and, important to this matter, "constructive" ownership. The inclusion of a reference to IRC 318 in R.C. 5747.221 is an example of General Assembly choosing to explicitly broaden the definition of "indirect" to include the attribution rules found in the IRC. If "indirect" inherently included ownership through the attribution rules in the IRC, the General Assembly's reference in R.C. 5747.221 would have been unnecessary. If the General Assembly intended on R.C. 5733.40(A)(7) to include the IRC attribution rules, it would have included a similar provision to R.C. 5747.221 to ensure constructive ownership by way of the attribution rules found in the IRC was included.

If a statute is ambiguous, the court, in determining the intention of the legislature may consider the circumstances under which the statute was enacted, the consequences of a particular construction, and the administrative construction of the statute. R.C. 1.49. Stated otherwise, the "primary goal in construing a statute is to ascertain and give effect to the intent of the legislature." *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969. The General Assembly's omission of a reference to IRC 318 or attribution rules in R.C. 5733.40(A)(7) is, in and of itself, a sign of legislative intent to define "indirect interest" by its common usage, not the specific meaning used in the IRC. This is important, because, as discussed above, the General Assembly recently amended R.C. 5733.40 with a clear intent to clarify Division (A)(7) as it relates to PEOs.[2] When construing a statute, the court must give effect to the words used, and neither delete nor insert words into the statute.[3] Thus, the statute should not be read to include "constructively" where it has been omitted. To be sure, the General Assembly has had multiple opportunities, including with SB 8, to incorporate references to IRC 318 or specifically define "indirect interest" to mean constructive ownership for the purposes of R.C. 5733.40(A)(7), but it has not done so.

Instead of looking outside of the Ohio Revised Code to the IRC for clarity on "indirect interest" as used in Division (A)(7) of R.C. 5733.40, the Tax Commissioner will look for context and similar usage of the phrase "indirect" or "indirectly" in terms of ownership interest elsewhere within Chapter 5733. For instance, R.C. 5733.04(I)(12)(c) is worth examining. R.C. 5733.04 is the definitions section of Chapter 5733, and Division (I)(12)(c) uses the words "directly" and "indirectly", and also includes the terms "beneficially" and "constructively." Furthermore, Division (I)(12)(c) expressly references attribution rules contained in IRC §318. This specific reference is notable because, if the term "indirect" is read to include the IRC attribution rules as the petitioners seeks to do with R.C. 5733.40(A)(7), then it would encompass both indirect and constructive ownership, leaving the word "constructively" devoid of any

[2] The 132nd Ohio General Assembly passed Amended Substitute Senate Bill 8 ("SB 8"). SB 8, Uncodified Section 5.
[3] *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 627, 64 N.E. 574, 576.

meaning, which disregards the rules of statutory construction which require that every word in statute is presumed to have some effect.[4]

Chapter 5733 of the Ohio Revised Code relates to the corporation franchise tax. The corporation franchise tax was a business privilege tax that dated back to 1902 which the Generally Assembly repealed for tax year 2014 and after. *See*, Amended Substitute House Bill 510, 129th General Assembly. Nevertheless, as is the case in the first sentence of R.C. 5733.40(A)(7), there are several sections of Chapter 5733 that applied to both corporation franchise tax and still apply for the purposes of establishing the framework for Ohio's pass-through entity and trust withholding tax. The interplay between Chapters 5747 and 5733 that the General Assembly established to administer Ohio's pass-through entity tax is one that uses provisions in the corporation franchise tax to identify qualifying pass-through entities and further to lay out how those entities must withhold for their qualifying investors.

Section 5733.40 is the definitions section for qualified pass-through entities and represents an ideal location where the General Assembly could have incorporated a reference to IRC 318. The General Assembly did define "investor" and "qualifying investor" respectively in Divisions (H) and (I), and neither of those sections reference or contemplate constructive ownership interests. However, R.C. 5733.40(I) does, in several places, contemplate pass-through entities with investors who are trusts or other corporate entities. This focus on ownership by other entities is useful, because it demonstrates that much of the General Assembly's focus in constructing R.C. 5733.40 was focused on the concept of entities investing in other entities.

The absence of a specific reference to constructive ownership or IRC 318 along with the focus of entity ownership of other entities contained in R.C. 5733.40 are instructive in setting the context for the application of "indirect interest" in this matter. Specifically, the contextual meaning of the term "indirect" in Division (A)(7) is one which applies to situations where an investor owns an interest in a pass-through entity that owns an interest in another pass-through entity. In other words, the definition of "indirect interest" in R.C. 5733.40(A)(7) means intermediate entity ownership, not the IRC attribution rules which would allow for ownership to flow through spousal or family ownership. This application is consistent with an approach that seeks context within R.C. 5733.40 instead of attempting to incorporate references to IRC 318 or constructive ownership that the General Assembly did not include.

In the present case, if the petitioners' application of constructive ownership were applied for tax year 2015, it would render distinctions between indirect and constructive used elsewhere in Chapter 5733 meaningless. Additionally, the petitioners' application for tax year 2015 would also expand the meaning of indirect interest beyond statutory language specifically chosen by the General Assembly in R.C. 5733.40. Such an application looks beyond the common and contextual usage of the word "indirect interest", and therefore is contrary the rules of statutory construction prescribed in R.C. 1.42 and 1.49. As such, Mr. Garber's indirect interest does not mean constructive ownership for purposes of R.C. 5733.40(A)(7). Therefore, Mr. Garber's guaranteed payments and/or compensation does not qualify for BID for tax year 2015.

C. TAXPAYER NOTICE

Taxpayer Notice states "[i]f a taxpayer has already filed an individual income tax return for tax years 2013 or 2014, and claimed the SBD based on reliance to the initial guidance related to the term "indirect" and IRC attribution, the Department will not challenge the filing position of the taxpayer." Further, it

[4] *State v. Linner*, 77 Misc.2d 22, 665 N.E.2d 1180.

also states "[i]f a taxpayer file[d] an original, or amended, return to claim the BID for tax years 2015 and beyond, the term "indirect" is to be correctly interpreted with the analysis and conclusion above."[5] More specifically, in the notice, the Department stated "the instructions pertaining to Ohio's business income deduction (the "BID", applicable to tax years 2015 to present) have *always stated that IRC provisions are inapplicable when determining if an individual "indirectly" owns an interest in an entity."* (Emphasis added). Here, the tax years at issue are 2014-2015, during which the SBD and the BID were in effect. The guidance and approach that the petitioners seek to rely on was only applicable to the SBD, which was in effect for tax year 2014. As such, Mr. Garber's guaranteed payments and/or compensation would qualify for the SBD for tax year 2014. However, Mr. Garber's guaranteed payments and/or compensation from 2015 does not qualify for the BID for tax year 2015.

An information release, such as the Taxpayer Notice relied upon by the petitioners, does not create a legal obligation by its own force as information releases have no force of law.[6]

IV. ABATEMENT OF THE PENALTY

The Tax Commissioner may still abate a penalty when taxpayers demonstrate that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The facts and circumstances in this matter support a full abatement of the penalty assessed. Furthermore, the payment of interest is mandatory pursuant to R.C. 5747.08(G) and cannot be abated.

V. CONCLUSION

For the reasons laid out above, the petitioners' request with respect to the guaranteed payments and/or compensation paid to Mr. Garber as it qualifies for the small business deduction in 2014 is well-taken. As for 2015, the petitioners have not demonstrated that Mr. Garber held at least a twenty percent direct or indirect interest in Garber Electrical Contractors, Inc. Therefore, the guaranteed payments and/or compensation paid to Mr. Garber does not qualify for the BID for tax year 2015.

Accordingly, the assessment for tax year 2014 is cancelled and the assessment for 2015 is adjusted as follows:

Assessment Number	Period	Tax	Interest	Penalty	Total
02201826344266	2015	$1,690.49	$152.14	$0.00	$1,842.63

Current records indicate that no payments have been made on these assessments, leaving an adjusted balance of $1,842.63. 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 total above.** Payments shall be made payable to the "Treasurer – State of Ohio." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

[5] Ohio Department of Taxation, Taxpayer Notice, Personal Income & Pass-Through Entity Tax: Meaning of "Indirect" Ownership, March 29, 2017.
[6] *Renacci v. Testa*, 148 Ohio St.3d 470, ¶39, 2016-Ohio-3394

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 17 2020

Lawrence A. & Stephanie L. Gilbert
9131 Equus Cir.
Boynton Beach, FL 33472

Re: Two Assessments
Individual Income Tax – Multiple Periods

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

Assessment No.	Year	Tax	Interest	Penalty	Total
02201418309957	2011	$7,433.28	$497.00	$0.00	$7,930.28
02201418309956	2012	$6,205.34	$231.00	$762.00	$6,436.34

I. BACKGROUND

The Ohio Department of Taxation assessed the petitioners based on the unrebutted presumption that they were nonresidents of Ohio who failed to file individual income tax returns reporting Ohio-sourced income for the periods at issue. Specifically, during an audit pertaining to tax years 2011 and 2012, the Department's audit staff identified that Mr. Gilbert earned nonqualified stock option compensation for personal services he performed in Ohio but failed to allocate that compensation to Ohio as required under Ohio law.[1] The stock option compensation at issue relates to two grants of options which were granted in 2000 and exercised in 2011, and another grant of options which was granted in 2001 and exercised in 2012. In response to the assessments, the petitioners filed timely petitions for reassessment objecting to the assessments.

Records reflect that petitioners maintained a residence at 300 Sharon Woods Rd in Wadsworth, Ohio, and were Ohio residents until on or around January 1, 2011. Records further reflect that the stock option compensation identified by the Department's audit staff was earned through personal services that Mr. Gilbert earned as an employee for The Proctor & Gamble Company (P&G). The petitioners describe Mr. Gilbert's duties with P&G as follows:

[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 nonqualfied 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 Mr. Gilbert.

> Mr. Gilbert was engaged in global technology development for beauty care products. His job include travel to many European and Asian destinations on a regular basis to review global plans and projects. In addition, Mr. Gilbert was required to travel extensively around the Unites States to meet with technology vendors and universities where P&G funded skin science research. *** Overall, Mr. Gilbert spent approximately 40% of his work time outside the State of Ohio.

Records reflect that the Department's audit staff allocated Mr. Gilbert's stock option income without fully accounting for the amount of time that Mr. Gilbert performed personal services for P&G outside of the state of Ohio between the time the stock options in question were granted and the time that options were exercised. The petitioners object to the assessments and contend that the amounts assessed should be adjusted to account for the personal services that Mr. Gilbert performed for P&G outside of Ohio. For the reasons discussed below, the petitioners' contention is well taken, and the amounts assessed shall be adjusted to account for Mr. Gilbert's personal services performed outside of 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.[2]

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

[2] 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.

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.[3]

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.[4] 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.

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[3] The United States Office of Personnel Management, the Unites States General Accounting Office, and the United States Congress all recognize that average full-time employee 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 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).

[4] 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).

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.*[5] 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.[6] 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*.[7] 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,

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[5] *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)

[6] *Rice & Wardrop.*

[7] 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."

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.[8]

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."[9] Ohio's application of R.C. 5747.20(B)(1) similarly focuses on where the compensation was earned by nonresident taxpayers.

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 Administrate 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

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[8] 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.

[9] *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.

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, between the time the stock options were granted and exercised, Mr. Gilbert performed personal services for P&G in Ohio. As a result, and in accordance with the relevant authority, the petitioners were statutorily required to report and allocate the portions of stock option compensation which were earned through person services Mr. Gilbert performed in Ohio.

During the audit which led to the assessments at issue in this matter, the Department's audit staff used documentation provided by the petitioners and their authorized representatives as well as other evidence available at the time to allocate Mr. Gilbert's stock option compensation. Even so, the allocation methodology utilized by the audit staff did not fully account for Mr. Gilbert's days-worked outside of Ohio during the grant and exercise dates of the options. The evidence currently available to the Tax Commissioner supports a days-worked methodology which allocates 60% of Mr. Gilbert's stock option compensation to Ohio. This allocation ratio is not only supported by the evidence available to the Tax Commissioner regarding the travel associated with Mr. Gilbert's work for P&G, but it also comports with the contentions and calculations submitted by the petitioners. Ultimately, this days-worked allocation methodology accounts for personal services that Mr. Gilbert performed outside of Ohio between the time P&G granted and he exercised stock options in 2011 and 2012. Thus, the 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 Mr. Gilbert performed services for P&G in Ohio and earned portions of his 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 Mr. Gilbert performed personal services in Ohio 60% 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 Mr. Gilbert earned for personal services he performed for P&G in Ohio.

Accordingly, the assessments are adjusted as follows:

Assessment No.	Year	Tax	Interest	Penalty	Total
02201418309957	2011	$3,344.39	$223.61	$0.00	$3,568.00
02201418309956	2012	$2,934.75	$109.25	$0.00	$3,044.00

Current records indicate that a $6,612.00 payment has been made in full satisfaction of these adjusted assessment amounts, 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 APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

David & Marie Godsell
4724 Dudley Lane, NW
Atlanta, GA 30327-3330

APR 17 2020

Re: Refund Claim No. IT-9936
Individual Income Tax – 2007

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

Tax Year	Refund Claimed
2007	$12,340.00

Following an income tax audit of the claimants for tax year 2007, the Department's audit staff identified that the claimants failed to fully remit their Ohio tax. The audit staff then issued billing notices, and the claimants paid the amounts on the billing notices. Subsequently, the claimants filed the application for refund currently considered. The claimants contend that the amounts identified as underpaid on the billing notices were erroneous, and, as a result, they seek a refund equal to the full amount that they remitted in response to the billings. The claimants' application for refund was denied upon initial review, and they requested an administrative review in accordance with R.C. 5703.70. The claimants also requested a hearing on the matter which was held at the Department's offices in Columbus, Ohio.

Upon further review and based on the evidence currently available to the Tax Commissioner, the refund claim is granted in full, plus applicable statutory interest. However, if the claimants have outstanding debts to the State, the approved refund amount may be reduced to offset in accordance with R.C. 5747.12.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

David N. & C Lynn Kajganich
19807 Lytle Rd.
North Royalton, Ohio 44133

Re: Assessment No. 02201826040245
Individual Income Tax: 01/01/2014 – 12/31/2014

This is the final determination of the Tax Commissioner with regard to a petition for reassessment pursuant to R.C. 5703.60 concerning the following individual income tax corrected assessment:

Tax	Interest	Penalty	Payment	Balance Due
$4,596.00	$554.92	$1,109.84	($4,596.00)	$1,664.76

The Ohio Department of Taxation assessed the petitioner, David N. & C Lynn Kajgnaich (hereinafter "the petitioners") after making adjustments to the individual income tax return that they filed for the tax year at issue. Specifically, the Department disallowed a Small Business Investor Deduction ("SBD") claimed on the petitioners' 2014 individual income tax return.[1] Following the initial assessment, the petitioners submitted documentation demonstrating that a reduction in the originally assessed tax was appropriate; therefore, the Department issued a corrected assessment. The petitioners then filed a timely petition for reassessment in response to the corrected assessment.

The petitioners do not contest the underlying tax liability of the assessment; however, the petitioners object to the penalty and interest amounts assessed. Specifically, the petitioners contend that the interest imposed was incorrectly calculated and further request an abatement of the penalty. The petitioners requested a hearing on the matter which was conducted via telephone, and this matter is now decided based on the evidence currently available to the Tax Commissioner.

Pursuant to R.C. 5747.13(A) "the tax commissioner may make an assessment against any person liable for any deficiency for the period for which the return is or taxes are due, based upon any information in the commissioner's possession." Additionally, this statute gives the Tax Commissioner four years to assess. *Id.* In this case, the Department reviewed the petitioners' income tax return and disallowed the SBD claimed by the petitioners within four years of the petitioners filing their 2014 individual income tax return. As such, the assessment was properly made for the deficiency created by the disallowed SBD.

Former division of R.C. 5747.08(G), applicable for the tax period at issue, stated, in relevant part, that "in addition to all other interest charges and penalties, all taxes imposed under this chapter or Chapter 5748. of the Revised Code and remaining unpaid after they become due, except combined amounts due of one dollar or less, 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,

[1] The SBD was permitted under R.C. 5747.01(A)(31), applicable for the period in question.

APR 29 2020
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whichever occurs first." In the instant case, the original assessment was issued on September 25, 2018. After issuing the original assessment and reviewing the petition for reassessment filed in response to that assessment, the Department issued a corrected assessment in accordance with R.C. 5703.60. The corrected assessment reduced the tax amount originally assessed to that at issue in this matter. The statutory preassessment interested was also recalculated for purposes of the corrected assessment. Specifically, the corrected assessment calculated interest from April 16, 2015, i.e., the date the additional liability was due, until September 25, 2018, i.e., the date that the corrected assessment was issued. Therefore, the interest amount is reasonable, appropriate, and calculated in a manner consistent with R.C. 5747.08(G).

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

Accordingly, the corrected assessment is adjusted as follows:

Tax	Interest	Penalty	Payment	Balance Due
$4,596.00	$554.92	$832.38	($4,596.00)	$1,387.30

Current records indicate that no additional payments have been made on this assessment, leaving an adjusted balance of $1,387.30. 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 total above.** Payments shall be made payable to the "Treasurer – State of Ohio." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 17 2020

Pradip & Deborah Kamat
3929 E. Ash Ln.
Beachwood, OH 44122

Re: Assessment No. 02201801926407
Individual Income Tax - 2013

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

Tax	Interest	Penalty	Total
$696.70	$86.52	$173.04	$956.26

The Ohio Department of Taxation assessed the petitioners after making adjustments to the individual income tax return that the petitioners filed for the 2013 tax year. Specifically, the Department partially disallowed the petitioners' Small Business Investor Income Deduction (SBD) on their 2013 income tax return. The petitioners do not object to the assessment or interest amounts assessed but request an abatement of the penalties 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.

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

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$696.70	$86.52	$89.02	$872.24

Current records indicate that $778.03 has been made on this assessment, leaving a balance due of $94.21. 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.

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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:

APR 08 2020

Mohan Nuthakki
Sandhya Nuthakki
4625 Schrubb Dr
Kettering, OH 45429

Re: Two 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 Number	Period	Tax	Interest	Penalty(s)	Payment(s)	Total
02201829060339	01/01/2014-12/31/2014	$5,351.91	$663.20	$1,326.40	($5,980.79)	$1,360.72
02201829161966	01/01/2015-12/31/2015	$5,572.45	$522.27	$1,044.54	($6,060.37)	$1,078.89

The Department assessed Mohan and Sandhya Nuthakki (hereinafter referred to as "the petitioners") after conducting a review of their Ohio Individual Income Tax Returns for the periods in question that revealed an apparent overstatement in their computation of the Small Business Investor Income Deduction.[1] The review of the petitioners' tax return and supporting documentation revealed an apparent overstatement of that deduction due to the erroneous inclusion of guaranteed payments and/or compensation received from a pass-through entity in which the petitioners did not appear to have at least 20% direct or indirect ownership interest per R.C. 5733.40(A)(7). The petitioners do not object to the tax and interest amounts assessed but request an abatement of the late payment penalty. The petitioners did not request a hearing on this matter. Therefore, this matter is decided based upon the evidence currently available to the Tax Commissioner.

The Tax Commissioner may abate a penalty when the taxpayers demonstrate that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the petitioners claim that their failure to comply was due to a reasonable cause. The evidence and circumstances, including the petitioners' previous compliance history and the payment of the tax and interest amounts assessed in this matter, support a partial abatement of the penalty.

Accordingly, the assessments are adjusted as follows:

Assessment Number	Period	Tax	Interest	Penalty(s)	Payment(s)	Total
02201829060339	01/01/2014-12/31/2014	$5,351.91	$663.20	$50.00	($5,980.79)	$84.32
02201829161966	01/01/2015-12/31/2015	$5,572.45	$522.27	$50.00	($6,060.37)	$84.35

[1] Authorized under former R.C. 5747.01(A)(31), applicable for the periods at issue.

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

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 17 2020

William Reinbolt & Jamie Pribe
3185 Klondike Road
Delaware, OH 43015

Re: Refund Claim No. 1800457
Individual Income Tax – 2016

This is the final determination of the Tax Commissioner with regard to an application for refund filed pursuant to 5747.11:

Tax Year	Refund Claimed
2016	$22,052.00

I. BACKGROUND

The claimants filed an individual income tax return for tax year 2016 claiming an Ohio Business Income Deduction (BID) for the capital gains Mr. Reinbolt received from the sale of his ownership interest in River Rock Rehabilitation, LLC ("River Rock"). Upon initial review, the Department disallowed the BID for the capital gains and, therefore, partially denied the claimants' refund request for tax year 2016.[1] The claimant contends that the Department incorrectly identified the capital gains as nonbusiness income and denied the corresponding BID. Accordingly, the claimant objects to the denial of his refund claim and request a refund of income tax paid to Ohio for tax year 2016. The claimants contend that the Department incorrectly identified the capital gains from the sale of River Rock as nonbusiness income, and thus incorrectly denied the corresponding BID.

The claimants object to the denial of the full refund claim reported on their original return for tax year 2016. The claimant requested an administrative review of the refund claim denial in accordance with R.C. 5703.70 but did not request a hearing. Therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim.

II. CLAIMANTS' CONTENTIONS

The claimants assert that their 2016 individual income tax return was correct as filed. The claimants contend that the gain from the sale of Mr. Reinbolt's ownership interest in River Rock is business income and thus eligible for the BID. To support his contention, Mr. Reinbolt emphasizes that he was a 50% owner of River Rock Rehabilitation and, as such, he was an integral part of all facets of the business. The claimants also argue that the sale of Mr. Reinbolt's entire interest in River Rock is considered a liquidation of a business.

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

III. RELEVANT AUTHORITY

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

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

B. BUSINESS & NONBUSINESS INCOME

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

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

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

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

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

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

In *Corrigan v. Testa,* the Supreme Court of Ohio reviewed the applicability of R.C. 5747.212 to nonresident taxpayers and ultimately found that "the ordinary treatment of capital gains derived from intangible property" (e.g. an ownership interest in an entity), is nonbusiness income. *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶3 (2016). Additionally, while the Court has found that income generated by a pass-through entity is business income to the entity's investors, it has declined

to extend such treatment to income from an investor's sale of the pass-through entity. *Id.* ¶36-37; *see also Agley v. Tracy,* 87 Ohio St.3d 265, 719 N.E.2d 951 (1999). Furthermore, the Court has declined to rely on "form-over-substance" arguments when determining the proper classification of income derived from the sale of an interest in a business, instead relying on the actual facts of the transaction giving rise to income. *Corrigan* at ¶62-67.

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

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

Kemppel at 422 (internal citations omitted).

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

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

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

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

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

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

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.

IV. ANALYSIS

Mr. Reinbolt can only deduct his gain from his sale of River Rock if such gain is business income. The Department acknowledges that Mr. Reinbolt was a 50% shareholder of River Rock and performed personal services for the company as a physical therapist. However, his participation and ownership interest in the company are not individually or collectively determinative for the purposes of addressing whether the gain resulting from his sale of his interest in the business is business income. Instead, for the claimants to prevail, they must show that the income (1) meets the transactional test, (2) meets the functional test, or (3) is related to a "partial or complete liquidation of a business." R.C. 5747.01(B).

Income is business income under the "transactional test" only if it is derived from a transaction in which the taxpayer regularly engages. *Kemppel* at 422. The claimants have presented no evidence that either Mr. Reinbolt or River Rock regularly disposed of intangible interests in entities. On the contrary, the record reflects that the sale of Mr. Reinbolt's intangible ownership interest in the business was a one-time occurrence and, therefore, did not arise from transactions or activities in the normal course of his, or even River Rock's trade or business. As such, the gains from this extraordinary and unusual event do not meet the transactional test.

Income is business income under the "functional test" only "if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." R.C. 5747.01(B) and *Kemppel* at 423. Additionally, gains satisfying the functional test generally arise from the sale of an asset which produces business income while it was owned by the taxpayer. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Commonwealth, Bd. Of Fin. & Revenue*, 537 Pa. 205, 210 (1994). Here, the claimants have not argued or demonstrated that acquiring or disposing of its intangible interests in companies constituted an integral part of their regular trade or business. Rather, it appears that Mr. Reinbolt was employed as a physical therapist for River Rock which was in the business of providing physical therapy services. In short, Mr. Reinbolt's intangible property (i.e. his ownership interest in River Rock) is not "integral" to the "regular course of a trade or business operation" conducted by either Mr. Reinbolt or River Rock. Accordingly, the resulting gains from the sale of said intangible property does not meet the functional test.

Income is also business income if it is generated from the "partial or complete liquidation of a business * * *." R.C. 5747.01(B). Based on prior case law and the legislative intent which led to the amendment of R.C. 5747.01(B), a "partial or complete liquidation of a business" requires a complete asset sale

followed by the actual cessation of all business operations (a complete liquidation), or the sale of certain assets followed by the actual cessation of the line of business relating to those assets (a partial liquidation). In contrast, the sale of an intangible asset such as an ownership interest in an entity, is not a liquidation. Instead, it is merely a transactional sale which results in a capital gain to the investor. In this case, Mr. Reinbolt sold his entire intangible ownership interest in River Rock, he did not sell a business asset held by River Rock. In addition, the intangible interest was held by Mr. Reinbolt personally, not River Rock, and was not used exclusively or primarily for River Rock's business purposes as a business asset would be. The business was not liquidated and dissolved; rather, it continues to operate as River Rock, a physical therapy rehabilitation center, but under different ownership. Therefore, Mr. Reinbolt's gain from the sale of River Rock was not a partial or complete liquidation of a business.

Finally, it should be noted that, unlike the taxpayers in *Corrigan*, the claimants here were residents of the state of Ohio. Therefore, the capital gains in question would not be subject to apportionment under R.C. 5747.212 because that provision only applies for the purposes of calculating the nonresident credit under R.C. 5747.05(A). Thus, to the extent that the claimants' make contentions which involve the applicability of R.C. 5747.212 to the capital gain at issue, they are not well taken.

V. CONCLUSION

The capital gains from Mr. Reinbolt's sale of his ownership interest in River Rock are not business income under either the transactional or functional tests of R.C. 5747.01(B). The evidence reflects that Mr. Reinbolt's sale of an intangible ownership interest in a business gave rise to the gain. Moreover, the sale of that intangible interest did not occur within the regular course of the claimants' business and the disposition of intangible assets was not an integral part of either the claimants' or River Rock's business. Furthermore, the income is not from "a partial or complete liquidation," as that phrase is used in R.C. 5747.01(B). The legislative history shows that "partial or complete liquidation" contemplates the cessation of the business, as opposed to an investor selling an ownership interest to another party who continues to operate the business. Here, the business continued operating after the sale. There was not an actual sale of business assets followed by a cessation of the business.

Ultimately, the claimants have not demonstrated that their capital gains were business income. Therefore, the claimants' capital gain income is nonbusiness income and does not qualify for Ohio's business income deduction or business income tax rate.

Accordingly, the refund claim is denied in full.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date:

APR 17 2020

Michael H. Shaut
3052 Warrington Rd
Shaker Hts, OH 44120

Re: Assessment No. 02201314476248
Individual Income Tax – 2005

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

Tax	Interest	Penalty	Total
$1,118,624.00	$419,742.00	$0.00	$1,538,366.00

The Department assessed the petitioner for failing to fully remit individual income tax for the period in question. The petitioner filed a petition for reassessment objecting to the assessment. Based on the facts and circumstances in this matter, the assessment shall be cancelled.

Accordingly, the assessment is cancelled.

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

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

Larry R. & Claire Versteegh
129 Skyview Dr.
Ashville, NC 28804

Re: Two Refund Claims
Individual Income Tax – Multiple Periods

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

Refund Claim No.	Tax Year	Refund Claimed
10047	2006	$41,134.00
10048	2007	$20,771.00

Following an income tax audit of the claimants for tax years at issue, the Department's audit staff identified that the claimants failed to fully remit their Ohio income tax for that period. The audit staff then issued billing notices. The claimants paid the amounts on the billing notices, and subsequently filed the applications for refund currently considered. The claimants contend that the billing notices issued by the Department's audit staff were erroneous and did not take into account amounts of income tax remitted to other states during the periods in question. As such, the claimants seek refunds equal to the full amount that they remitted in response to each of the billing notices. The claimants' applications for refund were denied upon initial review, and they requested an administrative review in accordance with R.C. 5703.70.

Upon further review and based on the evidence currently available to the Tax Commissioner, the refund claims are granted in full, plus applicable statutory interest. If the claimants have debts to the State, the approved refund amount may be reduced to offset in accordance with R.C. 5747.12.

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

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

Jeffrey A. McClain
JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 29 2020

Chapman Enterprises, Inc.
8392 Coonpath Rd.
Carroll, OH 43112-9735

Re: Four Assessments
Employer Withholding Tax – Multiple Periods
School District Withholding Tax – Multiple Periods

This is the final determination of the Tax Commissioner with regard to petitions for reassessment filed pursuant to R.C. 5747.13 concerning the following employer withholding tax and the school district withholding tax assessments:

Assessment Number	Tax Type	Period	Tax	Total Interest	Penalty	Total
100000722564	Employer Withholding	01/01/2007-12/31/2012	$64,442.61	$17,509.87	$32,221.47	$114,173.95
100000722577	Employer Withholding	01/01/2013 - 03/31/2016	$26,691.92	$2,325.27	$13,346.02	$42,363.21
100000722563	School District Withholding	01/01/2007-03/31/2012	$7,753.61	$2,021.74	$3,877.01	$13,625.36
100000722578	School District Withholding	01/01/2007 – 03/31/2016	$5,091.63	$425.47	$2,545.95	$8,063.05

I. FACTUAL BACKGROUND

The Department assessed the petitioner, Chapman Enterprises, Inc. (hereinafter "Chapman Enterprises" or "the company"), for failing to remit fully its Ohio employer's income tax and school district income tax withheld ("withholding taxes"). The Department assessed the petitioner after conducting an audit of its withholding account for the periods of the first quarter of 2007 through the first quarter of 2016. The audit review revealed that, aside from a partial income tax withholding payment in 2007, the petitioner had not remitted withholding taxes for the tax periods at issue. Subsequent to the audit and assessment, Chapman Enterprises wound up its business operations.

Based on the information in its possession, the Department's audit staff assessed the petitioner in accordance with R.C. 5747.13(A). The pre-assessment interest assessed in this matter was calculated pursuant to R.C. 5747.08(G). Pursuant to R.C. 5747.15(A)(4)(a), the Department imposed the penalties identified above.

The petitioner requested a hearing on the matters which was conducted at the Department's offices in Columbus, Ohio. This matter is now decided based on the information available to the Tax Commissioner.

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APR 29 2020

II. THE PETITIONER'S CONTENTIONS

The petitioner does not directly dispute the accuracy of the tax and interest assessed; rather, it contends that Chapman Enterprises' bookkeeper, Annette Spence, embezzled large sums from the company and failed to make proper filings and produce accurate records. Accordingly, they contend that Chapman Enterprises should be subject to the entirety of the taxes assessed, and Ms. Annette Spence should be assessed for the entire amount.

The petitioner contends that throughout her tenure as bookkeeper Ms. Spence actively hid tax information from the company's officers, made false and fraudulent tax filings to the state and federal tax authorities, and stole hundreds of thousands of dollars from Chapman Enterprises. Moreover, the petitioner asserts that the company's officers were unaware of any failure to comply with tax obligations or impropriety until it received the Ohio Department of Taxation's assessment on or about July 3, 2017. Ms. Spence began as Chapman Enterprises' bookkeeper October 7, 2002, and the evidence available to the Department indicates that she used the company's QuickBooks accounting system/software to process its accounts payable and receivable. The petitioner also indicates that Ms. Spence was responsible for all company tax payments, posting all bookkeeping and accounting entries, and processing company payroll.

The petitioner contends that Ms. Spence did not inform the company's officers about the commencement of the audit. The petitioner further contends that, when the Department's audit staff subsequently notified Ms. Spence about the withholding tax delinquency in May 2016, she did not deliver the notice to anyone else at the company. The petitioner contends that its corporate officers remained unaware of Spence's impropriety until the Department assessed the company.

Records reflect that Ms. Spence's conduct as bookkeeper of Chapman Enterprises resulted in multiple felony convictions. On April 18, 2019, she was convicted of theft from a person in a protected class—a felony of the second degree—and filing incomplete, false, and fraudulent returns—a felony in the fifth degree—in association with her conduct with Chapman Enterprises. *State of Ohio v. Annette D. Spence*, Franklin C.P., 18CR-766 (Apr. 18, 2019). The Court also concluded that Ms. Spence fraudulently added income to her pay, stole company checks, and made fraudulent purchases on a company credit card. *Id.* The Court, however, was silent as to whether Spence misfiled or filed fraudulent tax returns to either Ohio or federal tax authorities. The Franklin County Court of Common Pleas concluded that Ms. Spence stole $270,589.57 from the company over the span of at least five years from January 2011 to December 2016. The petitioner contends that this figure was arrived at by the prosecution to attain the requisite dollar amount necessary to charge Ms. Spence with a first-degree felony. The petitioner contends that, once the felony threshold was reached, the prosecution discontinued its investigation and filed charges. Thus, the petitioner asserts that the exact dollar amount attributable to Ms. Spence is not in the record. However, aside from court records, the petitioner did not provide additional evidence demonstrating that the amount was greater than $270,589.57. Upon conviction, Ms. Spence was ordered to pay restitution for the entire amount; although, the judge expressed doubt regarding her ability to do so. There is no indication from the record that Ms. Spence has paid any part of the amount owed.

III. RELEVANT AUTHORITY

APR 29 2020

Pursuant to R.C. 5747.06(A), employers are charged with the responsibility of withholding from their employees' compensation an amount "substantially equivalent" to the income tax due the state from the employee. Similarly, employers are charged with withholding school district income tax from their employees' compensation. R.C. 5747.06(B).

R.C. 5747.07(B) states that every employer who is required to withhold taxes from employee compensation under R.C. 5747.06 shall file a return and pay any amount required by law. Employers who fail in their withholding and remittance obligations are responsible for the taxes due and may be assessed penalties and interest pursuant to R.C. 5747.13. Additionally, R.C. 5747.07(F)(4) and (5) require the Tax Commissioner to assess interest if remittances of the withheld amounts are not paid to the State in a timely manner. R.C. 5747.15(A)(4)(a) also imposes a penalty of up to 50 percent of the delinquent payment upon an employer if that employer fails to remit the taxes withheld. There is no bar or time limit to an assessment against an employer for failing to file a return. R.C. 5747.13(A); R.C. 5703.58(C)(1).

IV. Analysis

An employer who fails to file a return or fails to remit the full amount due may be assessed an amount "based upon any information in the commissioner's possession." R.C. 5747.13(A). Here, that information was obtained during an audit which revealed that the petitioner withheld income and school district taxes from its employees but failed to report and remit it. Much of the information the Department's audit staff utilized was either provided by the petitioner or obtained through information reported to the Department by the Internal Revenue Service ("IRS") under authorization of Section 6103(d) of the Internal Revenue Code. Specifically, the Department's audit staff used gross wages, W-2 information, and other relevant information reported to the IRS to calculate the tax amounts assessed. For instance, the gross wages to calculate the Ohio withholding taxes due in this matter are consistent with the gross wages that the petitioner reported to federal taxing authorities.

Moreover, Mr. John Siebert, Chapman Enterprises' CPA and an authorized representative of the petitioner, did not dispute the accuracy of the records and filings that gave rise to the assessment. While Ms. Spence's conduct may have contributed to the petitioner's failure to comply with its withholding tax obligations, the petitioner has not submitted evidence that refutes the accuracy of the tax and interest amounts assessed. In fact, there is neither evidence in the record nor any presented by the petitioner to refute the accuracy of the tax and interest amounts assessed in these matters. Ultimately, the evidence currently available to the Tax Commissioner reflects that the tax and interest amounts are accurate and there is no authority or basis upon which to adjust them.

V. Penalty Abatement

The Tax Commissioner may abate penalties when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). This authority to abate penalties has been examined in situations involving employee embezzlement. In *William A. Conti Interiors, Inc. v. Tracy*, BTA No. 1992-K-550 (Dec. 30, 1993), a taxpayer was victimized by an employee's embezzlement. In the *Conti* case, it was established that the failure to pay taxes was not an attempted evasion on the part of the appellant but was rather the victimization of the appellant by an employee. See also *Columbia Gas v. Limbach*, 69 Ohio St. 3d 462, 1994 Ohio 535, 633 N.E.2d 1108 (1994). When the failure to pay was brought out in *Conti*, the taxpayer paid the taxes that had been due and paid the penalty. The BTA found the situation in *Conti* warranted a full penalty abatement. See also

Roth, Blair, Roberts, Strasfeld & Lodge v. Wilkins, 2006 Ohio Tax LEXIS 58, *8-9 (Jan. 9, 2006).

Here, once the failure to pay was discovered by the petitioner, it did not immediately pay the taxes that had been due. It should further be noted that the tax and interest amounts assessed are uncontested and remain outstanding. Even so, as previously mentioned, the Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The evidence and circumstances in this matter support a partial reduction of the penalty.

VI. Conclusion

While there is no dispute that Ms. Spence's actions may have led to the petitioner's failure to remit the required withholding taxes, the petitioner has not demonstrated that the amounts assessed were improperly tabulated or that the assessments were otherwise improper. Moreover, the petitioner did not provide amended filings or alternative accountings. Throughout discussions with the Department's hearing officer, the petitioner's authorized representative communicated that Chapman Enterprises' CPA indicated Department records were in line with his observations, filings were accurate, and there is no evidence to override the records the Department used in assessing the petitioner.

Accordingly, the assessments are adjusted as follows:

Assessment Number	Tax Type	Period	Tax	Total Interest	Penalty	Total
100000722564	Employer Withholding	01/01/2007-12/31/2012	$64,442.61	$17,509.87	$3,222.13	$85,174.61
100000722577	Employer Withholding	01/01/2013 - 03/31/2016	$26,691.92	$2,325.27	$1,334.60	$30,351.79
100000722563	School District Withholding	01/01/2007-03/31/2012	$7,753.61	$2,021.74	$387.68	$10,163.03
100000722578	School District Withholding	01/01/2007 – 03/31/2016	$5,091.63	$425.47	$254.58	$5,771.68

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

APR 29 2020

MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED, AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

Ronald Chapman
8392 Coonpath Rd.
Carroll, OH 43112-9735

Re: Four Assessments
Employer Withholding Tax – Responsible Party: Multiple Periods
School District Withholding Tax – Responsible Party: Multiple Periods

This is the final determination of the Tax Commissioner with regard to petitions for reassessment filed pursuant to R.C. 5747.13 concerning the following employer withholding tax and the school district withholding tax responsible party assessments:

Assessment Number	Tax Type	Period	Tax	Total Interest	Penalty	Total
100000725529	Employer Withholding	01/01/2007-12/31/2012	$64,442.61	$17,509.87	$3,222.13	$85,174.61
100000725527	Employer Withholding	01/01/2013 - 03/31/2016	$26,691.92	$2,325.27	$1,334.60	$30,351.79
100000725494	School District Withholding	01/01/2007-03/31/2012	$7,753.61	$2,021.74	$387.68	$10,163.03
100000725528	School District Withholding	01/01/2007 – 03/31/2016	$5,091.63	$425.47	$254.58	$5,771.68

I. BACKGROUND

The Department assessed the petitioner, Mr. Ronald Chapman as responsible party of Chapman Enterprises, Inc. (hereinafter "Chapman Enterprises"), pursuant to R.C. 5747.07(G). Chapman Enterprises failed to fully remit Ohio employer's income and school district income tax withheld ("withholding taxes") for the periods identified above. The assessments were never fully satisfied by Chapman Enterprises and remain outstanding.[1] 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 Chapman Enterprises has been derivatively assessed against the petitioner because he was identified to be a responsible party. The petitioner requested a hearing on the matters which was conducted at the Department's offices in Columbus, Ohio.

[1] Chapman Enterprises filed petitions for reassessment on the underlying entity employer income tax and school district income tax assessments (100000722564, 100000722577, 100000722563, and 100000722578). The Tax Commissioner issued a Final Determination affirming the tax and interest amounts assessed in those matters and reflected above. The Final Determination also abated the penalties assessed. The adjustments to the penalties are reflected in the financial table above.

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APR 29 2020

II. THE PETITIONER'S CONTENTIONS

The petitioner does not directly dispute the accuracy of the tax and interest assessed; rather, it contends that Chapman Enterprises' bookkeeper, Annette Spence, embezzled large sums from the company and failed to make proper filings and produce accurate records. Accordingly, they contend that Chapman Enterprises should be subject to the entirety of the taxes assessed, and Ms. Annette Spence should be assessed for the entire amount.

The petitioner contends that throughout her tenure as bookkeeper Ms. Spence actively hid tax information from him, made false and fraudulent tax filings to the state and federal tax authorities, and stole hundreds of thousands of dollars from Chapman Enterprises. Moreover, the petitioner asserts that he was unaware of any failure to comply with tax obligations or impropriety until the company received the Ohio Department of Taxation's assessment on or about July 3, 2017. Ms. Spence began as Chapman Enterprises' bookkeeper on October 7, 2002, and the evidence available to the Department indicates that she used the company's QuickBooks accounting system and software to process its accounts payable and receivable. The petitioner also indicates that Ms. Spence was responsible for all company tax payments, posting all bookkeeping and accounting entries, and processing company payroll.

The petitioner contends that Ms. Spence did not inform him about the commencement of the audit. The petitioner further contends that, when the Department's audit staff subsequently notified Ms. Spence about the withholding tax delinquency in May 2016 she did not deliver the notice to anyone else at the company. The petitioner contends that he remained unaware of Ms. Spence's impropriety until the Department assessed the company.

Records reflect that Ms. Spence's conduct as bookkeeper of Chapman Enterprises resulted in multiple felony convictions. On April 18, 2019, she was convicted of theft from a person in a protected class—a felony of the second degree—and filing incomplete, false, and fraudulent returns—a felony in the fifth degree—in association with her conduct with Chapman Enterprises. *State of Ohio v. Annette D. Spence*, Franklin C.P., 18CR-766 (Apr. 18, 2019). The Court also concluded that Ms. Spence fraudulently added income to her pay, stole company checks, and made fraudulent purchases on a company credit card. *Id.* The Court, however, was silent as to whether Ms. Spence misfiled or filed fraudulent tax returns to either Ohio or federal tax authorities. The Franklin County Court of Common Pleas concluded that Ms. Spence stole $270,589.57 from the company over the span of at least five years from January 2011 to December 2016. The petitioner contends that this figure was arrived at by the prosecution to attain the requisite dollar amount necessary to charge Ms. Spence with a first-degree felony. The petitioner contends that, once the felony threshold was reached, the prosecution discontinued its investigation and filed charges. Thus, the petitioner asserts that the exact dollar amount attributable to Ms. Spence is not in the record. However, aside from court records, the petitioner did not provide additional evidence demonstrating that the amount was greater than $270,589.57. Upon conviction, Ms. Spence was ordered to pay restitution for the entire amount; although, the judge expressed doubt regarding her ability to do so. There is no indication from the record that Ms. Spence has paid any part of the amount owed.

III. RELEVANT AUTHORITY

A. THE OBLIGATION OF AN EMPLOYER TO WITHHOLD & REMIT

Pursuant to R.C. 5747.06(A), employers are charged with the responsibility of withholding from their employees' compensation an amount "substantially equivalent" to the income tax due to the state from

the employee. Similarly, employers are charged with withholding school district income tax from their employees' compensation. R.C. 5747.06(B).

R.C. 5747.07(B) states that every employer who is required to withhold taxes from employee compensation under R.C. 5747.06 shall file a return and pay any amount required by law. Employers who fail in their withholding and remittance obligations are responsible for the taxes due and may be assessed penalties and interest pursuant to R.C. 5747.13. Additionally, R.C. 5747.07(F)(4) and (5) require the Tax Commissioner to assess interest if remittances of the withheld amounts are not paid to the State in a timely manner. R.C. 5747.15(A)(4)(a) also imposes a penalty of up to 50 percent of the delinquent payment upon an employer if that employer fails to remit the taxes withheld. There is no bar or time limit to an assessment against an employer for failing to file a return. R.C. 5747.13(A); R.C. 5703.58(C)(1).

B. RESPONSIBILITY OF CORPORATE OFFICERS

R.C. 5747.07(G) indicates, in relevant part, that:

> [A]n officer, member, manager, or trustee of [the entity] who is responsible for the execution of [the 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.

Former Ohio Adm. Code 5703-7-15(A)(1), in effect for the periods in question, clarified R.C. 5747.07(G) by further defining "officer" or "corporate officer" to mean "the president, vice-president, treasurer, secretary, chief executive officer of a corporation, or any person holding a similar title or position in a corporation or business trust." Divisions (C)(3) and (5) of former Ohio Adm. Code 5703-7-15 also states that an officer of a corporation has demonstrated responsibility for the execution of the corporation's fiscal responsibilities if "[t]he officer or trustee exercises management control or authority over employees whose duties include the preparation, signing, or filing of returns or reports," or "the officer or trustee exercises authority to sign checks *** drawn on the corporation's or trust's accounts, in payment of tax liabilities."

Generally, personal liability for officers of a corporation for failure of a corporation to file returns or pay taxes is limited to those officers who have control or supervision or are charged with the responsibility of filing returns and making payments. *Weiss v. Porterfield*, 27 Ohio St.2d 117 (1971); *Spithogianis v. Limbach,* 53 Ohio St.3d 55 (1990). 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. Specifically, the Court stated: "In that case the corporate officer *had the authority* to control or supervise the tax return and tax payment activities of the corporation." *McGlothin*, supra, (emphasis added), at 73. Therefore, individuals who are owner-officers of a closely held corporation or limited liability company are ordinarily responsible for, or in charge of, a business's fiscal duties, or charged with supervision thereof.

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. Here, the petitioner was the president of Chapman Enterprises during the period assessed. With regard to the payment of trust fund taxes, an officer and director of a business has general fiscal responsibilities for that business and can, therefore, be responsible for the payment of such taxes to the state. *Seibenick v. Tracy*, BTA No. 1993-M-1087, unreported.

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IV. ANALYSIS

To the extent the petitioner challenges the assessments of Chapman Enterprises, such contentions cannot be considered. The only issue that can be considered in this matter is whether the petitioner was a responsible party of Chapman Enterprises under R.C. 5747.07(G) during the periods in question. The petitioner may not challenge the merits of the underlying assessment against the company in a proceeding under R.C. 5747.07(G). Ohio Adm.Code 5703-7-15(A)(1). Substantive arguments regarding the tax liability assessed against the company can only be raised during the company's assessment proceedings.

Furthermore, the petitioner's contention that Ms. Spence should be held fully and solely responsible for the company's failure to remit withholding taxes is inconsistent with the relevant authority. The requirements for exercising fiscal responsibility under Ohio Adm.Code 5703-7-15(C) allows for more than one individual to be held personally liable for any unpaid taxes. Ohio Adm.Code 5703-7-15(D)(2) further explains that if more than one individual is personally liable under R.C. 5747.07, their liability shall be joint and several. Thus, the Department is authorized to assess one or all of the parties responsible for Chapman Enterprises failure to fully remit Ohio income tax withholding for the period at issue.

Because Mr. Chapman was president of Chapman Enterprises throughout the entirety of the tax periods assessed, he is considered an officer with respect to the company's withholding taxes. Former Ohio Adm.Code 5703-7-15(A). Under R.C. 5747.07(G), any outstanding withholding tax liability against an employer-taxpayer entity can be derivatively assessed against an officer as a responsible party. The statute indicates, in relevant part, that: "An officer, member, manager, or trustee of [the entity] who is responsible for the execution of the [the entity's] fiscal responsibilities, shall be personally liable for failure to file the report or pay the tax due as required by this section." R.C. 5747.07(G). Generally, personal liability for a corporation's officers for its failure to file returns or pay taxes is limited to those individuals who have control or supervision or are charged with the responsibility of filing returns and making payments. *Weiss v. Porterfield*, 27 Ohio St.2d 117 (1971); *Spithogianis v. Limbach*, 53 Ohio St.3d 55 (1990). However, even if an individual does not actually participate in or supervise the corporation's fiscal operations, if his or her position is one that would be ordinarily be responsible for such duties, then the individual may be found to be responsible to the state.[2]

Mr. Chapman contends that after Ms. Spence was hired in 2002, she was granted authority over her work within Chapman Enterprises gradually. During that time, the petitioner indicated that Ms. Spence acted deceptively and hid pertinent business information from him, going so far as taking the laptop that contained the business' QuickBooks accounts when she was confronted about her activity. Even so, the petitioner has not submitted any evidence that would demonstrate Mr. Chapman lacked the authority to control or supervise Ms. Spence's activities or, more broadly, the tax return and tax payment activities of the company during the periods in question. In fact, the record reflects that the petitioner, as president of Chapman Enterprises, was one of the primary individuals who had the authority to grant or limit Ms. Spence's duties and ability to withhold, report, and remit withholding taxes. Based on the evidence currently available to the Tax Commissioner, the petitioner was an officer and responsible party of

[2] Refer to *Spithogianis*, supra. In *McGlothlin v. Limbach* (1991), 57 Ohio St.3d 72, 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. Specifically, the Court stated: "In that case the corporate officer *had the authority* to control or supervise the tax return and tax payment activities of the corporation." *McGlothin*, supra, (emphasis added), at 73.

Chapman Enterprises during the periods at issue. Therefore, the petitioner can be held responsible for Chapman Enterprises' failure to remit withholding taxes.

V. Conclusion

Mr. Chapman operated as the president of Chapman Enterprises during the tax periods at issue and had the ability and authority to oversee accounting and bookkeeping matters within the organization. As such, he is a responsible party under R.C. 5747.07(G) against whom Chapman Enterprises' non-remittance may be derivatively assessed for the periods in question.

Accordingly, the assessments are affirmed.

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

Jeffrey A. McClain/80

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:

APR 17 2020

5270 WC RD, Inc.
5270 Warrensville Center Rd.
Maple Heights, OH 44137

RE: Assessment No.: 100001426697
Sales Tax
Account No.: 18-806563

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

Tax	Pre-Assessment Interest	Penalty	Total
$56,561.21	$6,086.43	$28,280.50	$90,928.14

The petitioner operates as a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from November 12, 2015 through April 30, 2018. A hearing was requested and held telephonically on March 18, 2020.

The petitioner requested penalty abatement. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. See *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The facts and circumstances do not support abatement of the penalty. The auditor noted that the petitioner failed to properly remit substantial amounts of the sales tax collected during the audit period. Audit Remarks, Page 3. The request is denied.

Accordingly, the assessment is affirmed as issued.

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

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

FINAL DETERMINATION

Date: APR 29 2020

ADR Petroleum Inc.
50 W. Mitchell Ave.
Cincinnati, OH 45217

RE: Assessment No.: 100001487687
Sales Tax
Account No.: 31-904155

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

Tax	Pre-Assessment Interest	Penalty	Total
$25,721.86	$2,388.85	$12,860.74	$40,971.45

The petitioner operates a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from January 1, 2016 through March 31, 2019. A hearing was requested and held telephonically on April 7, 2020.

The petitioner requested a penalty abatement. Given the totality of the circumstances, a partial penalty abatement is warranted.

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$25,721.86	$2,388.85	$6,430.26	$34,540.97

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

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

FINAL DETERMINATION

Date: APR 29 2020

AJCAM LLC
414 E. 5th St.
Uhrichsville, OH 44683

Re: Assessment No.: 100001436957
Sales Tax
Account No.: 79-042332

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

Tax	Pre-Assessment Interest	Penalty	Total
$55,761.04	$5,384.73	$27,880.26	$89,026.03

The petitioner operates a drive-thru store at 10 Grant St., Dennison, OH 44621. This assessment is the result of a mark-up audit of the petitioner's sales for the period from January 1, 2016 through December 31, 2018. The petitioner filed a petition for reassessment. A hearing was held on March 19, 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., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

A mark-up analysis was conducted using the petitioner's inventory purchase invoices and records provided by the petitioner's distributors. The petitioner stated it failed to maintain the primary sales records required by R.C. 5739.11 because it sold the business in March 2018. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco products, pop & soft drinks, energy drinks, other alcohol products, and other taxable merchandise. Each category was assigned a mark-up percentage derived from the product

checklist completed with the assistance of the petitioner, suggested retail mark-up percentages, a prior audit, and state minimum requirements.

Since the petitioner did not provide evidence of primary records or internal controls to calculate sales tax liability, 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 signed the memorandum of agreement agreeing to the audit methodology.

A sample period of January 1, 2017 through December 31, 2017 was used as a representation of the entire audit period to calculate taxable sales. Inventory purchase invoices 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 instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon records, summaries, or other information obtained directly from the distributor. In instances when the confirmation of the amount of the taxable inventory purchases could not be obtained from either the taxpayer or the distributor, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor. Taxable inventory purchase amounts derived from distributor summaries or estimates were divided by the number of months in the sample period and recorded as monthly purchase amounts.

All taxable inventory purchases were then listed by category. The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The totals for each category of taxable merchandise were summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales of 122.534 percent. The reported gross sales for each non-sampled month of the audit period were multiplied by that percentage to determine the calculated taxable sales for each non-sampled month. The calculated taxable sales for each non-sampled month were multiplied by the applicable tax rates in effect throughout the audit period to determine the sales tax liability for each non-sampled month. Sales tax liability for sampled months was determined by multiplying the actual calculated monthly taxable sales for each sampled month by the applicable tax rate. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability.

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).

Objections to Audit Methodology

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The petitioner contends that the auditor did not spend any significant time reviewing the taxpayer's records before determining that a mark-up methodology, utilizing distributor records, was appropriate to conduct the audit. Next, the petitioner contends that the mark-ups used by the auditor on various products are grossly inflated and wrong. The petitioner specifically contended that the mark-up on cigarettes was incorrect. "For example, no markup was charged on the cigarette sales because they were used as a loss leader during the course of the taxpayer's operations at the stores." Petition for Reassessment, Page 6. Finally, the petitioner contends that the sampling period is not representative of the audit period. These contentions are not well taken.

The petitioner only provided the auditor with one invoice from each distributor, in order to show who its vendors were. Audit Remarks, Page 6. The petitioner tried to obtain records from the person who is operating the business under the management agreement but was unable to provide any further information. As a result, there were incomplete and insufficient taxpayer records covering the audit period for the auditor to review, so a mark-up was the appropriate methodology to employ. The petitioner has not provided any evidence to demonstrate that the auditor did not attempt to review the petitioner's records before electing to conduct a mark-up audit.

The petitioner provided the carryout product checklist to the auditor without any products listed. Instead, the petitioner attached a note to the checklist that explained that the purchase and sale prices remained similar from the prior audit. Therefore, the auditor used the mark-ups from the prior audit, with the exception of cigarettes and other alcohol products. The previous audit showed cigarettes were marked up beyond the state minimum amount. However, the auditor "could not substantiate a higher than state minimum mark-up on cigarettes, so the auditor used the state minimum of 8%." Audit Remarks, Page 9. The prior audit file did not have a calculation for the mark-up on other alcohol products, so an industry average was employed. In the petition for reassessment, the petitioner contends that they do not mark-up cigarettes. This is lower than the state minimum amount and the petitioner provided no evidence to support their contention. The petitioner failed to present evidence to substantiate its claim that the mark-up percentages were too high.

The petitioner agreed with the auditor to use the sample period of January 1, 2017 through December 31, 2017. The petitioner stated that, to the best of its knowledge, that period is representative of the sales, at least through March 2018 of the audit period. Audit Remarks, Page 9. This sample period was memorialized in the memorandum of agreement. The petitioner signed the memorandum of agreement, agreeing to the audit methodology, without providing any suggestions for an alternative sample period or methodology. The petitioner then provided its U.S. Return of Partnership Income Form 1065 for the years 2016 and 2017 in order to prove gross sales for those years. Those tax returns are simply the petitioner's interpretation of their primary records, and there is no guarantee that the information was calculated correctly. The Department requires primary documentation of sales records to prove that the calculation of the tax due was incorrect. Furthermore, the petitioner's gross sales reported on the forms are roughly

the same for 2016 and 2017. That contradicts the petitioner's claim that 2017 was not representative of the audit period. The petitioner failed to present sufficient evidence that the 2017 sample period was not representative of the audit period. Therefore, these contentions are denied.

Data Source

The petitioner contends that the auditor used erroneous sales data to compute a "phantom" sales tax liability for the sales tax period. The petitioner states that the petitioner's records show that it did not buy taxable items from some of the distributors listed in the audit reports. The petitioner did not submit any evidence that substantiates this claim. Therefore, this contention is denied.

Returns, Rebates, and Refunds

The petitioner contends that the audit failed to account for returns, rebates, and refunds that were made or received throughout the audit period. The petitioner contends that even though such amounts are significant, there has been no allowance provided for reducing sales to account for those adjustments. These contentions are not well taken. The petitioner did not provide any additional evidence that demonstrates that an adjustment is warranted. Therefore, these contentions are denied.

Cigarette and Other Tobacco Product Rebates

The petitioner contends that the audit did not correctly account for all of the cigarette rebates received during the audit period. The petitioner provided two rebates from the 2017 sample period that were not accounted for in the audit. There was a rebate from RAI for $372.50 and a rebate from Liggett Vector for $1,643.50. The petitioner also provided scanned pages for cigarette and other tobacco product rebates that were properly excluded from the audit. These were mostly denied on the basis that they were either not actual cigarette rebates, not for the sample period, or were "other tobacco product" rebates. Discounts for other tobacco products are not accounted for, being there is no mandatory minimum mark-up percentage and, therefore, there is no proof that the rebate savings were passed onto the customer. Cigarette rebates from 2016 and 2018 were also provided, but they were denied for being outside the sample period. Therefore, the petitioner's contention is allowed, in part. The tax, interest, and penalty have been adjusted below.

Pop Discounts

The petitioner contends that the audit failed to account for pop discounts granted during the audit period. The petitioner contends that there were pop discounts in the amount of $46,586.23 during the sample year 2017 at its Uhrichsville store. The petitioner believes that there were similar discounts applied at this store for that year. The petitioner also stated that similar pop discounts were accounted for during the prior audit. In support of these contentions, the petitioner provided what appeared to be printouts of a computer screen with handwritten notes. Unfortunately, the contents of the printouts are un-readable. No readable versions were submitted upon request.

Additionally, the petitioner did not provide any records from the prior audit that show such calculations. Therefore, the petitioner failed to meet its burden, and the contentions are denied.

Theft

The petitioner contends it did not receive proper credit for stolen inventory. The petition for reassessment presented no police reports or additional evidence in support of this contention and did not quantify an amount of loss. 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.

Sale of Business

The petitioner contends that he sold his business and transferred his liquor license during the audit period. He contends that, as of April 1, 2018, he was no longer involved in the day-to-day operation of the store, and his liquor license was transferred to the new owner by May 1, 2018. These contentions are not well taken. There was no asset purchase agreement, sale of business agreement, or any other type of documentation submitted with the petition for reassessment to substantiate this claim. As of October 16, 2019, the liquor license still had not been transferred. As a result, the agreement entered into by the petitioner is considered a management agreement by the Tax Commissioner. "Any side agreement that a taxpayer might enter into with another entity concerning responsibility for payment of sales tax, like the Management Agreement to which appellant refers, is not binding on the Tax Commissioner." *Painter v. Testa*, 2017-Ohio-267, 81 N.E.3d 860 (5th Dist.), citing *Farhan, dba Hiland Foods v. Tracy*, 10th Dist. Franklin No. 97APH10-1410, 1998 WL 48987 (July 21, 1998). In *Painter*, the appellant entered into an agreement to sell the business assets to another entity. It allowed that entity to operate under its liquor license until the license was successfully transferred. *Id.* As a result, it is well settled that the agreement that the petitioner entered into is not binding on the Tax Commissioner. Here, sales continued to be made under the petitioner's vendor's license and liquor license. Therefore, these contentions are denied.

Responsible Party

The petitioner objected to an assertion made by the auditor that Richard or Rebecca Henry are responsible parties under R.C. 5739.33. This final determination is based on a sales tax assessment concerning tax owed to the state by the petitioner, under R.C. 5739.13, not an assessment to determine who are the responsible parties for the petitioner, under R.C. 5739.33. Therefore, this contention is unable to be addressed because it is outside the scope of this final determination.

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Time for Review

The petitioner contends that it had not been given a fair and adequate opportunity to review its records and prepare a response to the audit report. As a result, the petitioner believes it has shown enough error contained in the audit report to justify its withdrawal, and that its sales tax returns should be accepted as filed. These contentions are not well taken. The petitioner failed to provide complete records to be used as the basis for this audit. The petitioner has also failed to provide adequate documentation to substantiate most of its contentions. The petitioner was notified of its rights to appeal and mailed the Letter of Confirmation on July 12, 2019. The initial reply date stated in the Letter of Confirmation was August 5, 2019. An extension was granted until September 5, 2019, so that the petitioner could obtain more documents. A second extension was granted until September 26, 2019. The audit began in January 2019 and concluded in July 2019, over five months later. Then, the petitioner had two and a half additional months after the audit concluded to review its records and prepare a response. In total the petitioner had well over seven months to assemble and review the appropriate records and documentation. Therefore, these contentions are denied.

Penalty

The petitioner "objects to the proposed assertion of a 55% penalty in this case." Petition for Reassessment, Page 7. The petitioner incorrectly inflated the amount of penalty assessed by including in its calculation the amount of pre-assessment interest that was also assessed, by law, on the tax due. The petitioner contends that remission of penalty should be made, and is required, if it is determined that the additional sales tax, as to which the penalty applied, is invalid. *Warner Cable Communications Inc. v. Limbaugh*, 67 Ohio App.3d 458, 587 N.E.2d 369 (1990). In *Warner*, the court determined that only a portion of the original assessment was the proper tax amount owed. Therefore, only the max penalty percentage on the tax that was properly owed could be assessed against the petitioner, and not the amount of penalty that was determined to be owed based off the original, higher tax amount due. In this case, the petitioner provided cigarette rebates, which reduced the underlying amount of tax owed. As a result, the appropriate amount of interest and penalty were recalculated based off the corrected amount of sales tax owed. The Tax Commissioner has the discretion, but is not required by law, to further abate the assessed penalty.

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

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$55,342.10	$5,344.79	$19,369.56	$80,056.45

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**

APR 29 2020

provided by law, which is in addition to the above total. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

AJCAM LLC
414 E. 5th St.
Uhrichsville, OH 44683

Re: Assessment No.: 100001449775
Sales Tax
Account No.: 79-042083

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

Tax	Pre-Assessment Interest	Penalty	Total
$62,485.81	$6,205.25	$31,242.76	$99,933.82

The petitioner operates a drive-thru store located at 417 N. Dawson St., Uhrichsville, OH 44683. This assessment is the result of a mark-up audit of the petitioner's sales for the period from January 1, 2016 through December 31, 2018. The petitioner filed a petition for reassessment. A hearing was held on March 19, 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., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

A mark-up analysis was conducted using the petitioner's inventory purchase invoices and records provided by the petitioner's distributors. The petitioner stated it failed to maintain the primary sales records required by R.C. 5739.11 because it sold the business in March 2018. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco products, pop & soft drinks, energy drinks, other alcohol products, and other taxable merchandise. Each category was assigned a mark-up percentage derived from the product

checklist completed with the assistance of the petitioner, suggested retail mark-up percentages, a prior audit, and state minimum requirements.

Since the petitioner did not provide evidence of primary records or internal controls to calculate sales tax liability, 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 signed the memorandum of agreement agreeing to the audit methodology.

A sample period of January 1, 2017 through December 31, 2017 was used as a representation of the entire audit period to calculate taxable sales. Inventory purchase invoices 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 instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon records, summaries, or other information obtained directly from the distributor. In instances when the confirmation of the amount of the taxable inventory purchases could not be obtained from either the taxpayer or the distributor, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor. Taxable inventory purchase amounts derived from distributor summaries or estimates were divided by the number of months in the sample period and recorded as monthly purchase amounts.

All taxable inventory purchases were then listed by category. The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The totals for each category of taxable merchandise were summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales of 124.552 percent. The reported gross sales for each non-sampled month of the audit period were multiplied by that percentage to determine the calculated taxable sales for each non-sampled month. The calculated taxable sales for each non-sampled month were multiplied by the applicable tax rates in effect throughout the audit period to determine the sales tax liability for each non-sampled month. Sales tax liability for sampled months was determined by multiplying the actual calculated monthly taxable sales for each sampled month by the applicable tax rate. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability.

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).

Objections to Audit Methodology

The petitioner contends that the auditor did not spend any significant time reviewing the taxpayer's records before determining that a mark-up methodology, utilizing distributor records, was appropriate to conduct the audit. Next, the petitioner contends that the mark-ups used by the auditor on various products are grossly inflated and wrong. The petitioner specifically contended that the mark-up on cigarettes was incorrect. "For example, no mark-up was charged on the cigarette sales because they were used as a loss leader during the course of the taxpayer's operations at the stores." Petition for Reassessment, Page 6. Finally, the petitioner contends that the sampling period is not representative of the audit period. These contentions are not well taken.

The petitioner only provided the auditor with one invoice from each distributor, in order to show who its vendors were. Audit Remarks, Page 6. The petitioner contends that they tried to obtain records from the person who is operating the business under the management agreement but was unable to provide any further information. As a result, there were incomplete and insufficient taxpayer records covering the audit period for the auditor to review, so a mark-up was the appropriate methodology to employ. The petitioner has not provided any evidence to demonstrate that the auditor did not attempt to review the petitioner's records before electing to conduct a mark-up audit.

The petitioner provided the carryout product checklist to the auditor without any products listed. Instead, the petitioner attached a note to the checklist that explained that the purchase and sale prices remained the same from the prior audit. Therefore, the auditor used the mark-ups from the prior audit, with the exception of cigarettes and other alcohol products. The previous audit showed cigarettes were marked up beyond the state minimum amount. However, the auditor "could not substantiate a higher than state minimum mark-up on cigarettes, so the auditor used the state minimum of 8%." Audit Remarks, Page 10. The prior audit file did not have a calculation for the mark-up on other alcohol products, so an industry average was employed. In the petition for reassessment, the petitioner contends that they do not mark-up cigarettes. This is lower than the state minimum amount and the petitioner provided no evidence to support their contention. The petitioner failed to present evidence to substantiate its claim that the mark-up percentages were too high.

The petitioner agreed with the auditor to use the sample period of January 1, 2017 through December 31, 2017. The petitioner stated that, to the best of its knowledge, that period is representative of the sales, at least through March 2018 of the audit period. Audit Remarks, Page 9. This sample period was memorialized in the memorandum of agreement. The petitioner signed the memorandum of agreement, agreeing to the audit methodology, without providing any suggestions for an alternative sample period or methodology. The petitioner then provided its U.S. Return of Partnership Income Form 1065 for the years 2016 and 2017 in order to prove gross sales for those years. Those tax returns are simply the petitioner's interpretation of their primary records, and there is no guarantee that the information was calculated correctly. The Department requires primary documentation of sales records to prove that the calculation of the tax due was incorrect. Furthermore, the petitioner's gross sales reported on the forms are roughly

the same for 2016 and 2017. That contradicts the petitioner's claim that 2017 was not representative of the audit period. The petitioner failed to present sufficient evidence that the 2017 sample period was not representative of the audit period. Therefore, these contentions are denied.

Data Source

The petitioner contends that the auditor used erroneous sales data to compute a "phantom" sales tax liability for the sales tax period. The petitioner states that the petitioner's records show that it did not buy taxable items from some of the distributors listed in the audit reports. The petitioner did not submit any evidence that substantiates this claim. Therefore, this contention is denied.

Returns, Rebates, and Refunds

The petitioner contends that the audit failed to account for returns, rebates, and refunds that were made or received throughout the audit period. The petitioner contends that even though such amounts are significant, there has been no allowance provided for reducing sales to account for those adjustments in the sales tax audit report. These contentions are not well taken. The auditor noted that most distributors provided information which took returns into consideration, and the petitioner did not produce any additional documentation proving otherwise. Audit Remarks, Page 13. The petitioner provided scanned pages for cigarette and other tobacco product rebates. These were mostly denied on the basis that they were either not actual cigarette rebates, not for the sample period, or were "other tobacco product" rebates. Discounts for other tobacco products are not accounted for, being there is no mandatory minimum mark-up percentage; therefore, there is no proof that the rebate savings were passed onto the customer. The petitioner provided two cigarette rebates from 2017 that were appropriately accounted for. Cigarette rebates from 2016 and 2018 were also provided, but they were denied for being outside the sample period. The petitioner has not demonstrated that any further adjustment is warranted. Therefore, these contentions are denied.

Pop Discounts

The petitioner contends that the audit failed to account for pop discounts granted during the audit period. The petitioner contends that there were pop discounts in the amount of $46,586.23 during the sample year 2017. The petitioner stated that similar pop discounts were accounted for during the prior audit. In support of these contentions, the petitioner provided what appeared to be printouts of a computer screen with handwritten notes. Unfortunately, the contents of the printouts are un-readable. No readable versions were submitted upon request. Additionally, the petitioner did not provide any records from the prior audit that show such calculations. Therefore, the petitioner failed to meet its burden, and the contentions are denied.

Theft

The petitioner contends it did not receive proper credit for stolen inventory. The petitioner presented no police reports or additional evidence in support of this contention and did not

quantify an amount of loss. 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.

Sale of Business

The petitioner contends that he sold his business and transferred his liquor license during the audit period. He contends that, as of April 1, 2018, he was no longer involved in the day-to-day operation of the store, and his was liquor license transferred to the new owner by May 1, 2018. These contentions are not well taken. There was no asset purchase agreement, sale of business agreement, or any other type of documentation submitted with the petition for reassessment to substantiate this claim. As of October 16, 2019, the liquor license still had not been transferred. As a result, the agreement entered into by the petitioner is considered a management agreement by the Tax Commissioner. "Any side agreement that a taxpayer might enter into with another entity concerning responsibility for payment of sales tax, like the Management Agreement to which appellant refers, is not binding on the Tax Commissioner." *Painter v. Testa*, 2017-Ohio-267, 81 N.E.3d 860 (5th Dist.), citing *Farhan, d.b.a. Hiland Foods v. Tracy*, 10th Dist. Franklin No. 97APH10-1410, 1998 WL 48987 (July 21, 1998). In *Painter*, the appellant entered into an agreement to sell the business assets to another entity. It allowed that entity to operate under its liquor license until the license was successfully transferred. *Id.* As a result, it is well settled that the agreement that the petitioner entered into is not binding on the Tax Commissioner. Here, sales continued to be made under the petitioner's vendor's license and liquor license. Therefore, these contentions are denied.

Responsible Party

The petitioner objected to an assertion made by the auditor that Richard or Rebecca Henry are responsible parties under R.C. 5739.33. This final determination is based on a sales tax assessment concerning tax owed to the state by the petitioner under R.C. 5739.13, not an assessment to determine who are the responsible parties for the petitioner under R.C. 5739.33. Therefore, this contention is unable to be addressed because it is outside the scope of this final determination.

Time for Review

The petitioner contends that it had not been given a fair and adequate opportunity to review its records and prepare a response to the audit report. As a result, the petitioner believes it has shown enough error contained in the audit report to justify its withdrawal, and that its sales tax returns should be accepted as filed. These contentions are not well taken. The petitioner failed to provide complete records to be used as the basis for this audit. The petitioner has also failed to provide adequate documentation to substantiate most of its contentions. The petitioner was notified of its rights to appeal and mailed the Letter of Confirmation on July 12, 2019. The initial reply date stated in the Letter of Confirmation was August 5, 2019. An extension was granted

until September 5, 2019, so that the petitioner could obtain more documents. A second extension was granted until September 26, 2019. The audit began in January 2019 and concluded in July 2019, over five months later. Then, the petitioner had two and a half additional months after the audit concluded to review its records and prepare a response. In total the petitioner had well over seven months to assemble and review the appropriate records and documentation. Therefore, these contentions are denied.

Penalty

The petitioner "objects to the proposed assertion of a 55% penalty in this case." Petition for Reassessment, Page 7. The petitioner incorrectly inflated the amount of penalty assessed by including in its calculation the amount of pre-assessment interest that was also assessed, by law, on the tax due. The petitioner contends that remission of penalty should be made, and is required, if it is determined that the additional sales tax, as to which the penalty applied, is invalid. *Warner Cable Communications Inc. v. Limbaugh*, 67 Ohio App.3d 458, 587 N.E.2d 369 (1990). In *Warner*, the court determined that only a portion of the original assessment was the proper tax amount owed. Therefore, only the max penalty percentage on the tax that was properly owed could be assessed against the petitioner, and not the total amount of penalty that was previously determined to be owed, based off the original, higher tax amount due. The case at hand is distinguished because, here, the petitioner has not met its burden to show that the initially assessed tax due amount is improper. As a result, the Tax Commissioner has the discretion, but is not required by law, to abate, by any amount, the assessed penalty.

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

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$62,485.81	$6,205.25	$21,869.82	$90,560.88

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, OH 43216-2678.

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APR 29 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.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date:

APR 17 2020

Appalachian Oilfield Services, LLC
34602 State Rt. 7
Sardis, OH 43946

Re: Refund Claim Number 201803382
Filed on April 19, 2016

This is the final determination of the Tax Commissioner on applications for refund of sales tax in the amount of $113,022.13 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

This refund claim pertains to sales tax paid on the purchase of trucks between April 1, 2015 and August 31, 2015. A hearing was held on January 6, 2020.

Appalachian Oilfield Services, LLC provides oilfield operations, logistical, cleanup, and other services to hydraulic fracking companies in Ohio. As part of these services the claimant purchased seven semi-trucks, paying sales tax to the Monroe County Clerk of Courts for each at the time of titling. Appalachian Oilfield subsequently filed for a refund of tax paid.

The initial reviewing agent denied the claims, requesting proof of Department of Transportation (DOT) or Public Utility Commission of Ohio (PUCO) licensing, as well as buyer's agreements, proof of payment, Clerk of Courts receipts, and a description of how the trucks were used.

The claimant provided the additional information, at which time the reviewing agent requested more detailed descriptions of truck use. Appalachian Oilfield produced a signed statement by their CEO attesting that the trucks were used in transporting material for others, namely water, brine, drilling mud, and residual oilfield waste. Other information provided by the claimant clarified that five of the trucks were used for hauling of drilling mud, waste, or other materials. The two remaining trucks in the claim were "vac trucks" featuring suction hoses and water tanks.

At hearing the claimant stated that they do not own the wells from which they pick up waste or to which they deliver water; they are primarily a hauling and services business. The claimant contends that any and all material hauling was done under the explicit instructions of the customer with whom they contract, and the materials are disposed of under customer direction as well. This arrangement is memorialized by job manifests, purchase orders, and payment receipts. The hearing officer requested examples of such documents, and a sample period of March 2019 for these documents was agreed upon by both parties.

Appalachian produced sample invoices and manifests for the five standard hauling trucks, a document matching VIN numbers with the truck numbers on the invoices, and contract language

demonstrating that materials were disposed of under the control and direction of Appalachian Oilfield's customer. Two additional VIN numbers were produced by the claimant that were not included in the Application for Sales Tax Refund; they will not be considered in this Final Determination.

Pursuant to R.C. 5739.02, an excise tax is levied on each retail sale made in the state. 5739.02(B)(32) allows an exemption from sales tax where the subject transaction is the " ... sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire ... ". R.C. 5739.01(Z)(1) defines "highway transportation for hire" as "the transportation of personal property belonging to others for consideration by...The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare."

The claimant must show that the transaction meets the requirements of the exemption. "To show that a motor vehicle is primarily used for the transportation of tangible personal property of others, there must be proof of that use." *RKE Trucking Inc. v. Zaino,* 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638.

After review of the additional information, the reviewing agent determined that the documentation provided supported the refund request for the portion of the transactions related to the five standard hauling trucks.

However, the claimant has not supported its contention that the transportation for hire exemption applies to the two vac trucks. According to the invoices produced by the claimant after hearing, these trucks were provided as part of rig, upright, and tank cleaning services and carried water for this purpose. No manifests were available for these trucks as they were not hauling goods as a transportation service. Water used in a cleaning service is not tangible personal property belonging to another. The vac trucks do not meet the requirement of the transportation for hire exemption from sales tax.

Accordingly, a partial refund in the amount of $77,456.10 with appropriate interest is hereby authorized.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

Atmiya Property LLC
1953 S. Yellow Spring St.
Springfield, OH 45506

Re: Assessment No. 100001124737
Sales Tax
Account No. 12-057412

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

Tax	Pre-Assessment Interest	Penalty	Total
$133,197.11	$11,599.95	$66,598.43	$211,395.49

The assessment is the result of an audit of the petitioner's sales from June 1, 2015 through December 31, 2017. A hearing was held on November 21, 2019.

This assessment is the result of a mark-up analysis of the petitioner's purchases of inventory. The petitioner is required to maintain primary and secondary records of sales. R.C. 5739.11 and Ohio Adm.Code 5703-9-02. The petitioner did not provide z-tapes or other primary sales records for the period at issue. Audit Remarks, Page 4. Therefore, a mark-up analysis was conducted using inventory purchase invoices supplied by the taxpayer and its suppliers. The Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. R.C. 5739.13. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

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

Audit Methodology

A mark-up analysis was conducted using the petitioner's inventory purchase records and the records supplied by the petitioner's suppliers. Utilizing these records, the auditor calculated the

taxable beer, wine, cigarettes, other tobacco, other alcohol, pop & soft drinks, energy drinks & other beverages, and other merchandise. Each category was assigned a mark-up percentage based on evidence from the petitioner, industry standards, and state minimum requirements. The petitioner did not sign the Memorandum of Agreement outlining the audit methodology. A ten-day letter was issued on or about September 11, 2018 allowing the petitioner the opportunity to suggest an alternative audit methodology; however, none was submitted.

A sample period of January 1, 2017 through December 31, 2017 was used as a representation of the entire audit period to calculate taxable sales. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The totals for each category of taxable merchandise were summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales (223.1%). The reported gross sales for each non-sampled month of the audit period were multiplied by that percentage to determine the calculated taxable sales for each non-sampled month. The calculated taxable sales for each non-sampled month were multiplied by the applicable tax rate to determine the sales tax liability for each non-sampled month. Sales tax liability for sampled months was determined by multiplying the actual calculated monthly taxable sales for each sampled month by the applicable tax rate. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability. As the taxpayer only accepted food stamps in the year 2017, an adjusted was necessary to the 2017 sales of food stamp eligible purchases. Audit Remarks, Page 5.

The taxpayer's challenges to the conclusions reached by the mark-up analysis ignore the fact that such an approach was necessitated due to the taxpayer's own failure to maintain complete and accurate records. When this occurred, the commissioner was not only entitled, but was required, to gather information from other sources and estimate the amount of taxes which should have been collected and remitted. R.C. 5739.13 and *Brandy's Inc. v. Zaino*, 3rd Dist. Hancock No. 5-01-43, 2002-Ohio-1923, ¶25. While the taxpayer has challenged the accuracy of the audit conclusions, it failed to provide information to establish an alternative.

Beer and Wine

The petitioner contends a forty-five percent mark-up percentage was applied to all invoices from Heidelberg Distribution, which included sales of beer and wine. As noted above, assessments are presumptively valid. The burden is on the petitioner to present sufficient evidence to prove error in the assessment. The petitioner maintains this application of the mark-up percentage overstated the sales of beer and wine, as the petitioner marks up beer by twenty five percent and wine between twenty five percent and forty five percent. This contention is not well taken because the mark-up percentage for wine suggested by the petitioner is below the minimum mark-up percentage for wine required by Ohio law of fifty percent. Ohio Adm.Code 4301:1-1-03(C)(2)(c). Additionally, the petitioner presented no evidence to support this lower mark-up percentage. As to the application of the mark-up percentages, the petitioner fails to identify any specific invoices where mark-up percentages were improperly applied. The petitioner has not met its burden to provide sufficient evidence to show error in the assessment. The mark-up percentages identified in the Memorandum of Agreement were applied to each invoice, but only to the portion of the invoice

containing the applicable merchandise. The objection is denied.

Cigarettes

The petitioner contends that they applied a seven percent mark-up to cigarette sales. The petitioner did not submit evidence to support this contention. Additionally, the minimum mark-up percentage on cigarettes required by Ohio law is eight percent. R.C. 1333.11(B). The burden is on the petitioner to present sufficient evidence to show error in the assessment. The petitioner has not met its burden. The objection is denied.

Sales on Soda

The petitioner contends soda is sold at a seven percent mark-up and at times the manufacturer requires the petitioner to offer certain sales. The burden is on the petitioner to present sufficient evidence to show error in the assessment. The petitioner did not identify any specific transactions or provide any evidence showing sales were made at a lower mark-up percentage. The petitioner has not met its burden. The objection is denied.

Penalty Abatement

The petitioner requests abatement of the penalty. The petitioner was cooperative during the audit process and has no prior audits. Considering all the surrounding facts and circumstances, partial abatement of the penalty is granted.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$133,197.11	$11,599.95	$46,618.80	$191,415.86

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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FINAL DETERMINATION

Date:

APR 17 2020

Kenneth Brewer
8378 Chamberlain Rd.
Franklin, OH 45005

Re: 2 Assessments
Sales Tax (Responsible Party)
Maple Park Body & Frame, Inc.
Vendor's License No. 31-1746699

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

Assessment	Time Period	Amount
100001451218	01/01/2007 - 06/30/2007	$388.35
100001451217	10/01/2004 - 10/31/2004	$302.17
	Total:	$690.52

These are responsible party assessments. Maple Park Body & Frame, Inc. incurred sales tax liability resulting in assessments for periods shown above. These assessments were never satisfied by Maple Park Body & Frame, Inc. and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns and those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Maple Park Body & Frame, Inc. has been derivatively assessed against Kenneth Brewer. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods shown above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was not requested.

The petition for reassessment does not dispute the fact that the petitioner is a responsible party for Maple Park Body & Frame, Inc. The petition for reassessment does not present any argument against holding the petitioner responsible for the underlying corporate liability under R.C. 5739.33. Instead, the petition for reassessment contends that the underlying assessment is incorrect. These arguments cannot be considered. The petitioner operated Maple Park Body & Frame, Inc. and incurred sales tax liability as the President and sole member. Based upon this information, the petitioner is a responsible party for the corporation per R.C. 5739.33.

Therefore, the assessments are affirmed as issued.

Any reduction or credit made to the underlying corporate assessments on appeal or in collection will be applied to the corresponding responsible party assessments. Proper credit for any payments

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

Jason Brooks
2163 West Blvd.
Cleveland, OH 44102

Re: 11 Assessments
Tax Type: Sales (Responsible Party)
ICaterCleveland LLC
Vendor's License No.: 18-509128

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

Assessment No.	Filing Period	Total
100001349844	01/01/2015 – 06/30/2015	$9,769.68
100001349845	01/01/2017 – 06/30/2017	$19,210.24
100001349846	07/01/2017 – 12/31/2017	$22,090.54
100001349851	06/01/2013 – 06/30/2013	$1,498.15
100001349852	07/01/2013 – 12/31/2013	$1,504.56
100001349853	07/01/2014 – 12/31/2014	$7,531.23
100001349854	01/01/2014 – 06/30/2014	$5,093.50
100001349855	07/01/2015 – 12/31/2015	$12,293.55
100001349856	01/01/2016 – 06/30/2016	$14,589.39
100001349857	07/01/2016 – 12/31/2016	$17,119.77
100001349867	01/01/2018 – 06/30/2018	$26,895.64
	Total	$137,596.25

These are responsible party assessments. ICaterCleveland LLC incurred sales tax liability resulting in sales tax assessments for the above periods. These assessments were never fully satisfied by ICaterCleveland LLC and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of ICaterCleveland LLC has been derivatively assessed against Jason Brooks. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. No hearing was requested.

APR 29 2020

The petitioner objects to the assessment. The petitioner contends that he was not an officer or employee of the company, had no control over the company or its finances, and received no financial gain from the company. Additionally, the petitioner contends that he became a member of the limited liability company to merely assist the actual owners in passing a background check to obtain a lease. The petitioner identifies other parties who he states should be the responsible parties on the assessments. These contentions are not well taken.

The evidence indicates that the petitioner was listed as a member of the limited liability company during a restatement of the articles of organization, filed on June 7, 2013. The petitioner, as a member of ICaterCleveland LLC, signed, on May 20, 2013, a facility license agreement between ICaterCleveland LLC, as licensee, and Fitness & Sports Clubs, LLC, as licensor. The petitioner is listed as the contact for the licensee for all notices and communications made in connection with the agreement. Furthermore, the petitioner also signed, on June 6, 2013, as a guarantor of the licensee's obligations under the lease agreement. The petitioner signed a personal check on June 6, 2013, made out to John Husted, then Ohio Secretary of State, for the expedited filing of the restatement of the articles of organization.

The petitioner contends that the other members of the company are actually the responsible parties. However, the fact that one person may be responsible does not absolve another of liability. *Perry v. Tracy*, BTA No. 98-M-8, 1998 WL 741927 (Oct. 16, 1998). R.C. 5739.33 requires personal liability to fall on **any** officer or employee having the requisite indices of responsibility. *Beck v. Tracy*, BTA No. 96-K-156, 1997 WL 40124 (Jan. 17, 1997). (Emphasis added.) Furthermore, the capacity in which the petitioner signed documents, which assumed responsibility for the financial obligations of ICaterCleveland, LLC, suggests that the petitioner indeed had the requisite indices of responsibility. Ohio Adm.Code 5703-9-49(C).

The evidence in file suggests the petitioner shared responsibility for the execution of the ICaterCleveland LLC's fiscal responsibilities. Therefore, it is determined that the petitioner was a responsible party of ICaterCleveland LLC, under R.C. 5739.33.

Accordingly, the assessments are affirmed as issued.

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

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APR 29 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

Aden Burt
7981 Aspen Ridge Dr.
Blacklick, OH 43004

Re: Assessment No.: 100001510727
Tax Type: Sales (Responsible Party)
A2B Property Services LLC
Vendor's License No.: 92-200059

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

Tax	Pre-Assessment Interest	Penalty	Total
$148,516.07	$17,385.84	$22,277.11	$188,179.02

This is a responsible party assessment. A2B Property Services, LLC incurred sales tax liability resulting in a sales tax assessment for the period of April 1, 2014 through March 31, 2018. This assessment was never fully satisfied by A2B Property Services, 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 or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of A2B Property Services, LLC has been derivatively assessed against Aden Burt. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was scheduled for Wednesday, April 1, 2020, but the petitioner waived his hearing via email on March 23, 2020.

The petitioner objects to the assessment. The petitioner does not object to the responsible party assessment or challenge his status as the responsible party, it is important to note the petitioner is responsible based on the evidence. The evidence indicates that the petitioner is the owner of A2B Property Services, LLC and is identified as the sole authorized representative on the company's Ohio Secretary of State business filings. After receiving notice of the audit commencement, the petitioner contacted the auditor to inform him that he would submit copies of the company's 1099s and other documentation prior to the deadline. Audit Remarks, Page 3. Additionally, the petitioner provided the company's financial records in the form of 1099s in his appeal. The petitioner has not met his burden to demonstrate the assessment was in error. Therefore, it is determined that the petitioner was a responsible party of A2B Property Services, LLC under R.C. 5739.33.

Underlying Assessment

The petitioner also submitted an objection related to the underlying corporate assessment. Since this is a responsible party assessment, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period listed above. Therefore, this objection cannot be considered as it relates to the underlying assessment.

Accordingly, the assessments shall stand as issued.

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

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 0 8 2020

Terry C. Conrad
3711 Rolliston Rd.
Shaker Heights, OH 44120

RE: Assessment No.: 100001010125
Tax Type: Sales
Account No.: 18-811430
Reporting Period: 01/01/2018 – 01/31/2018

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

Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
$7,977.90	$96.98	$797.79	$279.23	$2,792.27	$11,944.17

A hearing was not requested.

On June 14, 2018, the petitioner was issued an assessment after failing to file the sales tax return for the period shown above. After the issuance of the assessment, the petitioner filed a sales tax return stating that no sales had been made in that period; therefore, no sales tax was owed. As a result, the assessment has been adjusted below.

The petitioner contends that the assessment is in error because it is in violation of the Fair Credit Billing Act. He contends the assessment "failed to evaluate, authenticate, and re-evaluate information contained within all files received." Petitioner cites to Section 161 of the Fair Credit Billing Act which discusses the correction of billing errors. He states that he alerted the Department of the business.ohio.gov malfunctions, thereby preventing him from filing his monthly statements as required. Additionally, he states that he indicated to the Department that its assessment contained a billing error. He believes that, as a result of his actions, the Tax Commissioner does not have the authority to collect from him regarding this assessment. These contentions are not well met.

When a taxpayer fails to comply with a statutory filing deadline, the Ohio Revised Code gives the Tax Commissioner broad authority to levy assessments concerning the taxpayer's business activity, based upon all information available to the Tax Commissioner at that time. R.C. 5739.13. As a result, the Fair Credit Billing Act does not apply to the Tax Commissioner in this manner.

The petitioner also objects to the additional charge and additional charge penalty. Each vendor is

required to file a return for the preceding month on or before the twenty-third day of each month as stated in R.C. 5739.12(A)(1). Any vendor who fails to file a return *** in the manner prescribed under this section and the rules of the commissioner may, for each such return, be required to forfeit and pay into the state treasury an additional charge not exceeding fifty dollars or ten per cent of the tax required to be paid for the reporting period, whichever is greater, *** and such sum may be collected by assessment in the manner provided in section 5739.13 of the Revised Code. R.C. 5739.12(D). The Ohio Revised Code provides for both an additional charge for a vendor's failure to timely file sales tax returns and a penalty on sales tax assessments. *O'Brien v. Tracy*, BTA No. 96-B-665, 1997 WL 594266 (Sept. 19, 1997). R.C. 5739.133 provides that "a penalty may be added to every amount assessed under section 5739.13 or 5739.15 of the Revised Code." The penalty applies not only to the actual sales tax assessed, but also to the additional charge imposed. *Ernst Enterprises, Inc. v. Tracy*, 68 Ohio St.3d 542, 629 N.E.2d 410 (1994). Based upon the facts and circumstances of the case, the additional charge penalty is abated.

Accordingly, the assessment is amended as follows:

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

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

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

APR 0 8 2020

Dayton Freight Lines, Inc
6450 Poe Ave., Ste. 311
Dayton, OH 45414

Re: Refund Claim No. 201801349
Refund Amount Requested: $37,792.11
Refund Period: July 12, 2012 – July 12, 2016
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $37,792.11 in sales tax filed pursuant to R.C. 5739.07. After initial review, the claim was partially approved in the amount of $7,739.96 plus applicable interest. The claimant disagreed and requested reconsideration of the matter. A hearing was held.

Multiple Points of Use

The claimant contends that they erroneously paid sales tax on Multiple Points of Use (MPU) software license purchases from six vendors for the period from July 12, 2012 through July 12, 2016. The purchases at issue were from the following vendors: Digital Visions, Microsoft, Harris Data, Midrange Solutions, Netech, and CDW Direct. Purchases from Digital Visions were approved for refund, and all others were denied. The auditor requested additional information, which was not provided. Pursuant to R.C. 5739.033(D) consumers can apportion taxes for software used in multiple states using the multiple points of use exemption certificate by paying taxes due directly to the state.

At the hearing, the claimant indicated that all of the items for which they are seeking a refund are located outside of Ohio. They contend that the physical location of the software should determine the taxability. The petitioner submitted a spreadsheet that purports to show the vendor location, invoice numbers, tax amount paid, and the reason for the exemption. However, the petitioner has not submitted original invoices for these vendors, any evidence showing where the software is actually used, or copies of contracts between the claimant and the vendors. The petitioner has provided no further evidence to prove that these transactions qualify for the MPU exemption.

Therefore, the remaining refund request is denied.

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

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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: APR 17 2020

Don Wood, Inc.
900 East State St.
Athens, OH 45701

Re: Refund Claim No. 201901815
Refund Amount Requested: $1,004.50
Refund Period: October 18, 2018
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund filed pursuant to R.C. 5739.07. The claimant operates a car dealership in Athens, Ohio. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

On October 18, 2018, a customer purchased a Toyota Corolla from the claimant, Don Wood Inc. The claimant contends that they mistakenly titled the vehicle under the wrong vehicle identification number (VIN), before retitling under the correct VIN. The claimant contends that sales tax was paid each time the vehicle was titled. The claimant requests a refund in the amount of $1,004.50 for the sales tax paid on the incorrect VIN title.

Pursuant to Ohio Adm.Code 5703-9-07(A)(3), an application for refund filed by a vendor must show that the tax was remitted to the state and provide applicable supporting documentation. The claimant provided the title and buyer's order for the correct VIN. The claimant also provided a receipt from the Clerk of Courts proving that sales tax was paid on the correct VIN. Additionally, the claimant provided the title for the incorrect VIN and proof that the title was canceled. However, the claimant has not provided a receipt proving that sales tax was paid on the incorrect VIN. The claimant has not provided sufficient evidence that tax was paid when the vehicle was titled under the incorrect VIN. Therefore, the Department cannot grant a refund because sufficient evidence has not been provided pursuant to Ohio Adm.Code 5703-9-07(A)(3).

The claim 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.

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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: APR 0 8 2020

DriveTime Car Sales Company, LLC
1780 Country Rd 1
Tiffin, OH 44883

Re: Eight Refund Claims
Filed on August 17, 2018

Refund ID	Requested Refund
201900546	$115,640.64
201900547	$166,092.95
201900548	$73,579.55
201900549	$142,650.34
201900550	$87,935.84
201900551	$120,485.69
201900552	$95,649.07
201900553	$47,052.50
TOTAL:	$849,086.58

This is the final determination of the Tax Commissioner on applications for refund of sales tax in the amount of $849,086.58 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

Drivetime Car Sales Company, LLC is a registered motor vehicle dealer with eight locations in Ohio. The claimant directly finances a majority of its sales, whereby all fees and taxes are paid by the claimant at the time of purchase through a third-party vendor. The claimant stated after taxes and fees are paid, the vendor debits the covered amount from an account held by the claimant via an ACH transaction.

Drivetime allows vehicles to be returned for any reason within five days of purchase and for enumerated reasons after that. These refund claims pertain to taxes paid on automobiles returned between August 1, 2014 and July 31, 2018. A hearing was held on November 19, 2019.

The initial reviewing agent denied the claims, requesting additional documents showing proof of tax paid and verification that the full purchase price was refunded to the customer for each returned vehicle. The claimant responded to this request with a spreadsheet purporting to show general ledger entries tracking refunds. The claimant failed to provide any evidence to support the information on the spreadsheet.

The refund claim was then reviewed by a hearing officer who, via email on October 19, 2019, again requested proof of tax paid and full purchase price refund for each return in the refund claim.

In response, the claimant requested a hearing, which was held on November 19, 2019. At hearing the claimant was notified yet again of the information necessary to support the refund claim and given sixty days to respond with said information. On January 24, 2020 the claimant's representative provided an excel spreadsheet via email containing customer account summaries. The claimant failed to provide any evidence to support the information on the spreadsheet.

Ohio Adm.Code 5703-9-11(A) requires that, in order to receive a refund of sales tax when merchandise is returned, the vendor must refund the full purchase price of the merchandise. *Destiny's Auto Sales, LLC v. Levin*, BTA Case No. 2008-M-1773, 2011 WL 489362 (February 8, 2011). Purchase price includes "the total amount of consideration … for which tangible personal property or services are sold." R.C. 5739.01(H)(1)(a)(iii). The total purchase price consists not only of the cost of the vehicle, but also the services necessary to complete the sale. *Tallen v. Testa*, BTA Case No. 2017-1616, 2018 WL 6493035 (December 4, 2018).

In support of their refund request the claimant produced various versions of the same information. Included in the original refund request were fourteen sample titles in the name of Bridgecrest Acceptance Corporation, copies of Retail Purchase and Rescission Agreements, copies of Requests to Reverse Assignments of Contract, and spreadsheets compiling purchase and refund information, the latter of which the claimant contends originated from the claimant's general ledger. Despite repeated requests, none of the backup documentation for the spreadsheets was provided. In addition, the claimant also failed to clearly demonstrate proof of tax paid or proof customers received a full refund of the purchase price.

The claimant contends that the produced Rescission Agreements, used in the process of customer returns, provide adequate information to support a refund. The claimant contends the agreements provide for a termination of a contract and a waiver of any further rights or obligations upon the return of an automobile.

Section 4 of the Agreement for Rescission of Retail Installment Contract and Security Agreement refutes this contention. It reads:

> We and you agree that as part of the consideration we receive under this Agreement, we will retain all monies that you paid to us … including the down payment you have made and/or trade in … .We and you agree that we will retain refunds of monies or other payments (if any) pertain to the cancellation of any applicable service contract. We and you agree that we may also seek payment from you, your insurance company, and/or third parties, as applicable, for any damage to the Vehicle caused between the time you purchased the Vehicle from us and the time you returned the Vehicle to us.

However, Ohio Adm.Code 5703-9-11(B) specifically states:

> In no event shall a transaction be treated as a return of merchandise or a rejection of services for purposes of reporting sales or use tax if the vendor or seller deducts from the customer's refund any amount for use, damage, or wear and tear of the merchandise returned, any restocking or handling charge, or otherwise fails to

refund to the customer or credit the customer's account with the full purchase price and applicable tax.

Therefore, on its face the claimant's Rescission contract precludes a refund of sales tax under Ohio Adm.Code 5703-9-11(A).

Nonetheless, the claimant contends that 49 of the transactions included in the initial refund claims involve full refunds as necessitated by the Ohio rule. The spreadsheet provided on January 24, 2020 contains information pertaining to these 49 accounts, consisting of tabs listing what is claimed as sales tax collected, sales tax paid, customer down payments, customer additional payments, customer refunds, and a summary schedule.

The claimant maintains that this information was pulled from their general ledger. However, the claimant provides no supporting documentation, original or electronic documents, nor any other independent verification of the information provided. There are no checks or verification that sales tax was paid at the time of titling, no original statements to show tax debited from Drivetime accounts by the vendor, nor any independent verification of the refunds provided to the customers. In some cases, the Total Customer Refund per GL recorded on the excel spreadsheet is at odds with the information on the Requests to Reverse Assignments of Contract, or no Request to Reverse was produced. A reconciliation of these discrepancies was not provided.

The claimant was granted multiple opportunities to produce the information requested to support its refund claims by both the refund review agent and the hearing officer. The claimant failed to produce this information. The claimant failed to provide sufficient evidence to support their contentions.

Accordingly, the refund claims are denied.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 17 2020

Hilltop Carryout Inc.
1971 Doren Ave.
Columbus, OH 43223

RE: 4 Assessments
Tax Type: Sales (Delinquency)
Account No.: 25-304985

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

Assessment No.	Filing Period	Total
100001311093	01/01/19 – 01/31/19	$2,999.57
100001329830	02/01/19 – 02/28/19	$3,000.67
100001347815	03/01/19 – 03/31/19	$2,999.30
100001396867	04/01/19 – 04/30/19	$2,998.75
	Total:	$11,998.29

A hearing was requested and held on March 17, 2020.

The petitioner was issued estimated assessments after failing to file the sales tax returns for the periods listed above. On January 7, 2020, the petitioner filed the sales tax returns.

Accordingly, the assessments have been modified as shown below:

Assessment No.	Filing Period	Total
100001311093	01/01/19 – 01/31/19	$151.30
100001329830	02/01/19 – 02/28/19	$138.93
100001347815	03/01/19 – 03/31/19	$187.36
100001396867	04/01/19 – 04/30/19	$137.77
	Total:	$615.36

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

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

Hilltop Carryout Inc.
1971 Doren Ave.
Columbus, OH 43223

APR 17 2020

RE: Assessment No. 100001344287
Sales Tax
Account No. 25-304985

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

Tax	Pre-Assessment Interest	Penalty	Total
$39,007.15	$4,384.65	$19,503.43	$62,895.23

The petitioner operates as a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from March 1, 2015 through June 30, 2018. A hearing was requested and held on March 17, 2020. The petitioner requested abatement of the interest and penalty.

Interest

The request for remission of pre-assessment interest cannot be considered. The Tax Commissioner lacks jurisdiction to abate pre-assessment interest added to an assessment pursuant to R.C. 5739.133(B). Therefore, the request for interest remission is denied.

Penalty

The petitioner requested penalty abatement. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. See *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Given the totality of the circumstances, the request for a penalty abatement is denied. This is the petitioner's second audit. In addition, the taxpayer did not regularly meet their obligation to file their sales tax returns and remit the corresponding tax amounts in a timely matter on multiple occasions within the audit period. Audit Remarks, Page 10. The request is denied.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payments have been made toward the assessment. However, due to payment processing and posting time lag, payments may have been made that are not reflected in this

final determination. **Any post-assessment interest will be added to the assessment as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

Derek C. Hindman
7096 Wetherington Dr.
West Chester, OH 45069

Re: Assessment No.: 100001119592
Tax Type: Sales (Responsible Party)
The Blowdry Bar LLC
Vendor's License No.: 09-901392
Reporting Period: 07/01/2017 – 07/31/2017

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

Tax	Pre-Assessment Interest	Penalty	Total
$2,000.00	$57.83	$970.00	$3,027.83

This is a responsible party assessment. The Blowdry Bar LLC incurred sales tax liability resulting in sales tax assessment for the above period. This assessment was never fully satisfied by The Blowdry Bar 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 or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amount. Accordingly, the outstanding liability of The Blowdry Bar LLC has been derivatively assessed against Derek Hindman. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. No hearing was requested.

The petitioner objects to the assessment. The petitioner contends that he was no longer an officer or partner of the company during the assessment period; he contends that The Blowdry Bar LLC was sold, on December 30, 2016, to Ms. Jena Smith. The petitioner states that, on December 30, 2016, all assets of the business, including bank accounts, were transferred to Ms. Smith; therefore, any further attempts to collect sales taxes should be directed to her. These contentions are not well taken.

The evidence submitted via the petition for reassessment indicates that the petitioner was previously the managing partner of The Blowdry Bar LLC. The petitioner is listed as the owner of The Blowdry Bar LLC in filings with Ohio.gov. The petitioner is listed as the responsible party for The Blowdry Bar LLC on the county vendor's license registration. No amendments were filed with the state that illustrate a change in ownership of the limited liability company. The agreement to sell The Blowdry Bar LLC contained several provisions regarding the transfer of title for the

business assets from the seller to the buyer. The title for the assets was to be held in the seller's name until 50% of the purchase price had been paid. The buyer was to pay equal monthly installments for a period of 60 months to the seller, beginning on March 1, 2017. The seller retained the right to cancel the sale and retain full ownership of the business if the buyer defaulted, without having to return any previous payments made in accordance with the sale agreement. Additionally, the seller agreed to continue paying liability insurance on the equipment and product inventory until title was transferred to the buyer, reserving full entitlement to any funds received from insurance claims filed during that transitory period. In practice, this is essentially a management agreement disguised as a sale until the title transfer. Furthermore, any side agreement that a taxpayer might enter into with another entity concerning responsibility for payment of sales tax *** is not binding on the Tax Commissioner. *Farhan, dba Hiland Foods v. Tracy*, 10th Dist. Franklin No. 97APH10-1410, 1998 WL 418987 (July 21, 1998).

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

The petitioner failed to demonstrate that the assessment is in error. Therefore, it is determined that the petitioner was a responsible party of The Blowdry Bar LLC, under R.C. 5739.33.

Accordingly, the assessment is affirmed as issued.

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

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

James Hockaday
1214 Chestnut Dr.
Ashtabula, OH 44004

Re: 8 Assessments
Sales Tax (Responsible Party)
Pairings - Ohio's Wine & Culinary Experience
Vendor's License No. 04-078316

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

Assessment No.	Time Period	Total
100001516377	1/1/17 – 1/31/17	$67.50
100001516378	7/1/17 – 7/31/17	$3,011.19
100001516379	9/1/17 – 9/30/17	$3,012.06
100001516380	6/1/17 – 6/30/17	$3,028.93
100001516381	8/1/17 – 8/31/17	$3,011.41
100001516382	4/1/17 – 4/30/17	$3,026.96
100001516383	3/1/17 – 3/31/17	$3,012.06
100001516384	5/1/17 – 5/31/17	$3,028.06
	Total:	$21,198.17

These are responsible party assessments. Pairings - Ohio's Wine & Culinary Experience 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 Pairings - Ohio's Wine & Culinary Experience has been derivatively assessed against James Hockaday. A hearing was held on April 14, 2020.

Not a Responsible Party

The petitioner contends that he was only affiliated with the corporation from 2011 through January 5, 2017 for the purposes of education and development of the Ohio wine industry. He maintains that during this time, he served as the Vice Chair until May 2015, and never had any responsibility for maintaining financial records or preparing tax returns. Further, he alleges that when tax issues began, he had no connection to the Board of Trustees or the corporation. In support of this position, the petitioner submitted minutes from a board meeting that took place on May 18, 2015. The

minutes state that the board accepted the petitioner's resignation as Vice Chair of the Board. Further, the petitioner submitted a letter dated January 5, 2017 in which he resigned as a Trustee. Finally, the petitioner submitted a copy of the company bylaws explaining organizational control. Based on the information provided, the petitioner has submitted sufficient evidence to support their contention that they were no longer in a position of control during the time periods of the assessments.

This final determination is intended to bind the Tax Commissioner only in the absence of evidence supporting a finding of responsibility under R.C. 5739.33. Should additional evidence become available, which contradicts the evidence presented by the petitioner or any other information relied upon in the final determination, the petitioner may be subject to future reassessment.

Accordingly, the assessments are cancelled.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 17 2020

Home Brew Ohio LLC
6409 Milan Rd.
Sandusky, OH 44870

Re: Refund Claim No. 201900297
Filed on July 10, 2018
Sales Tax
Account: 22-050182

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $2,525.24 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and provided additional information on the matter. A hearing was not requested.

The Commissioner shall refund sales tax remitted erroneously by a vendor. R.C. 5739.07(A). If the refund request is the result of an amended return, the claimant must submit documentation to support the original and amended figures. Ohio Adm.Code 5703-9-07(A)(3)(e).

The refund claim is the result of claimant's amended return for November 2017. The claimant contends they erroneously included their October 2017 sales tax with their remitted amounts for November 2017. The claimant submitted documents summarizing taxable sales and tax collected during the period in question. However, the claimant's documents do not support the amended return. The taxable sales and tax collected totals on the submitted documents differ from the amended return filed by the claimant. As the submitted summaries do not match the amended return, the claimant has not provided the required evidence to support the original and amended returns.

Therefore, the claim for refund is denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 0 8 2020

J Lally Inc.
1014 Amherst Road NE
Massillon, OH 44646-4544

RE: Assessment No. 100000184592
Sales Tax
Account No. 76-151580

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

Tax	Pre-Assessment Interest	Penalty	Total
$63,173.44	$3,158.26	$31,586.65	$97,918.35

The petitioner operates a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from October 26, 2011 through August 31, 2014. A hearing was held on this matter. The petitioner provided a memorandum in support of its petition for reassessment on July 2, 2018. The petitioner's objections are addressed below.

Methodology

The evidence indicates that the petitioner failed to keep complete and accurate records as required by R.C. 5739.11. Therefore, the Department conducted an audit and mark-up analysis using the records supplied by the petitioner and the petitioner's suppliers. Utilizing these records, the Department's Auditor calculated the taxable beer, wine, cigarettes, tobacco, pop & soft drinks, energy drinks, taxable merchandise and other taxable alcohol. 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).

It is further noted that there is a Memorandum of Agreement in the file. It is acknowledged that the petitioner did not sign the agreement, however, the audit methodology is spelled out in the agreement,

nonetheless. The petitioner contends that the audit produced inaccurate results. The petitioner raises the following objections in support of this contention.

Cigarette Rebates

The petitioner maintains that the taxable sales were overstated because it was not given full credit for cigarette rebates. The petitioner states that it has rebates from the Elum, Phillip Morris, RJ Reynolds, and Newport. The petitioner has provided sufficient evidence that it had rebates from all the aforementioned suppliers for the period at issue, with the exception of Newport. Therefore, the petitioner's contention is allowed, in part.

Expired, Damaged and Stolen Inventory

The petitioner maintains that it had outdated and damaged inventory that it did not sell during the period in question. In support of its position, the petitioner provided photographs of what it purports to be damaged and outdated inventory that it could not sell. The petitioner's contention is not persuasive. The petitioner has not demonstrated that it did not sell the items identified in the photographs. Indeed, one of the pictures shows the goods with a price tag of .99, which suggests that the petitioner had the item for sale. This contradicts the petitioner's contention that it did not sell the goods. The objection is denied.

The petitioner further contends that it experienced a burglary where fourteen cartons of cigarettes were stolen. The petitioner provides a police report in support of its contention. The police report indicates that seven cartons of cigarettes were stolen. Thus, the objection is allowed with regard to seven cartons of cigarettes.

Inventory Build-up

The petitioner contends that it intentionally built up its inventory in the sample period of 2013. Consequently, the petitioner maintains that the Department's audit presumption that all purchased inventory was sold during the 2013 sample year is incorrect.

In support of its position, the petitioner emphasizes the following points:

- The substantial expansion of its shelving in order to accommodate more inventory
- Greater utilization of wall space, including creation of additional rooms
- Bigger and longer isles
- Addition of a cigarette room
- Additional coolers

The Department's standard methodology used for an audit and mark-up analysis accounts for any inventory build-up contention, because beginning and ending inventory totals are not included in the calculation. Additionally, while it is probably true that not all the inventory purchased during the sample period was resold to customers during the same period, it is also probably true that goods

already held in inventory were sold during the sample period. Therefore, any "inventory build-up" during the sample period has typically already been taken into account by the methodology used. However, the petitioner states that it had additional inventory at the end of 2013 that did not exist in 2012. Therefore, the petitioner maintains that the audit erroneously overstated the liability since the excess inventory was not sold.

The petitioner's contention is flawed. First, the petitioner has not sufficiently established that it did not sell the 2013 inventory in question. In other words, even if the petitioner was to sufficiently demonstrate an inventory build-up, there is no evidence that the inventory was not sold. Indeed, the evidence indicates that the Department's Auditor asked for sales records or additional evidence to show that there was an actual increase in inventory and that the inventory was not sold. The Auditor's review of the evidence provided by the petitioner revealed that it was incomplete and failed to show that there was an actual increase in inventory or whether the inventory was sold.

Next, even if the petitioner had demonstrated an inventory build-up, the petitioner has not demonstrated that this would impact the percentage of taxable versus exempt sales. Significantly, Ohio case law has consistently concluded that in order to have a successful inventory build-up claim, a taxpayer would have to establish that more taxable goods remained in inventory versus non-taxable goods. Indeed, the Ohio Board of Tax Appeals ("BTA"), states, "[i]f inventory was purchased but not sold, that fact would only affect the percentages calculated by the Commissioner if appellant could prove that more goods for which tax was charged when sold remained on the shelves during the audit period than goods which were tax exempt when sold." *Shaheen, Inc. DBA Abe's Quick Shoppe v. Tracy,* BTA No. 96-M-1231, 1998 WL 127061 (Mar. 20, 1998). The BTA has further held that "[i]f the vendor's purchases comprise significant quantities of items for which sales tax is not collected when sold, that circumstance would be reflected in sales, if, as the agent concluded in this audit, the vendor's purchases comprised significant quantities of items for which sales tax is collected when sold, the percentage of taxable sales to non-taxable sales would reflect that. *M.D.B., Inc./One Stop Carryout v. Zaino,* BTA No. 2001-S-421, 2001 WL 1337407 (Oct. 26, 2001) *citing Markho, Inc, dba One Stop Carry Out and One Stop Mini Mart v. Tracy,* BTA No. 98-M-132 (July 16,1999). Therefore, the fact that appellant did not sell all items purchased does not affect the Commissioner's ultimate conclusion unless the appellant could show that more taxable items remained on the shelf than non-taxable items.

Therefore, in order to establish that sales were overstated due to an inventory build-up, the petitioner must provide probative and competent evidence that any such inventory was not sold. Next, the petitioner would have to establish that more taxable items remained on the shelf than non-taxable items. The petitioner has not met these criteria.

The petitioner attempts to demonstrate an inventory build-up by showing that the store had additional space for more inventory. Additionally, the petitioner states that the inventory was not sold. This is hardly demonstrative of either proposition. Indeed, a self-serving conclusory statement that inventory is not sold is not probative evidence. Further, just because a store has additional space does not mean the petitioner purchased additional inventory. Again, even if the petitioner purchased additional inventory, it does not mean the petitioner did not sell what it purchased. As stated above, the Department's Auditor made the reasonable conclusion that the petitioner failed to demonstrate that the inventory was not sold. Lastly, while the petitioner's argument focuses on taxable items, this fact does

not establish that more taxable items remained in inventory. Consequently, the petitioner has not sufficiently demonstrated that there is an error in the assessment. Therefore, the objection is denied.

Improved Compliance 2014

The petitioner contends that its compliance substantially improved for the year 2014. Consequently, the petitioner states that it is totally inappropriate to apply the 2013 mark-up percentage to the 2014 reported taxable sales. The petitioner's contention is without merit for the following reasons.

First, the petitioner's contention basically amounts to an acknowledgment that it was not correctly reporting its taxable sales prior to 2014. The evidence demonstrates that the petitioner purchased an additional location and operated under a management agreement until the liquor license transferred in June 2014. Indeed, the petitioner states, "based on the seller's very good records and guidance with respect to taxable sales, Mr. Singh realized that the taxpayer had been incorrectly determining taxable sales." (Petitioner's Memorandum, pg. 5). The petitioner goes on to state that the taxpayer changed its practices to collect additional tax on items that had been treated as nontaxable. However, the petitioner didn't object to using 2013 as the sample period during the audit. Moreover, the petitioner has not put forth sufficient evidence to prove its contention.

Significantly, the Hearing Officer asked the Department's Auditor about the petitioner's improved compliance argument. The Auditor stated that he didn't recall the petitioner raising this issue during the audit. Nonetheless, the Auditor reviewed the petitioner's sales tax returns for the audit period. The Auditor stated that while there was an increase in the reported gross sale for 2014, there was not a significant change in the exempt sales reported. The objection is denied.

Penalty

The petitioner requests a penalty abatement. The circumstances in this matter warrant a partial penalty abatement. Therefore, the penalty shall be reduced to 10%.

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$57,580.67	$2,878.65	$5,758.06	$66,217.38

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

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

FINAL DETERMINATION

Date: APR 17 2020

Sarah Koski Noufer
4118 Logans Way
Perry, OH 44081

Re: Assessment No. 100001516397
Sales Tax (Responsible Party)
Pairings - Ohio's Wine & Culinary Experience
Vendor's License No. 04-078316
Period: 01/01/17 – 1/31/17

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:

Tax	Penalty	Total
$0.00	$67.50	$67.50

This is a responsible party assessment. Pairings - Ohio's Wine & Culinary Experience incurred sales tax liability resulting in an assessment. This assessment was never satisfied and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Pairings - Ohio's Wine & Culinary Experience has been derivatively assessed against Sarah Noufer for the period shown above. A hearing was not requested.

The petitioner did not challenge her status as a responsible party but indicated in the petition for reassessment that she volunteered with the company because of her hospitality background. However, it is important to note that the evidence indicates that the petitioner was the President of the company. A statutory agent update form was completed and became effective November 21, 2016. The petitioner signed this form as an authorized representative and indicated that her title was President.

The petitioner makes several objections regarding the underlying assessment. The petitioner contends that the business was not operating regularly by the end of July 2016 and all business operations ceased on January 31, 2017. Further, she alleges that foreclosure proceedings were underway by May 2017. Pursuant to R.C. 5739.33, the only issue that can be considered is whether the petitioner is an appropriate responsible party. The objection to the underlying corporate assessment cannot be considered.

The objection is denied.

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Accordingly, the assessment is affirmed as issued.

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

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

FINAL DETERMINATION

Date:

APR 0 8 2020

Jack D. Lewis
2148 Dunkeld Dr.
Grove City, OH 43123

Re: 24 Assessments
Tax Type: Sales (Responsible Party)
Collision Express of Ohio, Inc.
Vendor's License No.: 25-905066

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

Assessment No.	Filing Period	Total
100001215227	09/01/16 – 09/30/16	$3,008.34
100001215228	10/01/16 – 10/31/16	$3,026.19
100001215229	11/01/16 – 11/30/16	$3,031.78
100001215230	12/01/16 – 12/31/16	$3,028.28
100001215231	01/01/17 – 01/31/17	$3,026.08
100001215232	02/01/17 – 02/28/17	$3,032.65
100001215233	03/01/17 – 03/31/17	$3,030.24
100001215234	04/01/17 – 04/30/17	$3,031.12
100001215235	05/01/17 – 05/31/17	$3,027.40
100001215236	06/01/17 – 06/30/17	$3,012.94
100001215237	07/01/17 – 07/31/17	$3,011.84
100001215238	08/01/17 – 08/31/17	$3,028.27
100001215239	09/01/17 – 09/30/17	$3,011.41
100001215240	10/01/17 – 10/31/17	$3,032.21
100001215241	11/01/17 – 11/30/17	$3,022.58
100001215242	12/01/17 – 12/31/17	$3,026.96
100001215243	01/01/18 – 01/31/18	$3,011.41
100001215244	02/01/18 – 02/28/18	$3,026.73
100001215245	03/01/18 – 03/31/18	$3,021.26
100001215246	04/01/18 – 04/30/18	$3,032.87
100001215247	05/01/18 – 05/31/18	$3,028.65
100001215248	06/01/16 – 06/30/16	$3,019.79
100001215249	07/01/16 – 07/31/16	$3,018.52

100001215250	08/01/16 – 08/31/16	$3,020.44
	Total:	$72,567.96

These are responsible party assessments. Collision Express of Ohio, Inc. incurred sales tax liability resulting in sales tax assessments for the above periods. These assessments were never fully satisfied by Collision Express of Ohio, Inc. and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Collision Express of Ohio, Inc. has been derivatively assessed against Jack Lewis. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. No hearing was requested.

The petitioner objects to the assessments. The petitioner contends that he reached out to the Department regarding the assessments he received. He states that a Department employee informed him, after looking up one of the assessment numbers, that the assessments were regarding a vendor's license that was obtained in 1970. He states that clearly because of his age, he was 12 in 1970, he cannot be the responsible party regarding these assessments. Further, he states that he attached his driver's license, social security card, and birth certificate to his petition for reassessment in order to prove he is not the person to be associated with these assessments. These contentions are not well taken.

The evidence available to the commissioner indicates that the vendor's license at issue was not obtained in 1970. The evidence indicates that the petitioner is listed as the Chief Executive Officer and responsible party on the county vendor's license registration for Collision Express of Ohio, Inc and that the company began making taxable sales on February 19, 2013. The social security number and the home address listed on the petitioner's driver's license, that were submitted with the petition for reassessment, mirror the information provided by the petitioner on the company's vendor's license registration. The petitioner is the sole signee on the articles of incorporation filed on behalf of Collision Express of Ohio, Inc. Furthermore, the petitioner is also listed as the principal of Collision Express of Ohio, Inc. on both Manta.com[1] and Buzzfile.com.[2]

The petitioner failed to provide any evidence to demonstrate that he is not an officer of the company. The petitioner failed to demonstrate that the assessments were in error. Therefore, it is determined that the petitioner was a responsible party of Collision Express of Ohio, Inc., under R.C. 5739.33.

Accordingly, the assessments are affirmed as issued.

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

[1] Manta: https://www.manta.com/c/mhbdhr2/collision-express-of-ohio-inc#details (accessed on March 26, 2020).
[2] Buzzfile: http://www.buzzfile.com/business/Collision-Express-of-Ohio-Inc-614-600-2010 (accessed on March 26, 2020).

provided by law, which is in addition to the above referenced total. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 08 2020

Liton Bhowmick
5240 Timberline Road
Columbus, OH 43220

Re: 33 Assessments
Sales Tax (Responsible Party)
T&L Global Management, LLC
Vendor's License No. 45-2458167

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

Assessment No.	Time Period	Total
100001448378	02/01/2017-02/28/2017	$2,993.00
100001448379	04/01/2017-04/30/2017	$2,993.66
100001448380	03/01/2017-03/31/2017	$2,993.66
100001448381	08/01/2017-08/31/2017	$2,993.60
100001448382	11/01/2017-11/30/2017	$2,993.66
100001448383	07/01/2017-07/31/2017	$2,993.44
100001448384	06/01/2017-06/30/2017	$2,994.54
100001448385	01/01/2017-01/31/2017	$2,993.00
100001448386	12/01/2017-12/31/2017	$2,993.66
100001448387	10/01/2017-10/31/2017	$2,993.66
100001448388	05/01/2017-05/31/2017	$2,993.88
100001448389	02/01/2018-02/28/2018	$3,008.12
100001448390	10/01/2018-10/31/2018	$3,007.35
100001448391	05/01/2018-05/31/2018	$3,006.80
100001448392	07/01/2018-07/31/2018	$3,012.44
100001448393	06/01/2018-06/30/2018	$3,014.19
100001448394	09/01/2018-09/30/2018	$3,002.37
100001448395	03/01/2018-03/31/2018	$3,002.86
100001448396	01/01/2018-01/31/2018	$2,993.00
100001448397	09/01/2017-09/30/2017	$2,993.66
100001448398	11/01/2018-11/30/2018	$3,002.20
100001448399	04/01/2018-04/30/2018	$3,012.50
100001448400	08/01/2018-08/31/2018	$3,007.35
100001448401	06/01/2016-06/30/2016	$67.50
100001448402	01/01/2015-01/31/2015	$67.50
100001448403	12/01/2014-12/31/2014	$112.06
100001448407	12/01/2018-12/31/2018	$2,999.30
100001448408	05/01/2016-05/31/2016	$67.50

100001448409	11/01/2016-11/30/2016	$2,994.10
100001448410	12/01/2016-12/31/2016	$2,993.88
100001448411	04/01/2016-04/30/2016	$67.50
100001448412	01/01/2019-01/31/2019	$2,999.85
100001448413	02/01/2019-02/28/2019	$3,000.67
	Total	$84,362.46

These are responsible party assessments. T&L Global Management, LLC. incurred sales tax liability resulting in assessments for periods shown above. These assessments were never satisfied by T&L Global Management, LLC. and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns and those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of T&L Global Management, LLC. has been derivatively assessed against Liton Bhowmick. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods shown above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was not requested.

The petition for reassessment does not dispute the fact that the petitioner is a responsible party for T&L Global Management, LLC. The petition for reassessment does not present any argument against holding the petitioner responsible for the underlying corporate liability under R.C. 5739.33. Instead, the petition for reassessment attacks the underlying assessment. These arguments cannot be considered. The petitioner operated T&L Global Management, LLC. and incurred sales tax liability as CEO and sole member. Based upon this information, the petitioner is a responsible party for the corporation per R.C. 5739.33 and is liable for the unpaid amounts.

Therefore, the assessments are affirmed as issued.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

MPW Industrial Services, Inc.
9711 Lancaster Rd. SE
Hebron, OH 43025

Re: Refund Claim No. 201806646
Filed on March 27, 2018

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $157,914 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

This refund claim pertains to the tax paid on the purchases related to the purchase of four mobile clarifier units between May 11, 2017 and September 28, 2017. A hearing was not requested.

The claimant relies on the resale exemption in R.C. 5739.01(E). The mobile clarifier units, which are used in RO pretreatment, stormwater discharge treatment, and other remediation projects, were purchased by the claimant from the manufacturer Clearwater Industries using financing provided by Huntington National Bank. Sales tax was paid by the claimant at the time of titling. The claimant stated in an email on February 27, 2020 to the hearing officer that they made several modifications to the units, including updating chemical lines and fittings, adding drains, changing tanks, and other material changes.

After they completed these modifications, the claimant entered into a sale-leaseback agreement with Huntington Bank, whereby the unit titles were transferred to Huntington in exchange for the financing provided on the initial purchase from Clearwater. The claimant then leased the units from Huntington. No sales tax was paid at the time of the title transfer, and the claimant provided an exemption certificate to Huntington memorializing the same. The units were then sub-leased by the claimant to third parties.

Upon initial review, the refund claim was denied pending additional documentation of proof of tax paid, contracts with Huntington Bank relevant to the units, and applicable tax exemption certificates. The claimant provided this information.

As an initial matter, the burden is on the taxpayer to prove its claim for refund. "… Every sale or use of tangible personal property in Ohio is *presumed* to be taxable, and the burden rests on the taxpayer to establish affirmatively its right to the exceptions claimed" *Standard. Oil Co. v. Peck*, 163 Ohio St. 63, 65, 125 N.E.2d 342 (1955).

Pursuant to R.C. 5739.02, an excise tax is levied on each retail sale made in the state. 5739.01(E) defines "Retail sale" as "all sales, except those in which the purpose of the consumer is to resell

the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person."

In order to claim the sale for resale exemption, the claimant must be able to demonstrate that no change was made to the goods subject to resale. "In other words, when the purchaser's intent in buying goods or services is to resell them to yet another purchaser *without changing the goods or services in any way*, the original purchase is not considered a "retail sale" and is therefore not subject to sales tax." (Emphasis added.) *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 26.

When asked by the hearing officer if any changes had been made to the units subsequent to the purchase from Clearwater but prior to the leaseback agreement with Huntington, the claimant stated the units had been subject to multiple, material changes. The evidence indicates that the form of the goods was changed, thus the sale for resale exemption does not apply.

Accordingly, the refund claim is denied.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

Mr. Sushi, Inc.
1159 N. Hamilton Rd
Gahanna, OH 43230

Re: Assessment No.: 100001428713
Sales Tax
Account No. 25-904626
Audit Period: 01/01/2016 – 02/28/2019

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

Tax	Pre-Assessment Interest	Penalty	Total
$52,176.70	$4,601.31	$26,088.21	$82,866.22

This assessment is the result of an audit of the petitioner's records for the period shown above. The petitioner operates a restaurant in Gahanna, Ohio. A hearing was not requested.

The auditor reviewed bank statements,1099K statements, credit card processing statements, federal return 1120S, daily sales breakdowns and daily totals for transactions categorized by cash, card (including tips), and tips for the entire audit period. Audit Remarks Page 4. Using daily totals for transactions categorized by cash, card (including tips) and tips, the auditor calculated the new gross sales amount for the audit period. The exempt sales amount from the daily sales breakdown was used as the new exempt sales amount. The new exempt sales amount was subtracted from the new gross sales amount to determine a new taxable sales amount. This amount was then multiplied by the Franklin County sales tax rate. The petitioner was given credit for tax already paid and the resulting amount was the tax liability. Audit Remarks Page 4.

Exempt Sales

The petitioner contends that when calculating sales tax liability, the auditor mistakenly used the exempt sales figures in place of the taxable sales figures and vice versa. The petitioner addressed this concern with the auditor during the audit. The auditor requested primary sales records to support the contention. Audit Remarks Page 5. The petitioner provided z-tapes for the months of June and July of 2019. The auditor reviewed the information provided by the petitioner, but ultimately determined that the information provided did not support any change to the figures used to determine sales tax liability. In further support of this contention, the petitioner submitted sales report figures that are purportedly from each month of the audit period. However, no sales records or other documentation has been provided to explain or support these figures. Without additional information, it is impossible

to determine whether or not changes to the exempt and taxable sales used to determine liability are warranted. Therefore, the objection is denied for lack of sufficient evidence.

The assessment is affirmed as issued.

Current records indicate that payments totaling $82,866.22 have been in full satisfaction of the assessment.

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

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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:

APR 17 2020

Curtis W. Murray Jr.
1040 Church Hill Court
Wooster, OH 44691

Re: Assessment No. 100001116737
Sales Tax (Responsible Party)

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

Tax	Pre-Assessment Interest	Penalty	Total
$2,000.00	$50.97	$970.00	$3,020.97

This is a responsible party assessment. Pride of the Hills Manufacturing of Killbuck, Inc. ("Killbuck") incurred sales tax liability resulting in this assessment for the period of July 1, 2017 through November 9, 2017. This assessment was never satisfied by Killbuck 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 Killbuck has been derivatively assessed against Curtis W. Murray Jr. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period assessed. Neither the underlying substantive issues nor remission of the penalty can be considered. A hearing was held on November 14, 2019.

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

The petitioner objects to the assessment. The petitioner does not contest that he was a responsible party for Killbuck prior to September 15, 2017. The petitioner contends, instead, he was relieved of liability as a responsible party on September 15, 2017 when the sheriff levied upon the property of Killbuck pursuant to a writ of execution. The petitioner contends he was denied access to the company's computers after the writ was executed. The petitioner maintains this lack of access to the facility relieved him of obligations as a responsible party. As noted above, the burden is on the petitioner to provide evidence showing error in the assessments.

Corporate Officer Status and Fiscal Responsibilities

The petitioner is a responsible party for all assessed period. A person is considered a responsible party when he is an officer of an entity and responsible for the entity's fiscal responsibilities. R.C. 5739.33. A Vice President is an officer of a corporation. Ohio Adm.Code 5703-9-49(A)(1). An officer is a responsible party if he exercises management authority over employees whose duties include preparing sales tax returns. Ohio Adm.Code 5703-9-49(C)(3). The officer is also a responsible party if he directs or exercises control over an outside accountant who prepares sales tax returns. Ohio Adm.Code 5703-9-49(C)(4). The petitioner stated he was the Vice President of Killbuck in his Petition for Reassessment and reaffirmed that notion during the hearing. In addition, the petitioner is listed as Vice President on bankruptcy filings. The petitioner attested to the fact that he had supervisory authority over Killbuck's accountant during the hearing.

Writ of Execution

On September 15, 2017 the sheriff served a writ of execution and levied upon the property of Killbuck. The petitioner contends this relieved him of his duty as a responsible party. To support this contention, the petitioner relies upon *Bigelow v. Tracy*, BTA No. 93-T-750, 1994 WL 646078 (Nov. 14, 1994). In *Bigelow*, the appellant operated a car dealership. Pursuant to an agreement with the bank, the bank entered the appellant's premises and took control of the operations of the dealership. Bank personnel possessed keys for the premises and vehicles, all sales were approved by the bank, and proceeds from sales were completely controlled by the bank. The Board found the appellant was no longer a responsible party after the bank took control of operations. The Board based its decision on the bank's control of the physical location, the bank's control of all finances of the business, and control over the company's transactions.

The evidence submitted by the petitioner shows the petitioner's circumstances differ from *Bigelow*. In the instant case, the sheriff served a writ of execution on September 15, 2017. The submitted writ makes no mention of control of the financial affairs and business activities of Killbuck. The writ details a levy on the physical property at a location of the company. Unlike *Bigelow*, the evidence submitted by the petitioner shows only the transfer of physical property of Killbuck. The petitioner was not divested of control of the financial activities in a manner analogous to *Bigelow*. The evidence does not show that the petitioner lost control of the financial activities or accounts. The petitioner maintains that the lack of access to the company's computers deprived him of control of Killbuck's fiscal responsibilities as the passwords for the Ohio Business Gateway were saved on these computers. The Ohio Business Gateway website has a "Forgot Password" feature which the petitioner could have employed to access his account. Filing paper returns and filing by telephone were also available.

Another key difference from *Bigelow* is the control of transactions. In *Bigelow*, the appellant lost control of the company's sales transactions. The bank approved all sales and took immediate control of the proceeds. As retail sales continued by the company at the location pursuant the agreement with the bank, the appellant was required to maintain a vendor's license pursuant to 5739.17(A). In the instant case, the petitioner retained control of the business operations of Killbuck after the property was transferred to the sheriff. The sheriff did not take control of

Killbuck's future transactions, only the property at the location in question. The petitioner did not lose control of Killbuck's sales activity. The petitioner was free to cancel the vendor's license at any time if Killbuck intended to cease operations. The evidence is insufficient to relieve the petitioner of his duties as a responsible party for Killbuck. The objection is denied.

Trustee

The petitioner next contends the appointment of the trustee after the bankruptcy filing was converted to Chapter 7 relieved him of liability as a responsible party. The petitioner's contention is not well taken. The business was not in the care of a trustee during the assessed periods. The time period for the assessments ends on November 9, when the trustee was appointed. The objection is denied.

Underlying Assessment

The petitioner also disputes the underlying sales tax assessment. The petitioner cannot object to the underlying assessment during an assessment issued under R.C. 5739.33. The only objections which can be considered are those pertaining to the petitioner's membership in one of the classes held responsible under R.C. 5739.33. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976). The objection is denied.

Therefore, the assessment is affirmed.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 17 2020

Curtis W. Murray Jr.
1040 Church Hill Ct.
Wooster, OH 44691

Re: 3 Assessments
Sales Tax (Responsible Party)

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

Assessment	Time Period	Total
100001116718	9/1/2017 - 9/30/2017	$3,013.16
100001116719	10/1/2017 - 10/31/2017	$3,012.29
100001116720	11/1/2017 - 11/9/2017	$3,030.65
	Total:	$9,056.10

These are responsible party assessments. Pride of the Hills Manufacturing, Inc. ("Pride") incurred sales tax liability resulting in various assessments. These assessments were never satisfied by Pride 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 and those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Pride has been derivatively assessed against Curtis W. Murray Jr. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods assessed. Neither the underlying substantive issues nor remission of the penalty can be considered. A hearing was held on November 14, 2019.

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

The petitioner objects to the assessments. The petitioner does not contest that he was a responsible party for Pride prior to September 15, 2017. The petitioner contends, instead, he was relieved of liability as a responsible party on September 15, 2017 when the sheriff levied upon the property of Pride pursuant to a writ of execution. The petitioner contends he was denied access to the facility after the writ was executed. The petitioner maintains this lack of access to the computers for the

company relieved him of obligations as a responsible party. As noted above, the burden is on the petitioner to provide evidence showing error in the assessments.

Officer Status and Fiscal Responsibilities

The petitioner is a responsible party for all assessed periods. A person is considered a responsible party when he is an officer of an entity and responsible for the entity's fiscal responsibilities. R.C. 5739.33. A Vice President is an officer of a corporation. Ohio Adm.Code 5703-9-49(A)(1). An officer is a responsible party if he exercises management authority over employees whose duties include preparing sales tax returns. Ohio Adm.Code 5703-9-49(C)(3). The officer is also a responsible party if he directs or exercises control over an outside accountant who prepares sales tax returns. Ohio Adm.Code 5703-9-49(C)(4). The petitioner stated he was Vice President of Pride in his Petition for Reassessment and reaffirmed that notion during the hearing. The petitioner stated he supervised the accountant for Pride at the hearing.

Writ of Execution

On September 15, 2017, the sheriff served a writ of execution and levied upon the property of Pride. The petitioner contends this relieved him of his duty as a responsible party. To support this contention, the petitioner relies upon *Bigelow v. Tracy*, BTA No. 93-T-750, 1994 WL 646078 (Nov. 14, 1994). In *Bigelow*, the appellant operated a car dealership. Pursuant to an agreement with the bank, the bank entered the appellant's premises and took control of the operations of the dealership. Bank personnel possessed keys for the premises and vehicles, all sales were approved by the bank, and proceeds from sales were completely controlled by the bank. The Board found the appellant was no longer a responsible party after the bank took control of operations. The Board based its decision on the bank's control of the physical location, the bank's control of all finances of the business, and control over the company's transactions.

The evidence submitted by the petitioner shows the petitioner's circumstances differ from *Bigelow*. In the instant case, the sheriff served a writ of execution on September 15, 2017. The submitted writ makes no mention of control of the financial affairs and business activities of Pride. The writ details the levy on the physical property at a location of the company. Unlike *Bigelow*, the evidence submitted by the petitioner shows only the transfer of physical property of Pride. The petitioner was not divested of control of the financial activities in a manner analogous to *Bigelow*. The evidence does not show the petitioner lost control of the financial activities or accounts. The petitioner maintains the lack of access to the company's computers deprived him of control of Pride's fiscal responsibilities as the passwords for the Ohio Business Gateway were saved on these computers. The Ohio Business Gateway website has a "Forgot Password" feature which the petitioner could have employed to access the account. Filing paper returns and filing by telephone were also available.

Another key difference from *Bigelow* is the control of transactions. In *Bigelow*, the appellant lost control of the company's sales transactions. The bank approved all sales and took immediate control of the proceeds. As retail sales continued by the company at the location pursuant the agreement with the bank, the appellant was required to maintain a vendor's license pursuant to 5739.17(A). In the instant case, the petitioner retained control of the business operations of Pride

after the property was transferred to the sheriff. The sheriff did not take control of Pride's future transactions, only the property at the location in question. The petitioner did not lose control of Pride's sales activity. The petitioner was free to cancel the vendor's license at any time if Pride intended to cease operations. The evidence is insufficient to relieve the petitioner of his duties as a responsible party for Pride. The objection is denied.

Trustee

The petitioner next contends the appointment of the trustee after the bankruptcy filing was converted to Chapter 7 relieved the petitioner of liability as a responsible party. The petitioner's contention is not well taken. The business was not in the care of a trustee during the assessed periods. The time period for the assessments ends on November 9, the date the trustee was appointed. The objection is denied.

Underlying Assessment

The petitioner also disputes the underlying sales tax assessment. The petitioner cannot object to the underlying assessment during an assessment issued under R.C. 5739.33. The only objections which can be considered are those pertaining to the petitioner's membership in one of the classes held responsible under R.C. 5739.33. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976). The objection is denied.

Therefore, the assessments are affirmed.

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

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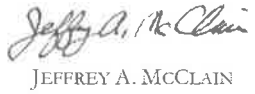

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 17 2020

Curtis W. Murray Sr.
8140 State Route 514
Big Prairie, OH 44611

Re: Assessment No. 100001116727
Sales Tax (Responsible Party)

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

Tax	Pre-Assessment Interest	Penalty	Total
$2,000.00	$50.97	$970.00	$3,020.97

This is a responsible party assessment. Pride of the Hills Manufacturing of Killbuck, Inc. ("Killbuck") incurred sales tax liability resulting in this assessment for the period of July 1, 2017 through November 9, 2017. This assessment was never satisfied by Killbuck 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 Killbuck has been derivatively assessed against Curtis W. Murray Sr. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period assessed. Neither the underlying substantive issues nor remission of the penalty can be considered. A hearing was held on November 14, 2019.

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

The petitioner objects to the assessment. The petitioner does not contest that they were a responsible party for Killbuck prior to September 15, 2017. The petitioner contends, instead, they were relieved of liability as a responsible party on September 15, 2017 when the sheriff levied upon property of the Killbuck pursuant to a writ of execution. The petitioner contends they were denied access to the facility after the writ was executed. The petitioner maintains this lack of access to the facility relieved them of obligations as a responsible party. As noted above, the burden is on the petitioner to provide evidence showing error in the assessments.

Officer Status and Fiscal Responsibilities

The petitioner is a responsible party for all assessed period. A person is considered a responsible party when he is an officer of an entity and responsible for the entity's fiscal responsibilities. R.C. 5739.33. A President is an officer of a corporation. Ohio Adm.Code 5703-9-49(A)(1). An officer is a responsible party if he exercises management authority over employees whose duties include preparing sales tax returns. Ohio Adm.Code 5703-9-49(C)(3). The officer is also a responsible party if he directs or exercises control over an outside accountant who prepares sales tax returns. Ohio Adm.Code 5703-9-49(C)(4). The petitioner stated he was President of Killbuck in his Petition for Reassessment and reaffirmed that notion during the hearing. In addition, the petitioner is listed as President on bankruptcy filings. The petitioner attested to the fact he had supervisory authority over Killbuck's accountant during the hearing.

Writ of Execution

On September 15, 2017 the sheriff served a writ of execution and levied upon the property of Killbuck. The petitioner contends that this relieved them of his duty as a responsible party. To support this contention, the petitioner relies upon *Bigelow v. Tracy*, BTA No. 93-T-750, 1994 WL 646078 (Nov. 14, 1994). In *Bigelow*, the appellant operated a car dealership. Pursuant to an agreement with the bank, the bank entered the appellant's premises and took control of the operations of the dealership. Bank personnel possessed keys for the premises and vehicles, all sales were approved by the bank, and proceeds from sales were completely controlled by the bank. The Board found the appellant was no longer a responsible party after the bank took control of operations. The Board based its decision on the bank's control of the physical location, the bank's control of all finances of the business, and control over the company's transactions.

The evidence submitted by the petitioner shows the petitioner's circumstances differ from *Bigelow*. In the instant case, the sheriff served a writ of execution on September 15, 2017. The submitted writ makes no mention of control of the financial affairs and business activities of Killbuck. The writ details a levy on the physical property at a location of the company. Unlike *Bigelow*, the evidence submitted by the petitioner shows only a transfer of physical property of Killbuck. The petitioner was not divested of control of the financial activities in a manner analogous to *Bigelow*. The evidence does not show the petitioner lost control of the financial activities or accounts. The petitioner maintains the access to the company's computers deprived him of control of Killbuck's fiscal responsibilities as the passwords for the Ohio Business Gateway were saved on these computers. The Ohio Business Gateway website has a "Forgot Password" feature which the petitioner could have employed to access the account. Filing paper returns and filing by telephone were also available.

Another key difference from *Bigelow* is the control of transactions. In *Bigelow*, the appellant lost control of the company's sales transactions. The bank approved all sales and took immediate control of the proceeds. As retail sales continued by the company at the location pursuant the agreement with the bank, the appellant was required to maintain a vendor's license pursuant to 5739.17(A). In the instant case, the petitioner retained control of the business operations of Killbuck after the property was transferred to the sheriff. The sheriff did not take control of

Killbuck's future transactions, only the property at the location in question. The petitioner did not lose control of Killbuck's sales activity. The petitioner was free to cancel the vendor's license at any time if Killbuck intended to cease operations. The evidence is insufficient to relieve the petitioner of his duties as a responsible party for Killbuck. The objection is denied.

Trustee

The petitioner next contends the appointment of the trustee after the bankruptcy filing was converted to Chapter 7 relieved the petitioner of liability as a responsible party. The petitioner's contention is not well taken. The business was not in the care of a trustee during the assessed periods. The time period for the assessments ends on November 9, when the trustee was appointed. The objection is denied.

Underlying Assessment

The petitioner also disputes the underlying sales tax assessment. The petitioner cannot object to the underlying assessment during an assessment issued under R.C. 5739.33. The only objections which can be considered are those pertaining to the petitioner's membership in one of the classes held responsible under R.C. 5739.33. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976). The objection is denied.

Therefore, the assessment is affirmed.

Current records indicate that no payments have been applied on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post-assessment interest will be added to the assessments 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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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

APR 17 2020

Curtis W. Murray Sr.
8140 State Route 514
Big Prairie, OH 44611

Re: 3 Assessments
Sales Tax (Responsible Party)

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

Assessment	Time Period	Total
100001116715	9/1/2017-9/30/2017	$3,013.16
100001116716	10/1/2017-10/31/2017	$3,012.29
100001116717	11/1/2017-11/9/2017	$3,030.65
	Total:	$9,056.10

These are responsible party assessments. Pride of the Hills Manufacturing, Inc. ("Pride") incurred sales tax liability resulting in various assessments. These assessments were never satisfied by Pride 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 and those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Pride has been derivatively assessed against Curtis W. Murray Sr. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods assessed. Neither the underlying substantive issues nor remission of the penalty can be considered. A hearing was held on November 14, 2019.

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

The petitioner objects to the assessments. The petitioner does not contest that he was a responsible party for Pride prior to September 15, 2017. The petitioner contends, instead, he was relieved of liability as a responsible party on September 15, 2017 when the sheriff levied upon property of the Pride pursuant to a writ of execution. The petitioner contends he was denied access to the facility after the writ was executed. The petitioner maintains this lack of access to the facility relieved him

of obligations as a responsible party. As noted above, the burden is on the petitioner to provide evidence showing error in the assessments.

Officer Status and Fiscal Responsibilities

The petitioner is a responsible party for all assessed periods. A person is considered a responsible party when he is an officer of an entity and responsible for the entity's fiscal responsibilities. R.C. 5739.33. A President is an officer of a corporation. Ohio Adm.Code 5703-9-49(A)(1). An officer is a responsible party if he exercises management authority over employees whose duties include preparing sales tax returns. Ohio Adm.Code 5703-9-49(C)(3). The officer is also a responsible party if he directs or exercises control over an outside accountant who prepares sales tax returns. Ohio Adm.Code 5703-9-49(C)(4). The petitioner stated he was President of Pride in his Petition for Reassessment and reaffirmed that notion during the hearing. The petitioner attested to the fact he had supervisory authority over Pride's accountant during the hearing.

Writ of Execution

On September 15, 2017 the sheriff served a writ of execution and levied upon the property of Pride. The petitioner contends this relieved him of his duty as a responsible party. To support this contention, the petitioner relies upon *Bigelow v. Tracy*, BTA No. 93-T-750, 1994 WL 646078 (Nov. 14, 1994). In *Bigelow*, the appellant operated a car dealership. Pursuant to an agreement with the bank, the bank entered the appellant's premises and took control of the operations of the dealership. Bank personnel possessed keys for the premises and vehicles, all sales were approved by the bank, and proceeds from sales were completely controlled by the bank. The Board found the appellant was no longer a responsible party after the bank took control of operations. The Board based its decision on the bank's control of the physical location, the bank's control of all finances of the business, and control over the company's transactions.

The evidence submitted by the petitioner shows the petitioner's circumstances differ from *Bigelow*. In the instant case, the sheriff served a writ of execution on September 15, 2017. The submitted writ makes no mention of control of the financial affairs and business activities of Pride. The writ details the levy on the physical property at a location of the company. Unlike *Bigelow*, the evidence submitted by the petitioner shows only the transfer of physical property of Pride. The petitioner was not divested of control of the financial activities in a manner analogous to *Bigelow*. The evidence does not show that the petitioner lost control of the financial activities or accounts. The petitioner maintains that the lack of access to the company's computers deprived them of control of Pride's fiscal responsibilities as the passwords for the Ohio Business Gateway were saved on these computers. The Ohio Business Gateway website has a "Forgot Password" feature which the petitioner could have employed to access the account. Filing paper returns and filing by telephone were also available.

Another key difference from *Bigelow* is the control of transactions. In *Bigelow*, the appellant lost control of the company's sales transactions. The bank approved all sales and took immediate control of the proceeds. As retail sales continued by the company at the location pursuant the agreement with the bank, the appellant was required to maintain a vendor's license pursuant to 5739.17(A). In the instant case, the petitioner retained control of the business operations of Pride

after the property was transferred to the sheriff. The sheriff did not take control of Pride's future transactions, only the property at the location in question. The petitioner did not lose control of Pride's sales activity. The petitioner was free to cancel the vendor's license at any time if Pride intended to cease operations. The evidence is insufficient to relieve the petitioner of his duties as a responsible party for Pride. The objection is denied.

Trustee

The petitioner next contends the appointment of the trustee after the bankruptcy filing was converted to Chapter 7 relieved the petitioner of liability as a responsible party. The petitioner's contention is not well taken. The business was not in the care of a trustee during the assessed periods. The time period for the assessments ends on November 9, when the trustee was appointed. The objection is denied.

Underlying Assessment

The petitioner also disputes the underlying sales tax assessment. The petitioner cannot object to the underlying assessment during an assessment issued under R.C. 5739.33. The only objections which can be considered are those pertaining to the petitioner's membership in one of the classes held responsible under R.C. 5739.33. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976). The objection is denied.

Therefore, the assessments are affirmed.

Current records indicate that no payments have been applied on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post-assessment interest will be added to the assessments 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 THESE MATTERS. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THESE MATTERS WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

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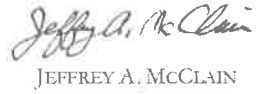

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 17 2020

Holly S. Norris
1478 Eagle Way
Ashland, OH 44805

Re: 4 Assessments
Sales Tax (Responsible Party)

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

Assessment No.	Time Period	Total
100001515528	7/1/2010 - 7/31/2010	$1,493.99
100001515529	6/1/2010 - 6/30/2010	$1,497.76
100001515530	9/1/2010 - 9/30/2010	$1,491.25
100001515538	8/1/2010 - 8/31/2010	$1,491.58
	Total:	$5,974.58

These are responsible party assessments. Papa V's LLC incurred sales tax liability resulting in multiple assessments. These assessments were never satisfied by Papa V's LLC and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Papa V's LLC has been derivatively assessed against Holly S. Norris. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues nor remission of the penalty can be considered. A hearing was scheduled for April 7, 2020; however, the petitioner waived her hearing request in an April 7, 2020 email.

The petitioner is a responsible party for all of the assessed periods. A person is considered a responsible party when she is an officer of an entity and responsible for the entity's fiscal responsibilities. R.C. 5739.33. An officer includes a president. Ohio Adm.Code 5703-9-49(A)(1). A person who signed the Application for a Vendor's License as President and offers no evidence disputing the liability as a responsible party is considered a responsible party. *See Blosser v. Zaino*, BTA No. 2002-B-659, 2003 WL 21092386 (May 9, 2003). The petitioner signed as the President of Papa V's LLC on the Application for Vendor's License. Additionally, the petitioner presents no evidence to dispute her liability as a responsible party.

The petitioner contends the underlying assessments against Papa V's LLC were in error. The petitioner cannot object to the underlying assessment during an assessment issued under R.C.

5739.33. The only objections which can be considered are those pertaining to the petitioner's membership in one of the classes held responsible under R.C. 5739.33. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976). The objection is denied.

Therefore, the assessments are affirmed.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

Padmavathi LLC
660 N. Broadway St.
Lebanon, OH 45036

RE: Assessment No.: 100001363548
Sales Tax
Account No.: 83-038988

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

Tax	Pre-Assessment Interest	Penalty	Total
$39,297.51	$4,115.03	$19,648.67	$63,061.21

The petitioner operates as a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from August 17, 2015 through April 30, 2018. A hearing was held on March 31, 2020. Petitioner objected to the audit results and requested a waiver of the interest and penalty.

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., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

A mark-up analysis was conducted using the petitioner's inventory purchase invoices and records provided by the petitioner's distributors. The petitioner stated it failed to maintain the primary sales records required by R.C. 5739.11 because its cash register was incorrectly setup. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco products, pop & soft drinks, energy drinks, other alcohol products, and other taxable merchandise. Each category was assigned a mark-up percentage derived from the product checklist completed with the assistance of the petitioner, suggested retail mark-up percentages,

and state minimum requirements. Since the taxpayer was registered to accept food stamps, pop and energy drink categories were reduced by 25 percent to account for food stamp sales.

A sample period of January 1, 2016 through December 31, 2016 was used as a representation of the entire audit period to calculate taxable sales. Inventory purchase invoices 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 instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon records, summaries, or other information obtained directly from the distributor. In instances when the confirmation of the amount of the taxable inventory purchases could not be obtained from either the taxpayer or the distributor, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor. Taxable inventory purchase amounts derived from distributor summaries or estimates were divided by the number of months in the sample period and recorded as monthly purchase amounts.

All taxable inventory purchases were then listed by category. The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The totals for each category of taxable merchandise were summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales was 40.0783 percent. The reported gross sales for each non-sampled month of the audit period were multiplied by that percentage to determine the calculated taxable sales for each non-sampled month. The calculated taxable sales for each non-sampled month were multiplied by the applicable tax rates in effect throughout the audit period to determine the sales tax liability for each non-sampled month. Sales tax liability for sampled months was determined by multiplying the actual calculated monthly taxable sales for each sampled month by the applicable tax rate. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability.

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).

Cigarette Rebates

The petitioner contends that cigarette rebates from the sample period were not properly accounted for during the audit. The petitioner provided evidence of 2016 rebates from RAI Services Company and Philip Morris USA to substantiate this claim. This contention is well taken. The tax, interest, and penalty have been adjusted below.

APR 29 2020

Interest

The request for remission of pre-assessment interest cannot be considered. The Tax Commissioner lacks jurisdiction to abate pre-assessment interest added to an assessment pursuant to R.C. 5739.133(B). Therefore, the request for interest remission is denied.

Penalty

The petitioner requested a penalty abatement. Given the totality of the circumstances, a partial penalty abatement is warranted.

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$35,401.48	$3,710.14	$8,850.19	$47,961.81

Current records indicate that payments of $20,000.00 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law**. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 0 8 2020

Paresh A Patel
1340 Fox Den Trail
Canfield, OH 44406-8302

Re: Assessment No. 100001068868
Sales Tax (Responsible Party)
Sunrise Convenient Inc.
Account No. 50-100894

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5703.60 and 5739.13, concerning the following sales tax assessment.

Tax	Pre-Assessment Interest	Penalty	Total
$106,880.85	$11,544.95	$53,646.15	$172,071.95

A hearing was not requested on this matter. This is a responsible party assessment. Sunrise Convenient Inc. incurred sales tax liability resulting in a sales tax assessment. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns, those in charge of or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the liability of Sunrise Convenient Inc. has been derivatively assessed against Paresh Patel. Therefore, the only issue that can be considered is whether the petitioner, Paresh Patel, is a responsible party under R.C. 5739.33 for the period of April 1, 2014 through March 31, 2017.

As a threshold matter, it is noted that the petitioner does not present any sufficient objections with regard to his status as the responsible party. Instead, the petitioner states that he doesn't agree with the assessment. The petitioner contends that a petition was filed by Sunrise Convenient Inc. and is pending review. As a result, the petitioner states that, "I kindly request that you remove the assessment notice under my personal name, Paresh Patel, and update your records accordingly." Simply stating that the underlying company has filed a petition and is currently under review does not raise a challenge to the petitioner's status as a responsible party under R.C. 5739.33.

The evidence demonstrates that the petitioner is a responsible party as contemplated by R.C. 5739.33. In accordance with Ohio Adm. Code 5703-9-49 (A)(1), "officer" or "corporate officer" means president, vice-president, treasurer, secretary, or chief executive officer of a corporation, or any person holding a similar title or position in a corporation, limited liability company, or business trust. The evidence in the file establishes that the petitioner is an owner and Chief Executive Officer of Sunrise Convenient Inc. Moreover, the petitioner participated in the audit of Sunrise Convenient Inc. During the audit, the petitioner agreed to the sample period. (Audit Remarks).

This is further evidence that the petitioner is the responsible party. *See Kattola v. McClain,* BTA No. 2017-2292, 2019 WL 6320591 (Nov. 19, 2019).

Additionally, according to documents filed with the Secretary of State, the petitioner was appointed as the Sole Director of Sunrise Convenient Inc., effective January 1, 2013, (Minutes of Shareholders and Directors Meeting for Sunrise Convenient, Inc.). Lastly, the petitioner is listed as an owner on the liquor license. Ohio law holds that the owner of the liquor license is the vendor responsible for the payment of sales tax pursuant to R.C. 5739.13. *Nusseibeh v. Zaino,* BTA No. 00-N-2089, 2002 WL 265570 (Feb. 22, 2002), citing, *Captain Franks's Inc. v. Limbach*, 76 Ohio App.3d 438, 602 N.E.2d 357(1991); *Riley v. Limbach,* BTA No. 83-G-700, 1986 WL 28496 (Aug. 21, 1986). Consequently, the petitioner is one of the class of persons chargeable under R.C. 5739.33.

Accordingly, the assessment is affirmed as issued.

As stated previously, the only issue considered in this case is whether the petitioner is a responsible party. Based on the evidence, the petitioner is a responsible party as contemplated in R.C. 5739.33 for the period in question. However, the evidence establishes that Sunrise Convenient Inc. has paid the corresponding underlying assessment in full. Therefore, the outstanding sales tax liability for the period in question has been satisfied.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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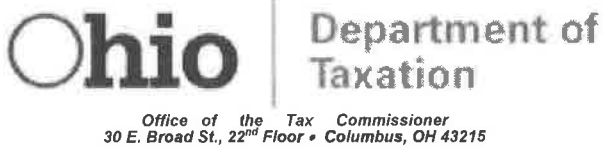

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: APR 08 2020

Shilpa P Patel
1340 Fox Den Trail
Canfield, OH 44406-8302

Re: Assessment No. 100001068869
Sales Tax (Responsible Party)
Sunrise Convenient Inc.
Account No. 50-100894

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5703.60 and 5739.13 concerning the following sales tax assessment.

Tax	Pre-Assessment Interest	Penalty	Total
$106,880.85	$11,544.95	$53,646.15	$172,071.95

A hearing was not requested on this matter. This is a responsible party assessment. Sunrise Convenient Inc. incurred sales tax liability resulting in a sales tax assessment. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns, those in charge of or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the liability of Sunrise Convenient Inc. has been derivatively assessed against Shilpa Patel. Therefore, the only issue that can be considered is whether the petitioner, Shilpa Patel, is a responsible party under R.C. 5739.33 for the period of April 1, 2014 through March 31, 2017.

As a threshold matter, it is noted that the petitioner does not present any sufficient objections with regard to her status as the responsible party. Instead, the petitioner states that she doesn't agree with the assessment. The petitioner then contends that a petition was filed by Sunrise Convenient Inc. and is pending review. As a result, the petitioner states that "I kindly request to remove the assessment notice under my personal name, Shilpa Patel, and update your records accordingly." Simply stating that the underlying company has filed a petition and is currently under review does not raise a challenge to the petitioner's status as a responsible party under R.C. 5739.33.

The evidence demonstrates that the petitioner is a responsible party as contemplated by R.C. 5739.33. In accordance with Ohio Adm. Code 5703-9-49 (A)(1), "officer" or "corporate officer" means president, vice-president, treasurer, secretary, or chief executive officer of a corporation, or any person holding a similar title or position in a corporation, limited liability company, or business trust.

The petitioner is listed as an owner and vice president of Sunrise Convenient Inc. on the liquor license. Ohio law holds that the owner of the liquor license is the vendor responsible for the payment of sales tax pursuant to R.C. 5739.13. *Nusseibeh v. Zaino,* BTA No. 00-N-2089, 2002 WL 265570 (Feb. 22, 2002), citing, *Captain Franks' Inc. v. Limbach*, 76 Ohio App.3d 438, 602 N.E.2d 357(1991); *Riley v. Limbach,* BTA No. 83-G-700, 1986 WL 28496 (Aug. 21, 1986). Consequently, the petitioner is one of the class of persons chargeable under R.C. 5739.33.

Accordingly, the assessment is affirmed as issued.

As stated previously, the only issue considered in this case is whether the petitioner is a responsible party. Based on the evidence, the petitioner is a responsible party as contemplated in R.C. 5739.33 for the period in question. However, the evidence establishes that Sunrise Convenient Inc. has paid the corresponding underlying assessment in full. Therefore, the outstanding sales tax liability for the period in question has been satisfied.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Office of the Tax Commissioner
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FINAL DETERMINATION

Date: APR 17 2020

S&S Processing of Pennsylvania, Inc.
P.O. Box 373
West Pittsburgh, PA 16160

Re: Refund Claim No. 201803876
Filed December 1, 2017
Account No.: 99-042140
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of $3,177.10 of sales tax filed pursuant to R.C. 5739.07.

The claimant ("S&S") is a producer of soil products and provides installation and maintenance services of the same. Its offices are located in West Pittsburgh, Pennsylvania. Its refund request is based upon several transactions upon which S&S states that both Ohio and Pennsylvania taxes were collected and paid. A hearing was not requested.

The claimant filed its refund application on December 1, 2017 with invoices indicating tax paid to Ohio. The agent of the Tax Commissioner who reviewed the refund application determined that the claimant had failed to provide sufficient proof of sales tax paid to Pennsylvania for the underlying transactions. The agent denied the claim, requesting cancelled checks or other proof of payment of Pennsylvania tax. The agent further noted that if Pennsylvania returns were submitted as proof of payment then S&S should provide accrual records in addition to the Pennsylvania return. The claimant subsequently appealed, stating that it had amended its Ohio and Pennsylvania returns to reflect the alleged Ohio overpayment. It provided handwritten figures, two credit memos for price difference on invoices, a summary spreadsheet listing each invoice's alleged price and tax figure discrepancies, and a copy of a Pennsylvania tax portal payment page. When a claimant provides additional information and does not request a hearing, the Commissioner shall review the information and make adjustments to the refund or compensation as the Commissioner finds proper. R.C. 5730.70(C)(2).

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, 6 (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. 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. *CSI Controls v. Testa*, BTA No. 2017-122, 2018 WL 1372809, *1 (January 4, 2018).

A taxpayer is entitled to a refund of taxes that were paid illegally or erroneously. R.C. 5739.07(B). This requires a claimant to provide information of undisputed facts that taxes were not only paid, but paid in a sum certain. *Id.* at *2. The statute also requires that the vendor must refund the full amount of sales tax paid to the consumer. R.C. 5739.07(A). The claimant states it charged, filed, and paid Ohio taxes in the amount of $3,177.10, but amended its return based upon the fact that all deliveries were sent and received in Pennsylvania. The agent reviewing S&S's claim requested proof of payment to Pennsylvania, including a request for the back-up accounting information if the claimant wanted to use its Pennsylvania tax return as proof of taxes paid. The claimant did not provide the requested information. Instead, the claimant provided a printout that appears to be a payment to the state of Pennsylvania for sales tax in the amount of $5,451.23. It also included handwritten calculations on that printout without any backup information. It further included two credit memos correcting the prices on two invoices and a spreadsheet that appears to attempt to illustrate the differences between prices in Ohio and Pennsylvania. The claimant did not provide any proof it reimbursed the consumer for Ohio tax.

Based upon the foregoing, the claimant has not shown it is entitled to a refund. Simply put, the claimant has not presented any documentary evidence that the sales tax paid to Pennsylvania included the transactions the claimant believes reflect taxes erroneously paid to Ohio. The printout from the state of Pennsylvania does not include a filing period. It does not even appear to be a sales tax return. Additionally, the claimant states it paid the taxes for the Ohio transactions in its sales tax return for the period of September of 2017, but claimant also states it paid taxes for these September transactions on its Pennsylvania return for the period of October of 2017. The Commissioner cannot determine that any refund is due from the information provided. The claimant has not provided proof of taxes paid to Pennsylvania on the transactions at issue. It further failed to show proof of refund of Ohio sales tax to the consumer as required by R.C. 5739.07(A). Therefore, the Tax Commissioner cannot conclude that the claimant has met its burden to show it is entitled to a refund.

The claimant has not met its burden to show that denial of its refund application was improper. It has failed to provide the necessary evidence that it is entitled to a refund. As a result, the Tax Commissioner concludes that the agent properly denied the refund.

Therefore, the claim for refund is denied.

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

FINAL DETERMINATION

Date:

APR 0 8 2020

Basem Saleh
2476 Danforth St.
Hamtramck, MI 48212

Re: 7 Assessments
Sales Tax (Responsible Party)
Glass City Express, Inc.
Vendor's License No. 48-176981

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

Assessment No.	Time Period	Total
100001308463	07/01/14 – 12/31/14	$3,002.70
100001308465	01/01/15 – 06/30/15	$3,017.97
100001308473	07/01/15 – 12/31/15	$3,346.42
100001308474	01/01/16 – 06/30/16	$3,987.60
100001308475	07/01/16 – 12/31/16	$4,699.41
100001308476	01/01/17 – 06/30/17	$5,309.60
100001308477	07/01/17 – 12/31/17	$6,046.99
	Total:	$29,410.69

These are responsible party assessments. Glass City Express, Inc. incurred sales tax liability resulting in assessments for periods shown above. These assessments were never satisfied by Glass City Express, Inc. and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns and those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Glass City Express, Inc. has been derivatively assessed against Basem Saleh. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods shown above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. No hearing was requested.

The petitioner contends that he was not a responsible party during the periods at issue. The petitioner provided a signed agreement to prove that there was a sale of the business on July 1, 2011.

Accordingly, the assessments are 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.

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

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 17 2020

Southern Alum Finishing
1581 Huber St. NW
Atlanta, GA 30318

RE: Refund Claim No.: 201900142
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund in the amount of $143.88 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

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

The claimant filed an amended sales tax return and requested a refund for an overpayment of sales tax in the amount of $143.88 for the period from September 1, 2017 through September 30, 2017. The Department informed the claimant during the initial denial that the Department requires additional evidence to support the sales tax liability the claimant reported on its amended return filed, such as sales journals, cash register receipts, or summary reports used to prepare the tax return.

The claimant submitted a document that is labeled sales tax receipt and several invoices from sales made during the reporting period. However, the sales tax receipt document is not explained, and it is not clear how this document supports the request for a refund. The invoices submitted provide support for the amended return, however, no documentation has been submitted to explain the original return. There are substantial differences between the original return and the amended return for which the claimant has offered no explanation. Further, the sales tax liability based on the invoices submitted, does not match the tax liability on the original or amended return. The claimant has not satisfied its burden that the claimant is entitled to a refund as required by R.C. 5739.07. The evidence submitted is insufficient to warrant a refund of the sales tax.

The claim for a refund is denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 17 2020

Sunrise Convenient, Inc.
10960 Akron Canfield Road
Ellsworth, OH 44416

Re: Assessment No. 100000938306
Sales Tax
Account No. 50-100894

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5703.60 and 5739.13.

This assessment is the result of an audit of the petitioner's sales from April 1, 2014 through March 31, 2017. The petitioner withdrew its objections except the request to abate the penalty.

Based upon the information in the file, the request to reduce the penalty is granted.

The assessment is adjusted as follows:

Tax	$107,292.45
Penalty	$18,776.18
Preassessment Interest	$9,145.43
Post-assessment Interest	$8,984.97
Total	$144,199.03

The petitioner has paid $144,199.03 on this assessment. Accordingly, 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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

Uttam Inc.
22 W. Long St.
Akron, OH 44301

Re: Assessment No.: 100001412407
Sales Tax
Account No.: 77-194471

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

Tax	Pre-Assessment Interest	Penalty	Total
$87,243.66	$8,974.15	$43,621.60	$139,839.41

The petitioner operates a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales for the period from September 1, 2015 through October 31, 2018. The petitioner filed a petition for reassessment. A hearing was requested, but neither the petitioner nor its representative attended the telephonic hearing on March 23, 2020.

On March 23, 2020 the petitioner's representative contacted the Department via email and withdrew the petition for reassessment.

Accordingly, the matter is dismissed.

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, OH 43216-2678.

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APR 29 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.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 0 8 2020

Karen R. Wightman
1432 Millstream Dr.
Beavercreek, OH 45432

Re: 68 Assessments
Tax Type: Sales (Responsible Party)
Precision Autosports, LLC
Vendor's License No.: 29-035359

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

Assessment No.	Filing Period	Total
100001425163	07/01/06 – 07/31/06	$6,859.13
100001425164	02/01/06 – 02/28/06	$1,607.65
100001425166	03/01/06 – 03/31/06	$329.45
100001425167	03/01/06 – 03/31/06	$617.24
100001425168	09/01/06 – 09/30/06	$5,143.31
100001425169	11/01/06 – 11/30/06	$1,411.76
100001425170	06/01/06 – 06/30/06	$589.59
100001425171	04/01/06 – 04/30/06	$1,201.36
100001425172	04/01/06 – 04/30/06	$1,267.22
100001425173	12/01/06 – 12/31/06	$1,035.81
100001425174	10/01/06 – 10/31/06	$2,760.86
100001425175	05/01/06 – 05/31/06	$2,541.54
100001425176	02/01/06 – 02/28/06	$1,290.20
100001425177	05/01/06 – 05/31/06	$1,194.44
100001425178	04/01/07 – 04/30/07	$1,499.89
100001425179	10/01/07 – 10/31/07	$533.81
100001425180	01/01/07 – 01/31/07	$2,936.13
100001425181	05/01/07 – 05/31/07	$3,836.49
100001425182	11/01/07 – 11/30/07	$1,437.26
100001425183	03/01/07 – 03/31/07	$4,096.15
100001425184	08/01/07 – 08/31/07	$1,154.04
100001425185	02/01/07 – 02/28/07	$4,131.87
100001425187	12/01/06 – 12/31/06	$1,147.57

100001425188	08/01/06 – 08/31/06	$2,299.88
100001425189	10/01/07 – 10/31/07	$3,740.59
100001425190	12/01/07 – 12/31/07	$974.02
100001425191	02/01/07 – 02/28/07	$1,411.92
100001425192	04/01/07 – 04/30/07	$4,127.79
100001425193	03/01/07 – 03/31/07	$4,229.18
100001425194	05/01/07 – 05/31/07	$2,190.85
100001425195	08/01/07 – 08/31/07	$3,777.31
100001425209	01/01/09 – 01/31/09	$1,989.16
100001425210	08/01/09 – 08/31/09	$2,925.21
100001425211	09/01/09 – 09/30/09	$1,226.70
100001425212	03/01/09 – 03/31/09	$1,976.23
100001425213	05/01/09 – 05/31/09	$1,365.13
100001425214	11/01/09 – 11/30/09	$1,282.87
100001425215	02/01/09 – 02/28/09	$303.27
100001425216	02/01/09 – 02/28/09	$1,983.30
100001425218	01/01/09 – 01/31/09	$4,054.16
100001425219	07/01/09 – 07/31/09	$4,084.34
100001425220	07/01/09 – 07/31/09	$160.16
100001425221	10/01/09 – 10/31/09	$1,667.45
100001425222	03/01/09 – 03/31/09	$399.77
100001425223	04/01/09 – 04/30/09	$1,436.71
100001425224	06/01/09 – 06/30/09	$1,977.86
100001425225	09/01/08 – 09/30/08	$4,532.34
100001425226	02/01/08 – 02/29/08	$2,574.45
100001425227	09/01/08 – 09/30/08	$2,486.03
100001425228	01/01/08 – 01/31/08	$2,586.24
100001425229	04/01/08 – 04/30/08	$6,168.19
100001425230	12/01/08 – 12/31/08	$380.20
100001425231	02/01/08 – 02/29/08	$4,002.13
100001425232	08/01/08 – 08/31/08	$2,497.12
100001425233	06/01/08 – 06/30/08	$4,147.83
100001425234	05/01/08 – 05/31/08	$1,031.44
100001425235	05/01/08 – 05/31/08	$2,561.27
100001425236	01/01/08 – 01/31/08	$2,618.14
100001425237	10/01/08 – 10/31/08	$2,471.18
100001425238	12/01/08 – 12/31/08	$2,450.79
100001425239	11/01/08 – 11/30/08	$2,031.46
100001425240	10/01/08 – 10/31/08	$69.50
100001425241	08/01/08 – 08/31/08	$840.12

100001425242	07/01/08 – 07/31/08	$1,533.58
100001425243	03/01/08 – 03/31/08	$2,561.31
100001425244	07/01/08 – 07/31/08	$2,508.73
100001425245	06/01/08 – 06/30/08	$2,523.46
100001425247	04/01/08 – 04/30/08	$2,550.01
	Total:	$153,331.95

These are responsible party assessments. Precision Autosports, LLC incurred sales tax liability resulting in sales tax assessments for the above periods. These assessments were never fully satisfied by Precision Autosports, LLC and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liabilities of Precision Autosports, LLC have been derivatively assessed against Karen Wightman. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalties can be considered. No hearing was requested.

The petitioner objects to the assessments. The petitioner contends that her divorce decree, which was finalized on November 4, 2011, legally severed all of her ties to her former husband's businesses. She states that the decree holds her harmless as to all past, present, and future liabilities arising out of either of her former husband's entities. She contends that the decree further indicates that her ex-husband is responsible for any and all debts, taxes, liens, judgments, and all other financial obligations of his entities. These contentions are not well taken.

The evidence indicates that the petitioner signed the articles of organization as a member of Precision Autosports, LLC on July 15, 2005. The petitioner owned a fifty percent share of Precision Autosports, LLC during the above assessment periods. The petitioner was listed as the vice-president/partner on the county vendor's license application for Precision Autosports, LLC.

The petitioner contends that her ex-husband is the responsible party. However, the fact that one person may be responsible does not absolve another of liability. *Perry v. Tracy*, BTA No. 98-M-8, 1998 WL 741927 (Oct. 16, 1998). R.C. 5739.33 requires personal liability to fall on any officer or employee having the requisite indices of responsibility. *Beck v. Tracy*, BTA No. 96-K-156, 1997 WL 40124 (Jan. 17, 1997). (Emphasis added.) As part of the divorce decree, the petitioner had to transfer her fifty percent ownership interest in Precision Autosports, LLC either back to the company or to her former husband, in order to be held harmless from all liabilities associated with the company. The divorce decree cannot retroactively remove the requisite indices of responsibility that the petitioner held during the assessment periods listed above. Furthermore, the terms of the divorce decree are not binding on the Tax Commissioner.

The petitioner failed to provide any evidence to demonstrate that she was not a member of the company during the above listed periods. The petitioner failed to demonstrate that the assessments were in error. Therefore, it is determined that the petitioner was a responsible party of Precision Autosports, LLC under R.C. 5739.33.

Accordingly, the assessments are affirmed as issued.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

Provider I Irrevocable Trust DTD Feb 14 2011
201 South Phillips Ave, Suite 235
Sioux Falls, SD 57104

Re: Assessment No. 16201402804816
Trust Income Tax - 2011

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

Tax	Interest	Penalty	Total
$86,901.00	$4,759.00	$9,518.00	$101,178.00

The Department assessed the petitioner after making adjustments to the Ohio Form 1041 Fiduciary Income Tax Return that it filed for the period in question. The petitioner filed a timely petition for reassessment objecting to and requesting a cancellation of the assessment currently considered. In addition, the petitioner requested a hearing on this matter which was conducted at the Department's offices in Columbus, Ohio. During the administrative appeal period, the petitioner presented evidence and arguments which support its contentions. Therefore, upon further review, the petitioner's request is well-taken.

Accordingly, the assessment is cancelled.

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

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

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

Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

Provider II Irrevocable Trust DTD Feb 14 2011
201 South Phillips Ave, Suite 235
Sioux Falls, SD 57104

Re: Assessment No. 16201402804820
Trust Income Tax - 2011

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

Tax	Interest	Penalty	Total
$86,901.00	$4,759.00	$9,518.00	$101,178.00

The Department assessed the petitioner after making adjustments to the Ohio Form 1041 Fiduciary Income Tax Return that it filed for the period in question. The petitioner filed a timely petition for reassessment objecting to and requesting a cancellation of the assessment currently considered. In addition, the petitioner requested a hearing on this matter which was conducted at the Department's offices in Columbus, Ohio. During the administrative appeal period, the petitioner presented evidence and arguments which support its contentions. Therefore, upon further review, the petitioner's request is well-taken.

Accordingly, the assessment is cancelled.

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

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

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

Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

Provider III Irrevocable Trust DTD Feb 14 2011
201 South Phillips Ave, Suite 235
Sioux Falls, SD 57104

Re: Assessment No. 16201402804821
Trust Income Tax - 2011

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

Tax	Interest	Penalty	Total
$86,901.00	$4,759.00	$9,518.00	$101,178.00

The Department assessed the petitioner after making adjustments to the Ohio Form 1041 Fiduciary Income Tax Return that it filed for the period in question. The petitioner filed a timely petition for reassessment objecting to and requesting a cancellation of the assessment currently considered. In addition, the petitioner requested a hearing on this matter which was conducted at the Department's offices in Columbus, Ohio. During the administrative appeal period, the petitioner presented evidence and arguments which support its contentions. Therefore, upon further review, the petitioner's request is well-taken.

Accordingly, the assessment is cancelled.

Current records indicate that no payments have been applied to this assessment, leaving no refund due the petitioner. 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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 29 2020

Provider IV Irrevocable Trust DTD Feb 14 2011
201 South Phillips Ave, Suite 235
Sioux Falls, SD 57104

Re: Assessment No. 16201402804822
Trust Income Tax - 2011

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

Tax	Interest	Penalty	Total
$86,901.00	$4,759.00	$9,518.00	$101,178.00

The Department assessed the petitioner after making adjustments to the Ohio Form 1041 Fiduciary Income Tax Return that it filed for the period in question. The petitioner filed a timely petition for reassessment objecting to and requesting a cancellation of the assessment currently considered. In addition, the petitioner requested a hearing on this matter which was conducted at the Department's offices in Columbus, Ohio. During the administrative appeal period, the petitioner presented evidence and arguments which support its contentions. Therefore, upon further review, the petitioner's request is well-taken.

Accordingly, the assessment is cancelled.

Current records indicate that no payments have been applied to this assessment, leaving no refund due the petitioner. 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

0000000187

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 29 2020

Provider V Irrevocable Trust DTD Feb 14 2011
201 South Phillips Ave, Suite 235
Sioux Falls, SD 57104

Re: Assessment No. 16201402804824
Trust Income Tax - 2011

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

Tax	Interest	Penalty	Total
$86,901.00	$4,759.00	$9,518.00	$101,178.00

The Department assessed the petitioner after making adjustments to the Ohio Form 1041 Fiduciary Income Tax Return that it filed for the period in question. The petitioner filed a timely petition for reassessment objecting to and requesting a cancellation of the assessment currently considered. In addition, the petitioner requested a hearing on this matter which was conducted at the Department's offices in Columbus, Ohio. During the administrative appeal period, the petitioner presented evidence and arguments which support its contentions. Therefore, upon further review, the petitioner's request is well-taken.

Accordingly, the assessment is cancelled.

Current records indicate that no payments have been applied to this assessment, leaving no refund due the petitioner. 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

0000000188

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

FINAL DETERMINATION

Date: APR 29 2020

Provider VI Irrevocable Trust DTD Feb 14 2011
201 South Phillips Ave, Suite 235
Sioux Falls, SD 57104

Re: Assessment No. 16201402804825
Trust Income Tax - 2011

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

Tax	Interest	Penalty	Total
$86,901.00	$4,759.00	$9,518.00	$101,178.00

The Department assessed the petitioner after making adjustments to the Ohio Form 1041 Fiduciary Income Tax Return that it filed for the period in question. The petitioner filed a timely petition for reassessment objecting to and requesting a cancellation of the assessment currently considered. In addition, the petitioner requested a hearing on this matter which was conducted at the Department's offices in Columbus, Ohio. During the administrative appeal period, the petitioner presented evidence and arguments which support its contentions. Therefore, upon further review, the petitioner's request is well-taken.

Accordingly, the assessment is cancelled.

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

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

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Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 17 2020

Luis F. Amunategui
3122 Huntington Rd.
Shaker Heights, OH 44120

Re: Assessment No. 100001016390
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$1,923.75	$255.19	$193.94	$2,372.88

This assessment was issued based upon the conduct of a special audit of a registered aircraft transaction. On June 2, 2014, Luis Amunategui received title to a 2002 Air Creations GTE 912 and other tangible personal property via a broker, R.O. Merret VanDam. No sales tax was paid during the transaction. No hearing was requested.

The petitioner contends that the Department erred in assessing use tax due on the entire transaction in which he purchased his aircraft. The petitioner states that he responded to the questionnaire with incorrect information, and, as a result, he overstated the purchase price of the aircraft, which serves as the basis for this assessment. He contends that he is only liable for the use tax due on the aircraft that he purchased, and not the other tangible personal property he bought in conjunction with the aircraft. These contentions are not well taken.

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of services provided, with it being the obligation of the user to file a return and remit tax on the purchase of such items when tax was not paid to a seller. "Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever: * * * all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred. R.C. 5739.01(B)(1). "Price," * * * means the total amount of consideration, including cash, credit, property, and services for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise. R.C. 5739.01(H)(1)(a).

The evidence submitted with the petition for reassessment shows that no sales tax was collected during the transaction in which the petitioner bought, through a broker, his aircraft to store, use, or consume in Ohio. Since a broker is an entity engaged in the business of making retail sales, tax

should have been remitted on the transaction. The receipt shows that the petitioner simultaneously purchased, in the same transaction, six additional items that constitute tangible personal property to be stored, used, or consumed in Ohio. Therefore, the price of the entire transaction was taxable, and the petitioner's objection is denied.

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments of $630.85 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, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:

APR 08 2020

Apple Ohio LLC
6200 Oak Tree Blvd, Ste 250
Independence, OH 44131

Re: Refund Claim No. 201702601

The final determination of the Tax Commissioner dated March 18, 2020 on page 261 is hereby vacated and replaced with the following.

This is the final determination of the Tax Commissioner on an application for refund, in the total amount of $10,294.39 in use tax filed pursuant to R.C. 5739.07.

The claim was initially denied. The claimant disagreed with the denial and requested a reconsideration of the refund claim. The claimant also submitted additional information for review. A hearing was held on the matter.

The information supplied by the claimant indicates that the refund is warranted.

Therefore, the claim is approved.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 0 8 2020

BABE, LLC
1225 Cleveland Rd. W.
Huron, OH 44839

RE: Assessment No.: 100000766238
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$42,963.51	$8,220.00	$6,444.52	$57,628.03

This assessment is the result of an audit of the petitioner's purchase of three vehicles. The facts indicate that BABE, LLC, a Montana business was formed by David M. Dreffer on October 29, 2009.[1] The petitioner and Mr. Dreffer purchased a 2010 Spartan motorhome in December 2009, a 2005 Chrysler PT Cruiser Convertible in August 2010, and a 2008 Spartan motorhome in February 2013. These vehicles were purchased under BABE, LLC and two of the three vehicles were initially registered in the state of Montana and one was purported to be registered in Montana. However, the evidence in the file demonstrates that the petitioner's sole owner, Mr. Dreffer was a full-time resident of Ohio at the time of these purchases. The evidence further demonstrates that the petitioner and Mr. Dreffer failed to pay tax to any jurisdiction on these purchases. As a result, an assessment was issued. The petitioner filed a petition for reassessment through its owner, Mr. Dreffer. A hearing was not requested.

Background

Montana does not have a sales tax or a use tax. Some practitioners advertise that people can form Montana LLCs and avoid paying tax on the purchase of a recreational vehicle. For instance, Action Services, LLC's website states,

> "Montana LLC by statute can be established to be used as holding companies. For those looking to minimize the overall cost of vehicle ownership Montana is very unique. We have no sales or use tax on vehicle purchases, no personal property tax or ad valarom tax, and reasonable registration fees.

[1] Montana Secretary of State website. https://www.mtsosfilings.gov/mtsos-corporations/viewInstance/view.html?id=8383adccf3cbf69372998a953a3446184805a5473cb37e7eb05e76748aea502a&_timestamp=12752884478933717

> It is best to establish the company prior to purchasing, especially if financing. You own the company, the company owns the vehicles and you authorize yourself or other drivers to use those vehicles.
>
> Join the savvy informed thousands that have our services as part of their strategic financial plan to help minimize their tax liability and operation costs." https://www.actionservices-mt.com/services.html.[2]

The typical scenario involves a resident of another state, such as Ohio, who wants to purchase a motorhome, recreational vehicle, boat, automobile, etc. and avoid paying tax on the purchase. The person forms an LLC, usually with the help of a Montana tax or law practitioner. The title of the vehicle is put in the name of the Montana LLC and the LLC obtains a Montana license plate for the vehicle.

The petitioner purchased three vehicles. He did not pay sales or use tax to Montana because Montana imposes no sales tax on the purchase of vehicles by its residents. The petitioner claimed the vehicles were being purchased by its Montana LLC. Action Services, LLC is the registered agent for BABE, LLC.[3] In addition to listing Action Services, LLC as its agent, BABE, LLC lists its principal office address as the same address as Action Services, LLC mailing address on the Montana Secretary of State's website.[4]

Action Services LLC's website provides a detailed description of the services it provides to its clients. Action Services manages the legal relationships needed to form and maintain the LLC in Montana. Action Services provides the following services and information to clients:

- 1 hour expedited filings for same day service
- Draft and file Articles of Organization, process your title work & send you the plates
- Buy only in the name of your LLC.
- If you RV Full Time and are searching for a state to domicile in, we can provide information on popular choices. Usually a state without an income tax. We can assist you to ascertain which is best for you and your objectives.
- Please let us know If you would like us to send your plates and registration to an alternative address.[5]

It is clear that Action Services, LLC and similar practitioners perform all the duties and paperwork associated with forming and managing the LLCs, including registering vehicles,

---

[2] Many practitioners advertise its services informing customers that they can form LLCs and purchase an RV without paying sales tax. See for example, https://www.actionservices-mt.com/services.html; https://www.49dollarmontanaregisteredagent.com/montana-registration/rv-motorhome; https://community.fmca.com/blogs/entry/847-montana-llc-rv-titling-tax-avoidance-or-tax-evasion/

[3] BABE, LLC's principal office address is Action Services, LLC's address. *See* Montana Secretary of State's website for both addresses. https://www.mtsosfilings.gov/mtsos-corporations/viewInstance/view.html?id=8383adccf3cbf69372998a953a3446184805a5473cb37e7eb05e76748aea502a&_timestamp=12752884478933717

[4] *Id.*

[5] https://www.actionservices-mt.com/ClientInfo.html

purchasing the license plates, and sending those items to an alternative address of the individual's choosing. As with the petitioner, the LLC's address is often the address of the practitioner that set up the LLC. The evidence establishes that LLCs are formed for no other purpose other than to avoid sales tax and other associated costs related to owning the vehicles.

Sham Transaction

The petitioner objects to the amount of the assessment but does not contest his individual liability or that the LLC is not the owner of the vehicles. Pursuant to R.C. 5703.56, a transaction without economic substance because there is no business purpose other than obtaining tax benefits is a "sham transaction" and may be disregarded by the Tax Commissioner for the purposes of determining tax liability.

The Department of Taxation contacted the petitioner in January of 2017 regarding the use or storage of the aforementioned vehicles. The Department informed the petitioner of its obligation under R.C. 5741.02 to pay use tax on the purchases of vehicles used or stored in the State of Ohio, even if the vehicles were purchased in another state. The Department requested the petitioner demonstrate that it either paid tax already, if tax was not paid, to remit use tax to Ohio, or explain why the vehicles are exempt from use tax. Letter from Tax Discovery Division, dated January 23, 2017.

The petitioner responded in a letter dated February 8, 2017 but did not provide the requested information. Instead, the petitioner merely stated that he does not own or have control over the vehicles mentioned in the letter. In letters dated February 21, 2017 and May 26, 2017, the Department informed the petitioner that its response was insufficient and informed him again to provide the requested documentation, including but not limited to the location where each vehicle is or was stored and used since acquiring the vehicles, whether the petitioner is a resident of Ohio, and proof of the purchase price of each vehicle. The Department informed the petitioner that if it did not receive the relevant requested information by June 16, 2017, an assessment would be issued. The Department did not receive any further information from the petitioner. As a result, an assessment was issued on August 28, 2017.

The petitioner did not provide all of the requested documents. The petitioner provided only evidence of the purchase of all three vehicles. The petitioner objects to the amount listed in the assessment and contends that the Department used an incorrect valuation method by utilizing the manufacturer's suggested retail price (MSRP), rather than the actual purchase price of the vehicles. The petitioner contends that the amount in the assessment is overstated as the incorrect pricing of each vehicle was used. Additionally, the petitioner contends the assessment is overstated because it includes a vehicle that must be excluded because it was purchased outside of the statute of limitations period.

The petitioner does not object to the substance of the assessment or challenge the fact that he owes use tax as an Ohio resident storing and using the vehicles in Ohio. The evidence in file demonstrates the petitioner formed an LLC for the sole purpose of avoiding sales or use tax on the

purchase of the vehicles. The petitioner did not supply evidence such as an EIN or tax return information to verify the LLC is actually conducting business.

As determined above, the facts in this case demonstrate that the petitioner formed the LLC for the sole purpose of avoiding sales or use tax on the purchase. It is not the petitioner's contention that he formed a Montana LLC to actually do business. Therefore, for the purposes of determining tax liability, the petitioner and BABE, LLC are indistinguishable as the owners of the vehicles. Due to the conflicting ownership and registration information, the Tax Commissioner issued an assessment against both the petitioner and BABE, LLC which was proper under *Satullo v. Wilkens*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954. These assessments were not issued with the intention of collecting the tax twice, but rather to ensure the proper party paid the outstanding tax liability. *Id.*

Statute of limitations

The petitioner contends that one of the vehicles, the 2010 Spartan motorhome, was purchased more than seven years prior to the assessment. The petitioner states that this portion of the assessment has been issued outside of the 7-year limitation set forth in R.C. 5703.58. Pursuant to R.C. 5741.16(C)(2), when a taxpayer fails to file the required return and pay the tax, the statute of limitations does not apply. The petitioner has not filed a return and has not paid tax on the purchase. Additionally, the petitioner incorrectly applies R.C. 5703.58, as this Section applies a statute of limitations for use tax acquired prior to 2008. The petitioner purchased the vehicle in 2009. Therefore, the objection is denied.

Penalty

The petitioner requests abatement of the penalty and an adjustment to the sales tax owed on the purchases. The petitioner contends the assessment lists an incorrect amount of sales tax owed as the Department of Taxation utilized the manufacturer's suggested retail price (MSRP), rather than the actual purchase price of the vehicles. The petitioner provided sufficient evidence to demonstrate the actual purchase price of the vehicles. Therefore, the assessment shall be adjusted to account for the actual purchase price of the vehicles. The request for an adjustment of the tax due is granted. As such, interest, and penalty shall be adjusted to reflect this change. Accordingly, the request for a penalty abatement is granted in part.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$37,895.52	$7,313.00	$5,684.32	$50,892.84

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

made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000138

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 17 2020

Cliffs Natural Resources, Inc.
200 Public Square, Ste. 3300
Cleveland, OH 44114

Re: Refund Claim No. 201606700 & 201606701

This is the final determination of the Tax Commissioner on applications for refund, in the total amount of $1,086,101.07 in use tax filed pursuant to R.C. 5739.07.

The claims were partially approved in the amount of $173,911.85. The claimant disagreed with the reduction and requested reconsideration of the claims.

In resolution of the matter, the claimant has agreed to reduce the remaining amount claimed on the application for refund.

Therefore, the claims are approved in the adjusted amount of $683,958.67, with appropriate interest.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 17 2020

David Dreffer
1225 Cleveland Rd. W.
Huron, OH 44839

RE: Assessment No.: 100000766240
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$42,963.51	$8,220.00	$6,444.52	$57,628.03

This assessment is the result of an audit of the petitioner's purchase of three vehicles. The facts indicate that David Dreffer formed BABE, LLC, a Montana business on October 29, 2009.[1] Using the Montana LLC, the petitioner purchased a 2010 Spartan motorhome in December 2009, a 2005 Chrysler PT Cruiser Convertible in August 2010, and a 2008 Spartan motorhome in February 2013. These vehicles were purchased under BABE, LLC and two of the three vehicles were initially registered in the state of Montana and one was purported to be registered in Montana. However, the evidence in the file demonstrates that David Dreffer was a full-time resident of Ohio at the time of these purchases. The evidence further demonstrates that the petitioner failed to pay tax to any jurisdiction on these purchases. As a result, an assessment was issued against both the corporate entity and the petitioner. The petitioner filed a petition for reassessment. A hearing was not requested.

Background

Montana does not have a sales tax or a use tax. Some practitioners advertise that people can form Montana LLCs and avoid paying tax on the purchase of a recreational vehicle. For instance, Action Services, LLC's website states,

> "Montana LLC by statute can be established to be used as holding companies. For those looking to minimize the overall cost of vehicle ownership Montana is very unique. We have no sales or use tax on vehicle purchases, no personal property tax or ad valarom tax, and reasonable registration fees.

[1] Montana Secretary of State website. https://www.mtsosfilings.gov/mtsos-corporations/viewInstance/view.html?id=8383adccf3cbf69372998a953a3446184805a5473cb37e7eb05e76748aea502a&_timestamp=12752884478933717

> It is best to establish the company prior to purchasing, especially if financing. You own the company, the company owns the vehicles and you authorize yourself or other drivers to use those vehicles.
>
> Join the savvy informed thousands that have our services as part of their strategic financial plan to help minimize their tax liability and operation costs." https://www.actionservices-mt.com/services.html.[2]

The typical scenario involves a resident of another state, such as Ohio, who wants to purchase a motorhome, recreational vehicle, boat, automobile, etc. and avoid paying tax on the purchase. The person forms a LLC, usually with the help of a Montana tax or law practitioner. The title of the vehicle is put in the name of the Montana LLC and the LLC obtains a Montana license plate for the vehicle.

The petitioner purchased three vehicles. He did not pay sales or use tax to Montana because Montana imposes no sales tax on the purchase of vehicles by its residents. The petitioner claimed the vehicles were being purchased by its Montana LLC. Action Services, LLC is the registered agent for BABE, LLC.[3] In addition to listing Action Services, LLC as its agent, BABE, LLC lists its principal office address as the same address as Action Services, LLC mailing address on the Montana Secretary of State's website.[4]

Action Services LLC's website provides a detailed description of the services it provides to its clients. Action Services manages the legal relationships needed to form and maintain the LLC in Montana. Action Services provides the following services and information to clients:

- 1 hour expedited filings for same day service
- Draft and file Articles of Organization, process your title work & send you the plates
- Buy only in the name of your LLC.
- If you RV Full Time and are searching for a state to domicile in, we can provide information on popular choices. Usually a state without an income tax. We can assist you to ascertain which is best for you and your objectives.
- Please let us know If you would like us to send your plates and registration to an alternative address.[5]

It is clear that Action Services, LLC and similar practitioners perform all the duties and paperwork associated with forming and managing the LLCs, including registering vehicles,

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[2] Many practitioners advertise its services informing customers that they can form LLCs and purchase an RV without paying sales tax. See for example, https://www.actionservices-mt.com/services.html; https://www.49dollarmontanaregisteredagent.com/montana-registration/rv-motorhome; https://community.fmca.com/blogs/entry/847-montana-llc-rv-titling-tax-avoidance-or-tax-evasion/

[3] BABE, LLC's principal office address is Action Services, LLC's address. *See* Montana Secretary of State's website for both addresses. https://www.mtsosfilings.gov/mtsos-corporations/viewInstance/view.html?id=8383adccf3cbf69372998a953a3446184805a5473cb37e7eb05e76748aea502a&_timestamp=12752884478933717

[4] *Id.*

[5] https://www.actionservices-mt.com/ClientInfo.html

purchasing the license plates, and sending those items to an alternative address of the individual's choosing. As with the petitioner, the LLC's address is often the address of the practitioner that set up the LLC. The evidence establishes that LLCs are formed for no other purpose other than to avoid sales tax and other associated costs related to owning the vehicles.

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The petitioner objects to the amount of the assessment but does not contest his individual liability or that the LLC is not the owner of the vehicles. Pursuant to R.C. 5703.56, a transaction without economic substance because there is no business purpose other than obtaining tax benefits is a "sham transaction" and may be disregarded by the Tax Commissioner for the purposes of determining tax liability.

The Department of Taxation contacted the petitioner in January of 2017 regarding the use or storage of the aforementioned vehicles. The Department informed the petitioner of its obligation under R.C. 5741.02 to pay use tax on the purchases of vehicles used or stored in the State of Ohio, even if the vehicles were purchased in another state. The Department requested the petitioner demonstrate that it either paid tax already, if tax was not paid, to remit use tax to Ohio, or explain why the vehicles are exempt from use tax. Letter from Tax Discovery Division, dated January 23, 2017.

The petitioner responded in a letter dated February 8, 2017 but did not provide the requested information. Instead, the petitioner merely stated that he does not own or have control over the vehicles mentioned in the letter. In letters dated February 21, 2017 and May 26, 2017, the Department informed the petitioner that its response was insufficient and informed him again to provide the requested documentation, including but not limited to the location where each vehicle is or was stored and used since acquiring the vehicles, whether the petitioner is a resident of Ohio, and proof of the purchase price of each vehicle. The Department informed the petitioner that if it did not receive the relevant requested information by June 16, 2017, an assessment would be issued. The Department did not receive any further information from the petitioner. As a result, an assessment was issued on August 28, 2017.

The petitioner did not provide all of the requested documents. The petitioner provided only evidence of the purchase of all three vehicles. The petitioner objects to the amount listed in the assessment and contends that the Department used an incorrect valuation method by utilizing the manufacturer's suggested retail price (MSRP), rather than the actual purchase price of the vehicles. The petitioner merely contends that the amount in the assessment is overstated as the incorrect pricing of each vehicle was used. Additionally, the petitioner contends the assessment is overstated because it includes a vehicle that must be excluded because it was purchased outside of the statute of limitations period.

The petitioner does not object to the substance of the assessment or challenge the fact that he owes use tax as an Ohio resident storing and using the vehicles in Ohio. The evidence in file demonstrates the petitioner formed an LLC for the sole purpose of avoiding sales or use tax on the purchase of the vehicles. The petitioner did not supply evidence such as an EIN or tax return information to verify the LLC is actually conducting business.

As determined above, the facts in this case demonstrate that the petitioner formed the LLC for the sole purpose of avoiding sales or use tax on the purchase. It is not the petitioner's contention that he formed a Montana LLC to actually do business. Therefore, for the purposes of determining tax liability, the petitioner and BABE, LLC are indistinguishable as the owners of the vehicles. Due to the conflicting ownership and registration information, the Tax Commissioner issued an assessment against both the petitioner and BABE, LLC which was proper under *Satullo v. Wilkens*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954. These assessments were not issued with the intention of collecting the tax twice, but rather to ensure the proper party paid the outstanding tax liability. *Id.*

Statute of limitations

The petitioner contends that one of the vehicles, the 2010 Spartan motorhome, was purchased more than seven years prior to the assessment. The petitioner states that this portion of the assessment has been issued outside of the 7-year limitation set forth in R.C. 5703.58. Pursuant to R.C. 5741.16(C)(2), when a taxpayer fails to file the required return and pay the tax, the statute of limitations does not apply. The petitioner has not filed a return and has not paid tax on the purchase. Additionally, the petitioner incorrectly applies R.C. 5703.58, as this Section applies a statute of limitations for use tax acquired prior to 2008. The petitioner purchased the vehicle in 2009. Therefore, the objection is denied.

Penalty

The petitioner requests abatement of the penalty and an adjustment to the sales tax owed on the purchases. The petitioner contends the assessment lists an incorrect amount of sales tax owed as the Department of Taxation utilized the manufacturer's suggested retail price (MSRP), rather than the actual purchase price of the vehicles. The petitioner provided sufficient evidence to demonstrate the actual purchase price of the vehicles. Therefore, the assessment shall be adjusted to account for the actual purchase price of the vehicles. The request for an adjustment of the tax due is granted. As such, interest, and penalty shall be adjusted to reflect this change. Accordingly, the request for a penalty abatement is granted in part.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$37,895.52	$7,313.00	$5,684.32	$50,892.84

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000217

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:

APR 29 2020

Emerald Environmental Services, Inc.
1621 St. Clair Ave.
Kent, OH 44240

Re: Assessment No.: 100001214966
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$3,233.42	$62.15	$485.01	$3,780.58

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 Ohio Department of Taxation was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. A hearing was not requested in this matter.

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

In accordance with R.C. 5739.01(Z), "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

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

In support of this position, the petitioner provided a transportation for hire questionnaire that states that the vehicle is used to transport "waste (absorbent materials)." Further, the petitioner provided documentation of active permit numbers, which demonstrate that it is authorized by both the Public Utilities Commission of Ohio and the U.S. Department of Transportation to operate as a motor carrier for hire. However, the petitioner failed to provide additional evidence necessary to substantiate the claimed exemption. The petitioner produced no invoice logs that showed it actually engages in transportation for hire. Furthermore, the petitioner has failed to demonstrate that the waste it states it hauls is owned and controlled by a third party. As a result, the petitioner has not demonstrated that the waste is "personal property belonging to others" within the meaning of R.C. 5739.01(Z)(1). *See Rumpke Container Serv., Inc. v. Zaino*, 94 Ohio St.3d 304, 762 N.E.2d 995 (2002). Therefore, the petitioner's contention is denied.

Accordingly, the assessment is affirmed as issued.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date:

APR 17 2020

Don Hofstetter
11090 Clay St.
Montville, OH 44064

Re: Three Assessments
Consumer's Use Tax

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

Assessment	Tax	Pre-Assessment Interest	Penalty	Total
100000536121	$6,140.42	$864.96	$921.06	$7,926.44
100000536125	$9,338.08	$684.93	$1,400.71	$11,423.72
100000554492	$19,500.00	$3,719.55	$2,925.00	$26,144.55
			Total	$45,494.71

These assessments were issued based upon the conduct of a special audit of motor vehicle title transfers. The petitioner purchased multiple vehicles without the payment of tax. The petitioner claims an exemption from use tax as the vehicles at issue were purchased by a Montana corporation. Montana has no state sales tax, and therefore the petitioner contends that they should not be taxed on purchases by a Montana corporation in Ohio for goods that will not be used in Ohio. The Ohio Department of Taxation was unable to verify the vehicles were used outside of Ohio. Accordingly, this assessment was issued. A hearing was held.

Corporate Entities

The transactions subject to these assessments were facilitated by four corporate entities: Future Track, Iron Horse Engineering Company Acquisition Company (IHEC), Montville Plastics & Rubber, Inc., (Montville) and Mr. Extruder, Inc. Montville and Mr. Extruder, Inc. are the same entity, with Mr. Extruder being the reorganized version as of September 2, 2014. All of these entities were owned by the petitioner Don Hofstetter alone or in partnership with his wife Jean Hofstetter. Future Track and IHEC are owned by Mr. and Mrs. Hofstetter in equal parts, Montville /Mr. Extruder, Inc. is solely owned by Mr. Hofstetter.[1]

Future Track was organized as a Montana corporation on November 22, 2010. Its purpose, according to documentation supplied by the petitioner's representative, was to lease vehicles to the other businesses owned by Mr. and Mrs. Hofstetter. It had no employees, no dealer's license

[1] Post-hearing information provided via letter dated August 20, 2018.

to lease or sell vehicles in the state of Ohio, and no address outside of a street address in Montana provided on its incorporation documents. This address is the same as its registered agent, Deer Creek Corporate Services, Inc.

IHEC is an Ohio corporation owned in equal share by Mr. and Mrs. Hofstetter. It was organized to sell rail line components on December 28, 1999 and, according to documents supplied by the petitioner's representative, it was sold on August 28, 2014 and is no longer in existence.

Montville Plastics & Rubber Inc. was incorporated on March 2, 1977 as a plastic extrusion manufacturer. On August 28, 2014 the company's business purpose changed to buying and selling plastic resin and equipment. Montville Plastics became Mr. Extruder via a name change on September 2, 2014. The company employed roughly 50 people as Montville, but currently has no employees. It is owned solely by Mr. Hofstetter.

Vehicle Purchases

The assessments at issue pertain to four vehicles, all purchased by Future Track and titled in Montana. These are a 2012 Audi A8, a 2014 Audi A8, a 2014 Buick Enclave, and a 2009 Monaco RV. The 2012 and 2014 Audis and the Buick Enclave were purchased in Ohio, and the Monaco was purchased in Texas. Subsequent to their purchase, lease agreements with either IHEC or Montville were drafted, depending on the vehicle. In support of the claim, the petitioner provided lease agreements and a handwritten accounting of checks issued from IHEC to Future Track for the lease of the Monaco RV. No cancelled checks or additional verification was provided for the RV or any further information for the other vehicles.

Sham Transactions

Pursuant to R.C. 5703.56(A)(1), a "'Sham transaction' means a transaction or series of transactions without economic substance because there is no business purpose or expectation of profit other than obtaining tax benefits." Further, "The tax commissioner may disregard any sham transaction in ascertaining any taxpayer's tax liability," and it is up to the petitioner to prove that the transactions were not shams. R.C. 5703.56(B). In reviewing these transactions, the Tax Commissioner can look past the formal structure and focus on the "economic reality" of what occurred. R.C. 5703.56(C). "The commissioner may recharacterize a transaction in accord with the 'economic reality' of the transaction." *David R. Kniffen v. McClain*, BTA No. 2019-530, 2019 WL 7476592 (December 31, 2019).

In support of its contention that the leases to Ohio corporations were legitimate transactions, the petitioner produced signed lease agreements for all of the at-issue vehicles.[2] Future Track, IHEC, Montville, and Mr. Extruder all have separate corporate existences. The latter two entities have ostensible business purposes outside of vehicle leasing, with Montville operating for over thirty years and employing up to fifty people.[3]

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[2] Post-hearing, petitioner provided lease agreements dated March 1, 2012, June 6, 2014, May 1, 2014, and December 7, 2010.

[3] Post-hearing information provided via letter dated August 20, 2018.

This, however, is not enough to support the contention that these were arms-length transactions sufficient to show legitimate business purpose or expectation of profit as required by R.C. 5703.56(A)(1). Looking past the formal structure to the "economic reality" of the transactions, it's clear that these vehicles were simply passed from one corporate entity owned by Mr. and Mrs. Hofstetter to another. IHEC and Mr. Extruder had no employees outside of the petitioners, and per the attestations provided by their representative, the Buick Enclave leased by Montville Plastics & Rubber was a personal car used exclusively by the Hofstetters.[4]

No independent entities were involved in the transactions and the lease payments do not support any valid business activity. Two of the entities had no valid business purpose beyond leasing, one entity had no employees, and the only corporation with business activity leased the vehicle for the personal use of its owner. The leases for these vehicles are transactions between two closely held corporations with no valid purpose other than the attempt to avoid tax liability, and "...the revenue is received under a lease lacking in substance and of a doubtful arms'-length character." *Pi In The Sky, LLC v. Testa,* 155 Ohio St.3d 113, 2018-Ohio-4812, 119 N.E.3d 117. The Tax Commissioner finds that these are sham transactions.

Sale for Resale

As sham transactions, no sale-for resale exemption would be available to the petitioners. "Sale", as defined by R.C. 5739.01(B), is a "transaction for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever." This includes any situation where "title or possession, or both, of tangible personal property, is to be transferred, or a license to use or consume the tangible personal property is to be granted." R.C. 5739.01(B)(1). An exception to this rule applies when "the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person." R.C. 5739.01(E).

The petitioners are sole owners of both the purchasing and leasing corporations. Future Track did not offer leases to third-parties. It did not advertise leasing or sales services. It did not charge sales tax on the leases. The petitioner's attestation in their August 18, 2018 letter to the hearing officer admits that the sole business purpose of Future Track was to lease vehicles to Mr. and Mrs. Hofstetter's other businesses.

Further, Future Track lacked the required licenses to sell or lease vehicles in Ohio. Per R.C. 4517.02(A)(3), no person shall "engage in the business of regularly making available, offering to make available, or arranging for another person to use a motor vehicle, in the manner described in division (M) of section 4517.01 of the Revised Code, unless the person is licensed as a motor vehicle leasing dealer... ". The petitioner admits in the same August 20, 2018 letter that Future Track does not possess the required Ohio vendor's license to act as a vehicle dealer.

With no business purpose outside of leasing vehicles to its owners, and no license by which it could do so, Future Track was not "engaging in business" as required by the statute to support a

[4] Post-hearing information provided via letter dated August 20, 2018.

sale-for-resale exemption from sales tax.

Out of State Purchase and Use

The petitioner based their exemption on the purchase of vehicles by an out of state corporation. This requires those vehicles to be stored or used out of state. The evidence provided by their representative and by the petitioners themselves shows that the vehicles were used or stored in Ohio.[5]

Use tax is collected in Ohio on purchases "acquired or received for a consideration, whether such acquisition or receipt was effected by a transfer of title, or of possession, or of both, or a license to use or consume; whether such transfer was absolute or conditional, and by whatever means the transfer was effected; and whether the consideration was a money, credit, barter, or exchange." R.C. 5741.01(D). Further, R.C. 5741.02(A)(1) explicitly provides that "an excise tax is … levied on the storage, use, or other consumption in this state of tangible personal property."

The 2012 Audi A8 in the subject petitions was purchased in Ohio by Future Track, then titled in Montana on April 20, 2012. From February 27 through April 2014, when the vehicle was totaled, it was leased by IHEC from Future Track. The Audi was used in Ohio for the duration of the lease.

The 2014 Audi A8 and 2014 Buick Enclave were both purchased in Ohio by Future Track and then titled in Montana. The Buick was leased from Future Track by Montville Plastics from May 1, 2014 through September 1, 2014. At that point the lease was transferred to Mr. Extruder coinciding with the Montville corporate name change. The Buick was used in Ohio for the duration of the lease. The 2014 Audi was leased from Future Track by IHEC between May 29 and September 1, 2014 when the lease was transferred to Mr. Extruder. The Audi was used in Ohio during the time it was leased by IHEC.

Finally, the Monaco RV was purchased in Texas in 2010 and titled in Montana the same year. It was leased by IHEC from December 2010 through December 2014. The petitioner provided evidence that the vehicle is used in Hilton Head, South Carolina, but admitted that it travels to the Hofstetter family home in Ohio for indeterminate periods.

The standard in R.C. 5741.02(A)(1) for "storage, use, or other consumption" is a fact-based analysis, and here the evidence is clear that the use of all of the vehicles was sufficient to meet this bar. The petitioner attested to using all the cars in Ohio at one time or another for extended periods, and although the Monaco RV was purchased in Texas and used in South Carolina, it was also parked at the petitioner's home in Montville, Ohio for indeterminate periods of time. Such use is sufficient enough to establish tax liability.

Further, when the petitioners purchased the Monaco RV, they signed a "Texas Motor Vehicle Sales Tax Exemption Certificate for Vehicles Taken Out of State." On this certificate, used to avoid paying sales tax in Texas, Future Track was the purchaser, and the petitioner's used their home address in Montville, Ohio as Future Track's corporate address. Not only does this illustrate the

[5] Letter from the petitioner to the hearing officer dated March 22, 2018.

sham nature of Future Track's status as a legitimate Montana corporate entity, it also establishes the RV's use in Ohio.

Conclusion

Evidence provided by the petitioner supports the fact that Future Track was a corporation established to avoid Ohio tax. The vehicles purchased by Mr. and Mrs. Hofstetter through Future Track were leased to other Ohio corporations, also solely owned by the petitioners; Future Track's only admitted corporate purpose was leasing vehicles to the petitioners. Future Track has no offices in Montana, and the petitioners even listed their own Ohio address as Future Track's address on Texas exemption certificates at the time of the Monaco RV purchase. Finally, all of the at-issue vehicles were used primarily or stored in Ohio sufficient to satisfy the requirements of R.C. 5741.02(A)(1).

Accordingly, the objections are denied. The assessments are affirmed as issued.

Current records indicate that no payments have been applied on these assessments, leaving a balance due of $45,494.71. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 17 2020

Robert D. Homman
2250 Debolt Rd.
Utica, OH 43080

RE: Assessment No.: 100001367628
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$398.75	$9.67	$59.81	$468.23

This assessment is the result of an audit of the petitioner's purchase of an all-terrain vehicle ("ATV"). On or around March 2, 2019, the petitioner purchased a 2003 Yamaha YFM660. The petitioner did not pay any tax at the time of purchase. Instead, an exemption was claimed as "Direct Use-Farming." The exempt use of the vehicle could not be verified and, therefore, this assessment was issued. The petitioner filed a petition for reassessment and requested abatement of the penalty. A hearing was held in this matter on Tuesday, March 10, 2020.

The petitioner contends that the vehicle is used in lieu of a tractor on its farm. The petitioner provides that the use of the vehicle includes clearing land for a barn, woodland management for timber and firewood, fence building and repairs, hauling tools and materials such as construction materials, hauling feed, manure, and hay and straw.

It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary is established. R.C. 5739.02(C) and 5741.02(G). R.C. 5739.02(B)(42)(n) provides an exemption from tax for items where the purpose of the purchaser is to use or consume the thing transferred primarily in farming, agriculture, horticulture, or floriculture. "Farming" is defined as ". . . the occupation of tilling the soil for the production of crops as a business and shall include the raising of farm livestock, bees, or poultry, where the purpose is to sell such livestock, bees, or poultry, or the products thereof as a business." Ohio Adm.Code 5703-9-23. "Business" requires the "object of gain, benefit, or advantage." R.C. 5739.01(F).

Therefore, in order for a vehicle to be eligible for the farming exemption, three prerequisites must be met. First, the vehicle must be used by a person that farms as a business enterprise, such as growing agricultural crops or raising livestock for sale as a business. Second, the person must

be able to demonstrate that the vehicle is used primarily in specific farming activities that are part of growing crops or caring for livestock. Third, these farming activities must account for the primary usage of the vehicle.

Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). The farming exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming as defined in the Ohio Administrative Code.

The first requirement for exemption is that a taxpayer be engaged in the business of farming. In order to demonstrate that the farming activities constitute a "business," a copy of the I.R.S. Form 1040 Schedule F (Profit or Loss from Farming) or other proof that the petitioner is engaged in the business of farming is necessary. The petitioner submitted a copy of his 1040 Schedule F for consideration as proof that he is engaged in the business of farming. The petitioner submitted sufficient evidence to demonstrate that he is engaged in the business of farming.

The next issue is whether the vehicle is used in an exempt manner. An ATV is not a traditional piece of farming equipment whose use is limited to a farming function. Instead, an ATV can be used in ways that are both taxable and exempt. Therefore, the question is whether the ATV at issue was primarily used directly for exempt farming purposes or for taxable non-farming purposes. When analyzing if a piece of equipment is used for farming as defined by law, the primary use of the equipment is the key factor. *Lucinda Hart v. Limbach*, BTA No. 86-D-280, 1988 WL 162378 (July 22, 1988). If the equipment is used solely in transporting farm products to and from processing or storing, it is not eligible for a farm use exemption as it plays no part in sowing, cultivating, or harvesting the grain. *Medina Sod Farms v. Limbach*, BTA No. 2152, 1986 WL 7747 (July 9, 1986). The burden of demonstrating that this ATV is used primarily in an exempt manner rests with the petitioner.

In the petition for reassessment, the petitioner contends that the ATV is used for hauling tools and materials for repairs around the farm and constructing structures. The petitioner also provides that the ATV has occasionally been used to herd the animals and collect maple sap and firewood to reduce the maple syrup. The petitioner contends that the ATV is used to transport wood to heat the petitioner's home, barn, and water, which is a year-long activity. The petitioner did not provide percentages of use for all of the items mentioned in its petition for reassessment.

The petitioner completed a Department of Taxation Farm Use Questionnaire indicating that the main uses of the vehicle were for woodland management for tree harvesting (45%); hauling seed, grain, fertilizer, hay and feed for livestock (10%); loading and unloading manure (10%); and repairing fencing (10%). The petitioner also indicated minor uses in hauling trash and garbage (5%); snowplowing (5%); recreational activity (5%); and cutting and hauling wood or brush (10%). The minor uses of the ATV account for at least twenty-five percent of non-exempt use. While use of the vehicle to snowplow, cut and haul brush, haul trash, and haul firewood for his home may be a convenience for the farmer or a help for those occupying large acreage properties, these are not farming activities. Therefore, at least twenty-five percent of the ATV's

use is verified as taxable. Since the petitioner did not provide evidence of how the ATV contributes to woodland management or elaborate on the difference between cutting and hauling wood and woodland management, the Department must evaluate usage based on the evidence provided. The remaining percentage of tax-exempt activity must account for greater than 50 percent of the ATV's use in farming.

The petitioner contends that much of the use of the ATV is for woodland management for productive timber sales. However, the petitioner's 1040 Schedule F lists the principal business activity of the farm as hogs, goats, and eggs. The petitioner failed to provide any evidence of current timber sales or production. After the hearing, the petitioner provided a 1040 Schedule D from 2010 which listed profits from standing timber. However, the evidence is insufficient to demonstrate that the petitioner is currently engaged in timber production as there is no mention of current timber sales in the documentation provided by the petitioner. Further, the petitioner states that the ATV is used for hauling firewood to heat his home, water, and barn, which is a year-round activity.

The petitioner submitted two Farm Use Questionnaires with different percentages for woodland management. A July 2019 Questionnaire included fifty percent for this category and noted that tree harvesting is a commodity that does not leave the property or is used for anything other than farm use. However, a September 2019 Questionnaire included a percentage of forty-five percent for this category and removed the notation that it does not leave the property. The statements concerning woodland management are contrary as to whether the product is sold as lumber or is used to heat the petitioner's home year-round and barn during the winter months.

During the hearing, the Department requested that the petitioner provide evidence of use of the vehicle for timber management and provide an explanation as to the difference between the categories of hauling and cutting wood and brush and woodland management. The Department also requested that the petitioner provide pictures or videos of the vehicle being used for farming activities. The petitioner stated that he had a difficult time distinguishing between the two activities because they are intermingled. He stated that the ability to use the leftover wood from path clearing for his home was a perk of the business. The petitioner contends that he repurposes the excess wood rather than wasting it. The petitioner stated that left over wood and grapevines are remnants of clearing paths for machinery during timber production. The petitioner contends that paths must be cleared for vehicles and machinery to get through the forest for harvest. The petitioner contends that timber harvests occur in fifteen-year cycles; however, he the petitioner failed to provide a woodland management plan or other evidence that the vehicle is being used for current timber production.

The petitioner provided numerous pictures of the ATV and the farm. However, the pictures were insufficient to demonstrate the vehicle is being used for farming activities related to timber management or production. Additionally, many of the pictures were titled with dates referencing winter 2010 and May 2010. The petitioner purchased the vehicle in question on March 2, 2019. Therefore, at least five of the pictures are not applicable to the current vehicle. The petitioner's pictures also fail to show how the vehicle is used to remove grapevines affecting the timber, or any evidence of how the ATV contributes to woodland management.

The petitioner failed to supply sufficient evidence that the use of the ATV satisfies the exemption. The objection is denied.

Penalty

The petitioner requests abatement of the penalty. The evidence and circumstances do not support abatement of the penalty. Accordingly, the request for a penalty abatement is denied.

Therefore, the assessment shall stand 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.

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/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:

APR 29 2020

Keebler Company
One Kellogg Square
P.O. Box 3599
Battle Creek, MI 49016

Re: Assessment No.: 100000838668
Use Tax
Account No. 98-002949
Audit Period: 07/01/2012 – 06/30/2015

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

	Pre-Assessment		
Tax	Interest	Penalty	Total
$319,287.17	$44,185.40	$47,892.54	$411,365.11

This assessment is the result of an audit of the petitioner's purchases for the period shown above. The petitioner operates a manufacturing company with a location in Cincinnati, Ohio. A hearing was held on March 3, 2020.

Tax Due Discrepancy

The petitioner contends that there is a discrepancy in the amount of tax assessed as noted on the audit summary findings provided by the auditor compared to the amount shown on the notice of assessment. The petitioner submitted a document that did indeed show a lower tax amount than what was ultimately assessed. However, the document the petitioner provided was a copy of preliminary findings that had not been approved by the audit review team. Once the preliminary results were reviewed, errors in the computations in the expense measure were identified and corrected. These corrections resulted in the accurate tax due amount on the notice of assessment. The petitioner failed to prove error in the assessed amount. The objection is denied.

Pollution Control Exemptions

The petitioner contends that the final use tax amount assessed is incorrect because several transactions included in the audit are exempt pollution control equipment purchases. The transfer of tangible personal property to an entity in possession of an exempt pollution control facility certificate is not considered a sale for the purposes of sales or use tax. R.C. 5709.25(A). The exemption can be claimed by an applicant before the certificate is issued if a properly completed application has been submitted to the Tax Commissioner. R.C. 5709.25(C)(1). At the time of the audit, the petitioner only had one

APR 29 2020

pollution control certificate that covered a boiler. Audit Remarks, Page 6. No other items were covered by this certificate. The petitioner subsequently submitted a pollution control application requesting an exemption totaling $3,470,592.05. The application contained several transactions, all of which were approved by the Department. Based on a review of the petitioner's approved application, the Department has removed several transactions from the audit that were originally included. The only transactions approved for removal from the audit are those that appear on the exemption application. The petitioner requested that several other transactions be removed pursuant to R.C. 5709.25(E) which states that a new application is not required if the cost of the additional property, net of retirements for similar property, does not exceed five hundred thousand dollars during any calendar year. This statute refers to replacement equipment for the original pollution control equipment exempted by the certificate. The equipment must be similar to equipment that has already been approved, otherwise, the Department has no way of knowing if the equipment actually qualifies for the exemption. It is not clear that the remaining transactions that the petitioner objects to are transactions for equipment that replaced a previously exempted piece of equipment or is similar to already exempted equipment. The petitioner has not provided sufficient evidence to support the contention that the remaining transactions are covered by the exemption certificate.

Therefore, the assessment is modified as follows:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$189,434.33	$23,539.69	$28,414.62	$241,388.64

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

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Jeffrey A. McClain

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 29 2020

Linx Logistics LLC
8640 Innovation Campus Way W.
New Albany, OH 43054

Re: 6 Assessments
Use Tax

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

Assessment Number	Tax	Pre-Assessment Interest	Penalty	Total
100001178829	$10,073.87	$143.15	$1,511.08	$11,728.10
100001178953	$2,372.56	$30.08	$355.88	$2,758.52
100001178961	$2,372.56	$30.08	$355.88	$2,758.52
100001178827	$9,348.87	$132.85	$1,402.33	$10,884.05
100001178951	$2,372.56	$30.08	$355.88	$2,758.52
100001178957	$2,372.56	$30.08	$355.88	$2,758.52
			Total:	$33,646.23

These assessments were issued based upon the conduct of special audits of the purchase of motor vehicles. The petitioner purchased the vehicles without the payment of tax. It is the petitioner's contention that the purchases are exempt because the vehicles are used in transportation for hire. The Ohio Department of Taxation was unable to verify the exempt use of the vehicles. Accordingly, these assessments were issued. A hearing was requested and held on March 12, 2020.

The petitioner contends the vehicles are exempt under R.C. 5739.02(B)(32). This contention is not well taken. The petitioner further requests penalty abatement, if the exemption is denied.

Transportation for Hire

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

(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for

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consideration over or on highways, roadways, streets, or any similar public thoroughfare;

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

(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

In support of its contention, the petitioner provided driver logs and invoices to establish that the vehicles at issue are used in the transportation of personal property belonging to others for consideration. However, the petitioner admits that it failed to complete the filing requirements in order to obtain a certificate authorizing it to engage in transportation of personal property belonging to others on any public thoroughfare. As a result, the petitioner fails to satisfy the elements of R.C. 5739.01(Z) necessary to qualify for exemption under R.C. 5739.02(B)(32). Therefore, the objection is denied.

Penalty Remission

The petitioner requested a penalty abatement. Given the totality of the circumstances, full penalty abatement is warranted.

Accordingly, the assessments are adjusted as follows:

Assessment Number	Tax	Pre-Assessment Interest	Penalty	Total
100001178829	$10,073.87	$143.15	$0.00	$10,217.02
100001178953	$2,372.56	$30.08	$0.00	$2,402.64
100001178961	$2,372.56	$30.08	$0.00	$2,402.64
100001178827	$9,348.87	$132.85	$0.00	$9,481.72
100001178951	$2,372.56	$30.08	$0.00	$2,402.64
100001178957	$2,372.56	$30.08	$0.00	$2,402.64
			Total:	$29,309.30

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

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APR 29 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

0000000474

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

FINAL DETERMINATION

Date:

APR 0 8 2020

Netsmart Technologies, Inc.
4950 College Blvd.
Overland Park, KS 66211

RE: Assessment No. 100001117043
Use Tax
Account No. 97-803642

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

Tax	Pre-Assessment Interest	Penalty	Total
$244,309.41	$22,415.85	$24,430.82	$291,156.08

The petitioner operates as a software and technology solutions company. This assessment is the result of an audit of the petitioner's purchases from July 1, 2014 through August 31, 2017. A hearing was not requested.

The petitioner requested a penalty abatement. The Tax Commissioner may add a penalty of up to fifteen percent of the amount assessed to any assessment. R.C. 5739.133(A)(3). Penalty remission is within the discretion of the Tax Commissioner. See *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Given the totality of the circumstances, a partial penalty abatement is warranted.

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$244,309.41	$22,415.85	$12,215.47	$288,940.73

Current records indicate that payments of $266,725.26 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, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: APR 08 2020

Orange Barrel Media LLC
250 N. Hartford Ave.
Columbus, OH 43222

RE: Assessment No. 100001342343
Use Tax
Account No. 97-166050

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

Tax	Pre-Assessment Interest	Penalty	Total
$123,445.98	$15,106.63	$18,516.72	$157,069.33

The petitioner operates as an outdoor media and advertising company. This assessment is the result of an audit of the petitioner's records from July 1, 2014 through March 31, 2018. A hearing was not requested.

The petitioner requested a penalty abatement. The Tax Commissioner may add a penalty of up to fifteen percent of the amount assessed to any assessment. R.C. 5739.133(A)(3). Penalty remission is within the discretion of the Tax Commissioner. See *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The record indicates that the petitioner was cooperative during the audit and has put in place internal controls to make sure that the correct amount of tax is accrued and paid. The facts and circumstances do support a partial abatement of the penalty.

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$123,445.98	$15,106.63	$9,258.45	$147,811.06

Current records indicate that payments of $138,552.61 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

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

FINAL DETERMINATION

Date:

APR 0 8 2020

Saturn of Dayton, Inc.
998 Miamisburg Centerville Rd.
Washington Township, OH 45459

Re: Assessment No.: 100000799135
Use Tax
Account No. 97-304705
Audit Period: 01/01/2011 – 12/31/2016

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

Tax	Pre-Assessment Interest	Penalty	Total
$14,305.66	$1,571.62	$2,145.69	$18,022.97

The petitioner operates as an automobile dealership in Washington Township, Ohio. This assessment is the result of an audit of the petitioner's purchases for the period shown above. A hearing was held on March 19, 2019. The petitioner's objections are addressed below.

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

Audit Methodology

The assessment is based upon an audit of petitioner's capital assets and expenses. For capital assets, the auditor reviewed the invoices comprehensively. For the petitioner's expensed purchases, the auditor and the petitioner agreed that the best option to determine liability would be to use a block sample. Audit Remarks, Page 3. The audit remarks further reflect the auditor and petitioner agreed that the calendar year 2016 would be the best year to use for this sampling method. *Id.*

The block sample methodology for calculating the liability of expenses is as follows: the auditor determined which accounts on the petitioner's books had insufficient tax paid on purchases. Using that information, the auditor divided the total tax deficient expense purchases in an account by the total purchases in the account for the sample period to determine percentage of error in the account. Those percentages of error were applied to the corresponding total audit period account purchases to determine the untaxed taxable purchases for the audit period for each account. Tax rate changes during the audit period were prorated by the number of months that each rate was in effect. This methodology is memorialized in the memorandum of agreement that was provided to the petitioner. Audit Remarks, Page 3.

The auditor provided the petitioner a copy of a memorandum of agreement reflecting these terms. *Id.* Two weeks later, the auditor provided the preliminary audit results along 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. Though petitioner stated the owner would sign the agreement, it did not submit an alternate audit methodology or sign the memorandum of agreement. *Id.*, Pages 3-4.

The petitioner objects to the audit methodology. Pursuant to former R.C. 5741.13 (now R.C. 5741.13(A)(2)), the Tax Commissioner may audit a representative sample of a consumer's purchases and may issue an assessment based thereon. The Ohio Board of Tax Appeals ("BTA") has ruled that purchase audits are an accepted form of estimating tax liability for over thirty years. *Latchaw v Limbach*, BTA No. 87-D-1101, 1989 WL 1464740 (November 24, 1989). Mere allegations without documentary evidence are insufficient to show error in audit methodology. *Burnt Sienna Companies v. McClain*, BTA No. 2018-1589, 2019 WL 1260581 (March 11, 2019).

The original petition for reassessment contains a general objection that the audit methodology is not representative of the audit period. The petitioner submitted no evidence in support. While the taxpayer has challenged the accuracy of the audit conclusions, it failed to provide information to establish an alternative. Therefore, this objection is denied.

Professional Touch Transactions

At hearing, the petitioner provided a specific objection to the inclusion of a transaction with the vendor Professional Touch as not representative of the audit period. The auditor's report includes three invoices from Professional Touch: one for "Annual Landscaping," one for "Tree Trimming," and one for "dumpster rental." The petitioner stated that the auditor's description of the last transaction was incorrect, and it was really a trash removal service. The petitioner further stated that Professional Touch is only used occasionally and should not have been projected over the audit period as a result. The record reflects that the auditor offered to remove the account containing Professional Touch expenses from the sample and audit it comprehensively over the audit period. The petitioner declined the offer. Audit Remarks, Page 4.

Generally, any use or other consumption of tangible personal property or services within Ohio is taxable. R.C. 5741.02(A)(1). As previously mentioned, mere allegations without documentary evidence are insufficient to show error in the audit methodology. *Burnt Sienna Companies,*

supra; see also *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, ¶27 (holding documentary evidence required to claim transaction was exempt from tax). The petitioner provided no evidence that would support its objection. The objection relating to the transactions with Professional Touch is denied.

Showroom Lighting

The petitioner objects to the inclusion of a purchase of showroom lighting from Express Electrical Services. At hearing, the petitioner stated that this purchase was an improvement to real property and exempt from tax. Generally, purchases of business fixtures are a taxable sale while purchases of real property are not. R.C. 5741.02(A)(1), 5739.01(B)(1), 5739.01(B)(3)(a), and 5739.01(B)(3)(b). Business fixtures are items of tangible personal property that are permanently affixed to the land or a building and primarily benefit the business conducted by the occupant on the premises. R.C. 5701.03(B).

The hearing officer requested documentation regarding this lighting from the petitioner, but it did not provide any evidence to support its contention. Whether an item constitutes a "business fixture" is a fact-specific determination and corroborating documentation is necessary to show error in an assessment. *Pep Boys v. Testa*, BTA No. 2015-706, 2016 WL 3018415, *4 (April 4, 2016). Showroom lighting by its very nature benefits the business conducted by the petitioner. It is not common to buildings. R.C. 5701.03(B). It is not a given that the lighting would or could be utilized on the property if the car dealership business left. *Oregon Ford v. Wilkins,* BTA No. 2005-A-111, 2006 WL 247160, *6 (January 27, 2006). The petitioner has presented no evidence to the contrary. The objection is denied.

Outside Floodlights

The petitioner objects to the inclusion of purchases of 30-foot tall outdoor floodlights from Miami Valley Lighting. The petitioner states that these floodlights constitute real property, not business fixtures. At hearing, the petitioner noted that these are security lights that are left on outside at all times. The petitioner stated this is because the primary use of the lights is to light the dealership's lot and to make sales. The BTA held in *Oregon Ford v. Wilkins, supra,* that outdoor floodlights used in an auto dealership business are business fixtures. *Id.* The hearing officer requested from the petitioner documentary evidence in support of this objection. The petitioner did not provide any. The petitioner has failed to meet its burden to show error in the assessment. Therefore, this objection is denied.

Repair Parts for Vehicles

The petitioner objects to the inclusion of certain transactions with vendor AMS. The petitioner states that these parts were exempt from tax as purchased for resale in a repair service. As the provider of repair and maintenance services, the petitioner is the consumer of any tangible personal property used in performing that service. R.C. 5739.03(B)(3)(a) and R.C. 5739.01(D)(5). The statute also states that the provider of repair and maintenance services cannot claim the sale-for-resale exemption with purchases in this context. *Id.* The hearing officer requested a specific list of parts and information regarding the petitioner's objection. The

petitioner failed to provide any information in support. Testimonial evidence without corroborating documentary evidence is insufficient to demonstrate exemption. *R.L. Best Co. v. Testa*, 7th Dist. Mahoning No. 18 MA 0001, 2018-Ohio-5400, ¶ 34, *appeal not allowed*, 155 Ohio St.3d 1422, 2019-Ohio-1421, 120 N.E.3d 868, *reconsideration denied*, 156 Ohio St.3d 1448, 2019-Ohio-2498, 125 N.E.3d 920. This objection is denied.

700 Credit

The petitioner objects to the inclusion of transactions with 700 Credit. It has provided sufficient evidence in support of its objection. These transactions will be removed from the assessment.

Therefore, the assessment shall be modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$9,642.78	$1,121.85	$1,446.13	$12,210.76

Current records indicate that a payment of $18,022.97 has been made in full satisfaction of the assessment and a refund is due with the appropriate statutory 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

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 08 2020

S.E.T. Inc.
235 E. Water St.
Lowellville, OH 44436

RE: Assessment No.: 100001336114
Use Tax
Account No.: 97-306681

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

Tax	Pre-Assessment Interest	Penalty	Total
$76,601.95	$11,594.28	$5,744.83	$93,941.06

The petitioner operates as a construction contractor. This assessment is the result of an audit of the petitioner's purchases from July 1, 2012 through June 30, 2018. The petitioner filed a petition for reassessment contesting the liability and requesting an abatement of the interest and penalty. No hearing was requested. 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).

The audit consisted of a comprehensive review of the petitioner's capital asset and job material purchases. These purchases were listed individually for the entire audit period. The Department reviewed all comprehensive transactions with the petitioner to determine the usage and thereby, the taxability of all listed transactions. Tax rates were applied to comprehensively reviewed transactions on an individual basis.

Since there were numerous invoices to be examined, a sample projection method was used for general and administrative (non-job material) purchases. A sample period of January 1, 2017 to

December 31, 2017 was used as a representation of the entire audit period to calculate taxable purchases. The petitioner provided the General Ledger Detail Report as the primary data source wherein most transactions were recorded. The report was condensed into a listing of all purchases that have tax relevance, and the petitioner provided the invoices for these transactions and other supporting documentation as necessary.

The Department reviewed the expense sample deficiency listing with the petitioner and attempted to determine the usage, and thereby, the taxability of all listed transactions. All tax determinations were clarified on the deficiency listing. Taxable expense purchases in the sample upon which tax was properly paid to vendors were treated as non-errors. Taxable expense purchases with no tax or insufficient tax paid were coded as positive errors. A list of accounts with errors were prepared and the petitioner provided account purchase totals for these accounts for both the sample period and the audit period.

Once all the worksheet and invoice reviews were concluded, the total tax deficient expense purchases, by account, were divided by the total purchase activity in the same account for the sample period to determine the percentage of error by account. These percentages of error were then applied to the corresponding account balances for all non-sampled periods to determine the untaxed taxable purchases for the audit period for each account. The tax liability for the sample periods was calculated on the actual tax deficient expense purchases for that account, for that sample period. Tax liability was allocated to counties by dividing the total tax deficient expense purchases in each county by the total tax deficient purchases for the sample period.

Pre-Construction Videos

The petitioner contends that the substance of the transactions from Elaine Petrakis was not the receipt of a compact disc, but the receipt of a service being provided to the petitioner to document a pre-construction site. The construction videos are custom generated for a specific project to document property upon which the petitioner will be operating. The videos are specifically created to document the right-of-way, curbs, driveways, and land of the property owners upon which the petitioner will be excavating, removing, and installing new utility piping. The overriding purpose of the service is to document the pre-construction site, in the form of a video instead of a written report due to convenience. Service vendors utilize skill and expertise to compile these videos accurately and concisely. The videos are custom created, not previously compiled. The petitioner contends that the videos are not mass produced or available for any customer other than the petitioner.

In an analogous case, the Board of Tax Appeals determined that the overriding purpose for the customers, in receiving a printed report generated by a personal service, was the benefits of such service, not the actual printed reports. *The McGraw-Hill Companies, Inc. v. Tracy*, BTA No. 96-A-465, 1998 WL 329586 (June 19, 1998). The petitioner contends that it desired the benefit of the services contained on the compact disc, not the discs themselves. These contentions are well met. Therefore, the purchase of the discs have been removed from the calculations in the underlying tax assessment. The tax, interest, and penalty have been adjusted below.

Audio Alarm Services

The petitioner contends that security services from the vendor Audio Alarm were included in the block sample audit projections, when the vendor did in fact charge sales tax to the petitioner. The evidence in the file supports this contention. Therefore, the purchase of these services have been removed from the calculations in the underlying tax assessment. The tax, interest, and penalty have been adjusted below.

ISnet Services

The petitioner contends that the services provided by ISnet were non-taxable professional services. The evidence in the file supports this contention. Therefore, the purchase of these services have been reoved from the calculations in the underlying tax assessment. The tax, interest, and penalty have been adjusted below.

Fastenal Transactions

The petitioner contends that the audit includes a small amount of transactions from the vendor Fastenal. These transactions involve the Ohio Department of Transportation and Pennsylvania-based transactions that never touched Ohio. The evidence in the file supports such a contention. Therefore, these transactions were removed from the calculations in the underlying tax assessment. The tax, interest, and penalty have been adjusted below.

Interest

The request for remission of preassessment interest cannot be considered. The Tax Commissioner lacks jurisdiction to abate preassessment interest added to an assessment pursuant to R.C. 5739.133(B). The request for interest remission is denied.

Penalty

The petitioner requested a penalty abatement. Given the totality of the circumstances, a partial penalty abatement is warranted.

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$75,010.79	$11,345.13	$3,750.13	$90,106.05

Current records indicate that payments in the amount of $75,172.54 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date:

Willard Shull
1646 Barbara Lane N.E.
Washington Courthouse, OH 43160

Re: Assessment No. 100001321309
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$253.75	$6.19	$38.06	$298.00

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 Ohio Department of Taxation was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. A hearing was deemed unnecessary in this matter.

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.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 17 2020

Ronnie L. Tye
5079 Nobles Pond Dr. N.W.
Canton, OH 44718

Re: Assessment No. 100001013862
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$4,225.00	$466.87	$633.75	$5,325.62

This assessment was issued based upon the conduct of a special audit of a registered aircraft transaction. On June 4, 2015, Ronnie Tye received title to a 1979 Piper PA-28RT-201T via Bartelt Aviation, Inc. No sales tax was paid during the transaction. No hearing was requested.

The petitioner contends that the Department erred in assessing use tax due on the purchase of the aircraft because it qualified under the casual sale exemption that is stated in R.C. 5739.02(B)(8) and 5739.01(L). The petitioner contends that even though the aircraft was transferred through a broker, Bartelt Aviation, Inc., it still satisfies the definition of a casual sale that is outlined in *Oberlander v. Porterfield*, 28 Ohio St.2d 171, 277 N.E.2d 198 (1971). These contentions are not well taken.

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of services provided, with it being the obligation of the user to file a return and remit tax on the purchase of such items when tax was not paid to a seller. As a result of the basic presumption that every sale or use of tangible personal property in this state is taxable, it is well settled that the laws relating to exemption from taxation are to be strictly construed. *Parbro Air, Inc. v. McAndrew*, BTA No. 2004-M-134, 2005 WL 2176497 (Aug. 26, 2005), citing *Ball Corp v. Limbach*, 62 Ohio St.3d 474, 584 N.E.2d 679 (1992) and *Highlights for Children, Inc. v. Collins*, 50 Ohio St.2d 186, 34 N.E.2d 13 (1977).

R.C. 5739.02(B)(8) states that the excise tax levied upon all retail sales does not apply to casual sales by a person. "Casual sale" means a sale of an item of tangible personal property that was obtained by the person making the sale, through purchase or otherwise, for the person's own use and was previously subject to any state's taxing jurisdiction on its sale or use. R.C. 5739.01(L).

In *Oberlander*, a "casual sale" is defined as "a sale of an item of tangible personal property which was obtained by the person making the sale, through purchase or otherwise, for his own use in this state. R.C. 5739.01(M).[1] The import of this definition is that the person selling the item did not obtain it for the purpose of resale. To qualify for the casual sale exemption the person making the sale must have acquired the tangible personal property *for his own use* in this state." (Emphasis sic.) *Oberlander*, 28 Ohio St.2d at 171, 277 N.E.2d 198.

To determine who is the person making the sale the Supreme Court looked to other sections of the Revised Code. 'Sale' is defined as including 'all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred * * * for a consideration.' R.C. 5739.01(B). 'Vendor' is broadly defined as 'the person by whom the transfer effected or license given by a sale is or is to be made or given. R.C. 5739.01(C). "A combined reading of those statutory definitions reveals that the person making the sale is the person who effects a transfer of title or possession, or both, or tangible personal property for a consideration. * * * To be a vendor, within the meaning of R.C. 5739.01(C), it is not necessary that one actually transfer title to or possession of tangible personal property. The vendor is the person by whom the transfer is effected. Therefore, even though appellant took no title to the property auctioned, he is still a vendor within the meaning of R.C. 5739.01(C)." *Oberlander* at 173. The Supreme Court held that since the appellant, an auctioneer, did not acquire the property for his own use in this state, the sales are not "casual," and he cannot validly claim an exemption under R.C. 5739.02(B)(8). *Id.*

The Board of Tax Appeals applied that reasoning to conclude that the use of a broker, an entity in the business of making retail sales, removes the "casual sale" nature of a transaction. *Parbro*, BTA No. 2004-M-134, 2005 WL 2176497. The BTA determined that the broker is treated as the person who is selling the item in the transaction, and the broker did not purchase the aircraft for its own use in this state, as is required to meet the definition of a casual sale. *Id.* at *4.

The petitioner used a broker in this transaction. Therefore, it is not a casual sale under either R.C. 5739.01(L) or *Oberlander*. As such, it fails to qualify for the exemption stated in R.C. 5739.02(B)(8). Use tax is owed because sales tax was not remitted on the transaction. Both of the petitioner's objections are denied.

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments in the amount of $5,325.62 have been made in full satisfaction of the assessment.

[1] The casual sale definition is now found in R.C. 5739.01(L).

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: APR 29 2020

United Dairy Farmers Inc.
3955 Montgomery Rd.
Norwood, OH 45212

Re: Refund Claim No. 201804973
Refund Amount Requested: $65,596.04
Refund Period: November 2013 – November 2017
Use Tax

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

The claimant submitted a request for refund contending that sales tax was erroneously paid on services and property purchased from several vendors. The claimant's refund request was initially approved in the amount of $24,253.46, plus applicable interest. After receiving detailed usage statements for the remaining denied transactions, an additional $6,580.07 was approved plus applicable interest. The claimant disagreed with the denial of the remaining transactions and requested reconsideration of the matter. A hearing was not requested.

A&E Butscha Co

The claimant requests a refund for tax paid on the purchase of a dip cabinet. While tangible personal property used to preserve food for sale for human consumption is tax exempt, if tangible personal property is used to display food for selection by the consumer, then it is taxable. R.C. 5739.02(B)(27)(b). Here, dip cabinets display ice cream for consumers to select and then purchase. Therefore, the cabinets and parts, such as lids are all taxable. The objection is denied.

A&H Electric Company Inc

Electrical and Conduit Wiring & Cabling

The claimant requests a refund for tax paid on several transactions involving electrical wiring. The transactions include: additional wiring for microwaves, upgraded wiring after installing a frozen carbonated beverage machine, installing wiring from the electric panel to gas pumps, electrical wiring to power video screens on gas pumps, installing cabling for money order machines and security card readers, installing cabling from the POS station to registers, wiring from pole lights to pylon and gas signs, and conduit wiring to gas dispensers, wiring on a deli case, and electrical work on a time clock.

A business fixture is an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business

conducted by the occupant on the premises and not the realty. R.C. 5701.03(B). However, even after affixed to land or a building, business fixtures retain their status as personal property. Ohio Adm.Code 5703-9-14(B). Therefore, unless a reason is provided to support an exemption, business fixtures are taxable tangible personal property. R.C. 5739.01(B)(1). While electrical wiring is common to all buildings and has been upheld as real property for purposes of taxability, that is not an automatic finding. The Board of Tax Appeals has declined to exempt electrical wiring when the use could not be determined. *Pep Boys v. Testa* BTA No. 2015-706, 2016 WL 3018415 (Apr. 4, 2016). In that case, the petitioner argued that "electrical wiring should not be considered a business fixture because it was hardwired into the building and a part of the structure to which they are attached." *Id.* In declining to exempt electrical wiring and other transactions in *Pep Boys*, the Board of Tax Appeals stated that the determination of whether an item constitutes a "business fixture" often turns upon the specific facts relating to its use and installation. *Id.*

Here, the electrical wiring is used to provide electricity for business fixtures such as gas pumps and video screens, beverage machines, signs, time clocks, and deli cases. These items are business fixtures. The claimant has provided no reason for an exemption for these items. Therefore, they are taxable tangible personal property. Other items, such as the microwaves, money order machines, and POS stations are tangible personal property that the claimant has not provided any evidence supporting an exempt usage.

In addition to the electrical work requested above, the claimant also requests a refund for electrical wiring installed from the electric panel to an outlet. Additional information was requested from the claimant explaining where this outlet was located, but none was provided. It is not clear if this is a standard outlet found in every building that primarily benefits the realty or if it is an outlet located on a taxable business fixture within the store. Without further information on the location of this outlet, a refund cannot be granted.

All objections to electrical wiring and cabling transactions are denied.

Pizza Fan

The claimant requests a refund for tax paid on work installing power for a pizza fan. According to the auditor's review, the transactions are for switches that provide power for pizza fans. Pizza fans are business fixtures. Therefore, the switch retains its status as tangible personal property after being installed and the transaction is taxable. Ohio Adm.Code 5703-9-14(B). The objection is denied.

Electrical Work Performed on Store "Islands"

The claimant requests a refund for tax paid on electrical work performed on islands within its stores. The claimant did not provide an explanation of these structures. Typically, islands are structures within stores where items such as coffee brewers, hot dog machines, and other similar items are placed. For example, several transactions were to install new receptacles for coffee brewers and additional circuits on the islands. Islands within claimant stores are business fixtures primarily benefitting the claimant's business. R.C. 5701.03(B). Therefore, the electrical work specifically for use in a business fixture is taxable. *Pep Boys v. Testa,* BTA No. 2015-706, 2016 WL 3018415 (Apr. 4, 2016). The objection is denied.

Lighting

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The claimant requests a refund of tax paid on several light fixture transactions. Specialized lighting that benefits the business more than the realty has been previously classified by the Board of Tax Appeals as a business fixture, and thus taxable. *Oregon Ford Inc. v. Wilkins*, BTA No. 2005-A-111, 2006 WL 247160 (Jan. 27, 2006). Here, according to invoices and usage statements provided by the claimant, the items in question are undercounter lights, pole lights, and underway lighting for outside awnings. As these are all specialized lighting fixtures, they are taxable. The objection is denied.

LED Drivers and Lights

The claimant requests a refund for tax paid on LED drivers and lights for store floor lights, the backroom, and front counters. All sales of tangible personal property are presumed taxable until the contrary is established. R.C. 5739.02(C) and 5741.02(G). The claimant has provided no supporting evidence to prove that an exemption is required. The objections are denied.

OSHA Training & Wall Packs

The claimant requests a refund for tax paid on OSHA safety training and certification and on work relocating wall packs. Neither request can be approved because not enough information has been provided. The claimant has also not sufficiently explained what a wall pack is or why the relocation should be exempted. Both objections are denied.

Miscellaneous

The claimant requests a refund for tax paid on invoice 30990. The request cannot be approved. The invoice does not provide a description of any of the items. The invoice shows item numbers but does not provide any other explanation of the items. Further, the taxable base amount provided by the claimant does not match any of the line items on this invoice. The claimant failed to provide sufficient evidence to support their contention. The objection is denied.

Barker's Towing and Recovery

The claimant requests a refund for towing services provided after an accident. Pursuant to R.C. 5739.01(B)(3)(s), as of August 1, 2003 motor vehicle towing is included in the definition of a sale and is therefore a taxable service. The invoice for the transaction in questioned is dated November 10, 2015, after the service became taxable. Therefore, the objection is denied.

C Nelson Manufacturing Co

The claimant requests a refund on several items purchased from C Nelson Manufacturing.

Dip Cabinets & Parts of Dip Cabinets

Several transactions submitted for reconsideration by the claimant are for dip cabinets or parts for dip cabinets. While tangible personal property used to preserve food for sale for human consumption is tax exempt, if the tangible personal property is used to display food for selection by the consumer it

is taxable. R.C. 5739.02(B)(27)(b). Here, dip cabinets display ice cream for consumers to select and then purchase. Therefore, the cabinets and parts, such as lids are all taxable. The objection is denied.

LED Plug-in Driver

The claimant also requested a refund for tax paid on LED plug-in drivers. No exemption reason was given for the request. It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary is established. R.C. 5739.02(C) and 5741.02(G). Because the claimant has not provided sufficient evidence to establish the exempt nature of these transactions, the objection is denied.

Light Fixtures

The claimant requests a refund for light fixture transactions. Specialized lighting that benefits the business more than the realty has been previously classified by Board of Tax Appeals as a business fixture, and thus taxable. *Oregon Ford Inc. v. Wilkins*, BTA No. 2005-A-111, 2006 WL 247160 (Jan. 27, 2006). However, pursuant to R.C. 5701.02(C), tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the realty and not the business is considered a fixture. Therefore, it would be exempted under R.C. 5739.02(B)(13). The invoices provided by the claimant only show that light fixtures were purchased. The petitioner failed to provide information beyond the invoice or give any indication on what kind of lights were purchased. Therefore, it is not clear if these lights are specialized lighting or standard ceiling lights that you would find in every building. The objection is denied.

Digital Temperature Controller

The claimant requests a refund for tax paid on a digital temperature controller for refrigerated cabinets. All sales of tangible personal property are presumed taxable. R.C. 5739.02(C) and 5741.02(G). No evidence supporting tax exemption was provided. Therefore, the objection is denied.

Novelty Pushcart

The claimant requests a refund for tax paid on a pushcart that is used to sell ice cream at events. As previously stated, sales of all tangible personal property are presumed taxable. R.C. 5739.02(C) and 5741.02(G). The petitioner did not provide any reason or supporting arguments to support the contention that the pushcart is exempt. Therefore, the objection is denied.

Commercial Parts and Services

The claimant requests a refund for tax paid on transactions for equipment used to cook hotdogs. Sales of tangible personal property used to prepare food for sale for human consumption are tax exempt. R.C. 5739.02(B)(27)(a). Based on evidence submitted by the petitioner, all equipment associated with invoice number INV191157 is approved for refund.

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Condo Masonry LLC

Construction Contract – Invoice 1271716

The claimant requests a refund for tax paid on service and materials provided to fix a dumpster. The claimant maintains that the vendor performed service on real property, and paid taxes on their purchases. The claimant failed to provide evidence that the dumpster is affixed to the property. Generally, dumpsters are not attached to the realty and are considered taxable personal property. Accordingly, this objection is denied.

Invoice 4202016

The claimant requests a refund for tax paid to Condo Masonry for services performed at a United Dairy Farmers store located in Hamilton County. Sales of services are sourced to the location where the consumer receives the service. R.C. 5739.033(C)(2). The amount requested by the claimant is based on the location of the vendor. However, the store in question is located in Butler County, which is where the service took place. Therefore, the amount of $538.99 previously approved by the auditor is correct, and no additional refund on this claim is warranted.

Evans Brothers Construction LLC

Building Maintenance

The claimant requests a refund for tax paid on a maintenance service provided by Evans Brothers Construction LLC. Pursuant to R.C. 5739.01(B)(3)(j), building maintenance and janitorial services are included within the definition of a sale, and are therefore taxable services. However, the invoice provided by the claimant shows that the service provided involved unclogging drains. While this is related to building maintenance, it is not considered the same service. Therefore, the refund related to unclogging drains is approved.

Light Bulb Replacement

The claimant requests a refund for tax paid on purchases of light bulbs. Sales of all tangible personal property is presumed taxable until the contrary is established. R.C. 5739.02(C) and 5741.02(G). The claimant does not provide any reasoning for this specific request. The objection is denied.

Painting

The claimant requests a refund for tax paid on painting services. Items painted included shelving on self-serve bread equipment, other equipment, a self-serve ice cream machine, and doors. The Board of Tax Appeals has previously held that painting services applied to real property are exempt, while paint applied to business fixtures remains a taxable service. *Funtime v. Wilkins*, BTA No. 2006-K-730, 2011 WL 2118310 (May 24, 2011). Therefore, painting services applied to taxable tangible personal property and business fixtures, such as the ice cream machine and self-serve bread equipment would remain taxable services. While the painting of doors could be considered exempt because the doors are real property, the invoice does not separate the charges. Therefore, the entire transaction is taxable because the claimant has not provided sufficient evidence to determine a clear right to the

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requested relief. *Belgrade Gardens v. Kosydar,* 38 Ohio St.2d 135, 311 N.E.2d 1 (1974). The objection is denied.

Imperial Brown Inc

The claimant requests a refund for tax paid on the purchase of a freezer and cooler combo. Equipment used to preserve food that has been or will be prepared for human consumption by a food service operator is not taxable, unless the equipment is used to display food for selection by customers. R.C. 5739.02(B)(27)(b). Because of the nature of the business, this freezer is most likely used to store food for customers to select and purchase. The claimant has not provided any evidence to the contrary. Further, the Board of Tax Appeals held that refrigeration cases used to display food for selection by customers are business fixtures. *Meijer, Inc. v. Tracy*, BTA No. 97-M-1618, 2001 WL 128070 (Feb. 8, 2001). Therefore, the objection is denied.

Ingersoll Rand Company Industrial Technologies

The claimant requests a refund of tax paid. The invoice states that the service provided was to troubleshoot a compressor not working properly. The claimant has not provided sufficient information to describe the service. Further, the tax base listed by the claimant is higher than what the invoice shows. The objection is denied for lack of information.

Jos Day

The claimant requests a refund for tax paid on services provided by Jos Day. Based on the invoice, the service provided involved pouring concrete to erect light poles at claimant stores. Parking lot lighting is a business fixture and therefore taxable. *Oregon Ford Inc. v. Wilkins*, BTA No. 2005-A-111, 2006 WL 247160 (Jan. 27, 2006). The objection is denied.

Kenmarc Inc

Coolers and Associated Fixtures

The claimant requests a refund for tax paid on the installation of wall and ceiling mount cooler fixtures and demo strip lighting for the coolers. The coolers are a business fixture because they benefit the business more than the realty. R.C. 5701.03(B). Therefore, these items associated with the coolers are taxable business fixtures as well. Further, specialized lighting, such as the strip lighting for the coolers is taxable. *Oregon Ford Inc. v. Wilkins*, BTA No. 2005-A-111, 2006 WL 247160 (Jan. 27, 2006). The objection is denied.

Air Pump

The claimant requests a refund for tax paid on service for an air pump. Air pumps are business fixtures. R.C. 5701.03(B). The air pump retains its status as personal property even after being affixed to the property. Ohio Adm.Code 5703-9-14(B). Repair of tangible personal property is a sale for tax purposes. R.C. 5739.01(B)(3)(a). Therefore, service to repair the air pump is taxable. The objection is denied.

Lighting

The claimant requests a refund of tax paid on several transactions involving lighting. The transactions include retrofit of exterior lighting, exterior lights checked and bulbs replaced, twelve nine-foot lamps replaced, and a new LED pole light installed. These transactions all involve exterior lighting. Parking lot lighting is a taxable business fixture. *Oregon Ford Inc. v. Wilkins*, BTA No. 2005-A-111, 2006 WL 247160 (Jan. 27, 2006). Further, light bulbs are taxable tangible personal property.

Other lighting transactions include replacing lamps and ballasts in lights around stores, retrofitting single-lamp fixtures to two-lamp fixtures, and installing new can lights and LED lamps. Absent additional documentation, these items are all tangible personal property for which no exempt reason has been given. Therefore, these lighting transactions are taxable. R.C. 5739.02(C) and 5741.02(G).

All objections to lighting transactions from this vendor are denied.

Installing New Circuits

The claimant requests a refund for tax paid on service provided to install a new circuit and receptacle for a new coffee pot on a coffee island within one of the claimant's store. Islands within the claimant's stores are business fixtures primarily benefitting the claimant's business. R.C. 5701.03(B). Installation of electrical wiring specifically for use in a business fixture is a taxable transaction. *See Pep Boys v. Testa,* BTA No. 2015-706, 2016 WL 3018415 (Apr. 4, 2016). The objection is denied.

Other Transactions

Finally, the claimant requests a refund for tax paid on the following transactions: troubleshooting cooler lights and checking power to the door frame and driver, checking power for the store sign, and investigating a light outage over gas pumps

Coolers, store signs, gas pumps, and coffee islands are all business fixtures pursuant to R.C. 5701.03(B). These items retain their status as personal property even after being affixed to the property. Ohio Adm.Code 5703-9-14(B). Repair of tangible personal property is a sale for tax purposes. R.C. 5739.01(B)(3)(a). Therefore, service to repair these items is taxable. The objection is denied.

<u>Lansa Inc</u>

The claimant requests a refund for tax paid to Lansa Inc. The invoice shows a sales tax amount charged and a total. However, there is no item description. The claimant did not provide additional information on the nature of this transaction when requested by the auditor. No further information has been provided. Because the nature of this transaction cannot be determined, the taxability cannot be determined. The objection is denied.

Sunderhaus Construction

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Labor & Material

The claimant requests a refund for tax paid on labor and material for building, priming and painting a dumpster enclosure and resetting a sign. Store signs have been previously found to be business fixtures, and thus taxable. *Pep Boys v. Testa*, BTA No. 2015-706, 2016 WL 3018415 (Apr. 4, 2016). Further, a dumpster enclosure is also a business fixture. R.C. 5701.03(B). Therefore, the labor and material applied to setting up the dumpster enclosure remains taxable. *See Funtime v. Wilkins*, BTA No. 2006-K-730, 2011 WL 2118310 (May 24, 2011). The objection is denied.

Pressure Washing and Drvit Repairs

The claimant requests a refund for tax paid on several invoices that contain bundled transactions. A bundled transaction means the retail sale of two or more products, except real property and services to real property, where the products are otherwise distinct and identifiable products and are sold for one non-itemized price. R.C. 5739.012(A)(1). The taxability of the transaction shall be determined by the true object of the consumer entering into the transaction. R.C. 5739.012(D). Here, several transactions include work for patching dryvit and pressure washing buildings, painting signs, and painting dryvit. Patching and painting dryvit are exempt services. R.C. 5739.02(B)(13). However, pressure washing is taxable as a building maintenance service and painting signs is taxable because store signs are business fixtures. R.C. 5739.01(B)(3)(j), *Funtime v. Wilkins*, BTA No. 2006-K-730, 2011 WL 2118310 (May 24, 2011). The claimant failed to submit sufficient evidence to determine the true object of these transactions.

Further, findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St. 3d 121, 537 N.E.2d 1302 (1989). Therefore, the burden is on the taxpayer challenging the determination to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar,* 38 Ohio St.2d 135, 311 N.E.2d 1 (1974). The claimant requests tax paid on a transaction that includes taxable and exempt services on one line item. The invoice submitted by the claimant does not allow the Tax Commissioner to discern the amount of taxes paid on the exempt service. The claimant has not met its burden of clearly establishing a right to the requested relief. The objection is denied.

Other Transactions

The claimant requests a refund of tax paid on the purchase of a portable wood desk used to perform work at different work sites, services provided removing furniture from a plant and taking them to a warehouse, and demolition of cubicles. R.C. 5739.02 levies an excise tax on all retail sales made in the state, unless an exemption or exception is applicable. The claimant has not provided sufficient documentation to describe the transactions and how they are exempt. Therefore, the objection is denied.

Zesco Products

The claimant requests a refund for tax paid on the purchase of a freezer. Equipment used to preserve food that has been or will be prepared for human consumption by a food service operator is not

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taxable, unless the equipment is used to display food for selection by customers. R.C. 5739.02(B)(27)(b), *Meijer, Inc. v. Tracy*, BTA No. 97-M-1618, 2001 WL 128070 (Feb. 8, 2001). The claimant has not provided any information demonstrating that this freezer is used to preserve food rather than display it for selection by customers. The objection is denied.

An additional refund in the amount of $46.84 with applicable interest is granted.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: APR 0 8 2020

Valley Tool & Die, Inc.
10020 York Theta Dr.
North Royalton, OH 44133

Re: Assessment No. 100000825635
Use Tax
Account No. 97-303136
Audit Period: 01/01/2010 – 12/31/2015

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

Tax	Pre-Assessment Interest	Penalty	Total
$17,674.53	$2,788.63	$1,766.99	$22,230.15

This assessment is the result of an audit of the petitioner's purchases for the period shown above. The petitioner operates a manufacturing company in North Royalton, Ohio. A hearing was not requested.

Audit Methodology

Capital asset purchases were reviewed on a comprehensive basis. Audit Remarks, Page 6. However, a block sample was used to review expense invoices. Audit Remarks, Page 7. October 1, 2014 through September 30, 2015 was chosen as the sample year, and any seasonal or cyclical purchasing patterns occurring in that year would be similarly reflected in other years of the audit period. Data for the sample period was derived from the petitioner's General Ledger Account Detail. The total tax deficient expense purchases for each account were divided by the total purchase activity in the same accounts for the sample period to determine the percentage of error on untaxed purchases. Each percentage of error was then applied to the corresponding account's total audit period purchases to determine untaxed taxable purchases for the audit period. The appropriate tax rate was then applied to the untaxed purchases for the audit period to determine the amount of tax due. Tax rate changes that occurred during the audit period were prorated by the number of months that each rate was in effect.

The petitioner contends that the audit included several purchases that were not subject to tax. In the petition for reassessment, the petitioner included a list of transactions used in the audit. Several of the transactions are highlighted with a short phrase explaining why the petitioner believes the transaction is exempt. However, the petitioner provided no evidence to support the contentions.

It should be noted that an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino,* 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E. 2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing, *Federated Department Stores, Inc. v. Lindley,* 5 Ohio St.3d 213, 450 N.E. 2d 687 (1983); *Automotive Warehouse, Inc. v. Limbach,* BTA No. 87-D-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. Sufficient, competent, and probative evidence to support allegations of error in the assessment would show in what manner and to what extent the error exists. *See Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999). As previously stated, the petitioner identified several transactions that they believe are not subject to tax. However, no evidence has been provided to explain why the petitioner believes these transactions to be tax exempt. All sales of tangible personal property are presumed taxable until the contrary is established. R.C. 5739.02(C) and 5741.02(G). The petitioner has not proven that these transactions are exempt.

Further, the auditor sent the petitioner a 10-day letter on August 8, 2017. The letter gave the petitioner the opportunity to provide an alternative methodology to determine tax liability. The petitioner did not provide an alternative methodology or indicate that certain transactions should not be included in the audit. The objection is denied.

The assessment is affirmed as issued.

Current records indicate that a payment of $22,230.15 has been made in full satisfaction of the assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

APR 29 2020

Kismut, LLC
Vikas Patel
10561 Nobhill Ln.
Concord, OH 44077

RE: Four Assessments
Use Tax

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

Assessment No.	Tax	Pre-Assessment Interest	Penalty	Total
100000490493	$18,787.75	$1,981.40	$2,818.16	$23,587.31
100000490496	$18,777.51	$1,556.19	$2,816.63	$23,150.33
100000490530	$24,270.12	$436.57	$3,640.52	$28,347.21
100000490531	$20,650.00	$315.48	$3,097.50	$24,062.98
			Total:	$99,147.83

These assessments are the result of an audit of the petitioner's purchase of four vehicles. Although Kismut, LLC and Mr. Patel were both assessed, it is not the intent of the Tax Commissioner to collect tax more than once for the purchase of these four vehicles. The Supreme Court of Ohio held that where ownership is unclear, multiple parties may be assessed for the full amount of the same use tax. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954.

The facts indicate that Vikas Patel formed Kismut LLC, a Montana business, on March 6, 2013.[1] Through the LLC, Mr. Patel purchased three vehicles between 2013 and 2016. The fourth was purchased directly by Vikas Patel. The petitioner titled the Ferrari 458 Italia in March 2013, the McLaren MP4 12C in December 2013, the Ferrari 458 Speciale in February 2016, and the Ferrari FF in March 2016. Three of the vehicles were registered and titled in Montana and the fourth was registered in Ohio. However, the evidence in the file demonstrates that Mr. Patel was a full-time resident of Ohio at the time of these purchases. The evidence further demonstrates that the petitioner failed to pay tax to any jurisdiction on these purchases. As a result, an assessment was issued. The petitioner filed a petition for reassessment.

[1] Montana Secretary of State website. https://www.mtsosfilings.gov/mtsos-corporations/viewInstance/view.html?id=8383adccf3cbf69372998a953a344618fa8d9d451817b17d7f68a676b2d15f5c&_timestamp=13959399860585420

Background

Montana does not have a sales tax or a use tax. Some practitioners advertise that people can form Montana LLCs and avoid paying sales tax on the purchase of luxury vehicles. For instance, the Heggen Law Office website states[2],

> "As a non-resident of Montana, you may be able to avoid paying sales tax, personal property tax and high licensing fees upon the purchase of your new high-performance car, boat, airplane or RV. A simple legal procedure is involved which, in most cases, helps clients save a great deal of money on taxes and licensing fees through creating a Montana LLC and then proceeding with Montana vehicle registration or Montana RV registration within the legal bounds of a Montana LLC. Let us help you take advantage of Tax Free Montana Vehicle Registration."

The typical scenario involves a resident of another state, such as Ohio, who wants to purchase a motorhome, recreational vehicle, boat, automobile, etc. and avoid paying tax on the purchase. The person forms an LLC, usually with the help of a Montana tax or law practitioner. The title of the vehicle is put in the name of the Montana LLC and the LLC obtains a Montana license plate for the vehicle.

The petitioners purchased four vehicles. They did not pay sales or use tax to Montana because Montana imposes no sales tax on the purchase of vehicles by its residents. As previously stated, the petitioners contend that three of the vehicles were being purchased by Kismut, LLC. Jared Heggen is the registered agent for Kismut, LLC.[3] In addition to listing Jared Heggen as its agent, Kismut, LLC lists its principal office address as the same address as Heggen Law Office's mailing address on the Montana Secretary of State's website.[4]

The Heggen Law Office website provides a detailed description of the services it provides to its clients. Heggen Law Office manages the legal relationships needed to form and maintain the LLC in Montana. They provide the following services and information to clients:

- 1 hour expedited filings
- Handle the registration and titling process at a local Montana DMV
- File annual reports with the state of Montana
- Keep your personal information confidential
- Use of the firm address as your LLC's physical and mailing address
- Pick up annual registration stickers for every car registered in Montana

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[2] Heggen Law Office, *Vehicle Registration*, http://heggenlawoffice.com/tax-free-montana-vehicle-registration/ (accessed Mar. 26, 2020).

[3] Montana Secretary of State website. https://www.mtsosfilings.gov/mtsos-corporations/viewInstance/view.html?id=8383adccf3cbf69372998a953a344618fa8d9d451817b17d7f68a676b2d15f5c&_timestamp=13959399860585420

[4] *Id.*

- Maintain a copy of your articles of organization, operating agreement, and all registrations and annual reports

It is clear that Heggen Law Office and similar practitioners perform all the duties and paperwork associated with forming and managing the LLCs, including registering vehicles and purchasing the license plates. As with the petitioner here, the LLC's address is often the address of the practitioner that set up the LLC. The evidence establishes that LLCs are formed for no other purpose but to avoid sales tax and other associated costs related to owning luxury vehicles. Pursuant to R.C. 5703.56, a transaction without economic substance because there is no business purpose other than obtaining tax benefits is a "sham transaction" and may be disregarded by the Tax Commissioner for the purposes of determining tax liability.

Resale Exception

The petitioner contends that these purchases are not subject to use tax because the cars were purchased with the intent to resell them to other consumers. R.C. 5739.01(E) excepts from taxation "those sales in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person." The petitioner further contends that there is no requirement that they be a licensed dealer in order to qualify for the resale exception. Under R.C. 4517.02(A)(2), no person shall engage in the business of selling used cars at retail or wholesale unless they are licensed as a dealer in Ohio. It follows that if you are not legally engaged in business pursuant to R.C. 4517.02(A)(2), you cannot qualify for the resale exception as outlined in R.C. 5739.01(E) because the exception requires that you be engaged in business.

The petitioner acknowledged that he is not licensed a dealer, but instead contends that a license is not required for the resale exception. However, as previously stated, the resale exception requires that one be engaged in business. The petitioner has not submitted any evidence indicating that he is licensed as a dealer, which is a requirement to engage in the business of selling used cars. In support of the position that he is not required to be a licensed dealer for the resale exception to apply, the petitioner cites *Foxhaven Marina, Inc. v. Tracy*, in which the Board of Tax Appeals found that it was not a statutory requirement for a watercraft dealer to be a licensed dealer. BTA No. 95-J-657, 1996 WL 764891 (Sept. 20, 1996). The Board of Tax Appeals compared *Foxhaven Marina* to a similar case, *McCleary v. Limbach*. The Board noted that even though the appellant in *McCleary* wasn't a licensed watercraft dealer, they had a vendor's license number that it used to report taxable sales. *Id.* citing *McCleary v. Limbach*, BTA No. 89-E-748, 1991 WL 235411 (Oct. 18, 1991). While the Board of Tax Appeals found that it was not a statutory requirement for a watercraft dealer to be licensed, there is such a statutory requirement for used car dealers in R.C. 4517.02(A)(2). Moreover, there is no evidence that the petitioner maintained an Ohio vendor's license to report taxable sales. Therefore, the decision in *Foxhaven* does not apply to the current set of facts.

The petitioner also maintains that the fact that the cars were used when they were taken to be displayed for prospective buyers does not override the initial reason of purchasing the cars for resale. In support of this position, the petitioner cites two previously decided cases in which the

resale exception was in question because of use of the property by the appellant. The Board of Tax Appeals previously held that an appellant's limited use of a boat in order to demonstrate it for potential buyers did not destroy the exemption. *McCleary v. Limbach*, BTA No. 89-E-748, 1991 WL 235411 (Oct. 18, 1991). Additionally, the Supreme Court of Ohio found that where the purchaser has put the property to more than one use, the primary use must determine its taxability. *Dresser Industries v. Lindley*, 12 Ohio St.3d 68, 465 N.E.2d 430 (1984). However, in both of those cases, there was no question as to whether the resale exception applied because both appellants were engaged in a business. Here, the petitioner has not proven that he was lawfully engaged in the business of selling used cars. Therefore, these two cases do not apply and there is no need to determine if the limited use of the vehicles destroyed the exception.

Finally, based on the petitioner's own admission he was well aware of the legal requirements he needed to fulfill in order to legally purchase cars for resale. In the petitioner's petition for reassessment, he admits that he researched how to buy and sell cars, and even contacted an attorney regarding forming a business and obtaining a dealer's license. He further admitted that he was advised that he would need to buy a building, but he "was not yet ready to operate on a scale that would justify buying a building" and ultimately moved forward without a dealer's license. In the petition for reassessment he further stated that he "determined that the problem with buying new and used cars without a dealer's license is you can't make money because you are paying sales tax buying at retail…" It is clear that the petitioner knew that he was required to have a dealer's license in order to legally engage in the business of selling cars and qualify for the resale exception outlined in R.C. 5739.01(E). Therefore, the petitioner's argument that he purchased these cars for the purpose of reselling them is not well taken because he knew that he could not legally do so without a dealer's license.

For all of the reasons above, the resale exception provided for in R.C. 5739.01(E) does not apply to the petitioner's purchases. The objection is denied.

Not Subject to Ohio Use Tax Pursuant to R.C. 5741.02(B)

The petitioner concedes that the Ferrari FF was stored in Ohio but maintain that the other three cars were stored in Indiana and Michigan. Therefore, pursuant to R.C. 5741.02(B) those cars are not subject to use tax in Ohio. Under R.C. 5741.02(B), "each consumer, storing, using, or otherwise consuming in this state tangible personal property or realizing in this state the benefit of any service provided, shall be liable for the tax…"

Here, while the petitioner contends that no use or benefit was realized in Ohio, he also acknowledges that the cars were brought into Ohio to display at car shows and show to prospective buyers. The petitioner submitted insurance policies for each vehicle. The policy for the McLaren indicates that the storage location was Mr. Patel's home address in Ohio. Further, the evidence indicates that the Ferrari 458 Italia was purchased from an Ohio vendor and titled in Ohio by the LLC, which claimed a nonresident exemption. Even if this particular car was removed from Ohio, the fact that it was titled in Ohio demonstrates an intent that the car would be in Ohio. *Oty v. Lindley*, BTA No. 81-F-240, unreported (October 24, 1983). Finally, Mr. Patel is

an Ohio resident. No evidence has been submitted to show that these cars were stored in other states. The objection is denied.

Not Subject to Ohio Use Tax Pursuant to R.C. 5741.02(C)(3)

The petitioner contends that cars not stored in Ohio are not taxable pursuant to R.C. 5741.02(C)(3). Under R.C. 5741.02(C)(3), use tax does not apply to "property or services, the storage, use, or other consumption of or benefit from which this state is prohibited from taxing by the Constitution of the United States, laws of the United States, or the Constitution of this state." In support of this argument, the petitioner cites *Big Boy's Toy v. Limbach* which provides that when determining if a state tax law violates the commerce clause, each prong of the four-part test established in *Complete Auto Transit* must be satisfied. 64 Ohio St.3d 448, 597 N.E. 2d 76 (1992). Particularly, the court determined that mere interruption from interstate commerce is not enough to apply state tax, use of property within Ohio must be substantial in order for there to be substantial nexus. *Id.*

However, in Big Boy's Toy, the commerce clause was at issue because the boat was intended to be kept for use as a floating vacation condominium along the east coast and was not purchased or stored exclusively in Ohio. *Id.* Therefore, the court had to determine if the commerce clause was violated by imposing Ohio use tax based on certain transactions that took place within Ohio. Here, the commerce clause is not an issue because it does not apply to intrastate commerce. Mr. Patel is an Ohio resident who stored, purchased, and/or used these vehicles within Ohio. Further, whereas the appellant in Big Boy's Toy provided proof of contacts with states other than Ohio, the petitioner has provided no proof that the vehicles in question were, or were intended to be, stored outside of Ohio. The objection is denied.

Purchase Price

While the petitioner does not appear to contest that use tax is owed on the purchase of the Ferrari FF, they do contend that the purchase price used to determine tax liability for the Ferrari FF on assessment 100000490531 is not accurate. The tax due amount shown on the notice of assessment is based on a purchase price of $295,000. The petitioner submitted a copy of the title transfer indicating a purchase price of $175,000 and copies of cashier's checks in the same amount paid to the seller of the Ferrari FF. Based on the evidence submitted by the petitioner, the tax amount due on assessment 100000490531 has been changed to reflect the actual purchase price.

Penalty

The petitioner requests 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). The facts and circumstances do not support reduction of the penalty.

Therefore, assessment numbers 100000490493, 100000490496, and 100000490530 are affirmed as issued and assessment number 100000490531 is adjusted as follows:

APR 29 2020

Assessment No.	Tax	Interest	Penalty	Total
100000490531	$12,250.00	$2,044.19	$1,837.50	$16,131.69

The remaining assessments are affirmed as issued.

Current records indicate that no payments have been made toward these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to 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 THESE MATTERS. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THESE MATTERS WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner