0000000129

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 15 2020

ABC Tires Shop, Inc.
1577 E. Dublin Granville Rd.
Columbus, OH 43229

Re: Assessment No. 100000761209
Commercial Activity Tax
Reporting Period: 01/01/2016 – 12/31/2016

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

Tax	AMT	Interest	Penalty	Total
$500.00	$2,600.00	$35.99	$620.00	$3,755.99

The Ohio Department of Taxation found that the petitioner did not file a return and remit CAT for the period at issue. The petitioner also failed to pay the annual minimum tax ("AMT") owed for tax year 2017. The petitioner objected to the assessment and did not request a hearing on the matter. Therefore, this matter is decided upon information available to the Tax Commissioner and the evidence supplied with the petition.

The petitioner's 2016 Form CAT 12 was due by May 10, 2017 and current records indicate that a CAT return has not be filed for 2016. Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed estimated AMT pursuant to R.C. 5751.03(B). In addition, the petitioner was assessed a late penalty pursuant to R.C. 5751.06(A) and an underpayment penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest amount was assessed pursuant to R.C. 5751.06(G).

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. Documentation in the file shows that a CAT account has been established for ABC Tires Shop, Inc. and that a 2016 CAT return has not been received. The petitioner was required under R.C. 5751.051(A)(5) to file a 2016 CAT return reporting its taxable gross receipts regardless of whether it incurred $150,000 or more of gross receipts for the calendar year. As such, the information available to the Tax Commissioner indicates that the petitioner had taxable gross receipt during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available and the penalties are reasonable based on the facts and circumstances.

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JAN 15 2020

Accordingly, the assessment is affirmed.

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

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

0000000191

FINAL DETERMINATION

Date:

JAN 2 2 2020

American Century Investment Services, Inc.
ATTN: Corporate Tax Department
4500 Main Street
Kansas City, MO 64111

Re: Tax Type: Commercial Activity
Two Assessments, Ten Refund Claims
Multiple Periods

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2018-988, dated December 10, 2019. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

The final determination of the Tax Commissioner also includes a petition for reassessment filed pursuant to R.C. 5751.09 concerning commercial activity tax (CAT) assessment number 100000946204.

In resolution of these matters, refund claim numbers 201437093, 201538279, 201538281, 201538280, 201538282, 201538283, 201538284, 201538285, 201538286, and 201538287 are denied and assessment numbers 100000644774 and 100000946204 are modified as follows:

Assessment Number	Period	Tax	Interest	Penalty	Total
100000644774	1/1/2013-12/31/2014	$100,000.00	$20,578.21	$0.00	$120,578.21
100000946204	1/1/2015-12/31/2016	$40,000.00	$5,894.44	$0.00	$45,894.44

Payments totaling $166,472.65 have been received in full satisfaction of these assessments.

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

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

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: JAN 15 2020

Arcade Plumbing Co.
5108 Grosse Pointe Dr.
Cincinnati, OH 45238

Re: Assessment No. 100000768031
Commercial Activity Tax
Reporting Period: 01/01/2016 – 12/31/2016

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

Tax	AMT	Interest	Penalty	Total
$500.00	$2,600.00	$35.54	$590.00	$3,725.54

The Ohio Department of Taxation found that the petitioner did not file a return and remit CAT for the period at issue. The petitioner also failed to pay the annual minimum tax ("AMT") owed for tax year 2016. The petitioner objected to the assessment and did not request a hearing. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

The petitioner's 2016 Form CAT 12 was due by May 10, 2017 and current records indicate that a CAT return has not be filed for 2016. Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed estimated AMT pursuant to R.C. 5751.03(B). In addition, the petitioner was assessed a late penalty pursuant to R.C. 5751.06(A) and an underpayment penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest amount was assessed pursuant to R.C. 5751.06(G).

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. Documentation in the file shows that a CAT account has been established for Arcade Plumbing Co. and that a 2016 CAT return has not been received. The petitioner was required under R.C. 5751.051(A)(5) to file a 2016 CAT return reporting its taxable gross receipts regardless of whether it incurred $150,000 or more of gross receipts for the calendar year. As such, the information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

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Accordingly, the assessment is affirmed. JAN 15 2020

Current records indicate that payment of $150.00 has been made on this assessment, leaving a balance of $3,575.54 due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law**. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 1090, Columbus, OH 43216-1090.

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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: JAN 15 2020

Blue Ridge Estates Ltd.
P.O. Box 562
Sharon Center, OH 44274

Re: Assessment No. 100000584940
Commercial Activity Tax
Reporting Period: 01/01/2015 – 12/31/2015

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

Tax	Interest	Penalty	Total
$3,100.00	$73.08	$620.00	$3,793.08

The Ohio Department of Taxation found that the petitioner did not file a return and remit CAT for the period at issue. The petitioner also failed to pay the annual minimum tax ("AMT") owed for tax year 2016. The petitioner objects to the assessment and did not request a hearing on the matter. Therefore, this matter is decided based upon information available Tax Commissioner and the evidence supplied with the petition.

The petitioner's 2015 Form CAT 12 was due by May 10, 2016 and current records indicate that a CAT return has not been filed for 2015. Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed estimated AMT pursuant to R.C. 5751.03(B). In addition, the petitioner was assessed a late penalty pursuant to R.C. 5751.06(A) and an underpayment penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest amount was assessed pursuant to R.C. 5751.06(G).

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. Documentation in the file shows that a CAT account has been established for Blue Ridge Estates, Ltd. and that a 2015 CAT return has not been received. The petitioner was required under R.C. 5751.051(A)(5) to file a 2015 CAT return reporting its taxable gross receipts regardless of whether is incurred $150,000 or more of gross receipts for the calendar year. As such, the information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties reasonable based on the facts and circumstances.

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JAN 15 2020

Accordingly, the assessment is affirmed.

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

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-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: JAN 2 8 2020

Crown Plastics Co.
c/o Rod Harris, Controller
116 May Drive
Harrison, OH 45030

Re: Multiple Refund Claims
Commercial Activity Tax
Multiple Reporting Periods

This is the final determination of the Tax Commissioner with regard to the following applications for commercial activity tax ("CAT") refund filed pursuant to R.C. 5751.08:

Refund Claim Number	Tax Period	Refund Claimed
941480350063	01/01/2015 – 03/31/2015	$4,961.00
941480034860	04/01/2015 – 06/30/2015	$8,340.00
941480046103	07/01/2015 – 09/30/2015	$1,426.00
941480317855	10/01/2015 – 12/31/2015	$12,071.00
941480058649	01/01/2016 – 03/31/2016	$4,670.00
941480030166	04/01/2016 – 06/30/2016	$6,619.00

The claimant, Crown Plastics Co., filed six (6) Applications for Commercial Activity Refund ("CAT REF") with the Department requesting refunds for amounts paid toward prior certified assessments.[1] Specifically, the Department assessed the claimant for failure to file timely quarterly CAT returns for all of tax year 2015 as well as the first and second quarters of 2016. Consequently, the claimant was assessed estimated tax for all four quarters of 2015 and for the first and second quarters of 2016 pursuant to R.C. 5751.09. The claimant was also assessed late payment penalties pursuant to R.C. 5751.06(A) and underpayment penalties pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The matters were subsequently certified to the Ohio Attorney General's office for collections[2] because the claimant did not file timely petitions for reassessment.

The claimant remitted payment to the Ohio Attorney General's office to be applied towards the certified assessments. The claimant then filed the required quarterly returns and the certified assessments were

[1] The claimant had certified assessments for: (1) 01/01/2015 – 03/31/2015; (2) 04/01/2015 – 06/30/2015; (3) 07/01/2015 – 09/30/2015; (4) 10/01/2015 – 12/31/2015; (5) 01/01/2016 – 03/31/2016; and (6) 04/01/2016 – 06/30/2016 for failure to file a timely quarterly CAT return. The claimant filed the required quarterly returns, paid the certified assessments in whole to the Ohio Attorney General's office, and requested a refund for the amounts overpaid.
[2] Pursuant to R.C. 131.02.

adjusted to reflect the new information within the claimant's recently filed quarterly CAT returns. On April 16, 2018, the claimant filed the six (6) above-referenced CAT REFs requesting the Department refund the difference between the amounts previously remitted to the Ohio Attorney General's office and the adjusted amounts reflected on the recently filed quarterly CAT returns.

Department records show that the Ohio Attorney General's office refunded the claimant: (1) $13,433.67 on November 07, 2019; (2) $5,891.00, on December 19, 2018; (3) $20,411.86 on June 04, 2019; (4) $4,684.79 on June 20, 2017; (5) $7,112.49 on August 10, 2019; and (6) $7,422.88 on August 10, 2019, which represents the payments previously made on the certified assessments and includes applicable statutory interest. These facts reflect that the refunds the claimant seeks in this matter have been granted and issued by the Ohio Attorney General's office.

Since the refunds sought herein have already granted and issued, the refund claims are dismissed.

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

0000000220

FINAL DETERMINATION

Date: JAN 23 2020

DriveTime Car Sales Company, LLC
1720 W. Rio Salado Pkwy
Tempe, AZ 85281-6590

Re: Commercial Activity Tax
Assessment No. 100000712672
Reporting Period: 01/01/2013 – 12/31/2014

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

Tax	Interest	Penalty	Total
$96,844.00	$8,787.00	$14,527.00	$120,158.00

I. BACKGROUND

Drivetime Car Sales Company, LLC (hereinafter "Drivetime" or "petitioner") is a subsidiary of Drivetime Automotive Group, Inc. (hereinafter "Drivetime Automotive"). Drivetime Automotive is headquartered in Phoenix, Arizona and operated 144 dealerships across the country during the period in question. Collectively, Drivetime Automotive comprises a fully integrated used vehicle retailer whose primary focus is on the sale, lease, and financing of used vehicles and related products to the subprime market. Drivetime Automotive performs all servicing functions for their loan portfolio, from collections through resale of a repossessed vehicle. The petitioner files CAT as a consolidated elected taxpayer group ("consolidated group") which was made up of approximately 47 entities during the periods in question, including DT Acceptance Corporation ("DT Acceptance") and GFC Lending, LLC, d.b.a. Go Lending ("GFC Lending"), a subprime automobile lending agency.

The Department assessed the petitioner after performing an audit review for the period at issue. The Department's assessment of the petitioner includes all entities in the Drivetime Automotive group with substantial nexus in the consolidated group. In addition, the Department reviewed the entities' taxable gross receipts reported for the CAT. The petitioner requested a telephone hearing, which was held on September 26, 2019. The petitioner objects to the assessment and requests an abatement of penalties and interest assessed. This matter is now decided based upon the evidence currently available to the Tax Commissioner.

II. PETITIONER'S CONTENTIONS

The petitioner raises three objections to the assessment. First, the petitioner contends that the Department incorrectly disallowed bad debt exclusion, which it claims were permissible under R.C. 5751.01(F)(2)(dd). Second, the petitioner argues that the Department erroneously increased its taxable gross receipts to include previously unreported interest income. Third, the petitioner requests an abatement of the penalties assessed.

JAN 23 2020

III. AUTHORITY

A. A GROSS RECEIPTS TAX

The CAT is a tax imposed on the privilege of doing business in Ohio and is measured by taxable gross receipts. "Gross receipts" is defined in R.C. 5751.01(F) as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration."

B. EXCLUSIONS FROM CAT

Chapter 5751 provides for 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:
>
> (a) Interest income *except interest on credit sales*;
>
> * * *
>
> (dd) Bad debts from receipts on the basis of which the tax imposed by this chapter was paid in a prior quarterly tax payment period. For the purpose of this division, "bad debts" means any debts that have become worthless or uncollectible between the preceding and current quarterly tax payment periods, have been uncollected for at least six months, and that may be claimed as a deduction under section 166 of the Internal Revenue Code and the regulations adopted under that section, or that could be claimed as such if the taxpayer kept its accounts on the accrual basis. *"Bad debts" does not include repossessed property, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, or expenses in attempting to collect any account receivable or for any portion of the debt recovered*[.] (emphasis added)

C. 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.

D. SITUSING GROSS RECEIPTS FROM THE SALE OF TANGIBLE PERSONAL PROPERTY

R. C. 5751.01(G) indicates that "taxable gross receipts" means gross receipts situsued 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 and states:

> Gross receipts from the sale of tangible personal property shall be situsued 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. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

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 situsued. *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 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.

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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 Ohio's 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." *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.

E. SITUSING GROSS RECEIPTS RELATED TO FINANCIAL INSTRUMENTS

Division (H) of R.C. 5751.033 governs the situsing of receipts from dividends, interest, and other sources of income from financial instruments, which states:

> Gross receipts from dividends, interest, and other sources of income from financial instruments described in divisions (F)(4), (5), (6), (7), (8), (9), (10), (11), and (13) of section 5733.056 of the Revised Code shall be sitused to this state in accordance with the situsing provisions set forth in those divisions. When applying the provisions of divisions (F)(6), (8), and (13) of section 5733.056 of the Revised Code, "gross receipts" shall be substituted for "net gains" wherever "net gains" appears in those divisions. Nothing in this division limits or modifies the exclusions enumerated in divisions (E) and (F)(2) of section 5751.01 of the Revised Code. The tax commissioner may promulgate rules to further specify the manner in which to situs gross receipts subject to this division.

Thus, per R. C. 5751.033(H), the Department must situs the petitioner's gross receipts from interest income in accordance with R. C. 5733.056(F)(6), which is a provision from Ohio's former corporation franchise tax relating to loans not secured by real estate. Substituting "gross receipts" for "net gains," R. C. 5733.056(F)(6) states:

> (6) The numerator of the sales factor includes [gross receipts] from the sale of loans. [Gross receipts] from the sale of loans includes income recorded under the coupon stripping rules of section 1286 of the Internal Revenue Code.
>
> * * *
>
> (b) The amount of [gross receipts], but not less than zero, from the sale of loans not secured by real property included in the numerator is determined by multiplying such [gross receipts] by a fraction the numerator of which is the amount included in the numerator of the sales factor pursuant to division (F)(5) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.

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R. C. 5733.056(F)(5) states that, "[t]he numerator of the sales factor includes interest and fees or penalties in the nature of interest from loans not secured by real property if the borrower is located in this state."

IV. Analysis of the Facts & Circumstances Presented

A. The Petitioner Cannot Take the Exclusion Permitted Under R.C. 5751.01(F)(2)(dd)

First, the petitioner argues that the Department incorrectly disallowed bad debt exclusions, which it claims were permissible pursuant to R.C. 5747.01(F)(2)(dd). More specifically, the petitioner contends that the disallowance of the exclusions fails to treat it as a consolidated group pursuant to R.C. 5751.011. However, contrary to the petitioner's assertion, the Department's audit staff accounted for the exclusion of permissible intercompany transactions in accordance with R.C. 5751.011(C)(1)(a), but disallowed exclusions of "bad debts" that were otherwise includable in the consolidated group's gross receipts. The audit adjustment is dictated by the language of the relevant statutory provision, which states that "bad debts" do not include "repossessed property, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, or expenses in attempting to collect any account receivable or for any portion of the debt recovered." R.C. 5751.01(F)(2)(dd).

Here, the petitioner is a "buy-here, pay-here" used car dealership, meaning that it directly offers financing for the vehicles on their car lot. Drivetime Automotive, through the petitioner, directs the retail vehicle sales and operations while DT Acceptance directs the financing and loan serving operations. The petitioner sells the automobile to the buyer and extends financing to the buyer by originating a note receivable. The petitioner then sells the note receivable secured by the automobile to DT Acceptance. DT Acceptance holds and services the loans for vehicles sold by the Drivetime Automotive group. Accordingly, the sale by the petitioner produces gross receipts per R.C. 5751.01(F). However, since the automobiles remain under the control of the petitioner until the loan is paid in full, the uncollectable amounts from a loan default are precluded from the reduction to gross receipts as bad debts under R.C. 5751.01(F)(2)(dd).

Additionally, as stated above, bad debts subject to the exclusion under R.C. 5751.01(F)(2)(dd) specifically do not include bad debts incurred on repossessed property. Here, if a car buyer defaults on their loan, the automobile can be returned to the petitioner or repossessed by the petitioner. Therefore, the petitioner's gross receipts related to repossessions or situations where the petitioner otherwise regains possession of a vehicle due to uncollectability of a loan are not excludable as bad debts under R.C. 5751.01(F)(2)(dd). As such, to the extent that they are includable in the gross receipts of the consolidated group, the exclusion sought by the petitioner for "bad debts" under R.C. 5751.01(F)(2)(dd) cannot be granted.

Finally, the evidence currently available to the Tax Commissioner indicates that the receipts related to repossessed property that the petitioner sought to exclude are gross receipts that were in fact related to property that was ultimately received in Ohio. As such, the gross receipts are situsable to this state in accordance with R.C. 5751.033(E). Specifically, the Department's audit staff requested and reviewed Federal Form 1120 Income Tax Returns for S Corporations and Federal Form 1065 Partnership Returns as well as state apportionment schedules for the members of the petitioner's consolidated group. The audit staff used this documentation to identify the location where the petitioner's property was ultimately received to situs the gross receipts at issue. Aside from the contention that the receipts

should be excluded as "bad debts", the petitioner has not provided any evidence or arguments to refute the accuracy of the gross receipts sitused to Ohio for purposes of this assessment.

B. THE PETITIONER CANNOT TAKE THE EXCLUSION PERMITTED UNDER R.C. 5751.01(F)(2)(a)

Second, the petitioner contends that the Department erroneously increased its taxable gross receipts to include previously unreported interest income. R.C. 5751.01(F)(2)(a) provides an exclusion for interest income, except when the interest income results from a credit sale. However, the evidence available to the Tax Commissioner indicates that interest that the petitioner receives is interest on credit sales. While the petitioner does not contest that it engages in credit sales, it argues that the Department incorrectly included additional interest income in calculating its gross receipts. However, Department records indicate that the petitioner's federal returns for the periods in question reported a large amount of interest income from financing transactions that were not originally reported on the petitioner's CAT returns. As stated above, Drivetime Automotive, through the petitioner, sells used automobiles to an unrelated third-party purchaser in exchange for a purchaser note. The petitioner then sells the receivable to DT Acceptance for its role in the financing of the receivable. Here, DT Acceptance is providing financing to a related buyer due to the purchase of the note receivable from the petitioner. Due to the interrelated nature of this activity, this type of situation is considered a credit sale for purposes of R.C. 5751.01(F)(2)(a) and the receipts from such interest are included in the petitioner's gross receipts.

Since the petitioner failed to report all the interest income from financing transactions on its CAT returns for the periods in question, the Department calculated the petitioner's interest income from finance receivables as reported on DT Acceptance's Federal Form 1120s. The Department then compared the number of cars sold in Ohio to the number of cars sold everywhere to obtain the Ohio apportionment factor in accordance with R.C. 5751.033(H) and 5733.056. Accordingly, the interest income from DT Acceptance and other related entities was then added to the petitioner's taxable gross receipts for the periods in questions. The methodology used by the audit staff is consistent with R.C. 5751.033(H) and is supported by the evidence currently available to the Tax Commissioner. Furthermore, the petitioner has not provided evidence or arguments refuting the accuracy of the methodology that the Department's audit staff used to situs gross receipts related to interest on credit sales.

C. 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.

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 tax and interest amounts assessed in this matter. Since the petitioner is a "buy here, pay here" car dealership, the automobiles remain under the control of the petitioner until the loan is paid in full; therefore, the uncollectable amounts from a loan default are precluded from the reduction to gross receipts as bad debts under R.C. 5751.01(F)(2)(dd). Additionally, since the automobiles that are returned to the petitioner either voluntarily or involuntarily through repossession remain under the control of the petitioner until the loans are paid in full, the gross receipts associated

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with these returns are also precluded from being excluded as a bad debt under R.C. 5751.01(F)(2)(dd). Thus, the petitioner is not entitled to the CAT bad debt exclusion since its calculation and reporting of bad debt expense on its federal returns are not consistent with the exclusion for bad debt permitted under R.C. 5751.01(F)(2)(dd). Further, since the petitioner engages in credit sales, its interest income is included in gross receipts pursuant to R.C. 5751.01(F)(2)(a). However, because the petitioner failed to include all of its interest income from financing transactions on its CAT returns for the periods in question, the Department calculated the petitioner's interest income based on its federal returns and situsted the income pursuant to R.C. 5751.033(H).

The petitioner has provided insufficient evidence to demonstrate that the amounts it seeks to exclude are consistent with or are permissible under the specific statutory exclusion provisions. Therefore, based on the relevant authority and the evidence currently available to the Tax Commissioner, the tax and interest amounts assessed are accurate and shall be affirmed.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$96,844.00	$8,787.00	$7,263.50	$112,894.50

Current records indicate that no payments have been made on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **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, P.O. Box 16158, Columbus, OH 43216-6158.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN - 6 2020

Jonathan M. Epling
4300 Lynn Road, Ste, 201
Ravenna, OH 44266

Re: Refund Claim No. 324523324964
Commercial Activity Tax
Reporting Period: 01/01/2017 – 12/31/2017

This is the final determination of the Tax Commissioner in regard to an application for refund, in the amount of $650.00, of Commercial Activity Tax ("CAT") filed pursuant to R.C. 5751.08.

The Ohio Department of Taxation initially denied the claimant's refund claim, and the claimant objects to the denial. The claimant did not request a hearing on the matter but requested an administrative review of the denial in accordance with R.C. 5703.70. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the request for administrative review.

Upon further review, the claimant has presented sufficient evidence to support its request for refund.

Accordingly, the refund claim is granted.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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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: JAN - 9 2020

Exact Tool & Die Inc.
c/o John Melnik, Vice President
5425 West 140th St.
Brook Park, OH 44142

Re: Multiple Refund Claims
Commercial Activity Tax
Multiple Reporting Periods

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

Refund Claim Number	Reporting Period	Refund Claimed
799883086089	04/01/2016 – 06/30/2016	$2,322.00
799883085404	07/01/2016 – 09/30/2016	$2,458.00
799883088196	10/01/2016 – 12/31/2016	$23,379.00
799883037183	04/01/2017 – 06/30/2017	$2,394.00
799883051578	07/01/2017 – 09/30/2017	$52.00

In November 2018, the claimant filed the above-referenced Applications for Commercial Activity Refund ("CAT REF"). Upon initial review, the Department denied the claimant's refund claims. The claimant objected to the denials and requested an administrative review of the initial refund claims in accordance with R.C. 5703.70. The claimant requested a hearing, which was scheduled for January 23, 2020 at the Department's offices in Columbus, Ohio. However, prior to the scheduled hearing, the claimant withdrew its pending refund claims.

Accordingly, the refund claims are dismissed.

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: JAN 28 2020

Glock, Inc.
6000 Highlands Parkway
Smyrna, GA 30082

Re: Ohio Tax Account No. 93025288
Tax Type: Commercial Activity
Assessment No. 17201609019002
Audit Period: 01/01/2013 – 03/31/2015

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

Tax Due	Interest	Penalty	Total
$14,981.00	$702.00	$0.00	$15,683.00

I. BACKGROUND

The petitioner, Glock, Inc. ("Glock" or "petitioner"), is an Austrian company with its main U.S. facility located in Smyrna, Georgia. Glock is primarily a manufacturer of pistols, knives, entrenching tools, replacement magazines, and holsters. The Glock semiautomatic pistol is used by over 65% of law enforcement agencies in the United States. Additionally, Glock owns Glock Professional, Inc. ("Professional") which provides firearm training and gunsmith courses. Professional holds classes and seminars across the United States.

The Department of Taxation conducted a CAT audit of the petitioner and notified the petitioner of the proposed audit adjustments in a letter dated March 2, 2016. The petitioner noted objections to matters other than the matters that contributed to the audit assessment. In other words, the petitioner objected to the amount of taxable gross receipts that it had previously self-reported with its original returns, but it did not object to the assessment in principle or the amounts assessed. The auditor concluded that the petitioner had underpaid its CAT with respect to the audited issues, and a Notice of Assessment dated April 7, 2016 was sent to the petitioner. The assessment represented only the tax due for the issues that the auditor outlined in the proposed audit adjustments. The auditor made no adjustments for the matters and amounts contested by the petitioner with respect to its original returns.[1]

The petitioner agreed with the adjustments that resulted in the audit assessment and paid the assessment in full. However, the petitioner also filed a petition for reassessment raising objections related to the amounts it self-reported on its original returns. In its petition for reassessment, the petitioner also requested a telephone hearing on the matter. During the hearing, the petitioner reiterated that it did not

[1] In October 2018, the petitioner submitted a refund request for amounts it paid for periods that partially overlap the audit period. The refund request is still under review and will be addressed by the Commissioner in a separate determination in accordance with R.C. 5703.70.

dispute the amounts assessed pursuant to the audit but was instead contesting the amount of CAT taxable gross receipts it reported on its original returns.

II. THE PETITIONER'S CONTENTION

The petitioner does not dispute the findings of the audit that resulted in the assessment. However, the petitioner objects to the amount of CAT taxable gross receipts it reported pursuant to returns filed for tax periods included in the audit period. Namely, the petitioner states that it included on its original returns gross receipts from the sale of tangible personal property that was received by its customers in Ohio but was subsequently sold and delivered to ultimate purchasers both within and without Ohio. The petitioner also argues that it failed to properly exclude cash discounts from its taxable gross receipts on its originally filed returns. Finally, the petitioner raises constitutional objections to the CAT related to the Commerce and Due Process Clauses of United States Constitution.

III. AUTHORITY

A. A GROSS RECEIPTS TAX

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.

B. SITUSING OF RECEIPTS FROM THE SALE OF TANGIBLE PERSONAL PROPERTY

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:

> 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. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

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 (July 19, 2017) agreeing that the location where the property was ultimately received after all transportation has been completed by the purchaser controls where the sales are sitused under R.C. 5751.033(E). *Greenscapes*, 2019-Ohio-384 at ¶ 27.

Mia Shoes, Inc. v. McClain, BTA No. 2016-282 (August 8, 2019), is a recent Board of Tax Appeals decision involving a manufacturer and wholesaler of footwear. Some of Mia Shoes' (Mia) sales were sales to customers that owned or used distribution centers within Ohio. Upon audit, the Department picked up receipts from sales to Ohio distribution centers as taxable gross receipts for CAT. Mia contended that most of its goods shipped to these Ohio distribution centers were later shipped outside of Ohio by Mia's customers. 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. Finding no evidence that Mia's customers ultimately received the goods outside Ohio within the meaning of the statute, the BTA affirmed the Commissioner's assessment.

C. EXCLUSIONS FOR CASH DISCOUNTS ALLOWED AND TAKEN

R.C. 5751.01(F)(2) provides, in relevant part, that "[g]ross receipts excludes the following amounts: * * *(bb) Cash discounts allowed and taken; * * *." The Tax Commissioner promulgated Administrative Code 5703-29-14 to define "cash discounts" for purposes of the CAT exclusion from gross receipts. Former Ohio Adm.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 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.

D. IMPORTANCE OF SUPPORTING DOCUMENTATION

A taxpayer must provide the Tax Commissioner with concrete 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*, 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, ¶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).

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IV. ANALYSIS

The petitioner contends that it overreported its taxable gross receipts when it prepared and filed its tax returns for CAT by including gross receipts from sales of goods that were ultimately delivered outside Ohio. The petitioner also contends that it included "cash discounts" that it should have excluded from the taxable gross receipts it reported on its returns.

A. THE PETITIONER DOES NOT OBJECT TO THE ASSESSMENT

The petitioner does not object to the amounts assessed nor does it request reduction, adjustment, or cancellation of the assessment. Rather, the petitioner stated multiple times, including in its petition for reassessment and during its hearing, that it does not contest the assessment. The final paragraph of the "Statement of Facts" in the petitioner's June 6, 2016 petition reads: "[t]he Department additionally adjusted Glock's taxable gross receipts for separate issues which amounted to additional tax and interest in the amount of $15,683. Glock does not contest this amount and will pay the assessed taxes." Records reflect that the petitioner paid the entire amount assessed – not under protest – in agreement with the assessment. Accordingly, the petitioner has not raised objections to audit adjustments which led to the assessment at issue. Moreover, the petitioner has offered no evidence or arguments to dispute the amounts assessed. In fact, the petitioner expressly agrees with the issues that gave rise to the assessment and the amounts assessed. To the extent that the petitioner does raise objections, those objections relate to the taxable gross receipts that it self-reported for a portion of the periods assessed. Moreover, those objections to the self-reported amounts relate primarily to subsequent filing periods not at issue in this matter. In any event, the appropriate method for a taxpayer to revise its self-reported taxable gross receipts would be by filing amended returns or applications for refund, not by filing a petition for reassessment on an assessment to which there are no pertinent objections.

B. THE AUDIT ADJUSTMENTS WHICH LED TO THE ASSESSMENT APPROPRIATELY SITUSED RECEIPTS FROM THE SALE OF TANGIBLE PERSONAL PROPERTY

Though it has not filed amended returns revising the situsing methodology it used in its original returns and no audit adjustment was made with respect to situsing, the petitioner nevertheless contends that it overreported its CAT by including gross receipts from sales of tangible personal property that was delivered by its Ohio customer to subsequent purchasers outside Ohio. It is worth noting that the petitioner's argument conflates the location where its purchaser ultimately receives the property with where the *ultimate* purchaser receives the property. The petitioner claims that it knows or can find out where its customer later resells and delivers the property it purchased from the petitioner. The petitioner contends that it should be permitted to situs gross receipts from the sale of tangible personal property to the location where the customer's customer receives the property.

The petitioner has misconstrued R.C. 5751.033(E). The petitioner construes the relevant statute to mean that the receipts must be sitused to the ultimate purchaser's location; that is, where the tangible personal property finally comes to permanent rest. Such an interpretation would create a situation that is not administrable and which would involve numerous sales of the property through numerous jurisdictions. For instance, the petitioner could have sold pistols to a distributor in Youngstown, Ohio. Then the distributor could have sold the pistols to a retailer in South Bend, Indiana. Then the retailer could have sold the pistols to a customer in Burlington, Vermont. Under the petitioner's construction of the statute, so long as it can track the property's location, the receipts should be sitused to Vermont as the ultimate purchaser's location. Such a result does not account for the petitioner's commercial activity in Ohio and

is contrary to the intent and plain language of the statute. The term "purchaser," as used in R.C. 5751.033(E), refers to the buyer in each and every sale. Thus, the situs of gross receipts from the sale of tangible personal property, for CAT purposes, is not contingent on the location of the ultimate purchaser. Rather, the situs depends on where the purchaser, in any given sale, ultimately receives the property. Accordingly, when the petitioner sells and ships property to an unrelated Ohio distributor, who then sells and ships the property to a retailer in Indiana, both the distributor and the retailer in Indiana are purchasers in the first and second sales, respectively. Because the petitioner was a party only to the first sale, the sole issue in this case is where the Ohio distributor received the property *pursuant to that sale*. Because the property was received by the petitioner's customer within Ohio, the petitioner's sale and delivery concluded within Ohio.

As explained above, the petitioner is arguing that it should be permitted to situs its gross receipts based upon the situs of its distributors' sales. However, the distributors' subsequent sales and shipments of property are separate and distinct from the sales between the petitioner and its purchasers. The evidence currently available to the Tax Commissioner indicates that the petitioner correctly included the taxable gross receipts from sales of property received by its purchasers in Ohio on its originally filed CAT returns.

C. THE PETITIONER FAILED TO PROVE IT HAD EXCLUDABLE "CASH DISCOUNTS"

Though it has not filed amended returns revising the situsing methodology it used in its original returns and no audit adjustment was made with respect to the exclusion for cash discounts, the petitioner contends that it should be entitled to exclude "cash discounts" from its CAT returns for the periods under audit. For the petitioner's part, the example invoice provided illustrates a "cash discount" for purposes of the CAT exclusion from gross receipts described by R.C. 5751.01(F)(2)(bb) and Adm.Code 5703-29-14. The fact that the petitioner offered, at least once, an "X per cent, y-day" discount as contemplated by the administrative code is not in dispute.

However, the petitioner did not provide credible evidence to support the amount of cash discounts that it included on its returns. The evidence offered consists of a sample invoice and a summary table that was prepared solely for the petition process. Other than the invoice, the petitioner has not provided business records to support the amount of the claimed cash discounts. The petitioner has also not shown that the amounts were initially included on the returns, or the accounting method that ties the discounts back to its books. As a conditional discount that depends on the actions of the customer, it is imperative that a taxpayer be able to show how it tracks the amount of such discounts actually given compared to the amount of such discounts offered. Even if the Tax Commissioner were to accept that the example invoice is representative of all invoices the petitioner issues, there is nothing on the sample invoice that indicates that the discount was realized. It is only evidence that the discount was offered. Furthermore, businesses often track multiple types of discounts, allowances, and trade spending in the same accounts. Not all of those other discounts, allowances, or trade spending may be excluded from gross receipts for CAT purposes. A taxpayer must be able to demonstrate that its accounting for excludable cash discounts offers sufficient specificity and reliability. A summary table prepared to assert the truth of the matter in controversy lacks such specificity and reliability. See *Community Management Corporation v. Testa*, BTA No. 2016-1005 (December 21, 2017).

Therefore, petitioner has not met its burden of establishing the extent to which it may have entitled to exclude cash discounts from the amounts that it reported on its CAT returns.

E. CONSTITUTIONAL OBJECTIONS

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

V. CONCLUSION

The petitioner has not raised any pertinent objections to the assessment, or the amounts of tax and interest assessed. Rather, the petitioner seeks remedies which can be accomplished through the filing of amended returns or applications for refund. Even if the Commissioner could make a determination regarding these matters, the petitioner's contentions would not be well taken for the reasons laid out herein.

Accordingly, the assessment is affirmed.

Current records indicate that a payment of $15,683.00 has been made in full satisfaction of this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

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FINAL DETERMINATION

Date:

JAN 22 2020

Health Net Federal Services, LLC
ATTN: Lorin Engquist, Director, State and Local Tax
21650 Oxnard Street, 25th Floor
Woodland Hills, CA 91367

Re: Twenty-five Refund Claims
Commercial Activity Tax – 04/01/2010 – 06/30/2016

This is the final determination of the Tax Commissioner for following a decision and order of the Board of Tax Appeals in Case No. 2018-495, dated October 28, 2019. In that order, the Board of Tax Appeals remanded the case for sixteen refund claims to the Tax Commissioner for further consideration.

The final determination of the Tax Commissioner also includes applications for commercial activity tax (CAT) refunds filed pursuant to R. C. 5751.08.

In resolution of these matters, the Tax Commissioner has agreed to grant a partial refund. Therefore, a partial refund totaling $2,034,140.00 plus applicable statutory interest, is hereby authorized.

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

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

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: JAN 15 2020

John M. Stiefel D.D.S, Inc.
117 Mansfield Avenue
Shelby, OH 44875

Re: Assessment No. 100000759359
Commercial Activity Tax
Reporting Period: 01/01/2016 – 12/31/2016

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

Tax	AMT	Interest	Penalty	Total
$500.00	$2,600.00	$35.99	$620.00	$3,755.99

The Ohio Department of Taxation found that the petitioner did not file a return and remit CAT for the period at issue. The petitioner also failed to pay the annual minimum tax ("AMT") owed for tax year 2017. The petitioner objected to the assessment and did not request a hearing on the matter. Therefore, this matter is decided upon information available to the Tax Commissioner and the evidence supplied with the petition.

The petitioner's 2016 Form CAT 12 was due by May 10, 2017 and current records indicate that a CAT return has not been filed for 2016. Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed estimated AMT pursuant to R.C. 5751.03(B). In addition, the petitioner was assessed a late penalty pursuant to R.C. 5751.06(A) and an underpayment penalty pursuant to R.C. 5751.06(G).

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. Documentation in the file shows that a CAT account has been established for John M. Stiefel D.D.S., Inc and that a 2016 CAT return has not be received. The petitioner was required under R.C. 5751.051(A)(5) to file a 2016 CAT return reporting its taxable gross receipts regardless if it incurred $150,000 or more of gross receipts for the calendar year. As such, information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

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Accordingly, the assessment is affirmed.

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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, PO Box 1090, Columbus, OH 43216-1090.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-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: JAN - 9 2020

M & S Petroleum, Inc.
Marathon Mini-Mart
8030 Paradise Cove
Liberty Township, OH 45044-8947

Re: Ohio Tax Account #: 95279896
Tax Type: Commercial Activity
Assessment #: 100000807949
Reporting Period: 01/01/2012 – 12/31/2016

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2018-631, dated November 27, 2019. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

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

	Total
Tax	$12,794.49
Interest	$2,169.86
Penalty	$0.00
Total	$14,964.35

Payments totaling $14,964.35 have been made in full satisfaction of this assessment.

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

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

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: JAN 28 2020

Moose Toys Pty Ltd
29 Grange Rd. Cheltenham
Melbourne VIC 3192 Australia

Re: Commercial Activity Tax
Assessment No. 100000825941
Reporting Period: 07/01/2009 – 12/31/2016

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

Tax	AMT	Interest	Penalty	Total
$94,161.00	$7,600.00	$6,480.00	$50,881.00	$159,122.00

I. BACKGROUND

Moose Toys Pty Ltd (hereinafter "Moose Toys" or "petitioner") is a global toy company headquartered in Melbourne, Australia, with offices in the United States, United Kingdom, France, China, and Hong Kong. The company's toys can be found in over 80 countries around the world at all major retailers and toy stores including Amazon.com, Target, Toys R Us ("TRUUS"), and Walmart. Moose Toys has products in all toy categories including collectibles, arts and craft, activity toys, dolls, novelty items and outdoor products. Some of the world's most popular toy brands from Moose Toys include Treasure X, Kindi Kids, Goo Jit Zu, Foam Alive, Capsule Chix as well as the global phenomenon, Shopkins. The Shopkins Scoops Ice Cream Truck was awarded the 2016 "Girls Toy of the Year" and the Shopkins Small Mart playset was awarded the 2015 "Girls Toy of the year" by the Toy Industry Association. Prior to the audit, the petitioner was not filing the CAT.

On November 9, 2017, the Department assessed the petitioner after performing a field audit for the periods at issue. The Department's audit staff identified that the petitioner met the substantial nexus bright-line presence standard per R.C. 5751.01(H) and (I). Prior to the audit, the petitioner was not filing the CAT; therefore, the Department registered the petitioner as a combined taxpayer group as of December 2, 2016. The Department assessed the petitioner estimated tax pursuant to R.C. 5751.09(A). In addition, the Department assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G).

The Department used the best evidence available to estimate the petitioner's gross receipts that were situsable per R.C. 5751.033(E). Additionally, the Department found that royalty income and service fee and commission income received by the petitioner are gross receipts per R.C. 5751.01(F) and situsable to Ohio per R.C. 5751.033(F) and (E), respectively. The petitioner requested a telephone hearing, which was held on September 24, 2019. The petitioner objects to the assessment and requests an abatement of penalties and interest assessed. This matter is now decided based upon the evidence currently available to the Tax Commissioner.

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JAN 28 2020

II. The Petitioner's Contentions

First, the petitioner contends that the Department erroneously included receipts from TRUUS in the calculation of its taxable gross receipts. Specifically, the petitioner asserts that it does not know at the time of sale what, if any, products are ultimately received by TRUUS in Ohio. Second, the petitioner disagrees with the inclusion of royalty fee income paid to Moose Creative Pty Ltds ("Moose Creative"), which owns the intellectual property for Moose Toys, in the calculation of the its gross receipts. Third, the petitioner also disagrees with the service fee and commission income included in its calculation of gross receipts and situsted to Ohio per R.C. 5751.033(I). Finally, the petitioner requests that the Department allow a retroactive consolidated election per R.C. 5751.011.

III. Relevant Authority

A. A Gross Receipts Tax

The CAT is a tax imposed on the privilege of doing business in Ohio and is measured by gross receipts. "Gross receipts" is defined in R.C. 5751.01(F) as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration."

B. CAT Registration & Filing Statuses

Taxpayers with more than $150,000 of taxable gross receipts situsted to Ohio for the calendar year are subject to the CAT. Accordingly, such taxpayers are required to register and file returns for the CAT. All taxpayers having substantial nexus with Ohio and more than 50% common ownership with other entities are required to file CAT returns as a combined taxpayer, unless an election to file as a consolidated group is made. R.C. 5751.012(A). In both cases, the combined and consolidated group will file returns and pay the CAT as a single taxpayer. Ohio Adm.Code 5703-29-02. Combined taxpayer groups may not exclude receipts between members of the group; however, such groups need only include in the group those members that have nexus with Ohio. R.C. 5751.012(B).

Alternatively, a group may elect to file CAT returns as a consolidated taxpayer if the group has at least 80% or at least 50% common ownership. R.C. 5751.011(A)(1). Unlike combined taxpayers, gross receipts received by one member of a consolidated group from another member are excluded from the group's Ohio gross receipts for the CAT. R.C. 5751.011(C)(1)(a). However, taxpayers making this election must agree that all commonly owned entities are part of the group even if nexus does not exist. *Id.* The consolidated election is also binding for eight calendar quarters. R.C. 5751.011(A)(3)(a). R.C. 5751.011(D) provides how the consolidated election is to be made:

> To make the election to be a consolidated elected taxpayer, a group of persons shall notify the commissioner of the election on a form prescribed by the commissioner for that purpose, which shall be signed by one or more individuals with authority, separately or together, to make a binding election on behalf of all persons in the group. Elections under division (A) of this section shall be made and the fee paid before the beginning of the first calendar quarter to which the election applies. The fee shall be collected and used in the same manner as provided in section 5715.04 of the Revised Code.

> Any person acquired or formed after the filing of the registration shall be included in the group if the person meets the requirements of division (A)(1) of this section, and the group shall notify the commissioner of any additions to the group on a form prescribed by the commissioner for such purpose.

Ohio Adm.Code 5703-29-04 also addresses the election to file as a consolidated group, which provides:

> A separate taxpayer or a combined taxpayer may make an election under section 5751.011 of the Revised Code at any time after it has registered. However, once the election is made, it remains in place for at least eight calendar quarters. Such election is effective prospectively *unless a retroactive application has been requested by the taxpayer and approved by the tax commissioner* *** [Emphasis Added]

The Ohio Board of Tax Appeals ("Board") decided *Nissan North America, Inc. v. McClain*, BTA Case No. 2016-1076 (October 9, 2019), where it overturned the Tax Commissioner's initial denial of a request for retroactive consolidated elected taxpayer status. In *Nissan*, the taxpayer requested that its election to file a consolidated taxpayer group be made retroactive; however, the Tax Commissioner denied the request because Nissan failed to elect consolidated status when it first filed its CAT returns. The Board reviewed the facts and circumstances presented and found that the Tax Commissioner abused his discretion by denying Nissan's request for retroactive consolidation. First, the Board identified that Nissan requested consolidated elected taxpayer status in writing on the form prescribed by the Commissioner as required per R.C. 5751.011(D). *Nissan* at 6. More importantly, however, the Board looked to Nissan's "intent to file as a consolidated taxpayer group" and stated that it "was apparent from the substance of its returns, in which it excluded intercompany transactions." *Id.* The Board also looked to precedent from Ohio's former corporation franchise tax, which allowed taxpayers "the right to correct what it claims was a mistake on its part in making the return." *Id.* at 7, citing *Procter & Gamble Co. v. Evatt*, 142 Ohio St. 373 (1943). Accordingly, the Board determined that Nissan had made a mistake on its CAT registration and agreed with Nissan that it was unreasonable for the Tax Commissioner to deny its request to apply its consolidated elected taxpayer status retroactively given the substance of Nissan's CAT returns. *Nissan* at 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:

> 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. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

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 "[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. 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 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." *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.

Mia Shoes, Inc. v. McClain, BTA No. 2016-282 (August 8, 2019) is a recent Board of Tax Appeals decision involving a manufacturer and wholesaler of footwear. Some of Mia Shoes' (Mia) sales were sales to customers that owned or used distribution centers within Ohio. Upon audit, the Department picked up receipts from sales to Ohio distribution centers as taxable gross receipts for CAT. Mia contended that most of its sales shipped to these Ohio distribution centers were later shipped outside of

Ohio by Mia's customers. 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. The Board affirmed the assessment and explained its decision as follows:

> In the present appeal, as was the case in *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. * * * [W]e find that the CAT was properly assessed.

D. 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 situsedto 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 situsedto this state to the extent the receipts are based on the right to use the property in this state.

E. 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 situsedunder this section, shall be situsedto this state in the proportion that the purchaser's benefit in this state with respect to what was purchased bears to the purchaser's benefit everywhere with respect to what was purchased. The physical location where the purchaser ultimately uses or receives the benefit of what was purchased shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere. If a taxpayer's records do not allow the taxpayer to determine that location, the taxpayer may use an alternative method to situs gross receipts under this division if the alternative method is reasonable, 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). 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.

F. Importance of Supporting Business Records & Documentation

With respect to situsing receipts for CAT purposes, the importance of the taxpayer submitting business records to support its methodology is identified by the relevant statutes, the relevant administrative authority, and the relevant caselaw. Specifically, 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. In addition, the BTA has held that "mere speculation is not evidence" to situs gross receipts. See, *Greenscapes* supra BTA No. 2026-350.

R.C. 5751.033(I) relates to the way in which receipts from the sale of services are sitused for CAT purposes as well as the importance of the taxpayer's records in showing where the services were provided. Specifically, division (I) states, in pertinent part, that:

> * * * If a taxpayer's records do not allow the taxpayer to determine [the] location [where the service is provided], 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. [Emphasis added.]

Ohio Adm.Code 5703-29-17(A) amplifies the requirement that situsing receipts from services must be supported by the taxpayer's business records as they existed at the time the service was provided or within a reasonable time thereafter.

IV. Analysis of the Facts & Circumstances Presented

A. Situsing Gross Receipts from the Sale of Tangible Personal Property

First, the petitioner contends that the Department erroneously included receipts from TRUUS in the calculation of its taxable gross receipts. Specifically, the petitioner argues that it does not know at the time of sale what, if any, products are ultimately received by TRUUS in Ohio and cites to *Greenscapes Home & Garden Prods., Inc. v. Testa* Dist. Franklin No. 17AP-593, 2019-Ohio-384. The petitioner states that it contracts with third parties to have its products manufactured in China and then the third-party manufacturer delivers the products to Moose Toys' warehouses or through customer designated transportation. The petitioner argues that TRUUS arranged for a third-party common carrier to pick up and deliver products to the U.S. and submitted cargo receipts to the Department that indicate the place

of delivery as "Any US Port, USA". The petitioner further contends that it is at this point where it loses control of the goods and any knowledge of where the ultimate destination ends.

Although the petitioner contends that sales made to TRUUS should not be sourced to Ohio because it has no knowledge of which orders end up in Ohio, the apportionment documentation provided by the petitioner for 2015 and 2016 show that there were Ohio sales for TRUUS. However, the petitioner did not situs its products sold to TRUUS to any state even though TRUUS had distribution centers located in the Columbus, Ohio area during the audit period. The petitioner cites to *Greenscapes* in an attempt to demonstrate that is has no knowledge of which orders from TRUUS are ultimately received in Ohio. The petitioner's application of *Greenscapes* is flawed, because, in its decision, the Tenth District Court of Appeals stated that "Greenscapes ignores that its retail customers have a presence in Ohio and that they purchased goods for delivery to their Ohio distribution centers." *Id* at ¶ 27. The petitioner's own records reflect that it was aware of sales activity apportionable to Ohio and, further, that its major customer operated distribution centers and retail locations in Ohio.

Likewise, as stated above, the apportionment documentation provided from the petitioner shows that there were Ohio sales for TRUUS during the period in question; however, the petitioner is ignoring the fact that TRUUS has a presence in Ohio and that they almost certainly purchased goods for delivery to their Ohio distribution center and Ohio retail locations. The Department requested shipping documents from the petitioner, but the shipping documents and copies of purchase orders do not specifically state where the products were shipped (e.g., "Any US Port, USA") or where the products shipped were ultimately received. Therefore, since the petitioner has not provided the Department with sufficient documentation, the Department used the best available evidence available on audit and estimated 5% of sales for 2015 and 2016 were ultimately received in Ohio and therefore situsable in accordance with R.C. 5751.033(E). The evidence utilized to estimate this situsing percentage included the apportionment documentation from the petitioner as well as information regarding the locations of TRUUS' retail and distribution operations.

B. SITUSING GROSS RECEIPTS FROM THE SALE OF INTELLECTUAL PROPERTY

Second, the petitioner argues that the Department incorrectly calculated taxable gross receipts based on royalty income. However, the financial statements submitted by the petitioner reveal related party transactions for royalty fees paid to a related company. Accordingly, the petitioner cannot exclude receipts between members of the group due to its combined taxpayer group filing status and must be sitused in accordance with the relevant authority. R.C. 5751.012(B). Here, the petitioner pays a royalty fee to Moose Creative, which owns the intellectual property on the petitioner's behalf. Since the intercompany transactions could not be excluded, the Department used the best available evidence to it and estimated the gross receipts for royalty income for the petitioner based on the financial statements provided in accordance with R.C. 5751.033(F). The Department estimated the gross royalty income and multiplied it by 50% for the U.S. apportioned royalty income and U.S. royalty income was then multiplied by an Ohio percentage of 5% to arrive at the estimated Ohio royalty income situsable to Ohio. The petitioner has not provided evidence or an alternative methodology which more reasonably reflects the receipts derived from the use of the intellectual property in Ohio as required under R.C. 5751.033(F). Therefore, the petitioner's contention is denied.

C. SITUSING GROSS RECEIPTS FROM THE SALE OF SERVICES

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Third, the petitioner contends that the Department erroneously included service fee and commission income in its calculation of taxable gross receipts because the income should not be situsted to Ohio. Specifically, the petitioner cites to Ohio Adm.Code 5703-29-17(C)(35), management consulting services, and contends that Moose Toys USA LLC's only customer is the petitioner and that it has no operations within Ohio. However, the petitioner has failed to provide sufficient documentation or evidence to prove that the service fee and commission income is from management consulting services in accordance with Ohio Adm.Code 5703-29-17(C)(35). The petitioner states that Moose Toys USA, LLC provides sales leads, promotions, sales support, marketing and other administrative services to assist Moose in developing its market in the United States. Nonetheless, the financial statements submitted by the petitioner reveal other intercompany transactions for service fees and commission paid to related companies. The petitioner did not provide business records as they existed at the time of the performance of the purported services or that were created within a reasonable time after the service was provided to support its proposed situsing methodology.

Critically, and as stated above, the petitioner cannot exclude receipts between members of the group due to its combined taxpayer group filing status. R.C. 5751.012(B). Accordingly, the Department used the best available evidence and estimated the gross receipts for service fee and commission income for the petitioner based on financial statements provided by the petitioner. The Department multiplied the total estimated amount by the estimated Ohio percentage of 5% to arrive at the estimated Ohio service fee and commission income. The petitioner has not provided evidence or an alternative methodology which more reasonably, uniformly, and consistently reflects the purchaser's benefit from the services in Ohio as required under R.C. 5751.033(I). Therefore, the petitioner's contention is denied.

D. RETROACTIVE CONSOLIDATION IS NOT APPROPRIATE IN THIS MATTER

Finally, the petitioner requests the Tax Commissioner grant its request for retroactive consolidation. Although the Board of Tax Appeals in *Nissan* recently overturned the Tax Commissioner's initial denial of a taxpayer's request for retroactive consolidation, that decision does not have a direct bearing on this matter. Rather, as an abuse of discretion determination, the decision was limited to determining whether an abuse had occurred based on the specific facts and circumstances of the case presented. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 70, 10 OBR 357, 359, 461 N.E.2d 897, 900 (1984); *Coleman Young Motors, Inc. v. Limbach*, 51 Ohio App.3d 117, 121, 554 N.E.2d 1349, 1354 (11th Dist.1988).

Even though the impact of the *Nissan* decision is limited in this matter, it is still worth noting that the Board in that case relied significantly on the substance of the taxpayer's CAT returns. Specifically, the Board focused on the fact that the taxpayer's "intent to file as a consolidated taxpayer group was apparent from the substance of its returns, in which it excluded intercompany transactions". *Nissan*, at 7. Here, however, the petitioner did not file CAT returns for periods under audit and there is therefore no substance upon which one could infer or attempt to identify an intent to file as a consolidated elected taxpayer group. Moreover, since the petitioner was not filing CAT returns prior to the audit, "the right to correct what it claims was a mistake on its part in making the return" does not exist. *See Lincoln Electric Co. v. Limbach,* 66 Ohio St.3d 176 at 178 (1993), citing *Procter & Gamble*, 142 Ohio St. 373 at 378 (1943). In other words, the petitioner does not have CAT returns to correct. *Id.* Ultimately, the petitioner has not complied with its basic CAT reporting requirements and did not make a reasonable request for retroactive consolidation; therefore, the request cannot be granted.

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 receipts from the sales of tangible personal property, intellectual property, or services. As explained above, the petitioner has not provided credible evidence that shows that the products sold to TRUUS were not ultimately received in Ohio or that the products shipped to "Any US Port, USA" were ultimately received outside of Ohio. On the contrary, records reflect that the petitioner's goods were received in Ohio and the situsing methodology utilized for purposes of the assessment is rooted in the evidence available, including the petitioner's own apportionment records. Due to the petitioner's combined filing status, the royalty, service fee, and commission income paid to the related company are taxable gross receipts to the petitioner and, for the reasons discussed above, are situsable to Ohio per R.C. 5751.033(F) and (I). Further, the request for retroactive consolidation is not reasonable because the petitioner was not registered for or filing CAT returns prior to the audit. Therefore, even if the *Nissan* decision were transferable, there would be no way to examine the petitioner's intent to file as a consolidated group or that would otherwise allow the petitioner to make the request in an attempt to correct a mistake reported on previously filed CAT returns.

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	AMT	Interest	Penalty	Total
$94,161.00	$7,600.00	$6,480.00	$25,440.50	$133,681.50

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

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JAN 28 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

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:
JAN - 9 2020

Muskingum Livestock Sales Co.
944 Malinda Street, P.O. Box 2003
Zanesville, OH 43702-2003

Re: Ohio Tax Account #: 95139046
Tax Type: Commercial Activity
Assessment #: 100000957814
Reporting Period: 04/01/2014-06/30/2017

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2018-1845, dated November 14, 2019. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

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

	Total
Tax	$7,234.34
Interest	$555.27
Penalty	$1,018.86
Total	$8,808.47

Payments totaling $8,808.47 have been made in full satisfaction of this assessment.

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

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

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: JAN 31 2020

Navistar, Inc.
c/o Jaime Esler, Director of International Tax & Controversy
2701 Navistar Dr.
Lisle, IL 60532

Re: Refund Claim No. 201434112
Commercial Activity Tax
Reporting Period: 01/01/2010 – 12/31/2013

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

Tax Period	Refund Claimed
01/01/2010 – 12/31/2013	$2,462,201.00

The claimant, Navistar, Inc., filed the currently considered Application for Commercial Activity Refund ("CAT REF") with the Department requesting a refund of net operating loss ("NOL") carry forward credits. The Department initially denied the claimant's refund claim. The claimant objected to the denial and requested a hearing on the matter in accordance with R.C. 5703.70. An administrative hearing on the matter was scheduled; however, prior to the hearing, the claimant withdrew its application for refund.

Accordingly, the refund claim is dismissed.

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: JAN 3 1 2020

Quality Carriers, Inc.
ATTN: Tax Department
4041 Park Oaks Boulevard
Tampa, FL 33610

Re: Refund Claim Number 38727
Commercial Activity Tax – Account 93008866
Tax Periods– 1st Quarter 2011 through 3rd Quarter 2014

This is the final determination of the Tax Commissioner with respect to an application for commercial activity tax ("CAT") refund in the amount of $310,776.00 filed pursuant to R.C. 5751.08.

I. BACKGROUND

The claimant describes its business operation and mission as follows:

> At Quality Carriers, our mission is to establish and maintain a position of leadership in our industry by providing our valued customers with safe and on-time delivery of customer goods and materials every time. At the same time, as a company, we strive to maintain the industry's best on-road record for driver safety. To fulfill this mission, every Quality Carriers employee commits to providing our drivers with the very best network of support possible. Our corporate culture is one that fosters an environment encouraging open communication with drivers while maintaining a company-wide focus on safety and quality.
>
> * * *
>
> Independent Affiliate Partners are independent trucking companies that operate under the auspices of Quality Carriers (QC) and receive a fixed percentage of linehaul revenues. Each Affiliate retains a separate, independent corporate identity and, more importantly, a distinct entrepreneurial motivation commonly found in independently owned and operated small businesses.
>
> Quality Carriers is always looking for local, regional, or national carriers to enter into an Affiliation agreement.[1]

The claimant operates in all 48 states of the continental USA, as well as Canada and Mexico. The claimant provides its customers with interstate transportation services. The claimant stated that it has

[1] Retrieved on December 4, 2019 from https://qualitycarriersinc.com/About-Quality-Carriers

some trucks of its own, but that these trucks do not operate within Ohio. Rather, the claimant primarily works in Ohio with affiliate carrier companies ("carriers") that own their own trucks. The carriers lease their vehicles to the claimant, and the claimant then ensures that the operation is in compliance with federal transportation regulations. The carriers operate under the claimant's federal transportation regulatory approval. The claimant's relationship with each carrier is governed by a Contractor Agreement.

In a typical $1,000 billed shipment, the claimant is paid $1,000. The claimant explained that pursuant to federal regulations, the $1,000 payment comes to the claimant, and then the claimant retains $150 and disburses the $850.00 to the carrier. The claimant stated at the hearing that federal law requires that the business be run under the name of the claimant, and that all payments by customers be made to the claimant and not to the carrier or the truck operator. The claimant contends that it never keeps more than 15% of the line haul revenue which it is paid by its customers.

The Department's audit staff was unable to reconcile the refund amount claimed with the evidence available and the relevant statutory authority. Therefore, upon initial review, the Department denied the refund. The claimant objected to that initial denial and requested a hearing on the matter pursuant to R.C. 5703.70. The hearing was conducted at the Department's offices in Columbus, Ohio, and this matter is now decided based on the evidence available to the Tax Commissioner.

II. Claimant's Contentions

The claimant initially filed returns and remitted Ohio CAT based upon the total amount gross receipts received from carriers. In other words, and framed in terms of the example above, the claimant paid CAT based upon the $1,000 of receipts, not the net amount of income, $150 in the example above, that it retains after paying its carriers their fees. The claimant contends that it should not pay CAT on the total amount of gross receipts, but rather its gross receipts should on be measured based on the net amount retained.

The claimant raises several objections regarding why it believes that only the net amounts it retains should be subject to CAT. First, the claimant contends that the lease of the truck from the affiliate company to the claimant is a legal fiction that should be ignored. More specifically, although the evidence available reflects that the claimant charges, receives, and realizes the full amount billed, the claimant contends that the amounts that it pays to its carriers should not be considered taxable gross receipts because federal regulations require that the amounts to be paid to the authorized carrier must be specified in the lease agreement. In particular, the claimant points to 49 CFR 376.12, which provides guidelines for leases involving federal motor carriers. The claimant argues that the amounts that it pays to its carriers should be deducted, excluded, or otherwise removed when computing its gross receipts for CAT purposes.

As an additional argument, the claimant contends that it does not owe CAT on its gross receipts from the transactions at issue, arguing that it has an agency relationship with its carriers that would allow it to exclude certain receipts related to that relationship from CAT.

III. Relevant Authority

A. Applications for CAT Refunds

R.C. 5751.08(A) governs CAT applications for refunds and provides that refund claims be filed with

the Department within four years of the date of payment of the tax. Additionally, that section states that 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 GROSS RECEIPTS TAX

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.

C. AGENCY EXCLUSION UNDER R.C. 5751.01(F)(2)(l)

The starting point for an agency analysis for purposes of the CAT is R.C. 5751.01(P), which defines an "agent" as a person authorized by another person to act on its behalf to undertake a transaction for the other. R.C. 5751.01(F)(2)(l) provides that "[p]roperty, money, and other amounts received or acquired by an agent on behalf of another in excess of the agent's commission, fee, or other renumeration" are excluded from the definition of "gross receipts."

Ohio Adm.Code 5703-29-13 further clarifies the definition of "agent" for CAT purposes. The Administrative Code states that "in determining whether an agency relationship exists, the facts must be determined under a strict, narrow reading of the definition. Absent proof of an agency relationship, the entire gross receipt must be reported by the person receiving the gross receipt for purposes of the commercial activity tax." Ohio Adm.Code 5703-29-13(B)(1). With respect to agency relationship created by contractual terms, the regulation states the following:

> In the case of a person enumerated in division (P)(2) of section 5751.01 of the Revised Code who retains a commission or fee from a transaction performed on behalf of another person, only the fee retained by the agent shall be a gross receipt of the agent pursuant to division of (F)(2)(I) of section 5751.01 of the Revised Code. For purposes of this paragraph and paragraph (B) of this rule, *the agency relationship should be explicitly stated in a contract that is available to the tax commissioner to inspect. Absent such proof, it will be presumed that no agency relationship exists and the person claiming the agency relationship will include the total amount received in its gross receipts.*
>
> (Emphasis added.) Ohio Adm.Code 5703-29-13(C)(2)(a).

Underpinning the statutory definition and administrative guidance regarding who is an "agent" is the common law principal of actual authority. This is the standard under which agency has been established between entities such that they may be subject to the CAT's agency exclusion. *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929 (2012). Actual authority is "an expression of intent by the principal that the agent act on behalf of the principal, along with the understanding of the agent. *Id.*, citing 1 Restatement of Law 3d, Agency, Section 3.01. The

primacy of a putative agent's authority to act for another arises by virtue of R.C. 5751.01(P)'s definition of "agent," which uses the term "authorized" to modify "person." *Willoughby Hills Development and Distribution, Inc. v. Testa*, 155 Ohio St.3d 276, 2018 WL 5833000, 2018 -Ohio-4488 (Nov. 7, 2018). Stated differently, where a company is not endowed with actual authority to bind another entity, then no agency relationship is formed, and no exclusion may be claimed.

An agency relationship also exists where a principal actually exerts its control over its agent. Ohio Adm.Code 5703-29-13(B)(1) citing *Hanson v. Kynast*, 24 Ohio St.3d 171, 173, (1986). More specifically, an agency relationship "exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks. *Id.* That is to say, simply having the option or an agreement to exercise an agency relationship or failing to act in a principal-agent capacity despite having the option to do so does not give rise to an agency relationship under Ohio law. An agent cannot make contracts on the principal's behalf without actual authority to do so. *Willoughby Hills Development and Dist., Inc. v. Testa*, 155 Ohio St.3d 276, 2018 WL 5833000 (2018). In a principal-agent relationship, the agent has the legal authority to act on behalf of the principal, and generally the principal is bound by and is liable for those actions. *N&G Construction, Inc. v. Lindley*, 56 Ohio St.2d 415, 418 (1978), citing *Gulf Oil Corp. v. Kosydar*, 44 Ohio St.2d 208 (1975) (paragraph two of the syllabus) and *Canton v. Imperial Bowling Lanes, Inc.*, 16 Ohio St.2d 47 (1968) (paragraph four of the syllabus).

D. NARROW CONSTRUCTION OF EXCLUSIONS

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 (1952); *Beckwith & Assoc. v. Kosydar* (1977), 49 Ohio St.2d 277, 279, and *Canton Malleable Iron Co. v. Porterfield* 30 Ohio St.2d 163, 166 (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.

This notion of narrowly construing exclusions is especially well-established with respect to agency. In particular, the party asserting the existence of an agency relationship bears the burden of proof in that regard. *Gardner Plumbing, Inc. v. Cottrill*, 44 Ohio St.2d 111, 115 (1975), *citing Union Mutual Life Ins. Co. v. McMillen,* 24 Ohio St. 67 (1873). Also see *Memorial Park Golf Club, Inc., supra.* In determining whether an agency relationship exists, the rules of statutory construction applicable to exemptions from taxation must be followed. Ohio law in this regard is well-established; exemptions from taxation are strictly construed against the claim of exemption and in favor of the taxing authorities. *Id*, Footnote 9. Thus, in determining whether an agency relationship exists, the facts must be determined under a strict, narrow reading of the definition. Absent proof of an agency relationship, the entire gross receipt must be reported by the person receiving the gross receipt for purposes of the commercial activity tax.

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E. FEDERAL REGULATION OF COMPENSATION PAID TO AUTHORIZED CARRIERS

The claimant cites 49 CFR 376.12(d) from the Code of Federal Regulations. This part of the Code of Federal Regulations is published by the Federal Motor Carrier Safety Administration, and the claimant is required to operate in compliance with these regulations. 49 CFR 376.12(d) provides:

> *Compensation to be specified.* The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease. Such lease or addendum shall be delivered to the lessor prior to the commencement of any trip in the service of the authorized carrier. An authorized representative of the lessor may accept these documents. The amount to be paid may be expressed as a percentage of gross revenue, a flat rate per mile, a variable rate depending on the direction traveled or the type of commodity transported, or by any other method of compensation mutually agreed upon by the parties to the lease. The compensation stated on the lease or in the attached addendum may apply to equipment and driver's services either separately or as a combined amount.

IV. ANALYSIS OF THE FACTS & CIRCUMSTANCES PRESENTED

A. THE CLAIMANT IS CHARGING, RECEIVING, & REALIZING GROSS RECEIPTS

Gross receipts are 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". It is worth reiterating that "gross receipts" is defined broadly to include all amounts realized that contribute to the production of gross income.[2] For CAT purposes, gross receipts are calculated without factoring in deductions that may be applicable when calculating federal gross income. Here, when the claimant charges and receives receipts from a shipping customer, the amount received is a gross receipt. This amount it receives from its shipping customer constitutes an "amount realized" pursuant to R.C. 5751.01(F) and is properly characterized as a gross receipt. The CAT is a tax on gross receipts, without deduction for cost of goods sold or for certain other costs, such as expenses incurred in the production of such receipts, including payments made to carriers for providing transportation services for the claimant's business.

The claimant contends that the amounts in question are not gross receipts because it only retains a portion of the amount collected for transportation services that it renders. More specifically, the claimant states that it must pay the third-party independent contractor ("contractors") providing the trucking service, and further that the amount paid to contractors is fixed in the Contractor Agreement. The claimant contends that it is contractually bound to pay the contractually-set fee owed to the independent contractor. This contention is denied.

The fees that the claimant pays to its independent contractors for the trucking services is an expense of doing business. The claimant incurs this expense in order to generate the transportation revenues for which it bills its customers. The claimant's transportation fees billed to its customers are the "total

[2] Ohio Legislative Service Commission Final Bill Analysis for Am. Sub, House Bill 530 (2006).

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" as described in R.C. 5751.01(F), and this total fee billed to the customers is taxable gross receipts. As such and in effect, the claimant is attempting to remove fee amounts it has already realized which, absent a specific statutory exclusion, is inconsistent with Ohio's definition of "gross receipts" which does not allow for deductions for expenses incurred or credits provided to customers. The fact that the fees paid to the independent contractor truckers are set in the Contractor Agreement does not make this expense deductible in the computation of gross receipts. There is no provision in Chapter 5751 of the Ohio Revised Code that generally exempts expenses that are set in amount and required to be paid by contract.

B. EXPENSES ARE NOT REMOVABLE FROM GROSS RECEIPTS ABSENT A STATUTORY EXCLUSION

Also, the fact that such contract provisions are required by federal regulations does not provide for such expenses to be netted out of gross receipts before computing gross receipts, and does not prevent such gross receipts from being treated the same for CAT as any other expenses incurred.

Provision 6(c) of the Contractor Agreement provides in part:

> 6. Settlement
> (c) Terms, Advances and Loans
> QC [Quality Carriers] will pay Contractor and Contractor's owner operators within 15 days of billing or within 15 days of receipt of information generated showing Contractor has billed loads in accordance with Section 10.

Under the terms of Provision 6(c) of the Contractor Agreement, Contractors first bill loads. Within 15 days of a Contractor billing a load, Quality Carriers must pay the Contractor for its services. The claimant, Quality Carriers, pays the Contractors independently of when Quality Carriers receives payments from its customers. Quality Carriers is obligated to pay its Contractors within 15 days of the work being billed, regardless of when Quality Carriers is paid by the customer. This shows that Quality Carriers receives all receipts from customers, and that the payment made by Quality Carriers to its Contractors is not related to when Quality Carriers gets paid by the customers. These facts again demonstrate that Quality Carriers receives and realizes one hundred percent of all fees paid from customers, and that any amounts it pays to its Contractors is an expense of Quality Carriers. R.C. 5751.01(F) indicates that expenses such as these paid by Quality Carriers to its Contractors are an expense that may not be deducted from gross receipts in computing taxable gross receipts for CAT.

In charging and receiving the fees at issue, the claimant realizes the entire fee amount. In this instance, the total amount received by the claimant generates gross receipts under the authority laid out above, and any amount that it pays to its Contractors is an expense or cost of doing business which it has agreed to pay to the Contractors in return for doing business with the claimant. Deducting its payments to Contractors from taxable gross receipts for CAT purposes is inconsistent with the definition of "gross receipts" which does not allow for such deductions, expenses, or credits. Therefore, the claimant's contention is not well-taken.

C. THE RECORD REFLECTS THAT THE CLAIMANT WAS AN NOT AN AGENT

While the gross receipts generated from the contracts discussed above are not deductible, Chapter 5751 does provide for several exclusions from gross receipts. Here, the claimant contends that certain receipts at issue should be excluded from gross receipts pursuant to R.C. 5751.01(F)(2)(l). Specifically,

the claimant, in a memorandum in support of its refund claim, argues that the claimant is an agent of the independent contractor truckers. In the memorandum, the claimant writes, "Subsection (l) provides that gross receipts do not include. '... money ... received or acquired by an agent on behalf of another in excess of the agent's commission, fee or other remuneration.'" The claimant also states that, "(p)ursuant to the Contractor Agreement and federal regulations, QC [Quality Carriers] acts as a conduit for the payment of a portion of the gross receipts from the shipping customer to the IC [Independent Contractor]."

The claimant submitted a copy of its "Contractor Agreement" as "Exhibit A" with its memorandum in support. This is the type of agreement that purportedly exists between the claimant and each independent contractor that operates one or more trucks and provides transportation services under the claimant's company. Provision 9 and Provision 16 of the Contractor Agreement provide:

> 9. Workers' Compensation
> Contractor hereby agrees that as an independent contractor it is Contractor's responsibility to furnish Workers' Compensation insurance for its employees. * *
> * * *
> 16. Independent Contractor
> It is understood and agreed that Contractor is an independent contractor under this Agreement and that neither Contractor nor such drivers, helpers or other employees as may be employed by it are employees of QC [Quality Carriers]. Accordingly, Contractor agrees that it will at all times during the duration of this Agreement, comply with all laws, regulations and rules of the United States and any State in and through which it may be operating under this Agreement including insurance for the benefit or the protection of its employees. Contractor shall be fully and solely responsible for the payment, and withholding and payment, of any and all taxes levied and assessed under any Federal and State laws providing for the withholding of taxes on income and for unemployment, old age, Social Security and any other taxes with respect to Contractor and all persons employed by it in the performance of this Agreement.
>
> Contractor agrees that, as an independent contractor, it is responsible for all costs and expenses related to its operation under this Agreement. As such, Contractor agrees to defend, indemnify and hold QC harmless from any direct, indirect and consequential loss, damage, fine, expense, including reasonable attorney fees, action, claim for injury to persons, including death and damage to property which QC may incur arising out of or in connection with Contractor's obligations and/or services under this Agreement.

As seen in provision 9 and provision 16 of the Contractor Agreement, the parties are expressly providing in the terms of the agreement that the parties are independent contractors, and neither is an agent of the other. The claimant's representative is disregarding this express language in the contract, which provides that the parties are independent contractors in order to limit its liability from operations, in an attempt to show that an agency relationship existed under R.C. 5751.01(F)(2)(l) and the relevant authority.

Provision 18 of the Contractor Agreement provides in part:

> 18. Contractor's Employees
> Contractor shall hire such competent and experienced drivers, helpers and other employees as it deems appropriate in the performance of its duty under this Agreement.

> QC shall have no right to direct or control their employment, their discharge or the manner in which they perform their duties for Contractor, nor shall QC have any responsibility for their compensation.

Provision 18 spells out each party's obligations to the other. It shows that at no point in either party's performance of its duties under the contract is either party in control of the other. Provision 18 shows that the claimant never has any control over the contractors' employees. Further, the "Contractor Agreement" itself, when all provisions of the agreement are reviewed, shows that there is no agency relationship between the parties.

Under 5751.01(P), an "agent" is a person authorized by another to act on its behalf to undertake a transaction for the other. However, in the fact pattern at issue herein, the supposed agent Quality Carriers acts in a manner more in line with that of the principal. Quality Carriers sells the independent contractor truckers' services to third parties. "A purchaser who resells goods supplied by another is acting as a principal, not an agent." *Willoughby Hills Development and Dist., Inc. v. Testa* (2018), 155 Ohio St.3d 276, 2018 WL 5833000. In the instant case, Quality Carriers is acting more like a principal than agent as it is selling the truckers' services to third parties that need goods transported.

The claimant cites Ohio Adm.Code 5703-29-13(E) which provides that an attorney who advances fees on behalf of a client may exclude the reimbursement of these fees from the person's gross receipts for CAT. Ohio Adm.Code 5703-29-13(E) does provide that the reimbursement of advances made are not gross receipts. However. in the case at hand, no part of the transportation service fees paid to the claimant are an advance. Furthermore, the facts and circumstances presented in this matter, differ substantially from the attorney example provided in Ohio Adm.Code 5703-29-13(E). Thus, Ohio Adm.Code 5703-29-13(E) and its exclusion for the reimbursement of advances does not apply to this matter.

Next, the claimant cites Ohio Adm.Code 5703-29-13(D)(2), which provides:

> For example, a restaurant in Columbus, Ohio employs a server to assist in serving its customers. The restaurant collects a total of one thousand two hundred dollars, including a twenty per cent gratuity of two hundred dollars. The restaurant only passes one hundred eighty dollars of the gratuity on to the server and retains the remaining twenty dollars. The restaurant is considered an agent for the one hundred eighty dollar portion of the gratuity that it passes on to the server. The twenty dollar portion retained is a gross receipt of the restaurant. (The server does not have any gross receipts for the one hundred eighty dollar portion of the gratuity it receives from the restaurant, as such amount is considered compensation and is specifically excluded under division (F)(2)(g) of section 5751.01 of the Revised Code.)

Ohio Adm.Code 5703-29-13(D)(1) explicitly provides that tips and gratuities collected by a restaurant on behalf of another are not gross receipts of the restaurant. Adm.Code 5703-29-13(D)(1) only applies to tips and gratuities collected by a restaurant or other establishment and is neither directly relatable nor applicable to a transportation services company such as the one which the claimant operates. The fees paid to the claimant by its customers does not include any tips or gratuities.

As explained above, Ohio Adm.Code 5703-29-13(B)(1) requires that the principal asserts control over the agent for an agency relationship to exist. Pursuant to R.C. 5751.01(P), an agent is "a person authorized by another person to act on its behalf to undertake a transaction for the other". The claimant

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contends that it obtains payment amounts from its customers as an agent for the portion of the payment that the claimant eventually pays to the carriers. However, the "Contractor Agreement" that governs the business relationship between the claimant and the affiliated carrier shows that there is no agency relationship between the parties. As explained above, Provision 16 of the "Contractor Agreement" expressly states that the Contractor is an independent contractor and that the parties each have their own independent duties and obligations. Provision 24 of the "Contractor Agreement" provides that this "Contractor Agreement" constitutes the "entire agreement" between the parties. As the claimant is attempting to argue for an agency relationship which is not provided for anywhere in the "Contractor Agreement", the claimant is ignoring the above-referenced provisions of the Contractor Agreement.

The claimant's contention that it should be permitted to exclude receipts under R.C. 5751.01(F)(2)(l) does not withstand a strict, narrow reading of the Revised Code and is not well taken. The record presented does not support the supposition that an agency relationship existed between the claimant and the carriers.

V. CONCLUSION

As explained above, the claimant contends that the amounts that it pays to its affiliated carriers should be subtracted from the fees it receives from its customers when computing gross receipts. However, for the reasons explained above, the amounts charged, received, and realized are gross receipts, and expenses cannot be deducted or removed from gross receipts without an exclusion. To that end, the claimant's contention that it should be permitted to exclude gross receipts under R.C. 5751.01(F)(2)(l) does not withstand scrutiny. As no agency relationship exists, no agency exclusion can be granted. Therefore, absent an exclusion, the transactions in question and the gross receipts that they generated were subject to the CAT and were properly reported on the claimant's originally filed returns.

Accordingly, the claimant's contentions are not well taken and the application for refund is denied.

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

JAN 2 8 2020

Uponor, Inc.
c/o John Reutter, Vice President of Finance
5948 148th St. W.
Apple Valley, MN 55124

Re: Assessment No. 100001012400
Commercial Activity Tax
Reporting Period: 01/01/2014 – 12/31/2017

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

Tax	Interest	Penalty	Total
$91,326.00	$6,347.16	$6,733.39	$104,406.55

The Ohio Department of Taxation assessed the petitioner for underreporting its taxable gross receipts for the period at issue. The petitioner does not contest the CAT liability as assessed and requests and abatement of the penalty assessed. The petitioner did not request a hearing on the matter; therefore, this matter is decided based upon the information available to the Tax Commissioner.

With the regard to penalty abatement, R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. Based upon information available to the Tax Commissioner, including the petitioner's compliance history in addition to the remittance of the tax and interest owed, the penalty shall be abated.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$91,326.00	$6,347.16	$0.00	$97,673.16

Current records indicate that a payment in full satisfaction of 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.

JAN 2 8 2020
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THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCIBRED 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: JAN - 9 2020

Jeffrey M. Anders
1111 Hoop Road
Xenia, OH 45385

Re: Assessment Nos. 100000433748, 100000433747, 100000433886, 100000433767, 100000433757
Employer Withholding Tax School District Withholding Tax - Responsible Party Assessments
Multiple Periods

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2018-772, dated September 16, 2019. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, assessment numbers 100000433748, 100000433747, 100000433886, 100000433767, 100000433757 are cancelled.

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

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

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: JAN - 7 2020

Linda Wallingford Trustee of Irrevocable Trust f/b/o Cynthia L. Wallingford
c/o Linda Wallingford
2772 Clarion Court
Columbus, OH 43220

Re: Assessment No. 16201414801979
Fiduciary Income Tax
Reporting Period: 01/01/2012 – 12/31/2012

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

Tax	Interest	Penalty	Total
$25,077.00	$841.00	$1,682.00	$27,600.00

The Department assessed the petitioner for failing to fully remit fiduciary income tax for the period in question. The petitioner filed a petition for reassessment objecting to the assessment and requested a hearing on the matter. The hearing was conducted at the Department's offices in Columbus, Ohio. 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 applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: JAN - 7 2020

Linda Wallingford Trustee of Irrevocable Trust f/b/o David M. Wallingford
c/o Linda Wallingford
2772 Clarion Court
Columbus, OH 43220

Re: Assessment No. 16201414801977
Fiduciary Income Tax
Reporting Period: 01/01/2012 – 12/31/2012

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

Tax	Interest	Penalty	Total
$25,075.00	$841.00	$1,682.00	$27,598.00

The Department assessed the petitioner for failing to fully remit fiduciary income tax for the period in question. The petitioner filed a petition for reassessment objecting to the assessment and requested a hearing on the matter. The hearing was conducted at the Department's offices in Columbus, Ohio. 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 applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN - 7 2020

Linda Wallingford Trustee of Irrevocable Trust f/b/o James S. Wallingford
c/o Linda Wallingford
2772 Clarion Court
Columbus, OH 43220

Re: Assessment No. 16201414801980
Fiduciary Income Tax
Reporting Period: 01/01/2012 – 12/31/2012

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

Tax	Interest	Penalty	Total
$25,075.00	$841.00	$1,682.00	$27,598.00

The Department assessed the petitioner for failing to fully remit fiduciary income tax for the period in question. The petitioner filed a petition for reassessment objecting to the assessment and requested a hearing on the matter. The hearing was conducted at the Department's offices in Columbus, Ohio. 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 applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN - 7 2020

Linda Wallingford Trustee of Irrevocable Trust f/b/o Jane M. Wallingford
c/o Linda Wallingford
2772 Clarion Court
Columbus, OH 43220

Re: Assessment No. 16201414801978
Fiduciary Income Tax
Reporting Period: 01/01/2012 – 12/31/2012

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

Tax	Interest	Penalty	Total
$26,075.00	$874.00	$1,748.00	$28,697.00

The Department assessed the petitioner for failing to fully remit fiduciary income tax for the period in question. The petitioner filed a petition for reassessment objecting to the assessment and requested a hearing on the matter. The hearing was conducted at the Department's offices in Columbus, Ohio. 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 applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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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: JAN - 7 2020

Linda Wallingford Trustee of Irrevocable Trust f/b/o Lola K. Howarter
c/o Linda Wallingford
2772 Clarion Court
Columbus, OH 43220

Re: Assessment No. 16201414801982
Fiduciary Income Tax
Reporting Period: 01/01/2012 – 12/31/2012

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

Tax	Interest	Penalty	Total
$6,691.00	$224.00	$448.00	$7,363.00

The Department assessed the petitioner for failing to fully remit fiduciary income tax for the period in question. The petitioner filed a petition for reassessment objecting to the assessment and requested a hearing on the matter. The hearing was conducted at the Department's offices in Columbus, Ohio. 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 applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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

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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: JAN - 7 2020

Linda Wallingford Trustee of Irrevocable Trust f/b/o Ronald Beck
c/o Linda Wallingford
2772 Clarion Court
Columbus, OH 43220

Re: Assessment No. 16201414801981
Fiduciary Income Tax
Reporting Period: 01/01/2012 – 12/31/2012

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

Tax	Interest	Penalty	Total
$6,691.00	$224.00	$448.00	$7,363.00

The Department assessed the petitioner for failing to fully remit fiduciary income tax for the period in question. The petitioner filed a petition for reassessment objecting to the assessment and requested a hearing on the matter. The hearing was conducted at the Department's offices in Columbus, Ohio. 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 applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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

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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

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FINAL DETERMINATION

Date: JAN 16 2020

T&T Enterprises of Ohio, Inc.
ATTN: Eric Trautman, Sr., President
5100 Duff Drive
Cincinnati, OH 45246

Re: Assessment Nos. 100000304280, 100000300320, 100000300321, 100000300322 and 100000309786
Motor Fuel Tax: International Fuel Tax Agreement – 7/2011-12/2011, 2012, 2013, 2014, and 1/2015-6/2015

This is the final determination of the Tax Commissioner with regard to petitions for reassessment filed pursuant to R.C. 5728.10 concerning the five above-referenced International Fuel Tax Agreement assessments.

In resolution of these matters, these assessments shall be modified pursuant to terms agreed to by the Tax Commissioner and the petitioner.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 3 1 2020

Charles C. Boucherle
2861 8th Ave.
St James City, FL 33956

Re: Assessment No. 02201211515460
Individual Income Tax – 2004

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
$83,489.00	$33,018.00	$0.00	$116,507.00

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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000137

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 15 2020

Thomas A. Demko
P.O. Box 82183
Columbus, OH 43202

Re: Two Assessments
Individual Income Tax
Multiple Reporting Periods

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

Assessment Number	Reporting Period	Tax	Interest	Penalty	Total
02201807347370	01/01/2014 – 12/31/2014	$500.00	$49.60	$99.20	$648.80
02201807347369	01/01/2015 – 12/31/2015	$400.00	$27.66	$55.32	$482.98

I. PROCEDURAL BACKGROUND

The Ohio Department of Taxation assessed the petitioner, Thomas A. Demko, after making adjustments to the individual income tax return he filed for tax years 2014 and 2015. Specifically, the Department disallowed the petitioner's "displaced worker training credit" included on his Ohio Schedule of Credits. The petitioner objects to the assessments and requests an abatement of the penalties assessed. The petitioner did not request a hearing on the matter; however, he did communicate and provide the Department with additional documentation during the administrative appeal period. As such, this matter is decided upon the evidence available to the Tax Commissioner.

II. STATUTORY AUTHORITY AND ANALYSIS

Revised Code 5747.27 states, in pertinent part, that "[a] nonrefundable credit is allowed against the aggregate tax liability . . . of a displaced worker who pays for job training to enhance the displaced worker's ability to get a *new* job." (Emphasis added). A displaced worker is defined as "an individual who lost his or her job due to the abolishment of the individual's position or the closure or moving of the individual's place of work and who does not obtain *another* job in which the individual works more than twenty hours per week." R.C. 5747.27. (Emphasis added). A displaced worker may claim a credit for the lesser of $500.00 or half the cost actually paid less any reimbursement during the twelve-month period immediately following the date an individual becomes a displaced worker. *Id.* "Job training" as used in this context, generally does not include: (1) amounts paid for professional organization fees; (2) expenses for classes to meet continuing professional requirements or minimum professional standards;

(3) expenses that improve job skills for the individual's current job; and (4) amounts paid to an out-placement firm to help develop skills used to find a job (such as career planning, resume writing, and marketing action plans).

In this case, the petitioner worked as an adjunct professor for Strayer University ("Strayer" or the "University") from October 2010 until November 2011 when he became an Associate Dean and full-time professor. In December 2013, the petitioner was "laid-off" from Strayer when the University closed its Columbus, Ohio campus. The petitioner then worked for Strayer as an online adjunct professor on an "as needed basis" not exceeding 20 hours a week. As such, records reflect that the petitioner meets the definition of a "displaced worker," under R.C. 5747.27, for the period of December 23, 2013 until December 23, 2014.

A. TAX YEAR 2014

The petitioner originally claimed the displaced worker credit based on thirteen separate expenses that he incurred during tax year 2014. Specifically, the petitioner claimed expenses from the following programs and services:

1. Ability Professional Network for a networking membership (January 10, 2014);
2. Scioto Ridge Job Networking for a networking membership (January 16, 2014);
3. Columbus Business First for a one-year subscription renewal (February 25, 2014);
4. Columbus Monthly for a subscription renewal (February 25, 2014);
5. Expand Socially for a LinkedIn and resume building workshop (March 8, 2014);
6. The Columbus Dispatch for a three-month subscription renewal (March 14, 2014);
7. The University of Dayton for Lean Six Sigma Yellow Belt training (May 9, 2014);
8. The Columbus Bar Association for membership dues and a continuing legal education "Easy Pass" (May 29, 2014);
9. The Columbus Dispatch for a three-month subscription renewal (August 8, 2014);
10. Ability Professional Network for a JumpStart membership (June 15, 2014);
11. Kaleidoscope Youth Center for a fundraiser (September 21, 2014);
12. Ability Professional Network for a networking membership (November 1, 2014);
13. The Morton Barber Learning Center for partial payment of an insurance education course (December 31, 2014).

The petitioner has conceded that that the programs at Scioto Ridge Job Networking and Ability Professional Network were to train him "in proper job searching techniques, interviewing skills, and career planning." The petitioner has also retained Scioto Ridge Job Networking on a long-term basis to assist him in his job search and to serve as a personal coach. Additionally, the petitioner has conceded that the programs he participated in with Expand Socially were to train him on "how to re-write [his] resume to fit into the requirements of each new job application," on "the use of LinkedIn," and in "dressing for success through the proper coordination of colors." The petitioner went on to concede that his subscriptions to Columbus Business First, Columbus Monthly, and the Columbus Dispatch were to "search for jobs and utilize. . . research training." Furthermore, the petitioner has conceded that the amount paid to Kaleidoscope Youth Center was for a fundraiser "in order to improve [his] networking skills."

As such, the follow expenses are considered "out-placement services" and are not eligible for the displaced worker training credit:

1. Ability Professional Network on January 10;
2. Scioto Ridge Job Networking on January 16;
3. Columbus Business First on February 25;
4. Columbus Monthly on February 25;
5. Expand Socially on March 8;
6. The Columbus Dispatch on March 14;
7. Ability Professional Network on June 15;
8. The Columbus Dispatch on August 8;
9. Kaleidoscope Youth Center on September 21; and
10. Ability Professional Network on November 1.

In addition, the petitioner is not entitled to claim the amount paid to the Columbus Bar Association ("CBA") because it was for membership dues and a "pass" to attend continuing legal education classes required to maintain his current licensure as an attorney. Thus, the amount paid to the CBA is not permissible because it was for membership dues and the maintenance of a license already held by the petitioner. The petitioner is also not entitled to claim the amount paid to the University of Dayton for Lean Six Sigma Training because he has not demonstrated how it was a training which enhanced his ability to get a new job. As such, the petitioner is not entitled to claim the amount paid to the University of Dayton as this expense does not constitute "job training" that helped the petitioner get a "new job". Lastly, the petitioner is not permitted to claim the amount paid to the Morton Barber Learner Center on December 31, 2014 because it is outside the twelve-month period prescribed by R.C. 5747.27.

B. TAX YEAR 2015

As noted above, the petitioner would only be entitled to claim the displaced worker training credit for qualifying training services paid for between December 23, 2013 and December 23, 2014. As such, the petitioner is not entitled to claim the displaced worker training credit for tax year 2015 because such training expenses occurred after the 12-month period prescribed by R.C. 5747.27.

III. PENALTY ABATEMENT

The Tax Commissioner may abate penalties when the taxpayer demonstrates that failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the petitioner claims his failure to comply for the periods at issue was due to reasonable cause, and the evidence and circumstances support a full abatement of the penalties. The payment of interest is mandatory pursuant to R.C. 5747.08(G).

IV. CONCLUSION

For the reasons laid out above, the petitioner is not entitled to claim the "displaced worker training credit" for the programs and services paid for during tax year 2014 because he has not demonstrated how they were "job training" which enhanced his ability to get a "new job" as contemplated in R.C. 5747.27.

JAN 15 2020

Furthermore, the petitioner is not entitled to claim the "displaced worker training credit" for the programs and services paid for during tax year 2015 because they are outside the twelve-month period permissible under R.C. 5747.27.

Accordingly, the assessments are adjusted as follows:

Assessment Number	Reporting Period	Tax	Interest	Penalty	Payment	Refund Due
02201807347370	01/01/2014 – 12/31/2014	$500.00	$49.60	$0.00	$(648.80)	$(99.20)
02201807347369	01/01/2015 – 12/31/2015	$400.00	$27.66	$0.00	$(482.98)	$(55.32)

Current records indicate that the payments above have been made on these assessments, resulting in a total overpayment of $154.52. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000141

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 15 2020

Ronnie & Dianne Evans
800 Africa Rd.
Galena, OH 43021

Re: Refund Claim No: 810032142
Individual Income Tax
Reporting Period: 01/01/2016 – 12/31/2016

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

Tax Year	Refund Claimed
2016	$3,114.00

I. BACKGROUND

The claimants, Ronnie and Dianne Evans, filed an amended individual income tax return for tax year 2016 claiming the Ohio Business Income Deduction ("BID") for capital gains earned from Mr. Evans participation in "day trading."[1] Upon initial review, the Department disallowed the deduction and denied the claimants' refund request for tax year 2016. The claimants contend that the Department incorrectly identified the capital gains as nonbusiness income. Accordingly, the claimants object to the denial of the refund claim and request an administrative review of the refund claim in accordance with R.C. 5703.70. The claimants did not request a hearing. Therefore, this matter is decided based upon the information and evidence available to the Tax Commissioner.

II. CLAIMANTS' CONTENTIONS

The claimants assert that Mr. Evans is a retired stockbroker who engages in "the business" of day trading and, as such, the capital gains earned from the sale of his short and long-term assets are considered "business income." For the reasons laid-out below, the claimants' contentions are not-well taken.

III. RELEVANT AUTHORITY

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

R.C. 5747.01(A)(31) allows individuals jointly filing the Ohio IT 1040 to claim a deduction for the taxpayer's Ohio business income up to $250,000, to the extent it is included in federal adjusted gross

[1] "Day trading" is the act of buying and selling stock shares or other securities on the same day, esp. over the Internet, usu. For the purpose of making a quick profit on the difference between the buying price and the selling price. Black's Law Dictionary 1534 (8th.Ed.2004).

JAN 15 2020

income. Any remaining business income above this amount is then taxed at a flat 3% rate. Additionally, taxpayers are required to complete and file an Ohio Schedule IT BUS ("IT BUS") in order to claim the BID. The IT BUS is used in determining taxable business income and business income tax liability for purposes of completing the Ohio IT-1040 individual income tax return. *See* R.C. 5747.01(A)(31), 5747.01(B), and 5747.01(HH).

B. BUSINESS & NONBUSINESS INCOME

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

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

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

The Ohio Supreme Court in *Kemppel v. Zaino*, 91 Ohio St.3d 420, 2001-Ohio-92, 746 N.E.2d 1073 (2001), reviewed the "transactional" and "functional" tests used to classify income. 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." *Kemppel* at 322. The nature, frequency, and regularity of the transactions are also relevant factors. *Id.* Under the functional test, the Court found that income is classified as business if "use of the property constituted an integral part of the regular course of a trade or business operation." *Kemppel* at 423. According to the functional test, the extraordinary nature and infrequency of the transaction are irrelevant. *Id.* at 422-423. In addition to the "transactional" and "functional" tests, Ohio defines business income to also include the partial or complete liquidation of a business. R.C. 5747.01(B).

By contrast, nonbusiness income is define as "all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or intangible personal property, *capital gains*, *interest*, *dividends*, and *distributions*, patent or copyright royalties, or lottery winnings, prizes, and awards." R.C. 5747.20. (Emphasis added). Generally, income, deductions, gains and losses recognized by a sole proprietorship or a pass-through entity are considered items of business income. Ohio also provides that capital gains from the sale of intangible personal property is taxable to the domicile of the taxpayer. *Corrigan*, at ¶ 3, discussing Ohio R.C. 5747.20(B).

JAN 15 2020

IV. ANALYSIS

A. THE CLAIMANTS DID NOT PROPERLY REPORT THE PURPORTED DEDUCTION

Out the outset, it must be noted that the claimants failed to submit an IT BUS with their amended return. As such, the claimants have not formally reported or substantiated the BID which they are seeking. The IT BUS is used for recording all business income that is reported on IRS schedules B, C, D, E and F as well as any other items of business income and gain separately stated on federal Schedule K-1 and miscellaneous federal income tax adjustments, if any. Without an IT BUS, the Department cannot verify the BID the claimants seek.

B. THE EVIDENCE AVAILABLE DOES NOT INDICATE THE MR. EVANS WAS IN THE BUSINESS OF TRADING STOCKS

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

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

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

V. CONCLUSION

Here, there is no evidence identifying that Mr. Evans operated a business or was in the business of trading stock or securities. Rather, the evidence available to the Tax Commissioner indicates that Mr. Evans is a retired stockbroker who also happens to participate in "day trading"; he is not "in the business" of

purchasing and selling long and short-term assets. Ultimately, the claimants have not demonstrated that Mr. Evans' capital gains were business income under the relevant authority. Therefore, the claimants' capital gain income is nonbusiness income and does not qualify for Ohio's business income deduction

Accordingly, the refund claim is denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: JAN 15 2020

Ralph Garritano
1340 Fudge Dr.
Beavercreek, OH 45434

Re: Assessment No. 02201713631486
Individual Income Tax - 2009

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
$6,067.76	$1,421.51	$2,123.71	$9,612.98

The Ohio Department of Taxation assessed the petitioner for failing to timely file a 2009 Ohio individual income tax return. This assessment was calculated using the petitioner's federal adjusted gross income as reported to Ohio by the Internal Revenue Service under authorization of Section 6103(d) of the Internal Revenue Code. Thereafter, the petitioner filed an untimely return, but failed to report additional income on his Ohio return. The petitioner objects to the assessment and requests an abatement of 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.

Subsequent to the assessment, the petitioner submitted W-2Gs, Certain Gambling Winnings statements with Indiana state income tax withholding amounts. A full-year Ohio resident is entitled to a resident credit of a percentage of income not subject to Ohio tax or taxes paid to other states, whichever is less. R.C. 5747.05(B). Accordingly, the petitioner has presented sufficient evidence to show that he paid income taxes to Indiana. Therefore, the Department has been able to verify the petitioner's Schedule C Ohio resident credit.

Accordingly, the assessment is cancelled.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 28 2020

Ralph Garritano
1340 Fudge Dr.
Beavercreek, OH 45434

Re: Assessment No. 02201834561417
Individual Income Tax - 2010

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	Late Payment Penalty	Total
$8,810.96	$2,263.08	$1,321.64	$4,526.16	$16,921.84

The Ohio Department of Taxation assessed the petitioner for failing to report additional income on his 2010 Ohio individual income tax return. This assessment was calculated using the petitioner's federal adjusted gross income as reported to Ohio by the Internal Revenue Service under authorization of Section 6103(d) of the Internal Revenue Code. The petitioner objects to the assessment and requests an abatement of 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.

Subsequent to the assessment, the petitioner submitted an amended 2010 U.S. Individual Income Tax Return reporting that he was a professional gambler and his gambling income had been removed from federal line 21, Other Income, and added to a federal Schedule C, Profit or Loss from Business (Sole Proprietorship). A professional gambler, who is engaged in the trade or business of gambling can offset losses and expenses of gambling against income on a federal Schedule C. Ohio, however, does not provide a deduction for gambling losses. On December 6, 2019, the Department's hearing officer sent a letter to the petitioner requesting W2G, Certain Gambling Winnings statements, and any documentation from the IRS showing that it accepted the petitioner's amended returns as filed for the year in question. This information was requested to be submitted by December 27, 2019. The petitioner, however, did not respond to the letter or provide the additional information requested. A full-year Ohio resident is entitled to a resident credit of a percentage of income not subject to Ohio tax or taxes paid to other states, whichever is less. R.C. 5747.05(B). Here, the petitioner reported an Ohio resident credit, but failed to respond with additional information to verify the credit amount claimed.

The petitioner also failed to provide any documentation from the IRS proving that it accepted the petitioner's amended federal return as filed. For gambling to reach the level of a trade or business activity it must be "pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and * * * not a mere hobby". *Commissioner v. Groetzinger*, 480 U.S. 23, 35, 107 S.Ct. 980, 94 L.Ed.2d 25 (1987). On the petitioner's first federal Schedule C, he listed "Professional Gambler" as

his principal business and reported a gross income of $243,700, a negative net profit of $4,334 and $248,034 in expenses. On the petitioner's second federal Schedule C, he listed "Automotive Repair" as his principle business and reported gross income of $127,789, a net profit of $70,819, and $56,970 in expenses. Accordingly, it does not appear that the petitioner's livelihood was from his winnings from slot machines; instead, his primary income came from his automotive repair business. Similar to taxpayers in the recent BTA decision *Adrean & Crystal Young*, BTA No. 2019-189, 2019 WL 4645200 (Sept. 17, 2019) who failed to prove that they were engaged in a trade or business although they filed a federal Schedule C, the petitioner has also failed to prove that his gambling reached the level of a trade or business and that his gambling loss should be excluded from his Ohio adjusted gross income. Therefore, the information currently available to the Tax Commissioner indicates that the tax and interest amounts assessed are based upon the best information available.

However, the Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The petitioner asserts that his failure to comply was due to reasonable cause and the evidence and circumstances support a partial reduction of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Late Payment Penalty	Total
$8,810.96	$2,263.08	$1,321.64	$2,263.08	$14,658.76

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000291

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

FINAL DETERMINATION

Date: JAN 28 2020

Ralph Garritano
1340 Fudge Dr.
Beavercreek, OH 45434

Re: Assessment No. 02201900863556
Individual Income Tax - 2011

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

Tax	Interest	Penalty	Late Payment Penalty	Total
$20,759.53	$4,563.59	$3,113.92	$9,127.18	$37,564.22

The Ohio Department of Taxation assessed the petitioner for failing to report additional income on his 2011 Ohio individual income tax return. This assessment was calculated using the petitioner's federal adjusted gross income as reported to Ohio by the Internal Revenue Service under authorization of Section 6103(d) of the Internal Revenue Code. The petitioner objects to the assessment and requests an abatement of 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.

Subsequent to the assessment, the petitioner submitted an amended 2011 U.S. Individual Income Tax Return reporting that was a professional gambler and his gambling income had been removed from federal line 21, Other Income, and added to a federal Schedule C, Profit or Loss from Business (Sole Proprietorship). A professional gambler, who is engaged in the trade or business of gambling can offset losses and expenses of gambling against income on a federal Schedule C. Ohio, however, does not provide a deduction for gambling losses. On December 6, 2019, the hearing officer sent a letter to the petitioner requesting W2G winning statements and any documentation from the IRS showing that it accepted the petitioner's amended returns as filed for the year in question. This information was requested to be submitted by December 27, 2019. However, the petitioner did not respond to the letter or provide any documentation from the IRS proving it accepted the petitioner's amended federal return as filed.

For gambling to reach the level of a trade or business activity it must be "pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and * * * not a mere hobby". *Commissioner v. Groetzinger*, 480 U.S. 23, 35, 107 S.Ct. 980, 94 L.Ed.2d 25 (1987). On the petitioner's first federal Schedule C, he listed "Professional Gambler" as his principal business and reported gross receipts of $407,005, a cost of goods sold of $407,005, gross income of $0.00, a negative net profit of $3,671 and $3,671 in expenses. On the petitioner's second federal Schedule C, he listed "Automotive Repair" as his principle business and reported gross income of $122,079, a net profit of $79,251, and

$42,828 in expenses. Accordingly, it does not appear that the petitioner's livelihood was from his winnings from slot machines; instead, his primary income came from his automotive repair business. Similar to taxpayers in the recent BTA decision *Adrean & Crystal Young*, BTA No. 2019-189, 2019 WL 4645200 (Sept. 17, 2019) who failed to prove that they were engaged in a trade or business although they filed a federal Schedule C, the petitioner has also failed to prove that his gambling reached the level of a trade or business and that his gambling loss should be excluded from his Ohio adjusted gross income. Therefore, the information currently available to the Tax Commissioner indicates that the tax and interest amounts assessed are based upon the best information available.

However, the Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The petitioner asserts that his failure to comply was due to reasonable cause and the evidence and circumstances support a partial reduction of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Late Payment Penalty	Total
$20,759.53	$4,563.59	$3,113.92	$4,563.59	$33,000.63

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

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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: JAN 29 2020

Ralph Garritano
1340 Fudge Dr.
Beavercreek, OH 45434

Re: Assessment No. 02201713631485
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
$17,105.73	$1,657.60	$5,987.00	$24,750.33

The Ohio Department of Taxation assessed the petitioner for failing to timely file a 2013 individual income tax return. This assessment was calculated using the petitioner's federal adjusted gross income as reported to Ohio by the Internal Revenue Service under authorization of Section 6103(d) of the Internal Revenue Code. Thereafter, the petitioner filed an untimely return, but failed to report additional income on his Ohio return. The petitioner objects to the assessment and requests an abatement of the penalties and interest amounts assessed. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

Subsequent to the assessment, the petitioner submitted W-2G, Certain Gambling Winnings statements with Ohio and Indiana state income tax withholding amounts. A full-year Ohio resident is entitled to a resident credit of a percentage of income not subject to Ohio tax or taxes paid to other states, whichever is less. R.C. 5747.05(B). Accordingly, the petitioner has presented sufficient evidence to show that he paid taxes to Indiana and Ohio. Therefore, the Department has been able to verify the petitioner's Schedule C Ohio resident credit and Ohio withholding amounts.

The petitioner also contends that he was a professional gambler and his gambling income and losses have been added to a federal Schedule C, Profit or Loss from Business (Sole Proprietorship), for the year in question thereby reducing his Ohio adjusted gross income. A professional gambler, who is engaged in the trade or business of gambling can offset losses and expenses of gambling against income on a federal Schedule C. Ohio, however, does not provide a deduction for gambling losses. For gambling to reach the level of a trade or business activity it must be "pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and * * * not a mere hobby". *Commissioner v. Groetzinger*, 480 U.S. 23, 35, 107 S.Ct. 980, 94 L.Ed.2d 25 (1987). The petitioner has failed to provide the Department with his 2013 U.S. individual income tax return, his federal Schedule C's for the 2013 tax period or provide any evidence to substantiate his claim that he was a "professional gambler." Similar to taxpayers in the recent BTA decision *Adrean & Crystal Young*, BTA No. 2019-189, 2019 WL

4645200 (Sept. 17, 2019) who failed to prove that they were engaged in a trade or business although they filed a federal Schedule C, the petitioner has also failed to prove that his gambling reached the level of a trade or business and that his gambling loss should be excluded from his Ohio adjusted gross income. Based on the information currently in the Tax Commissioner's possession, it does not appear that the petitioner's livelihood was from his winnings from slot machines; instead, it appears that the petitioner's primary income came from his automotive repair business. Therefore, the information currently available to the Tax Commissioner indicates that the tax and interest amounts assessed are accurate and based upon the best information available.

However, the Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The petitioner asserts that his failure to comply was due to reasonable cause and the evidence and circumstances support a partial reduction of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Ohio Withholding	Total
$13,252.07	$1,285.42	$2,993.50	($4,838.82)	$12,692.17

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

000000044

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN - 9 2020

David J. & Kimberly C. Hasler
33703 Americana Ave
Dade City, FL 33525

Re: Assessment No. 02201204494175
Individual Income Tax – Multiple Periods

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:

Year	Tax	Interest	Penalty	Total
2006	$22,115.00	$5,975.00	$0.00	$28,090.00
2007	$10,236.00	$1,553.00	$0.00	$11,789.00

The Department assessed the petitioners for failing to fully remit individual income tax for the periods in question. The petitioners 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
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: JAN 15 2020

C. Benjamin & Sondra Kirby
245 Hornwood Dr.
Dayton, OH 45405

Re: Two Assessments
Individual Income Tax
Multiple Reporting Periods

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

Assessment Number	Reporting Period	Tax	Interest	Penalty	Total
02201800919919	01/01/2015 – 12/31/2015	$1,026.95	$63.81	$127.62	$1,218.38
02201800919920	01/01/2016 – 12/31/2016	$1,779.00	$51.47	$102.94	$1,933.41

I. BACKGROUND

The Ohio Department of Taxation assessed the petitioners, C. Benjamin and Sondra Kirby, after making corrections to the Ohio individual income tax return they filed for tax years 2015 and 2016. Specifically, the Department disallowed the amounts claimed on Schedule A, Line 23 of the petitioners' income tax return. The petitioners object to the assessment and requested a hearing on the matter. A telephone hearing was scheduled, and the petitioners subsequently waived the hearing. Therefore, this matter is decided upon information available to the Tax Commissioner and the evidence supplied with the petition.

II. AUTHORITY

Ohio law requires the General Assembly to pass legislation adopting or conforming to federal law when federal tax law has changed. As of March 30, 2018, the state of Ohio has conformed for tax years 2017 and prior. Ohio's conformity statute states that any existing reference to the Internal Revenue Code ("IRC") in the Revised Code's chapters means the IRC as it existed on the effective date on the statute. *See* R.C. 5701.11(A).

III. CONCLUSION

Here, the petitioners claimed an amount related to "medical and primary caregiver expenses" on Line 23 of their Ohio Schedule A for tax years 2015 and 2016. The amount claimed by the petitioners is not eligible for the deduction because Ohio has adopted legislation and conformed to the changes in federal

tax law for tax years 2015 and 2016. As such, the petitioners are not entitled to the amounts claimed on their Schedule A deductions.

Accordingly, the assessments are affirmed.

JAN 15 2020

Current records indicate that no payment has 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 shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 1090, Columbus, OH 43216-1090.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-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: JAN 23 2020

Paul W. & Gina L. Linehan
251 Plymouth Dr.
Bay Village, OH 44140

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

This is the final determination of the Tax Commissioner with regards to an application for refund filed pursuant to R.C. 5751.11:

Tax Year	Refund Claimed
2017	$200,598.00

I. BACKGROUND

The claimants, Paul and Gina Linehan, filed an individual income tax return for tax year 2017 claiming the Ohio Business Income Deduction ("BID") for capital gains received from the sale of Mr. Linehan's membership interest in Gabriel Partners, LLC ("Gabriel Partners"). Upon initial review, the Department disallowed the deduction and denied the claimants' refund request for tax year 2017. The claimants contend that the Department incorrectly identified the capital gains as nonbusiness income.[1] Accordingly, the claimants objected to the denial of the refund claim and requested an administrative review of the refund claim in accordance with R.C. 5703.70 but did not request a hearing. Therefore, this matter is decided based upon the information and evidence available to the Tax Commissioner.

II. CLAIMANTS' CONTENTIONS

The claimants assert that Mr. Linehan was the former president and held a 16.667% membership interest in Gabriel Partners until he sold his membership interest in 2017. The claimants originally filed their individual income tax return for tax year 2017 claiming the capital gains received from the sale of Mr. Linehan's membership interest on Line 7 of their Ohio Business Income Schedule IT-BUS. The claimants now contend that the capital gains received from this sale should have been claimed on Line 3 of their Ohio Schedule IT-BUS. The claimants also argue that the capital gains received from the sale

[1] Ohio Adm.Code 5703-7-02(A) 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."

of Mr. Linehan's membership interest are from a "complete sale and liquidation" of Gabriel Partners. For the reasons discussed below, the claimants' contentions are not well-taken.

III. RELEVANT AUTHORITY

A. BUSINESS & NONBUSINESS INCOME

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

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

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

The Ohio Supreme Court in *Kemppel v. Zaino*, 91 Ohio St.3d 420, 2001-Ohio-92, 746 N.E.2d 1073 (2001), reviewed the "transactional" and "functional" tests used to classify income. 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." *Kemppel* at 322. The nature, frequency, and regularity of the transaction are also relevant factors. *Id.* Under the functional test, the Court found that income is classified as business income if "use of the property constituted an integral part of the regular course of a trade or business operation." *Kemppel* at 423. According to the functional test, the extraordinary nature and infrequency of the transaction is irrelevant. *Id.* At 422-423. In addition to the "transactional" and "functional" tests, Ohio defines business income to also include the partial or complete liquidation of a business. R.C. 5747.01(B).

By contrast, nonbusiness income is defined as "all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or intangible personal property, *capital gains*, interest, dividends, and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards." R.C. 5747.01(C). (Emphases added). Nonbusiness income is allocated to the state depending on factors such as the physical location of the property or assets from which the income arises. R.C. 5747.20. Ohio generally provides that capital gain from the sale of intangible personal property is taxable to the domicile of the taxpayer. *Corrigan*, at ¶ 3, discussing Ohio R.C. 5747.20(B).

B. LIQUIDATION

Subsequent to *Kemppel*, the Ohio General Assembly passed Senate Bill 261, which amended R.C. 5747.01(B) to treat income amounts received from a partial or complete liquidation of a business as business income. *See* Am. Sub. Senate Bill 261 (Effective Date, June 5, 2002). This is critical, as the legislative history shows that the facts in *Kemppel* provided the rationale the General Assembly relied upon to define a liquidation for purposes of the amendment to R.C. 5747.01(B).[2] In *Kemppel*, the "case" referenced in the Final Analysis for Am. Sub. Senate Bill 261, the corporation sold all of its assets, distributed the proceeds of the sale to its shareholders, and ceased doing business. The link between liquidation and the cessation of operations was reiterated by the Court at multiple points in *Kemppel*, when the Court cited out-of-state cases that differentiated between a partial and total liquidation of a business followed by the cessation of the business and the sale of assets followed by the continuation of the business. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Com., Bd. Of Fin. & Revenue*, 537 Pa. 205, 209, 642 A.2d 472, 474-75 (1994) and *Polaroid Corp. v. Offerman*, 349 N.C. 290, 307, 507 S.E.2d 284, 296 (1998). Taken together, this is a clear indication that the cessation of business operations is a material fact in determining what can be considered a liquidation under R.C. 5747.01(B). The converse implication is that the sale of an interest in an entity that continues to do business does not fit the intended definition of a liquidation under the relevant authority but, rather, is the sale of an intangible asset.

As discussed in *Corrigan*, an ownership interest in an entity is an intangible asset. *Corrigan*, 2016-Ohio-2805, at ¶ 3. The income from the sale of an ownership interest in an entity is a capital gain, which is generally nonbusiness income. *Id.* ¶ 36-37. Accordingly, the capital gains from the sale of intangible personal property is taxed to the domicile of the taxpayer. R.C. 5747.20(B)(2)(c). In *Corrigan*, the Court differentiates between situations where there is a gain from the sale of an asset, such as the sale of an ownership interest in an entity, and a liquidation of a business through an asset sale and the ceasing operations. *Id.* ¶ 65-66. The Court mentions that the two sale structures may involve the same "economic substance" but could have different tax implications to demonstrate that they are both not the same. *Id.* This implies that an asset sale and a sale of ownership interest do not both produce business income.

As mentioned previously, and based on prior case law and legislative intent, a transaction structured as an asset sale followed by the cessation of business operations is a liquidation, which produces business income under the second part of R.C. 5747.01(B). Similarly, the sale of an asset followed by a complete dissolution or cessation of the business for which the asset produced income would be a partial liquidation. In contrast, the sale of an intangible asset such as an ownership interest in equity, is not a liquidation, but instead is merely a capital gain to the investor, which is nonbusiness income pursuant to *Corrigan*.

IV. ANALYSIS

As noted above, a gain is classified as business income under the "transactional test" if it is derived from a transaction in which the taxpayer regularly engaged. *Kemppel* at 422. Thus, income arising from

[2] The Content and Operation section of the Final Analysis for Senate Bill 261, which is an explanation of permanent law published by the Legislative Services Commission ("LSC"), states "[i]n a recent case, gains from the liquidation of an Ohio pass-through entity * * *." *See* Ohio Legislative Service Commission Final Bill Analysis for Am. Sub. Senate Bill 261 at 4.

extraordinary or unusual events will not give rise to business income under the transactional test. The sale of Mr. Linehan's intangible interest was a one-time occurrence and, therefore, did not arise from transactions or activities in the normal course of his or Gabriel Partners' trade or business. As such, the capital gains in question do not meet the transactional test.

Under the functional test, income constitutes business income only "if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." *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 5, citing *Laurel Pipe Line Co. v. Cm., Bd. of Fin. & Revenue* (1994), 537 Pa. 205, 210. In this case, the claimants have not argued or demonstrated that acquiring or disposing of its intangible interest in companies constituted an integral part of Gabriel Partners' regular trade or business. Rather it appears that, while Mr. Linehan was president holding a 16.667% membership interest, Gabriel Partners was in the business of anti-money laundering services.[3]

As stated above, the General Assembly responded to *Kemppel* by amending R.C. 5747.01(B) to treat amounts received from the partial or complete liquidation of a business as business income. As illustrated in *Corrigan*, a transaction consisting of a true asset sale may constitute liquidation thereby producing business income; however, the transfer of intangible ownership interest as in *Corrigan* produces capital gains thereby producing nonbusiness income. Per the Membership Interest Purchase Agreement, Mr. Linehan agreed to sell, convey, assign, transfer, and deliver his rights, title and interest in and to his 16.667% membership interest in Gabriel Partners.[4] Accordingly, Mr. Linehan sold his entire intangible interest in Gabriel Partners, he did not sell a business asset held by Gabriel Partners. In addition, the intangible interest was held by Mr. Linehan personally, not Gabriel Partners, and was not used exclusively or primarily for Gabriel Partners' business purpose as a business asset would normally be used. Furthermore, the business was not liquidated and dissolved; rather, the business continues to operate.[5] As such, the "partial or complete liquidation of a business" part of R.C. 5747.01(B) is also not satisfied and, therefore, the resulting gain is nonbusiness income.

V. CONCLUSION

The claimants have not demonstrated that the capital gains are business income under either the transactional or functional tests. Furthermore, while Mr. Linehan sold all of his ownership interest in Gabriel Partners, the business continued operating. Accordingly, there was no sale of business assets followed by a cessation of the business and, therefore, there was no partial or complete liquidation of the business pursuant to R.C. 5747.01(B). Thus, the claimants' capital gain income recognized from the sale of Mr. Linehan's membership interest in Gabriel Partners is nonbusiness income under Ohio law.

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[3] Jeremy Nobile, *Battling money laundering is lucrative move for Gabriel Partners*, https://www.crainscleveland.com/article/20150531/NEWS/305319989/battling-money-laundering-is-lucrative-move-for-gabriel-partners (last accessed November 26, 2019).

[4] The Membership Interest Purchase Agreement, Section 4.11(B) also discusses the transfer of Gabriel Partners' buildings, equipment, machinery, fixtures, improvements, and other tangible assets (whether owned or leased) to the buyer for use in the "ordinary course of business of [Gabriel Partners] as presently conducted."

[5] PR Newswire, *Gabriel Partners LLC (AML RightSource, LLC) Announces Major Expansion*, https://www.prnewswire.com/news-releases/gabriel-partners-llc-aml-rightsource-llc-announces-major-expansion-300204011.html (last accessed Nov. 26, 2019).

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JAN 23 2020

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 CONCLUDE AND THE FILE APPROPRAITELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 29 2020

Robert W. McIntyre
5910 Landerbrook Drive
Suite 200
Cleveland, OH 44124

Re: Four Assessments
Individual Income Tax – Multiple Periods

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

Assessment No.	Tax Year	Tax	Interest	Penalty	Total
02201722970410	2013	$14,363.51	$1,529.20	$5,027.23	$20,919.94
02201722970411	2014	$12,845.38	$982.21	$4,495.88	$18,323.47
02201722970412	2015	$12,967.10	$598.56	$4,538.45	$18,104.11
02201722970413	2016	$11,914.00	$158.11	$4,173.40	$16,245.51

The Ohio Department of Taxation assessed the petitioner for failing to timely file individual income tax return for the periods at issue. The petitioner objects to the assessments and requests an abatement of the interest and late filing penalties assessed. Records now reflect that the petitioner's returns were untimely received by the Department.[1] The petitioner requested a hearing which was scheduled for December 12, 2019; however, the petitioner waived the hearing through email and by failing to call in during the scheduled telephone hearing time. Therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petitions.

The Department will adjust the tax amounts assessed to reflect the new information reported on the untimely filed income tax return. Although the payment of interest is mandatory pursuant to R.C. 5747.08(G), the petitioner filed untimely returns showing that the petition prepaid his income tax through income tax withholdings for the periods in questions. As such, the interest assessed will be adjusted. The Tax Commissioner may abate penalties when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the petitioner claims that his failure to comply was due to reasonable cause and the evidence and circumstances support a partial abatement of the penalty.

However, the Department is authorized to offset all or a portion of a taxpayer's income tax refund to be applied towards any unpaid tax. R.C. 5747.12 and Ohio Adm.Code 5703-7-13. The Department is required to offset a taxpayer's refund as partial payment of any debts reported by the following agencies: Ohio Department of Job and Family Services, Ohio Bureau of Workers' Compensation, Internal

[1] In response to the untimely filing of the 2013 return corrected assessment was issued on May 21, 2019 for tax year 2013 reflecting a balance due of $0.00.

Revenue Service, and the Ohio Attorney General's office. In the case at hand, the petitioner currently owes outstanding debt to one or more of the above agencies; therefore, the petitioner's entire refund amounts will be applied in partial satisfaction of the debt as required per R.C. 5747.12.

Accordingly, the assessments are adjusted as follows:

Assessment No.	Tax Year	Tax	Interest	Penalty	Withholding	Overpayment
02201722970410	2013	$15,457.25	$0.00	$0.00	($18,144.00)	($2,686.75)
02201722970411	2014	$13,958.27	$0.00	$50.00	($15,327.00)	($1,318.73)
02201722970412	2015	$13,765.37	$0.00	$50.00	($15,872.00)	($2,056.63)
02201722970413	2016	$11,089.00	$0.00	$50.00	($14,989.00)	($3,850.00)

Current records indicate that no additional payments have been made on these assessments, resulting in a total overpayment of $9,911.11 which will be applied towards the petitioner's outstanding debt as required per R.C. 5747.12. Due to processing and posting time lags, other payments may have been made that are not reflected in this final determination.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 3 1 2020

Patrick J. & Helen C. Norton
7850 E El Sendero, Unit 24
Scottsdale, AZ 85266

Re: Assessment No. 02201207521558
Individual Income Tax – Multiple Periods

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:

Year	Tax	Interest	Penalty	Total
2008	$23,107.00	$2,831.00	$0.00	$25,938.00
2009	$49,374.00	$3,724.00	$0.00	$53,098.00
2010	$29,395.00	$1,032.00	$0.00	$30,427.00

The Department assessed the petitioners for failing to fully remit individual income tax for the periods in question. The petitioners 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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000360

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

FINAL DETERMINATION

Date:

JAN 3 1 2020

Michael J. & Patricia E. Paschke
P.O. Box 1166
Uniontown, OH 44685

Re: Refund Claim No. 1800590
Individual Income Tax – 2016

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

Tax Year	Refund Claimed
2016	$108,843.00

I. BACKGROUND

The claimants filed an individual income tax return for tax year 2016 claiming an Ohio Business Income Deduction ("BID") for capital gains Mr. Paschke received from the sale of his ownership interest in Canton Elevator, Inc. ("Canton Elevator") to the Nidec Corporation ("Nidec"). Upon initial review, the Department disallowed the BID and, therefore, partially denied the claimants' refund request for tax year 2016.[1] The claimants contend that the Department incorrectly identified the capital gains from the sale of Canton Elevator 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 claimants requested an administrative review of the refund claim denial in accordance with R.C. 5703.70. The claimants also requested a hearing on the matter, which was held on September 11, 2018. This matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claims.

II. CLAIMANTS' CONTENTIONS

The claimants assert that their 2016 individual income tax return was correct as filed. The claimants argue that the gain from the sale of Mr. Paschke's ownership interest in Canton Elevator (the "company") is business income and thus eligible for the business income deduction. The claimants agree that they factually sold their ownership interest in the company. However, they contend that the sale of Mr. Paschke's ownership interest in the company is considered a partial or complete liquidation of the business, and thus is business income pursuant to R.C. 5747.01(B). The claimants reason that because they made an election under I.R.C. 338(h)(10) to value their stock sale as an asset sale, Ohio must follow this legal fiction not only for valuation purposes, but also when determining the character of the income as business or nonbusiness income pursuant to R.C. 5747.01(B) and (C).

[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

JAN 3 1 2020

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 – THE TRANSACTIONAL & FUNCTIONAL TESTS

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

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 stated 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 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

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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).

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.

D. I.R.C. 338(H)(10) ELECTION

Under I.R.C. 338(h)(10), the parties to a corporate acquisition may elect to treat a stock sale as an asset sale for federal income tax valuation purposes. This election allows the buyer to receive a stepped-up basis in the seller corporation's assets. 26 C.F.R. 1.338-1. If an I.R.C. 338(h)(10) election is made, the selling corporation is generally treated as making a deemed sale of its assets to the buyer, followed by a deemed liquidation, and the transaction is valued based on this legal fiction. *Id.* The election does **not** change the fact that, by the terms of the underlying sales agreement, the **company's stock** is transferred between the seller and buyer. Ohio's individual income tax law does not contain any specific references, or analogous provisions, to I.R.C. 338(h)(10).

IV. ANALYSIS OF THE FACTS & CIRCUMSTANCES PRESENTED

Mr. Paschke can only deduct his gain from his sale of Canton Elevator if such gain is business income. The Department acknowledges that Mr. Paschke was a 50% shareholder of Canton Elevator and performed personal services for the company. 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. Paschke or Canton Elevator regularly disposed of intangible interests in entities. On the contrary, the record reflects that the sale of Mr. Pashcke'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 Canton Elevator'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* (1994), 537 Pa. 205, 210. 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. Paschke was employed as an engineer for Canton Elevator which was in the business of designing, engineering, and manufacturing elevators for installation in various buildings and sites. In short, Mr. Paschke's intangible property (i.e. his ownership interest in Canton Elevator) is not "integral" to the "regular course of a trade or business operation" conducted by either Mr. Paschke or Canton

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Elevator. 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.

Mr. Paschke did not, in fact, sell the business's assets; instead, he sold his intangible ownership interest in the business itself. This intangible interest was held by Mr. Pashcke personally; it was not a business asset held or used by Canton Elevator in its trade or business. Furthermore, although Canton Elevator was "deemed" liquidated for federal income tax valuation purposes, the business was not liquidated, nor has it ceased to operate. Instead, the business continues designing, engineering, and manufacturing elevators. Thus, Mr. Paschke's gain from the sale of Canton Elevator was not a partial or complete liquidation of a business.

Finally, the claimants contend that, since the Internal Revenue Service ("IRS") recognizes Mr. Paschke's sale of his intangible ownership interest of Canton Elevator as a sale of assets,[5] Ohio should as well. Thus, the claimants ask the Commissioner to disregard the actual substance of the transaction (i.e. the sale of an ownership interest in a business), follow the legal fiction created under federal law (i.e. that an asset sale occurred when it did not),[6] and thus treat the resulting gain as business income derived from the sale of business assets. The claimants point to a case pertaining to Ohio's now-defunct corporation franchise tax to support their contention that the State of Ohio "recognizes all IRC 338 elections" and has conformed with the Internal Revenue Code. Specifically, the claimants identify *Customized Transportation, Inc. v. Tracy*, BTA No. 93-K-364 (March 15, 1996).

However, the claimants' reading of *Customized Transportation* is overly broad. Although the *Customized Transportation* decision briefly examined the Congressional intent behind its creation of the I.R.C. 338(h)(10) election and the concept that gains from such a sale would be included in net income, the Board did not, in any manner, state or otherwise imply that Ohio's tax laws conformed or adopted the federal form-over-substance treatment that occurs under an I.R.C. 338(h)(10) election. Moreover, the authority to conform to federal law lays with the Ohio General Assembly, not the Ohio Board of Tax Appeals.

With that in mind, it bears repeating that Ohio's individual income tax law does not contain either any specific references, or analogous provisions, to I.R.C. 338(h)(10). Although a true asset sale and an I.R.C. 338(h)(10) election receive similar tax treatment for federal purposes, they are comprised of different substance and, therefore, have different tax implications for Ohio income tax purposes. The Ohio Supreme Court acknowledged in *Corrigan* that "two different methods of achieving the same economic result could have drastically different tax implications." *Corrigan*, 149 Ohio St.3d 18, 2016-

[5] The IRS deems Mr. Paschke's sale of stock, i.e. intangible property owned by Mr. Paschke himself, as a sale of the Canton Elevator's assets for federal income tax valuation purposes, because of claimants' election under I.R.C. 338(h)(10).

[6] It is important to note that the I.R.C. 338(h)(10) election exists to allow a seller to transfer a stepped-up basis in a company's assets to a buyer. This allows the seller to avoid taxable gain from a portion of the sale proceeds, and enables a buyer to amortize and depreciate the assets of the acquired company. Thus, the election is for federal income tax valuation purposes for both parties. However, the election does not change the character of the income (e.g. from nonbusiness to business income) or the actual substance of the underlying sale. For all other legal purposes, the interest in the entity is sold.

Ohio-2805, 73 N.E.3d 381, at ¶ 65. The Court also "recognize[d] that an asset sale and a sale of ownership interest may be different forms involving the same economic substance to the parties * * * " but it does "not mean that the jurisdictional limits on Ohio's taxing powers lack their own substantive importance." *Id.* at ¶ 65. Here, Mr. Paschke (the seller) and Nidec (the purchaser) entered into a sales agreement where they agreed to transfer shares of stock in Canton Elevator and each make the I.R.C. 338(h)(10) election, thus creating the legal fiction of an asset sale and the corresponding federal valuations. However, the substance of the transaction was still the sale of the shareholders' ownership interest.

V. CONCLUSION

The capital gains from Mr. Paschke's sale of his ownership interest in Canton Elevator are not business income under either the transactional or functional tests of R.C. 5747.01(B). The evidence reflects that the claimants' 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 Canton Elevator'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.

Finally, Mr. Paschke's sale of his ownership interest in Canton Elevator is not reclassified as an asset sale for the purpose of determining the character of the income under Ohio law. Claimants' federal election under I.R.C. 338(h)(10) ignores the substance of the transaction (i.e. an investor's sale of his intangible ownership interest in the business) and instead creates a legal fiction (i.e. the investor's sale is "deemed" to be a sale of the business's assets) for federal income tax valuation purposes. There is no similar reclassification in Ohio law, and the relevant authority requires the Tax Commissioner to look at the substance of the underlying transaction, not a legal fiction created under federal law, in order to analyze whether the capital gain constitutes business or nonbusiness income under Ohio law.

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:

JAN 10 2020

James L. & Adelaide F. Rogula
370 Old Farm Rd
Northfield, IL 60093

Re: Assessment No. 02201224911928
Individual Income Tax – Multiple Periods

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:

Year	Tax	Interest	Penalty	Total
2003	$14,961.60	$6,700.00	$0.00	$21,661.60
2004	$20,310.97	$8,227.00	$0.00	$28,537.97

The Department assessed the petitioners for failing to fully remit individual income tax for the periods in question. The petitioners 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
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: JAN 15 2020

Dawn Speakman
15880 Fish Daum Road
Richwood, OH 43344

Re: Refund Claim No. 8167350910
Individual Income Tax
Reporting Period: 01/01/2014 – 12/31/2014

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

Tax Year	Refund Claimed
2014	$698.00

I. BACKGROUND

The claimant, Dawn Speakman, filed an individual income tax return for tax year 2014 claiming the Ohio Small Business Deduction ("SBD") for capital gains received from the sale of the claimant's membership interest in S & G Rental, LLC ("S & G"). Upon initial review, the Department disallowed the deduction and denied the claimant's refund request for tax year 2014.[1] The claimant contends that the Department incorrectly identified the capital gains as nonbusiness income. Accordingly, the claimant objected to the denial of the refund claim and requested an administrative review of the refund claim in accordance with R.C. 5703.70. The claimant 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 application.

II. CLAIMANTS' CONTENTIONS

The claimant asserts that she held a 25% membership interest in S & G until May 2014 when she sold her membership interest and all of S & G's assets to John Reese, owner of ACC Party Rental, Inc. ("ACC Party Rental"). The claimant originally filed her individual income tax return for tax year 2014 claiming the capital gains received from the sale of the claimant's membership interest and the business assets on

[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."

Line 5 of his Ohio Schedule IT SBD (Small Business Investor Income Deduction Schedule). The claimant argues that the capital gains received from the sale of her membership interest and the business's assets are from the liquidation of S & G. For the reasons discussed below, the claimant's contentions are not well-taken.

III. RELEVANT AUTHORITY

A. BUSINESS AND 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 R.C. 5747.21(B) (providing for the apportionment of business income by reference to apportionment statutes of the former corporate franchise tax, R.C. Chapter 5733); *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶ 21 (2016).

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

> [I]ncome, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade or business and includes income, gain, or loss from real property, tangible property, and intangible property if the acquisition, rental, management, and disposition of the property constitute 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.

The Ohio Supreme Court in *Kemppel v. Zaino*, 91 Ohio St.3d 420, 2001-Ohio-92, 746 N.E.2d 1073 (2001), reviewed the "transactional" and the "functional" tests used to classify income. 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." *Kemppel* at 422. The nature, frequency, and regularity of the transaction are also relevant factors. *Id.* Under the functional test, the Court found that income is classified as business income if "use of the property constituted an integral part of the regular course of a trade or business operation." *Kemppel* at 423. According to the functional test, the extraordinary nature of infrequency of the transaction is irrelevant. *Id.* at 422-423. In addition to the "transactional" and "functional" tests, Ohio defines business income to also include the partial or complete liquidation of a business. R.C. 5747.01(B).

By contrast, nonbusiness income is defined as "all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or tangible personal property, capital gains, interest, dividends and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards." R.C. 5747.02(C). Nonbusiness income is allocated to the state depending on factors such as the physical location of the property or assets from which the income arises. R.C. 5747.20. Ohio generally

provides that capital gain from the sale of intangible property is taxed to the domicile of the taxpayer. *Corrigan*, at ¶3 discussing R.C. 5747.20(B).

B. LIQUIDATION

Subsequent to *Kemppel*, the Ohio General Assembly passed Senate Bill 261, which amended R.C. 5747.01(B) to treat income amounts received from a partial or complete liquidation of a business as business income. *See* Am. Sub. Senate Bill 261 (Effective Date, June 5, 2002). This is critical, as the legislative history shows that the facts in *Kemppel* provided the rationale the General Assembly relied upon to define a liquidation for purposes of the amendment to R.C. 5747.01(B).[2] In *Kemppel*, the "case" referenced in the Final Analysis for Am. Sub. Senate Bill 261, the corporation sold all of its assets, distributed the proceeds of the sale to its shareholders, and ceased doing business. The link between liquidation and the cessation of operations was reiterated by the Court at multiple points in *Kemppel*, when the Court cited out-of-state cases that differentiated between a partial and total liquidation of a business followed by the cessation of the business and the sale of assets followed by the continuation of the business. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Com., Bd. Of Fin. & Revenue*, 537 Pa. 205, 209, 642 A.2d 472, 474-75 (1994) and *Polaroid Corp. v. Offerman*, 349 N.C. 290, 307, 507 S.E.2d 284, 296 (1998). Taken together, this is a clear indication that the cessation of business operations is a material fact in determining what can be considered a liquidation under R.C. 5747.01(B). The converse implication is that the sale of an interest in an entity that continues to do business does not fit the intended definition of a liquidation under the relevant authority but, rather, is the sale of an intangible asset.

As discussed in *Corrigan*, an ownership interest in an entity is an intangible asset. *Corrigan*, 2016-Ohio-2805, at ¶ 3. The income from the sale of an ownership interest in an entity is a capital gain, which is generally nonbusiness income. *Id.* ¶ 36-37. Accordingly, the capital gains from the sale of intangible personal property is taxed to the domicile of the taxpayer. R.C. 5747.20(B)(2)(c). In *Corrigan*, the Court differentiates between situations where there is a gain from the sale of an asset, such as the sale of an ownership interest in an entity, and a liquidation of a business through an asset sale and the ceasing operations. *Id.* ¶ 65-66. The Court mentions that the two sale structures may involve the same "economic substance" but could have different tax implications to demonstrate that they are both not the same. *Id.* This implies that an asset sale and a sale of ownership interest do not both produce business income.

As mentioned previously, and based on prior case law and legislative intent, a transaction structured as an asset sale followed by the cessation of business operations is a liquidation, which produces business income under the second part of R.C. 5747.01(B). Similarly, the sale of an asset followed by a complete dissolution or cessation of the business for which the asset produced income would be a partial liquidation. In contrast, the sale of an intangible asset such as an ownership interest in equity, is not a liquidation, but instead is merely a capital gain to the investor, which is nonbusiness income pursuant to *Corrigan*.

---

[2] The Content and Operation section of the Final Analysis for Senate Bill 261, which is an explanation of permanent law published by the Legislative Services Commission ("LSC") states, "[i]n a recent case, gains from the liquidation of an Ohio pass-through entity * * *." *See* Ohio Legislative Service Commission Final Bill Analysis for Am. Sub. Senate Bill 261 at 4.

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JAN 15 2020

IV. ANALYSIS

As noted above, a gain is classified as business income under the "transactional test" if it is derived from a transaction in which the taxpayer regularly engages. *Kemppel* at 422. As such, income arising from extraordinary or unusual events will not give rise to business income under the transactional test. Therefore, the sale of the claimant's intangible interest was a one-time occurrence and did not arise from transactions or activities in the normal course of her or S & G's trade or business. Thus, the capital gains in question do not meet the transactional test.

Under the functional test, income constitutes business income only "if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." *Kemppel* at 423. Additionally, gains satisfying the functional test generally arise from the sale of an asset which produces income while it was owned by the taxpayer. *Kemppel* at 5, citing *Laurel Pipe Line Co. v. Commonwealth Bd. of Fin. & Revenue* (1994), 537 Pa. 205, 210. Here, the claimant has not argued or demonstrated that acquiring or disposing of her intangible membership interest in companies constitute an integral part of her regular trade or business. Rather, it appears the claimant was in the business of renting party supplies. Additionally, the Department is not able to verify what, if any, business assets were sold to ACC Party Rental in 2014 since the evidence submitted by the claimant is insufficient. [3] Furthermore, the agreement submitted by the claimant only governs the "Assignment of LLC Interest"; not the assignment of business assets.

As stated above, the General Assembly responded to *Kemppel* by amending R.C. 5747.01(B) to treat amounts received from the partial or complete liquidation of a business as business income. As illustrated in *Corrigan*, a transaction consisting of a true asset sale may constitute liquidation thereby producing business income; however, the transfer of intangible ownership interest as in *Corrigan* produces capital gains thereby producing nonbusiness income. (Emphasis added). In this case, the claimant sold her entire membership interest in S & G to ACC Party Rental during tax year 2014. However, the business was not liquidated or dissolved in 2014; rather, it continued to operate as part of ACC Party Rental until February 2018 when a certificate of merger was filed with the Ohio Secretary of State. Furthermore, S & G updated its agent appointment to the owner of ACC Party Rental with the Ohio Secretary of State in December 2016. As such, the "partial or complete liquidation of a business" sentence of R.C. 5747.01 is not satisfied and, therefore, the resulting gain is nonbusiness income.

V. CONCLUSION

The claimant has not demonstrated that the capitals gains are business income under either the transactional or functional tests. Furthermore, while the claimant sold all of her membership interest in S & G, the business continued to operate. Accordingly, there was no sale of business assets followed by a cessation of the business, and, therefore, there was no partial or complete liquidation of the business pursuant to R.C. 5747.01(B). Thus, the claimant's capital gain income recognized from the sale of his membership interest in S & G is nonbusiness income under Ohio law.

---

[3] Specifically, the claimant submitted its "Asset Deprecation Report" as evidence of what business assets were sold to John Reese in 2014. This is insufficient evidence because it is not a binding agreement that conveys the transfer of ownership, title, or right to business assets and what particular business assets were sold.

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Accordingly, the refund claim is denied in full.

JAN 15 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 15 2020

Joseph Speakman
15880 Fish Daum Road
Richwood, OH 43344

Re: Refund Claim No. 8167350909
Individual Income Tax
Reporting Period: 01/01/2014 – 12/31/2014

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

Tax Year	Refund Claimed
2014	$775.00

I. BACKGROUND

The claimant, Joseph Speakman, filed an individual income tax return for tax year 2014 claiming the Ohio Small Business Deduction ("SBD") for capital gains received from the sale of the claimant's membership interest in S & G Rental, LLC ("S & G"). Upon initial review, the Department disallowed the deduction and denied the claimant's refund request for tax year 2014.[1] The claimant contends that the Department incorrectly identified the capital gains as nonbusiness income. Accordingly, the claimant objected to the denial of the refund claim and requested an administrative review of the refund claim in accordance with R.C. 5703.70. The claimant 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 application.

II. CLAIMANTS' CONTENTIONS

The claimant asserts that he held a 25% membership interest in S & G until May 2014 when he sold his membership interest and all of S & G's assets to John Reese, owner of ACC Party Rental, Inc. ("ACC Party Rental"). The claimant originally filed his individual income tax return for tax year 2014 claiming the capital gains received from the sale of the claimant's membership interest and the business assets on

[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."

Line 5 of his Ohio Schedule IT SBD (Small Business Investor Income Deduction Schedule). The claimant argues that the capital gains received from the sale of his membership interest and the business's assets are from the liquidation of S & G. For the reasons discussed below, the claimant's contentions are not well-taken.

III. RELEVANT AUTHORITY

A. BUSINESS AND 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 R.C. 5747.21(B) (providing for the apportionment of business income by reference to apportionment statutes of the former corporate franchise tax, R.C. Chapter 5733); *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶ 21 (2016).

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

> [I]ncome, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade or business and includes income, gain, or loss from real property, tangible property, and intangible property if the acquisition, rental, management, and disposition of the property constitute 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.

The Ohio Supreme Court in *Kemppel v. Zaino*, 91 Ohio St.3d 420, 2001-Ohio-92, 746 N.E.2d 1073 (2001), reviewed the "transactional" and the "functional" tests used to classify income. 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." *Kemppel* at 422. The nature, frequency, and regularity of the transaction are also relevant factors. *Id.* Under the functional test, the Court found that income is classified as business income if "use of the property constituted an integral part of the regular course of a trade or business operation." *Kemppel* at 423. According to the functional test, the extraordinary nature of infrequency of the transaction is irrelevant. *Id.* at 422-423. In addition to the "transactional" and "functional" tests, Ohio defines business income to also include the partial or complete liquidation of a business. R.C. 5747.01(B).

By contrast, nonbusiness income is defined as "all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or tangible personal property, capital gains, interest, dividends and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards." R.C. 5747.02(C). Nonbusiness income is allocated to the state depending on factors such as the physical location of the property or assets from which the income arises. R.C. 5747.20. Ohio generally

provides that capital gain from the sale of intangible property is taxed to the domicile of the taxpayer. *Corrigan*, at ¶3 discussing R.C. 5747.20(B).

B. LIQUIDATION

Subsequent to *Kemppel*, the Ohio General Assembly passed Senate Bill 261, which amended R.C. 5747.01(B) to treat income amounts received from a partial or complete liquidation of a business as business income. *See* Am. Sub. Senate Bill 261 (Effective Date, June 5, 2002). This is critical, as the legislative history shows that the facts in *Kemppel* provided the rationale the General Assembly relied upon to define a liquidation for purposes of the amendment to R.C. 5747.01(B).[2] In *Kemppel*, the "case" referenced in the Final Analysis for Am. Sub. Senate Bill 261, the corporation sold all of its assets, distributed the proceeds of the sale to its shareholders, and ceased doing business. The link between liquidation and the cessation of operations was reiterated by the Court at multiple points in *Kemppel*, when the Court cited out-of-state cases that differentiated between a partial and total liquidation of a business followed by the cessation of the business and the sale of assets followed by the continuation of the business. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Com., Bd. Of Fin. & Revenue*, 537 Pa. 205, 209, 642 A.2d 472, 474-75 (1994) and *Polaroid Corp. v. Offerman*, 349 N.C. 290, 307, 507 S.E.2d 284, 296 (1998). Taken together, this is a clear indication that the cessation of business operations is a material fact in determining what can be considered a liquidation under R.C. 5747.01(B). The converse implication is that the sale of an interest in an entity that continues to do business does not fit the intended definition of a liquidation under the relevant authority but, rather, is the sale of an intangible asset.

As discussed in *Corrigan*, an ownership interest in an entity is an intangible asset. *Corrigan*, 2016-Ohio-2805, at ¶ 3. The income from the sale of an ownership interest in an entity is a capital gain, which is generally nonbusiness income. *Id.* ¶ 36-37. Accordingly, the capital gains from the sale of intangible personal property is taxed to the domicile of the taxpayer. R.C. 5747.20(B)(2)(c). In *Corrigan*, the Court differentiates between situations where there is a gain from the sale of an asset, such as the sale of an ownership interest in an entity, and a liquidation of a business through an asset sale and the ceasing operations. *Id.* ¶ 65-66. The Court mentions that the two sale structures may involve the same "economic substance" but could have different tax implications to demonstrate that they are both not the same. *Id.* This implies that an asset sale and a sale of ownership interest do not both produce business income.

As mentioned previously, and based on prior case law and legislative intent, a transaction structured as an asset sale followed by the cessation of business operations is a liquidation, which produces business income under the second part of R.C. 5747.01(B). Similarly, the sale of an asset followed by a complete dissolution or cessation of the business for which the asset produced income would be a partial liquidation. In contrast, the sale of an intangible asset such as an ownership interest in equity, is not a liquidation, but instead is merely a capital gain to the investor, which is nonbusiness income pursuant to *Corrigan*.

[2] The Content and Operation section of the Final Analysis for Senate Bill 261, which is an explanation of permanent law published by the Legislative Services Commission ("LSC") states, "[i]n a recent case, gains from the liquidation of an Ohio pass-through entity * * *." *See* Ohio Legislative Service Commission Final Bill Analysis for Am. Sub. Senate Bill 261 at 4.

IV. ANALYSIS

JAN 15 2020

As noted above, a gain is classified as business income under the "transactional test" if it derived from a transaction in which the taxpayer regularly engages. *Kemppel* at 422. As such, income arising from extraordinary or unusual events will not give rise to business income under the transactional test. Therefore, the sale of the claimant's intangible interest was a one-time occurrence and did not arise from transactions or activities in the normal course of his or S & G's trade or business. Thus, the capital gains in question do not meet the transactional test.

Under the functional test, income constitutes business income only "if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." *Kemppel* at 423. Additionally, gains satisfying the functional test generally arise from the sale of an asset which produces income while it was owned by the taxpayer. *Kemppel* at 5, citing *Laurel Pipe Line Co. v. Commonwealth Bd. of Fin. & Revenue* (1994), 537 Pa. 205, 210. Here, the claimant has not argued or demonstrated that acquiring or disposing of his intangible membership interest in companies constitute an integral part of his regular trade or business. Rather, it appears the claimant was in the business of renting party supplies. Additionally, the Department is not able to verify what, if any, business assets were sold to ACC Party Rental in 2014 since the evidence submitted by the claimant is insufficient. [3] Furthermore, the agreement submitted by the claimant only governs the "Assignment of LLC Interest"; not the assignment of business assets.

As stated above, the General Assembly responded to *Kemppel* by amending R.C. 5747.01(B) to treat amounts received from the partial or complete liquidation of a business as business income. As illustrated in *Corrigan*, a transaction consisting of a true asset sale may constitute liquidation thereby producing business income; however, the transfer of intangible ownership interest as in *Corrigan* produces capital gains thereby producing nonbusiness income. (Emphasis added). In this case, the claimant sold his entire membership interest in S & G to ACC Party Rental during tax year 2014. However, the business was not liquidated or dissolved in 2014; rather, it continued to operate as part of ACC Party Rental until February 2018 when a certificate of merger was filed with the Ohio Secretary of State. Furthermore, S & G updated its agent appointment to the owner of ACC Party Rental with the Ohio Secretary of State in December 2016. As such, the "partial or complete liquidation of a business" sentence of R.C. 5747.01 is not satisfied and, therefore, the resulting gain is nonbusiness income.

V. CONCLUSION

The claimant has not demonstrated that the capitals gains are business income under either the transactional or functional tests. Furthermore, while the claimant sold all of his membership interest in S & G, the business continued to operate. Accordingly, there was no sale of business assets followed by a cessation of the business, and, therefore, there was no partial or complete liquidation of the business pursuant to R.C. 5747.01(B). Thus, the claimant's capital gain income recognized from the sale of his membership interest in S & G is nonbusiness income under Ohio law.

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[3] Specifically, the claimant submitted its "Asset Deprecation Report" as evidence of what business assets were sold to John Reese in 2014. This is insufficient evidence because it is not a binding agreement that conveys the transfer of ownership, title, or right to business assets and what particular business assets were sold.

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Accordingly, the refund claim is denied in full.

JAN 15 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: JAN - 6 2020

Nathan & Susan Sublett
9495 Friendsville Rd.
Seville, OH 44273

Re: Assessment No. 02201806041812
Individual Income Tax
Reporting Period: 01/01/2014 – 12/31/2014

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

Tax	Interest	Penalty	Total
$1,652.73	$163.15	$326.30	$2,142.18

The Ohio Department of Taxation assessed the petitioners after making adjustments to the individual income tax return they filed for tax year 2014. Specifically, the petitioners overstated their federal Schedule E income and their Internal Revenue Code ("IRC") section 168(k) and section 179 adjustments on the Ohio Small Business Investor Income Deduction ("SBD"). The petitioners object to the assessment and requested a hearing on the matter, which was conducted via telephone.

The petitioners contend that they correctly computed their SBD on their 2014 Ohio Form IT-1040 Individual Income Tax Return. Ohio Revised Code 5747.01(A)(31), effective for the tax year in question, provided that "Ohio small business investor income" means the portion of the taxpayer's Ohio adjusted gross income that is business income reduced by deductions from business income and apportioned or allocated to this State under sections 5747.21 and 5747.22 of the Revised Code, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year.

For tax year 2014, an individual taxpayer filing an SBD would determine their business income prior to calculating any deductions. Specifically, an individual taxpayer must account for the net income or loss from rental activities, net royalties, interest income, and dividend income as reported on a taxpayer's federal Schedule E on Line 4 of the Ohio SBD. See former R.C. 5747.01(B)(1)(C). A taxpayer must also account for any adjustments from IRC section 168(k) and section 179 expenses[1] on Line 6 of the Ohio SBD. See the 2014 SBD Instructions.

Here, the petitioners originally reported $60,699 as their net income from rental activities, net royalties, interest income, and dividend income. The petitioners also originally reported $84,772 as their IRC

[1] As reported on Line 35g of the Ohio IT-1040.

section 168(k) and section 179 adjustments. However, the petitioners' reported a net income of $47,253 for rental activities, net royalties, interest income, and divided income on their federal Schedule E and reported -$53,873 as their IRC section 168(k) and section 179 adjustments. Thus, it was incorrect for the petitioners to originally report $60,669 on Line 4 and $84,772 on Line 6 of the Ohio SBD. See former R.C. 5747.01(A)(31); see also the 2014 SBD Instructions. As a result, the petitioners overstated these amounts as originally reported on Lines 4 and 6 of the Ohio SBD.

The petitioners contend that, in claiming their originally reported SBD for 2014, they followed the instructions included with the Ohio 2014 IT-1040 Individual Income Tax Return. However, records reflect that the Department computed the petitioner's SBD in accordance with the Ohio Revised Code and the 2014 SBD Instructions. Even so, 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 petitioners have failed to supply any evidence or arguments sufficient to demonstrate that the tax amount assessed in this matter was inaccurate. On the contrary, evidence currently available to the Tax Commissioner indicates that the tax and interest amounts assessed are correct. Nevertheless, the Tax Commissioner may abate penalties when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the petitioners claim that their 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
$1,652.73	$163.15	$0.00	$1,815.88

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

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-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: JAN - 9 2020

Denise Tomcufcik
7901 Walton Road
Oakwood Village, Ohio 44146

Re: Assessment Serial No. 02201729807800
Individual Income Tax - 2013

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2018-81, dated September 23, 2019. In that order, the Board remanded the case to the Tax Commissioner for further consideration.

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

	Amount
Tax Due	$ 825.00
Pre- Assessment Interest	$ 94.68
Post- Assessment Interest	$ 72.15
Late Payment Penalty	$ 189.36
Total Balance Due	**$ 1,181.19**

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 2678, Columbus, OH 43216-2678.

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

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

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: JAN - 9 2020

Thomas L. & Kathleen M. Walpole
8560 Majorca Ln
Naples, FL 34114

Re: Assessment No. 02201134164185
Individual Income Tax – 2007

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
$23,746.00	$4,392.00	$0.00	$28,138.00

The Department assessed the petitioners for failing to fully remit individual income tax for the period in question. The petitioners filed a petition for reassessment objecting to the assessment and requested a hearing on the matter. The hearing was conducted at the Department's offices in Columbus, Ohio. 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
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: JAN 3 1 2020

Richard H. & Marla B. Watts
11500 NW 123rd Rd Ln
Reddick, FL 32686

Re: Assessment No. 02201211095869
Individual Income Tax – Multiple Periods

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:

Year	Tax	Interest	Penalty	Total
2003	$10,544.00	$4,615.00	$0.00	$15,159.00
2007	$879.00	$172.00	$0.00	$1,051.00
2008	$15,764.00	$1,968.00	$0.00	$17,732.00
2009	$122,922.00	$9,554.00	$0.00	$132,476.00
2010	$25,750.00	$963.00	$0.00	$26,713.00

The Department assessed the petitioners for failing to fully remit individual income tax for the periods in question. The petitioners 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
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:
JAN - 9 2020

Kamalkumar Amin
1559 W. Broad Street
Columbus, Ohio 43222

Re: Assessment No. 100000299696
Sales Tax – Responsible Party

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-223, dated September 16, 2019. In that order, the Board remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, the Tax Commissioner determines that the underlying corporate assessment has been satisfied. Accordingly, it is the order of the Tax Commissioner that the responsible party assessment is canceled.

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

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN - 7 2020

Bachir's Market Inc
601 Dearborn Ave.
Dayton, OH 45408

Re: Assessment No. 100000938151
Sales Tax
Account No. 57-192615

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:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$33,583.95	$2,517.38	$16,791.88	$52,893.21

The petitioner owns and operates a carryout. This assessment is the result of a field audit of the petitioner's sales for the period of July 1, 2014 to August 31, 2017. A hearing was held on November 19, 2019.

It should be noted that the assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-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-C-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections.

The petitioner is required to maintain primary and secondary records of sales pursuant to R.C. 5739.11 and Ohio Adm.Code 5703-9-02. The petitioner did not maintain complete records for the period at issue. Audit Remarks, Page 5. Therefore, a mark-up analysis was conducted using purchase summaries provided by suppliers and the petitioner. Pursuant to R.C. 5739.13, taxpayers are required to keep adequate records showing sales tax collected and remitted. In the event a taxpayer fails to maintain adequate records to substantiate these amounts, the Tax Commissioner may conduct an audit using any information available and may perform a mark-up analysis. 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).

JAN - 7 2020

Audit Methodology

A Memorandum of Agreement outlining the proposed audit methodology and a Ten-Day letter giving the petitioner the opportunity to provide additional evidence or to propose an alternative audit methodology were sent to the petitioner. Neither document was signed and the petitioner did not propose an alternative audit methodology. A mark-up analysis was used to calculate taxable sales based upon a block sample period from January 1, through December 31, 2016. Inventory purchase invoices supplied by the petitioner and petitioner's suppliers were the primary documents reviewed to determine the total taxable inventory purchased for sale during the sample period.

Utilizing the inventory purchase summaries, the auditor calculated the taxable beer, wine, cigarettes, other tobacco, other alcohol, pop & taxable beverages, energy drinks, and taxable merchandise purchases. Each category was assigned a mark-up percentage based on evidence from the petitioner, industry standards, and state minimum requirements. Since the petitioner was registered to accept food stamps, an adjustment was necessary for taxable items that were qualified to be purchased with food stamps.

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 (70.4062%). 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 petitioner was subtracted from the total sales tax liability to arrive at the assessed tax liability.

Food Stamp Allowance

The petitioner contends that the food stamp allowance of 25% is too low and should be increased. The petitioner provided additional sales records in regard to this claim. The provided records show only a summary of the total food stamp purchases and do not give detailed descriptions of the purchases listed. Specifically, they fail to demonstrate which were for non-taxable food and which were for taxable pop & energy drinks. Without detail as to how many food stamp purchases were for taxable goods, additional credit cannot be given. The objection is denied.

JAN - 7 2020

Penalty Remission

The petitioner requests a penalty remission. The petitioner was cooperative throughout the assessment process and provided all available records for review. Based on the totality of the circumstances, a partial penalty remission is justified.

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$33,583.95	$2,517.38	$11,754.10	$47,855.43

Current records indicate that no payments have been applied on this assessment, leaving a balance of $47,855.43. 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.

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 28 2020

Cantrell, Morris
DBA Ivory Coast II
5350 W. Third St.
Dayton, OH 45417

RE: Assessment #: 100001011186
Sales Tax
Account No. 57-200515

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
$174,373.13	$14,054.89	$87,186.44	$275,614.46

The petitioner operates as a bar and restaurant. This assessment is the result of a mark-up audit of the petitioner's sales for the period from March 1, 2014 to December 31, 2017. The petitioner filed a petition for reassessment and requested abatement of the penalty. A hearing was held in this matter on Tuesday, November 26, 2019. The petitioner's objections are addressed below.

Audit Methodology

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

A mark-up analysis was conducted using the petitioner's inventory purchases or summaries obtained directly from the petitioner's distributors, as the petitioner failed to maintain primary sales records as required by R.C. 5739.11. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period of January 1, 2015 through December 31, 2015. The amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a comparable distributor. Utilizing these records, the auditor calculated the taxable beer – bottle and can, liquor – blended rate, and wine.

The mark-up percentages for all inventory categories were calculated as weighted averages of a representative sample of the most popular premium, standard, and economy products for each

inventory category. The mark-up percentages for each product were determined by calculating a weighted average of the product sales prices, subtracting the product cost per serving, and dividing the difference by the product cost per serving. The weighted average sales prices accounted for different pricing structures such as happy hour. The petitioner's sales prices were derived from a drink price list, adjusted for the percentage of sales made during happy hour and special pricing. Serving sizes, including the fluid ounce serving sizes of poured alcoholic drinks, were derived from the Bar and Restaurant Liquor Permit Questionnaire completed by the petitioner. Individual product mark-up percentages were weighted based upon product sales volume, which were determined from an analysis of the total dollar cost of product inventory purchased for the period February 1, 2017 through February 27, 2017.

The petitioner utilized different pricing structures and different mark-up percentages for drinks involving one serving of liquor - defined as "Mixed Drinks" and multiple servings of liquor – defined as "Cocktails." Since the same liquors were used for both sales, a blended weight mark-up rate was calculated for all liquor sales. The blended rate was calculated by weighing the calculated weighted mark-up percentage for Liquor Single – Mixed Drinks and Liquor Multiple – Cocktails and then summing the two weighted percentages. The weights were based on sales records for the period January 27, 2017 through February 3, 2017. The auditor allowed a percentage reduction from the liquor – blended rate to account for spillage and over-pours.

The petitioner also did not maintain detailed records supporting its taxable food sales. The taxable food sales made during January 27, 2017 through February 3, 2017 were calculated by marking up direct food purchases and multiplying by 52 to calculate an annual taxable food sales figure to estimate the total taxable food sales for the sample period of January 1, 2015 through December 31, 2015.

The calculated taxable sales for each audit sample period from all categories were totaled and divided by the sum of the gross sales reported on the sales tax return filed by the petitioner to determine the taxable percentage of gross sales of 225.97 percent. The taxable percentage of reported gross sales was multiplied by the reported monthly gross sales for the audit period to determine the sales tax liability. The calculated taxable sales were multiplied 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. See, *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

Since the petitioner did not provide evidence of primary records 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 and did not submit an alternative methodology.

Discrepancy in the Audit

The petitioner objects to the mark up percentages used in the audit and argues that they are inaccurate. The petition states, in relevant part, "The specific objections to the mark up will be made known at hearing." The petitioner failed to provide any information to show the mark up percentages used were inaccurate. In addition, the petitioner signed the memorandum of agreement, agreeing to the audit methodology including the mark up percentages. The petitioner failed to prove error in the assessment. Therefore, this objection is denied.

Responsible Party

The petitioner objects to the finding that Morris Cantrell is the responsible party of Ivory Coast II, Inc. This objection lacks merit as this is not a responsible party assessment against Morris Cantrell issued pursuant to R.C. 5739.33 but rather an underlying assessment issued against the corporate entity Cantrell, Morris DBA Ivory Coast II for outstanding sales tax liability. Therefore, this objection is denied.

Penalty

The petitioner seeks abatement of the penalty. The petitioner provides that it is a new business and that the owner had little knowledge of business operations and sales tax responsibilities. The petitioner contends that a penalty abatement is warranted because any failure to collect was due to inexperience. Additionally, the petitioner stated that it was not collecting sales tax and was not willfully failing to remit sales tax. The petitioner provides that it has since made improvements to its internal controls and hired personnel to properly collect and remit sales tax. The evidence and circumstances support a partial abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$174,373.13	$14,054.89	$69,749.04	$258,177.06

Current records indicate that no payments have been made toward the assessment, leaving a balance due of $258,177.06. 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, Ohio 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
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FINAL DETERMINATION

Date: JAN - 6 2020

Robert Clemmer
7914 Black Hawk Ct.
West Chester, OH 45069

Re: 52 Assessments
Sales Tax (Responsible Party)
Sur-Tech Investigations Inc.
Vendor's License No. 89-176919

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
100000920037	4/1/07 – 4/30/07	$1,611.38
100000920038	5/1/07 – 5/31/07	$1,846.36
100000920046	5/1/00 – 5/31/00	$726.47
100000920047	8/1/01 – 8/31/01	$72.75
100000920048	11/1/01 – 11/30/01	$995.12
100000920049	12/1/01 – 12/31/01	$305.25
100000920050	1/1/02 – 1/31/02	$53.95
100000920051	2/1/02 – 2/28/02	$1,925.49
100000920052	3/1/02 – 3/31/02	$603.43
100000920053	4/1/02 – 4/30/02	$466.30
100000920054	5/1/02 – 5/31/02	$2,182.90
100000920055	6/1/02 – 6/30/02	$593.13
100000920056	7/1/02 – 7/31/02	$1,223.11
100000920057	8/1/02 – 8/31/02	$1,096.87
100000920058	9/1/02 – 9/30/02	$1,007.26
100000920059	10/1/02 – 10/31/02	$761.28
100000920060	1/1/03 – 1/31/03	$1,350.92
100000920061	3/1/03 – 3/31/03	$1,625.29
100000920062	1/1/04 – 1/31/04	$83.14
100000920063	1/1/07 – 1/31/07	$1,788.05
100000920064	2/1/07 – 2/28/07	$1,682.11
100000920065	3/1/07 – 3/31/07	$2,199.53
100000920066	6/1/07 – 6/30/07	$1,734.35
100000920067	11/1/07 – 11/30/07	$1,410.90

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100000920068	7/1/07 – 7/31/07	$1,539.01
100000920069	8/1/07 – 8/31/07	$1,802.15
100000920070	9/1/07 – 9/30/07	$1,562.93
100000920071	10/1/07 – 10/31/07	$1,770.28
100000920072	12/1/07 – 12/31/07	$1,427.32
100000920073	1/1/08 – 1/31/08	$613.84
100000920074	2/1/08 – 2/29/08	$957.07
100000920075	3/1/08 – 3/31/08	$1,133.97
100000920076	4/1/08 – 4/3/08	$968.38
100000920077	5/1/08 – 5/31/08	$1,251.52
100000920079	6/1/08 – 6/30/08	$1,559.97
100000920080	7/1/08 – 7/31/08	$1,175.62
100000920081	9/1/08 – 9/31/08	$1,181.04
100000920082	10/1/08 – 10/31/08	$795.01
100000920084	11/1/08 – 11/30/08	$1,011.55
100000920085	12/1/08 – 12/31/08	$3,851.40
100000920086	1/1/09 – 1/31/09	$2,649.72
100000920087	2/1/09 – 2/28/09	$2,654.64
100000920088	4/1/09 – 4/30/09	$4,032.95
100000920089	8/1/08 – 8/31/08	$1,167.42
100000920090	3/1/09 – 3/31/09	$2,658.29
100000920091	5/1/09 – 5/31/09	$4,026.35
100000920100	6/1/09 – 6/30/09	$4,021.04
100000920101	7/1/09 – 7/31/09	$4,015.98
100000920102	8/1/09 – 8/31/09	$4,012.31
100000920103	9/1/09 – 9/30/09	$4,009.10
100000920104	10/1/09 – 10/31/09	$4,008.00
100000920105	11/1/09 – 11/30/09	$4,003.02
	Total	$91,205.22

These are responsible party assessments. Sur-Tech Investigations Inc. incurred sales tax liability resulting in multiple assessments. These assessments were never fully satisfied by Sur-Tech Investigations 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 Sur-Tech Investigations Inc., has been derivatively assessed against Robert Clemmer. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was held in this matter on Wednesday, November 13, 2019.

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Responsible Party

The petitioner objects to the assessments; however, he also affirmed during the hearing that he is a responsible party for Sur-Tech Investigations Inc. The evidence indicates that the petitioner was President of Sur-Tech Investigations Inc., and is identified as such on various company documents, such as its county vendor's license application and Ohio Secretary of State business filings as an authorized representative. The petitioner's own LinkedIn profile lists himself as the Vice President of Surveillance Technologies LLC from 1990 through the present.[1] The evidence suggests that Surveillance Technologies LLC and the underlying corporation Sur-Tech Investigations Inc., are the same entity based upon corresponding Ohio Secretary of State business filings and the petitioner's LinkedIn profile which lists Surveillance Technologies LLC but includes a hyperlink for Sur-Tech Investigations Inc.'s website. The petitioner has not met his burden to demonstrate the assessment was in error. The objection is denied.

Statute of Limitations

The petitioner submitted four related objections that contend the statute of limitation has passed on these assessments. The petitioner contends that the statute of limitations has expired on these assessments and are precluded under R.C. 5703.58 and 5739.16. The petitioner also objects to the fact that the Department issued these assessments nine to eighteen years after the initial assessments were issued.

The Ohio Supreme Court in *Bowshier v. Limbach* held that the statute of limitations period enunciated in R.C. 5739.16 does not apply to corporate officers personally assessed under R.C. 5739.33. *Bowshier v. Limbach*, 52 Ohio St.3d 140, 556 N.E. 463 (1990). Therefore, the four-year limitation does not apply to responsible party assessments. *Fetchet v. Wilkins*, BTA No. 2006-K-276, 2008 WL 349023 (Jan. 25, 2008). Additionally, the time period included in R.C. 5703.58 does not apply to responsible party assessments as provided in *Mingee v. Zaino* in which the Ohio Board of Tax Appeals found that despite the passage of eight years from the underlying assessment and the responsible party assessment, a corporate taxpayer that fails to timely object to the underlying assessment cannot later contest it once a finding is made regarding the personal liability of a responsible corporate officer as the assessment is derivate in nature. *Mingee v. Zaino*, BTA No. 2002-A-1107, 2003 WL 1564350 (Mar. 21, 2003). Therefore, these objections lack merit and are denied.

Underlying Assessment

The petitioner also submitted numerous objections related to the underlying corporate assessments. Since these are responsible party assessments, 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. Therefore, these objections cannot be considered as they relate to the underlying assessments.

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[1] LinkedIn, https://www.linkedin.com/in/robert-clemmer-08455337 (accessed November 13, 2019).

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Accordingly, the assessments are affirmed as issued.

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

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THESE MATTERS. UPON EXPIRATION OF THE SIXTY-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: JAN 2 8 2020

James T. Dillard
38730 Flanders Dr
Solon, OH 44139

Re: 69 Assessments
Sales Tax (Responsible Party)
J.T. Dillard LLC
Vendor's License No. 89-571523

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
100001131489	8/1/04 – 8/31/04	$1,133.20
100001131490	3/1/04 – 3/31/04	$1,329.67
100001131491	4/1/04 – 4/30/04	$1,294.61
100001131492	12/1/04 – 12/31/04	$4,502.33
100001131493	2/1/04 – 2/29/04	$948.16
100001131494	9/1/04 – 9/30/04	$46.16
100001131495	10/1/04 – 10/31/04	$4,292.96
100001131496	7/1/04 – 7/31/04	$446.04
100001131498	5/1/05 – 5/31/05	$118.00
100001131500	10/1/07 – 10/31/07	$8,351.21
100001131501	3/1/08 – 3/31/08	$3,154.83
100001131502	3/1/08 – 3/31/08	$2,238.89
100001131503	10/1/09 – 10/31/09	$3,554.04
100001131504	3/1/10 – 3/31/10	$13,027.01
100001131507	11/1/04 – 11/30/04	$5,876.85
100001131508	6/1/04 – 6/30/04	$3,021.73
100001131511	3/1/05 – 3/31/05	$5,192.56
100001131513	8/1/05 – 8/31/05	$9,522.01
100001131514	9/1/05 – 9/30/05	$10,349.94

JAN 2 8 2020

100001131515	10/1/05 – 10/31/05	$12,213.69
100001131516	4/1/05 – 4/30/05	$645.65
100001131517	11/1/05 – 11/30/05	$491.82
100001131518	11/1/05 – 11/30/05	$12,877.84
100001131519	10/1/05 – 10/31/05	$360.59
100001131520	4/1/06 – 4/30/06	$48.89
100001131521	10/1/06 – 10/31/06	$14,526.88
100001131522	10/1/06 – 10/31/06	$2,198.02
100001131523	5/1/06 – 5/31/06	$165.27
100001131524	8/1/06 – 8/31/06	$37.72
100001131525	1/1/06 – 1/31/06	$43.75
100001131526	12/1/06 – 12/31/06	$2,733.22
100001131527	11/1/06 – 11/30/06	$12,764.63
100001131529	11/1/07 – 11/30/07	$5,865.48
100001131530	1/1/07 – 1/31/07	$53.67
100001131531	11/1/07 – 11/30/07	$8,299.38
100001131532	7/1/07 – 7/31/07	$16,041.13
100001131533	4/1/07 – 4/30/07	$38.07
100001131534	10/1/07 – 10/31/07	$6,878.47
100001131535	6/1/07 – 6/30/07	$12,714.88
100001131536	5/1/07 – 5/31/07	$96.34
100001131537	7/1/08 – 7/31/08	$1,083.83
100001131538	7/1/08 – 7/31/08	$1,680.00
100001131539	2/1/08 – 2/29/08	$1,161.28
100001131540	12/1/08 – 12/31/08	$810.88
100001131541	6/1/08 – 6/30/08	$2.14
100001131542	10/1/08 – 10/31/08	$11,788.78
100001131543	11/1/08 – 11/30/08	$11,644.24
100001131544	4/1/08 – 4/30/08	$74.87
100001131545	11/1/08 – 11/30/08	$1,207.50
100001131546	12/1/08 – 12/31/08	$4,415.80
100001131547	9/1/08 – 9/30/08	$11,660.42
100001131548	2/1/08 – 2/29/08	$9,888.42
100001131549	1/1/08 – 1/31/08	$2,883.97
100001131550	1/1/08 – 1/31/08	$3,062.20
100001131551	9/1/08 – 9/30/08	$750.64
100001131552	10/1/08 – 10/31/08	$2,766.44
100001131554	8/1/09 – 8/31/09	$204.89
100001131555	11/1/09 – 11/30/09	$13,353.43
100001131556	7/1/09 – 7/31/09	$171.71
100001131557	9/1/09 – 9/30/09	$14,453.85

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100001131558	6/1/09 – 6/30/09	$235.45
100001131559	12/1/09 – 12/31/09	$12,496.11
100001131560	1/1/10 – 1/31/10	$11,143.11
100001131561	2/1/10 – 2/28/10	$142.55
100001131562	7/1/12 – 7/31/12	$189.64
100001131563	3/1/14 – 3/31/14	$18,909.32
100001131564	2/1/14 – 2/28/14	$8,180.30
100001131565	5/1/09 – 5/31/09	$220.36
100001131566	4/1/09 – 4/30/09	$221.81
	Total	$332,299.53

These are responsible party assessments. J.T. Dillard LLC 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 J.T. Dillard LLC has been derivatively assessed against James T. Dillard. 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. Underlying substantive objections to the tax assessment cannot be considered. A hearing was held on November 19, 2019.

The evidence indicates that the petitioner is the President of the company. The petitioner is listed as the President on the vendor's license which is dated May 20, 2004. Additionally, the petitioner was profiled in an article in The Plain Dealer on December 11, 2011 in which he is identified as the President.[1] The Petitioner also listed his title as President and Managing Member on documents submitted to the Ohio Attorney General and the Ohio Department of Taxation. Finally, the petitioner claimed 100% ownership in J.T. Dillard LLC on his 2017 Schedule K-1 return.

Lack of Service

The petitioner contends that the company did not receive service of all the underlying corporate assessments. The petitioner cannot challenge the merits of the assessments against the underlying corporation in a proceeding under R.C. 5739.33. However, pursuant to *Cruz v. Testa*, challenges can be made to the underlying assessments based on service of those assessments. *Cruz v. Testa,* 144 Ohio St.3d 221, 2015-Ohio-3292, 41 N.E.3d 1213. Therefore, the Department must determine the delivery status of the corporate assessments.

Prior to October 16, 2009, R.C.5703.37 provided that the Tax Commissioner must serve notice on taxpayers through either personal service or by certified mail. In addition, R.C. 5739.131 provided that any resident of the state required to have a vendor's license and who conceals his whereabouts made the secretary of state his agent for the service of any notice of assessment.

[1] Marcia Pledger, *Terrell Dillard says commercial cleaning business is recession-resistant: Talk With The Boss*, (December 11, 2011) https://www.cleveland.com/business/2011/12/talk_with_the_boss.html (accessed January 15, 2019).

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Both R.C. 5703.37 and R.C. 5739.11 were amended, effective October 16, 2009, to allow the Tax Commissioner to serve a vendor who was concealing his whereabouts by resending the assessment via ordinary mail. The assessment is required to be clearly dated and include the following statement: "This notice or order is deemed to be served on the addressee under applicable law ten days from the date this notice or order was mailed by the commissioner as shown on the notice or order, and all periods within which an appeal may be filed apply from and after that date."

Therefore, assessments not successfully delivered to the taxpayer because they were unclaimed or returned should have been served to the Secretary of State if they were issued before October 16, 2009 or sent again by ordinary mail after October 16, 2009. In this case, four of the underlying corporate assessments 7070214306, 7070214307, 7070214305, and 7080201909 were unclaimed by the petitioner. Six of the underlying corporate assessments 7070207731, 7090224158, 7090224159, 7090224160, 7090224161, and 7090224156 have a mail status of "No Final Event" in the Department's system, which means the status of the delivery is unclear. These assessments were all issued before October 16, 2009; yet it is does not appear that any of these ten corporate assessments were served upon the Secretary of State pursuant R.C. 5739.131. Therefore, the Department cancelled responsible party assessments 100001131520, 100001131523, 1000031524, 100001131525, 100001131530, 100001131532, 100001131533, 100001131535, 100001131536, and 1000031565. The remaining fifty-nine corporate assessments were successfully delivered to the petitioner, delivered to the Secretary of State's Office, or service was perfected by sending the notice again by ordinary mail in accordance with R.C. 5703.37. Therefore, the corresponding responsible party assessments are affirmed as issued.

Payments Already Made on the Assessments

The petitioner contends that the assessments do not take into account amounts already paid by the taxpayer on the account through the previously established payment plan. This is an argument regarding the underlying assessments and does not address whether the petitioner is a responsible party. Therefore, it is not an appropriate argument to consider for the assessments shown above pursuant to R.C. 5739.33. Further, responsible party assessments are derivative in nature. Any payments made toward the underlying assessments will automatically flow to the corresponding responsible party assessments. The objection is denied.

Time-Barred by R.C. 131.02(F)(3)

Finally, the petitioner contends that the assessments are time-barred pursuant to R.C. 131.02(F)(3), which states that no initial action shall be commenced to collect any tax payable to the state that is administered by the tax commissioner after the expiration of the period ending on the later of seven years after the assessment of the tax, penalty, interest, or additional charge is issued or four years after the assessment of the tax, penalty, interest, or additional charge becomes final. The statute cited by the petitioner refers to the collection of a certified debt, which is a function of the Attorney General's Office. These assessments have not been certified to the Attorney General's Office for collection; therefore, the cited statute does not apply. In addition, the time limitations

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imposed by R.C. 5739.16 do not apply to responsible party assessments. *Bowshier v. Limbach*, 52 Ohio St.3d 140, 556 N.E.2d 463 (1990). The objection is denied.

Accordingly, assessments 100001131520, 100001131523, 1000031524, 100001131525, 100001131530, 100001131532, 100001131533, 100001131535, 100001131536, and 1000031565 are cancelled and the remainder of the assessments are affirmed.

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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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 15 2020

DM Baxter I Inc.
15565 Punderson Rd.
Burton, OH 44021

Re: Assessment No. 100000950960
Sales Tax
Account No. 28-900450

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
$27,238.12	$2,662.30	$6,806.40	$36,706.82

The petitioner operates a convenience store. This assessment is the result of an audit of the petitioner's sales from January 1, 2014 through August 31, 2017. A hearing was held via phone on November 7, 2019.

Audit Methodology

It should be noted that the assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 495. 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, unreported (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections.

The auditor found the petitioner's records were inadequate for the purposes of demonstrating the amount of tax collected. The petitioner was unable to provide primary sales records for review. Audit Remarks, Page 5. Pursuant to R.C. 5739.13, taxpayers are required to keep adequate records showing sales tax collected and remitted. Records are adequate if they demonstrate to the Tax Commissioner that the vendor collected the proper amount of tax due. This includes differentiating between taxable and non-taxable items and recording each transaction to show the amount of tax charged. Ohio Adm.Code 5703-9-02. In the event a taxpayer fails to maintain adequate records to substantiate these amounts, the Tax Commissioner may conduct an audit using any information available and may perform a mark-up analysis. See 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. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

The markup analysis used to calculate taxable sales was based upon a block sample period from January 1, 2016 to December 31, 2016. Supplier purchase invoices were the primary documents used. In the instance where these records were not available, taxable inventory purchases were estimated based on the average of the available records for the distributer. After procuring and reviewing the proper documentation from the petitioner's distributers, the auditor provided the petitioner with a Memorandum of Agreement and a Ten Day Letter. The Memorandum outlined the proposed audit methodology using a mark-up analysis while the Ten-Day letter gave the petitioner ten days to provide additional records or propose an alternative audit methodology. The petitioner signed and returned both documents.

The auditor grouped all taxable purchases made during the sample period into appropriate taxable categories in order to apply the corresponding markup percentage. Mark-up percentages were applied to the taxable sales of beer, wine, cigarettes, other tobacco, pop & soft drinks, energy drinks, taxable merchandise, and other alcohol. Mark-ups not subject to statutory state minimums were determined from the product checklist completed with the assistance of the petitioner, industry mark-up averages, and auditor observed mark-up percentages.

The calculated taxable sales of all inventory categories from the sample period were totaled and divided by the sum of the gross sales on the petitioner's sales tax returns filed for the same period, resulting in a taxable percentage of reported gross sales (57.5464%). This was then multiplied by the reported monthly gross sales for the entire audit period to determine the calculated taxable sales. Monthly calculated taxable sales were then multiplied by the applicable tax rate in effect throughout the audit period to determine gross sales tax liability by month. Credits representing tax reported and paid monthly via the petitioner's sales tax returns were subtracted from the monthly gross sales tax liability to determine unreported sales tax liability by month. Finally, these monthly tax liability figures were combined to determine total tax liability.

Sample Period

The petitioner disputes the use of 2016 as the sample period. It should be noted that the petitioner signed and returned the Memorandum of Agreement which spelled out the audit methodology to be used, including sample period, waiving all objections to said methodology. Moreover, on October 11, 2017, the auditor met with the petitioner and their representative in their store. During that meeting, the petitioner was only able to provide distributer records from 2016, therefore all parties agreed on using 2016 as the sample year. Audit Remarks, Page 5.

In a mark-up audit a sample period is selected which the auditor and taxpayer find best represents the activity of the business. Purchase and sales records from that period are analyzed to calculate what percentage of gross reported sales were taxable. Reported gross sales across all audit periods are then multiplied by that taxable percentage to determine taxable sales. Sample periods are used as a convenience to all parties by avoiding the burden of a full audit and as a necessity when adequate records are not available. As noted in the Audit Remarks, the petitioner could only supply purchase records for 2016, leading to it being used as the sample period. The petitioner and representative agreed to this year both in a meeting with the auditor and when the petitioner signed the Memorandum of Agreement. The objection is denied.

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Inventory Restocking

The petitioner contends that extensive restocking of inventory took place during the sample period and was extrapolated across the entire audit period, increasing tax liability. As noted above, the petitioner agreed to the sample period as representative of business during the audit period and signed the Memorandum of Agreement stating the same. Further, the audit methodology utilized in calculating the tax liability does not include the beginning nor ending inventory totals. While the Tax Commissioner acknowledges that it is probably true that not all inventory purchased during the sample period was resold during same period, it is probably also true that goods already held in inventory were sold during the sample period. Therefore, it stands to reason that the method used in calculating the tax liability already incorporates any inventory buildup into the calculation. Moreover, the Board of Tax Appeals rejected a similar argument in *Markho dba One Stop Carry Out and One Stop Mini Mart v. Tracy,* BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999). The objection is denied.

Adjusted Gross Sales

The petitioner contends that the auditor erroneously applied the taxable percentage of gross sales to the petitioner's gross sales instead of the adjusted gross sales, which does not account for the petitioner's tax-exempt sales. However, the sales tax liability is determined by calculating the taxpayer's percentage of taxable sales and applying this percentage to the taxpayer's reported gross sales. The percentage of taxable sales is determined by dividing the calculated taxable sales (as determined in the audit) by the taxpayer's reported gross sales. The resulting number is the calculated taxable percentage of the taxpayer's reported gross sales. Therefore, tax-exempt sales are inherently taken into consideration. Applying this percentage to the taxpayer's gross sales as per the agreement, results in the petitioner's taxable base absent any underreporting.

Further, as previously stated, the methodology was explained in the Memorandum of Agreement and the petitioner was given the opportunity to offer an alternative methodology. The petitioner signed the agreement outlining this methodology. The objection is denied.

Theft and Breakage

The petitioner requests a 1.33% reduction in sales due to theft and breakage and provided documentation to show this is the national average. General theft and breakage reductions are not taken into consideration in mark-up audits. Although the petitioner contends that the previous manager stole during the course of their employment, no documentation quantifying loss was provided. The Tax Commissioner cannot adjust assessments based on estimations or averages. The objection is denied.

Penalty Remission

The petitioner contends that evidence of extenuating circumstances was provided to the auditor but disregarded, and that there is additional information they wished to provide. The auditor provided the petitioner with a six-month waiver to produce any information available at the outset

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of the audit. The petitioner was granted an initial penalty remission. The petitioner asks that these extenuating circumstances be taken into consideration for a further penalty remission.

The petitioner contends she was helping to care for her sick mother and suffered health issues. She had left the business in the hands of an untrustworthy manager during this time. To ensure future compliance the petitioner has instituted more rigorous training for employees and is keeping detailed sales records subject to an annual review by an accountant. The petitioner was cooperative throughout all aspects of the audit and appeal. Based on the totality of the circumstances, a partial penalty remission is allowed.

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$27,238.12	$2,662.30	$4,085.52	$33,985.94

Current records indicate that no payments have been applied on this assessment, leaving a balance due of $33,985.94. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post-assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio". Any payment made within 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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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 15 2020

Don Wood Ford Lincoln Mercury Inc.
2065 East State St.
Athens, OH 45701

RE: Refund Claim No.: 201901816
Filed on December 12, 2018
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $1,105.63, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). The Commissioner shall refund sales tax remitted erroneously by a vendor when the vendor has refunded the full amount of sales tax to the consumer. R.C. 5739.07(A).

The claimant is a motor vehicle dealer. On July 27, 2018, the claimant collected sales tax on the sale of a 2018 Ford Escape. The claimant contends that the sales tax was incorrectly paid twice because the original Certificate of Title contained an error which listed the wrong Vehicle Identification Number (VIN). The claimant seeks a refund on behalf of the buyer. The claimant and the buyer provided a statement detailing the transaction and error in the Application for Dealer Assignment which resulted in the sales tax payment.

The Department informed the claimant during the initial denial that the Department required additional evidence including copies of the tax receipts issued by the Clerk of Courts or other documentation to prove sales tax was paid on both vehicles and documentation to show that the incorrectly titled vehicle was returned to the dealer. The claimant submitted additional evidence to warrant a refund of the sales tax paid by the claimant.

Therefore, a refund in the amount of $1,105.63 with appropriate interest is hereby authorized.

If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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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

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 10 2020

Double D Beverage and Deli LLC
34351 Chardon Rd, Ste 1
Willoughby Hills, OH 44094

Re: Assessment No. 100000882430
Sales Tax
Account No. 43-900467

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
$55,350.78	$4,465.94	$27,675.29	$87,492.01

The petitioner operates a convenience store and gas station. This assessment is the result of a field audit of the petitioner's sales for the period of January 1, 2014 through February 28, 2017. A hearing was held on May 28, 2019.

This assessment is the result of a mark-up analysis of the petitioner's purchases of inventory for the store. The petitioner is required to maintain primary and secondary records of sales pursuant to R.C. 5739.11 and Ohio Adm.Code 5703-9-02. The petitioner did not maintain complete records for the period at issue. Therefore, a mark-up analysis was conducted using inventory purchase invoices supplied by the taxpayer and its suppliers and a sample period of January 1, 2016 to December 31, 2016. 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).

An assessment is presumptively valid. *R.K.E. 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, citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

Audit Methodology, Mark-Up Percentages, Promotional Prices

Four of the petitioner's six objections are related to the audit methodology. The petitioner contends that the audit "is not reflective of sales." The petitioner also contends that it did not understand how mark-up percentages would be applied and provides the amounts it believes should be used for calculations. The petitioner contends that promotional pricing was not considered. Finally, the petitioner's fifth objection is that the "summary totals on purchases are not correct." Although the appellant is not precluded from contesting the audit, if it is claimed that the liability for taxable sales is excessive, the burden is upon appellant to establish its actual tax liability or any other error in the assessment by competent, probative evidence. *Alcan Aluminum Corp. v. Limbach* 42 Ohio St.3d 121, 537 N.E.2d 1302 (1989); *Federated Dept. Stores v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

A block sample period of January 1, 2016 to December 31, 2016 was chosen as a sample period. The auditor used statutory minimum mark-up percentages and used sample invoices, suggested retail price, and samples of prices during the store tour to determine the remaining percentages. The auditor prepared a Memorandum of Agreement ("the agreement") reflecting the 2016 sample period as well as the mark-up percentages. The petitioner signed the agreement on October 1, 2017.

Utilizing purchase records from this period, the auditor calculated the taxable sales of beer, wine, pop, cigarettes and other taxable inventory items. The purchases allocated to each category were totaled and multiplied by the applicable mark-up percentage agreed to by the petitioner to arrive at the calculated taxable sales for each inventory category during the sample period. The calculated taxable sales were then divided by the sum of the gross sales reported on the sales tax returns filed by the petitioner for the entire sample period. The resulting taxable percentage of reported gross sales (95.1868%) was then applied to gross sales for each period of the audit to arrive at a calculated taxable sales figure for each reporting period. The tax rate was then applied to arrive at the sales tax liability. The petitioner was given credit for sales tax remitted as well as cigarette rebates from RJ Reynolds and Altria.

Absent any evidence to the contrary, this method was a reasonable means of determining the tax liability for the relevant audit period. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996). The petitioner has supplied several general objections but has not provided any documentary evidence from the audit period to justify its claims. The hearing officer requested all back-up documentation justifying the petitioner's claims. The petitioner only provided a group of summary spreadsheets. The petitioner further did not provide specific data justifying its contention that it sells items, such as beer, at lower than the mark-up percentage required by the Ohio Revised Code. Without the underlying evidence or methodology to the petitioner's calculations, and the petitioner's own agreement with the audit terms, the Commissioner cannot conclude that the petitioner has met its burden to show error in the assessment.

Theft and Breakage

The petitioner contends the assessment failed to account for theft or breakage and other loss at the store. The petitioner presented no evidence from the audit period in support of this objection 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 at *5 (July 16, 2004). The petitioner has provided no evidence outside of a general objection. Therefore, this objection is denied.

Inventory

The petitioner's final objection is that the sample year is not representative of "product purchases of other years nor do purchases represent sales." The sample year was agreed to by the petitioner as being representative of the store's business during the entire audit period. See Audit Remarks, pg. 7. The audit methodology utilized in calculating the sales tax liability does not include the beginning nor ending inventory totals. While the Tax Commissioner acknowledges that it is probably true that not all inventory purchased during the sample period was resold during same period, it is probably also true that goods already held in inventory were sold during the sample period. Therefore, it stands to reason that the method used in calculating the sales tax liability already incorporates any inventory buildup into the calculation. Moreover, the Board of Tax Appeals rejected a similar argument in *Markho, Inc., d/b/a One Stop Carry Out and One Stop Mini Mart v. Tracy*, BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999). In addition, the petitioner has provided no evidence in support of their contention. The objection is denied.

Penalty

The petitioner requests full abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax required under R.C. Chapter 5739. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Based upon the surrounding facts and circumstances, a partial penalty is allowed.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$55,350.78	$4,465.94	$16,605.08	$76,421.80

Current records indicate that no payment has 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

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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:
JAN - 9 2020

Esko-Graphics Inc.
8535 Gander Creek Dr.
Miamisburg, OH 45342

RE: Refund Claim No: 201501975
Refund Amount Requested: $36,524.57
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $36,524.57, 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). R.C. 5739.07 allows a claimant to request a refund of tax illegally or erroneously paid.

The claimant is a graphic arts company and global supplier of integrated solutions for packaging, sign and display finishing, commercial printing and professional publishing. On or around May 12, 2011, the claimant purchased 748 iPads from PC Connection Sales Corp. in the amount of $559,051.46. These iPads were shipped to the claimant's address in Ohio.

Resale

R.C. 5739.02 levies an excise tax on any retail sale made in this state. R.C. 5739.01(E) excepts from the definition of retail sale the purchase of items by a consumer whose purpose is to resell the thing transferred, or benefit of the service provided, by a person engaging in business, in the same form in which it is received by the person.

The claimant contends that 747 of the units were resold and shipped out of the United States. The claimant is seeking a refund of the sales tax on those units. The claimant provided a copy of a cancelled check in the amount of $559,051.46 to PC Connection Sales Corp. dated June 9, 2011 and a purchase invoice of the original sale of the iPads from PC Connection to the claimant.

The Department informed the claimant during the initial denial that the Department required additional evidence including proof of resale for the refund period stated on the application. The claimant provided five invoices accounting for 744 iPads which were shipped to various Esko-Graphics locations outside of the United States.

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The claimant writes, the purchases were initiated with "…an informal request from our headquarters in Belgium for us to purchase and ship the iPads abroad." The claimant failed to provide a copy of the request or show the relationship between itself and the entities that received the transferred iPads. In addition, the petitioner did not provide accounting information to document the transfers or provide proof of payment from the other entities. The evidence establishes that the claimant purchased the property, received the property in Ohio, and then transported the property out of Ohio. Pursuant to Ohio Adm.Code 5703-9-39, this transaction is taxable to Ohio. The evidence submitted is insufficient to warrant a refund of the sales tax.

Therefore, the claim for a refund is denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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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: JAN 2 8 2020

Cynthia Evans
8299 East State Route 41
Troy, OH 45373

Re: 46 Assessments
Sales Tax (Responsible Party)
PEQ Services + Solutions, Inc.
Vendor's License No. 89-579615

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
100001098189	02/01/2014-02/28/2014	$3,049.36
100001098190	06/01/2014-06/30/2014	$2,186.28
100001098191	05/01/2014-05/31/2014	$2,055.30
100001098192	08/01/2014-08/31/2014	$3,019.30
100001098193	12/01/2014-12/31/2014	$3,415.82
100001098194	07/01/2014-07/31/2014	$3,012.72
100001098195	09/01/2014-09/30/2014	$3,143.77
100001098198	11/01/2014-11/30/2014	$3,124.66
100001098199	10/01/2014-10/31/2014	$3,462.38
100001098200	04/01/2014-04/30/2014	$1,788.46
100001098202	01/01/2015-01/31/2015	$3,418.62
100001098203	05/01/2015-05/31/2015	$3,416.38
100001098204	03/01/2015-03/31/2015	$3,416.75
100001098205	04/01/2015-04/30/2015	$3,419.00
100001098206	12/01/2015-12/31/2015	$3,416.56
100001098207	02/01/2015-02/28/2015	$3,416.01
100001098208	10/01/2015-10/31/2015	$3,416.75
100001098209	07/01/2015-07/31/2015	$3,427.22
100001098210	11/01/2015-11/30/2015	$3.418.25
100001098211	12/01/2016-12/31/2016	$3,427.72
100001098212	04/01/2016-04/31/2016	$3,443.79
100001098213	02/01/2016-02/28/2016	$3,455.18
100001098214	07/01/2016-07/31/2016	$3,437.06
100001098215	11/01/2016-11/30/2016	$3,426.72
100001098217	09/01/2015-09/30/2015	$3,416.01
100001098218	06/01/2015-06/30/2015	$3,419.37
100001098219	08/01/2015-08/31/2015	$3,423.10
100001098220	10/01/2016-10/31/2016	$3,425.60

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100001098221	06/01/2016-06/30/2016	$3,432.01
100001098222	01/01/2016-01/31/2016	$3,419.18
100001098223	09/01/2016-09/30/2016	$3,423.48
100001098224	03/01/2016-03/31/2016	$3,449.02
100001098225	08/01/2016-08/31/2016	$3,436.75
100001098226	05/01/2016-05/31/2016	$3,437.99
100001098228	01/01/2017-01/31/2017	$3,425.73
100001098229	04/01/2017-04/30/2017	$3,442.91
100001098230	08/01/2017-08/31/2017	$3,425.72
100001098231	03/01/2017-03/31/2017	$3,425.97
100001098232	05/01/2017-05/31/2017	$3,442.91
100001098233	07/01/2017-07/31/2017	$3,444.41
100001098234	06/01/2017-06/30/2017	$3,444.91
100001098235	10/01/2017-10/31/2017	$3,442.16
100001098238	09/01/2017-09/30/2017	$3,442.16
100001098239	12/01/2017-12/31/2017	$3,427.47
100001098240	02/01/2017-02/28/2017	$3,426.96
100001098241	11/01/2017-11/30/2017	$3,427.21
	Total	$151,715.09

The petitioner contends that she was not a responsible party during the periods at issue.

These are responsible party assessments. PEQ Services + Solutions, Inc. incurred sales tax liability resulting in multiple assessments. PEQ Services + Solutions, Inc. was sold and closed as a separate entity on March 31, 2014, and due to this closure, all underlying assessments after this date have been cancelled. An assessment from February 2014 was never satisfied by PEQ Services + Solutions, Inc. and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of PEQ Services + Solutions, Inc. has been derivatively assessed against Cynthia Evans. 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. The underlying substantive issues cannot be considered. No hearing was held.

The petitioner acted as secretary and treasurer for PEQ Services + Solutions, Inc., and is listed as such on the original vendors license application filed on March 7, 2007. As treasurer, the petitioner would have had the authority to exercise control of the corporation's fiscal responsibilities, including remitting tax. Despite the subsequent sale of PEQ Services + Solutions, Inc., the sale, dissolution, termination, or bankruptcy of a corporation does not discharge an officer's liability to file returns or remit tax. See R.C. 5739.33. The petitioner failed to provide evidence that she was not a responsible party for the period of February 1, 2014 through February 28, 2014.

Accordingly, assessment number 100001098189 is affirmed and the remainder of the assessments are cancelled.

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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: JAN 29 2020

Munther M. Ghazawna
600 Longfellow Dr.
Berea, OH 44017

RE: Assessment No.: 100000255555
Sales Tax (Responsible Party)
Account No.: 18-500665

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
$45,604.39	$9,867.38	$9,090.65	$64,562.42

This is a responsible party assessment. M & A Food Store Inc. incurred sales tax liability resulting in a sales tax assessment for the period of January 1, 2009 to June 30, 2011. This assessment was never satisfied by M & A Food Store Inc. and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns, those in charge of, or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of M & A Food Store Inc. has been derivatively assessed against Munther M. Ghazawna. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period of January 1, 2009 to June 30, 2011. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was not requested.

The petitioner objects to the assessment. The petitioner contends that his employment and involvement with the company ended on September 24, 2010. The petitioner provided sufficient evidence to demonstrate that he is not a responsible party for the entire assessed period. However, the evidence indicates that the petitioner was the President of the corporation until September 24, 2010. Further, the petitioner only contested his liability after September 24, 2010.

The petitioner is identified as the President of the corporation on various company documents, such as its county vendor's license application. The petitioner is also listed as an authorized representative on the company's Ohio Secretary of State business filings. This demonstrates that the petitioner had supervision over the corporation's fiscal operations until September 24, 2010. During the audit of the underlying assessment, a Department of Taxation Responsible Party Questionnaire was completed that listed the petitioner as a responsible party.

Based upon the available evidence, the Tax Commissioner finds that the petitioner is responsible and liable for the period of January 1, 2009 to September 24, 2010. Accordingly, it is determined that the petitioner was a responsible party of M & A Food Store Inc. under R.C. 5739.33 for those periods.

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Therefore, the assessment against Munther M. Ghazawna, as the responsible party, is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$42,789.58	$9,867.38	$9,090.65	$61,747.61

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
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: JAN 2 9 2020

Go Wright LLC
451 Catawba Ave.
Put-In-Bay, OH 43456

Re: Assessment No. 100001071464
Sales Tax
Account No. 62-800030

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
$18,137.65	$1,408.51	$9,068.73	$28,614.89

The petitioner owns and operates a bar and restaurant. This assessment is the result of a field audit of the petitioner's sales for the period of January 1, 2015 to December 31, 2017. A hearing was held on November 21, 2019.

The petitioner is required to maintain primary and secondary records of sales pursuant to R.C. 5739.11 and Ohio Adm.Code 5703-9-02. The petitioner did not maintain complete records for the period at issue. The petitioner's sales receipts failed to demonstrate the origin of exempt sales amounts and comps were not included as sales when calculating sales tax. Therefore, a mark-up analysis was conducted using supplier purchase summaries and the petitioner's purchase invoices. 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).

It should be noted that the assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-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-C-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections.

JAN 2 9 2020

Audit Methodology

As noted above, a mark-up analysis was used to calculate taxable sales. The petitioner did not sign the Memorandum of Agreement. A ten-day letter was issued allowing the petitioner the opportunity to provide an alternative audit method; however, none was submitted. The mark-up analysis was used to calculate taxable sales based upon a block sample period (January 1, 2016 through December 31, 2016). Vendor purchase invoices from July 2016 were used to determine product inventory cost. Inventory purchase invoices and supplier purchase summaries were the primary documents reviewed to determine the total taxable inventory purchased for sale during the sample period.

Mark-up percentages for all inventory categories were calculated as weighted averages of a representative sample of each category. The mark-up percentages for each product were determined by calculating a weighted average of the product sales prices, subtracting the product cost per serving, and dividing the difference by the product cost per serving. Weighted average prices account for different pricing structures such as Happy Hour, and weights for sales prices were based on an analysis of the petitioner's detailed sales records for July 2016. Sales prices were derived from the petitioner's drink price list. Serving size information was provided by the petitioner in the Bar and Restaurant Product Workpapers.

Inventory purchase summaries obtained from the petitioner's beer distributers did not delineate the amount of purchases of kegs versus bottles and cans. Therefore, a blended mark-up rate was calculated for beer purchases from these distributors. This rate was calculated by further weighing the weighted mark-up percentages of beer bottle and can and draft categories based upon the product sales dollar rates, and then summing the two weighted percentages. The weights were based on the petitioner's estimates.

The petitioner used different pricing structures and mark-up percentages for liquor sales involving one or multiple servings of liquor, which it defined as "mixed drinks" and "cocktails," respectively. The liquor multiple servings category also included multiple shots of the same liquor, a "double." Mark-up percentages were calculated for Liquor Single – Mixed Drink and Liquor Multiple – Cocktail. The cost per serving for both of these categories of drinks consisted of the cost of the serving of liquor alone. Mixers were not factored into the cost per serving. These mixers were also not listed as taxable inventory purchases to which the resulting weighted mark-up percentages were applied when calculating the petitioner's taxable sales. As the same liquors were used for both categories of drinks, mixed and cocktail, a blended weighted mark-up rate was calculated for all liquor sales. Weights based on the petitioner's estimates were used in calculating the blended rate for liquor, determined by weighing the calculated weighted mark-up percentages for Liquor Single – Mixed Drinks and Multiple - Cocktails and summing the two percentages.

Final weighted mark-up percentages for individual purchases were summed in appropriate inventory categories for beer - bottle and can, beer - draft, beer – blended rate, liquor – blended rate, and wine. Allowable waste and spillage percentages of 5%, 10%, and 5% were applied

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respectively to the calculated taxable sales of beer-draft and blended rate, liquor blended rate, and wine.

The petitioner maintained detailed records supporting taxable food sales. Therefore, taxable food sales were accepted as filed. The petitioner also maintained detailed records supporting its taxable sales of miscellaneous taxable merchandise. Therefore, these sales were accepted as filed as well.

The calculated taxable sales of all categories from the sample period were totaled and divided by the sum of the gross sales on the petitioner's sales tax returns filed for the same period, resulting in a taxable percentage of reported gross sales (109.67%). This was then multiplied by the reported monthly gross sales to determine the calculated taxable sales. Monthly calculated taxable sales were then multiplied by the applicable tax rate in effect throughout the audit period to determine gross sales tax liability by month. Credits representing tax reported and paid monthly via the petitioner's sales tax returns were subtracted from the monthly gross sales tax liability to determine unreported sales tax liability by month. Finally, these monthly tax liability figures were combined to determine total tax liability.

Pursuant to R.C. 5739.13, taxpayers are required to keep adequate records showing sales tax collected and remitted. In the event a taxpayer fails to maintain adequate records to substantiate these amounts, the Tax Commissioner may conduct an audit using any information available and may perform a mark-up analysis. See R.C. 5739.13. The records provided by the petitioner did not show where the exempt amount originated, and the calculation of sales tax did not include "comps" as sales. Lacking adequate records, the use of the mark-up audit methodology as applied was appropriate and supported by statute.

Liquor Sales Figures

The petitioner contends that the liquor sales figures used in the assessment are artificially inflated due to inventory build-up after it obtained a liquor license. In support of this contention the petitioner provided sales figures for each year of the audit period.

Upon review of the sales figures provided by the petitioner, there is a marked increase in liquor sales from 2015 to 2016. Additionally, records show that the petitioner obtained a D3 liquor license on May 25, 2016. However, the petitioner does not explain how this information creates error in the assessment. The petitioner obtained a D3 liquor license to sell additional types of alcohol. The Department assumes that the liquor purchased was sold. The sample year of 2016 was mutually agreed upon. Audit Remarks, Page 5. The petitioner did not provide any documentation to prove error in the assessment.

Waste and Spillage

The petitioner contends that the waste and spillage allowance for beer and liquor was too low, and that they should be increased due to the seasonal nature of the petitioner's establishment. In support

of his contention the petitioner provided handwritten notes on both supplier invoices and audit worksheets.

The Tax Commissioner cannot make adjustments based solely on estimates. The allowance for waste and spillage is given in recognition of the realities of bar and restaurant operations. To support an allowance greater than that provided by the Tax Commissioner requires documented proof of loss. The petitioner failed to provide such proof. As such, the objection is denied.

Food Sales

The petitioner contends that the amount of total sales derived from food sales should be higher than what was attested on the Bar and Restaurant Liquor Permit Questionnaire. Specifically, the petitioner contends that the amount of totals sales derived from food sales should be 80%, and not 75%.

The petitioner maintained detailed records supporting its taxable food sales, and those figures were accepted as filed by the Tax Commissioner. The petitioner failed to produce new or additional records to support a change in the percentage as reported. Without further evidence that a change is valid, the petitioner's records are accepted as filed. The objection is denied.

Sampled Serving Size

The petitioner contends that the sample liquor serving size used in the assessment was too low. The serving size should be 2 ounces rather than 1.5. In support of its contention the petitioner provides handwritten comments on the assessment figures and a spreadsheet purporting to show 2016 drink recipes, including liquor serving size.

The serving sizes used in the assessment to calculate weighted mark-up percentages were derived from the Bar and Restaurant Product Workpapers completed with the assistance of the petitioner. The petitioner did not provide verifiable information to support the use of figures other than those it provided during the audit. The metadata for the excel spreadsheet provided by the petitioner purporting to show 2016 drink recipes showed it was created in December 2019, shortly after it was requested at hearing. There are no other sources to authenticate that the recipes on the spreadsheet were used in 2016. No other information was provided to support the handwritten notes on the assessment worksheets. The objection is denied.

Drink Ingredients

The petitioner contends that the price of premium drink ingredients used in mixed drinks and cocktails were erroneously built into the mark-up pricing for these drinks. Specifically, the petitioner contends that the cost per ounce measure for the liquor mark-up percentage calculation should reflect premium ingredient pricing.

The cost per serving for liquor mark-up calculation is based on the cost of alcohol alone; no mixers are included. Audit Remarks, Page 5. Non-alcoholic mixers were also not considered taxable inventory as part of the audit. This objection is denied.

Special Pricing

The petitioner contends that special pricing such as "Islander" for locals, "First Responder" for those in emergency services, and weekly specials such as "Martini Monday", were not taken into account when calculating mark-up percentages.

The pricing used to calculate mark-up percentages by the auditor was derived from menus and pricing information provided by the petitioner. Audit Remarks, Page 5. Further, in a phone call with the auditor, the petitioner provided information to support special pricing and PMIX point of sales reports to support its claim. The auditor accepted this information and used the pricing provided by the petitioner when calculating weighed pricing. Audit Remarks, Page 5. The petitioner provided no verifiable information at hearing to support the consideration of additional special pricing. The objection is denied.

Credit for Tax Paid

The petitioner contends that it was not given proper credit for tax paid when determining tax liability in the assessment. In support of this contention the petitioner offers handwritten notes on the Tax Liability by Period worksheet and Ohio Business Gateway payment receipts from the sample period.

Ohio Business Gateway only tracks that a payment was made, not how the payment was applied nor remaining tax liability. Petitioner provided no additional information to support its contention. The objection is denied.

Penalty Remission

The petitioner asks for a penalty remission. Based on the totality of the circumstances, a partial penalty remission is appropriate.

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$18,137.65	$1,408.51	$2,766.41	$22,312.57

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 unpaid balance bears post-assessment interest as provided by**

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law, which is in addition to the above total. Payments shall be made payable to "Ohio Treasurer". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN - 9 2020

Hamza Business Inc.
7001 Sunbury Rd., Unit A
Westerville, OH 43082

RE: Assessment No.: 100001059591
Sales Tax
Account No.: 21-034823

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
$53,630.48	$4,517.98	$26,815.08	$84,963.54

The petitioner operates as a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from March 2, 2015 through December 31, 2017. The petitioner filed a petition for reassessment and requested abatement of the penalty. A hearing was held on this matter on Tuesday, October 29, 2019. 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 suppliers, as the petitioner failed to maintain the primary sales records required by R.C. 5739.11. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco, other alcohol, pop & soft drinks, energy drinks, and other taxable merchandise. Each category was assigned a mark-up percentage 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, a 25 percent reduction was given for the pop and energy drink categories.

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 acknowledged receipt of the ten-day letter but did not submit an alternate audit methodology or sign the memorandum of agreement.

A sample period of January 1, 2016 through December 31, 2016 was used as a representation of the entire audit period to calculate taxable sales. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. In instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a comparable distributor.

The 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 103.0418 percent. The reported gross sales for each non-sampled month of the audit period were multiplied by that percentage to determine the calculated taxable sales for each non-sampled month. The calculated taxable sales for each non-sampled month were multiplied by the applicable tax rate to determine the sales tax liability for each non-sampled month. Sales tax liability for sampled months was determined by multiplying the actual calculated monthly taxable sales for each sampled month by the applicable tax rate. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability.

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

The petitioner raises several general assertions in its petition for reassessment. The petitioner has not provided any evidence to support its objections.

Mark-up Percentages

The petitioner cites an incorrect mark-up percentage and miscalculations for the categories of pop and soft drinks, beer, wine, taxable merchandise, and cigarettes and other tobacco. The petitioner failed to provide evidence of an alternative calculation or dispute how the calculations were inaccurate. Nonetheless, the mark-up percentages used by the agent for cigarettes, beer, and wine are the mandatory minimums prescribed by R.C. 1333.11 and Ohio Adm.Code 4301:1-1-72 and 4301:1-1-03. The petitioner has a burden to do more than merely state an unsubstantiated assertion. The petitioner failed meet this burden by proving error in the assessment. Accordingly, this objection is denied.

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Inventory

The petitioner provides that the purchase pattern explained in the audit does not match inventory bought, as the petitioner left a lot of inventory in the store when it sold the business. The petitioner contends that the audit did not take this into account. No other information or documentation was provided by the petitioner.

The audit methodology utilized in calculating the sales tax liability does not include the beginning or ending inventory totals. While the Tax Commissioner acknowledges that it is probably true that not all inventory purchased during the sample period was resold during same period, it is probably also true that goods already held in inventory were sold during the sample period. Therefore, it stands to reason that the method used in calculating the sales tax liability already incorporates any inventory buildup into the calculation. Moreover, the Board of Tax Appeals rejected a similar argument in *Markho, Inc., d.b.a. One Stop Carry Out and One Stop Mini Mart v. Tracy*, BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999). The petitioner failed to prove error in the assessment; therefore, this objection is denied.

Cigarette Buy Downs/Rebates

The petition asserts that cigarette rebates were not credited in the audit. The audit included $14,370.72 of cigarette rebates. During the audit, the petitioner provided duplicate documentation which was not considered. Audit Remarks, Page 4. The petitioner did not provide any further documentation to show an additional cigarette rebate credit is warranted. The petitioner's contention is without merit and the objection is denied.

Penalty

Lastly, the petitioner seeks abatement of the penalty associated with the assessment. The petitioner asserts that based on its sale of the business and objections raised above, the penalty should be abated. Further the petitioner provides that it was cooperative during the audit and it timely filed its sales tax returns. Given the totality of the circumstances of this case, a partial penalty abatement is warranted.

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$53,630.48	$4,517.98	$18,770.49	$76,918.95

Current records indicate that no payments have been made toward the assessment, leaving a balance due of $84,963.54. 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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JAN - 9 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

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 29 2020

Jos. A Bank Clothiers, Inc.
6380 Rogerdale Rd.
Houston, TX 77072

RE: Refund Claim No. 201706938
Filed on May 25, 2017
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $29,498.71, 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 requested and scheduled for December 20, 2018, but the claimant did not call or appear at the scheduled time.

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

The claimant is a specialty retailer that sells tailored and casual menswear, footwear, and accessories, and offers tuxedo rentals. The claimant is seeking a refund for overpayments of sales tax remitted in the amount of $29,468.71 for the period from January 1, 2014 through December 31, 2014. The claimant contends that its accounting system accrued and remitted sales tax on tuxedo rentals multiple times for the same transactions. The claimant provides that while sales tax accrued multiple times on a single transaction, sales tax was only collected once from its customers for each transaction.

The Department informed the claimant in the initial denial letter that the Department required additional evidence to support the sales tax liability the claimant reported on its amended return, such as sales journals, cash register receipts, summary reports used to prepare the tax return, or other documentation to prove sales tax was twice remitted on the same transactions.

The claimant provided a statement explaining the previously submitted contentions of an accounting system error which duplicated remitted sales tax for each transaction, as the claimant's system erroneously processed the rental deposit, the return of the rental, and damage fees as separate transactions. The claimant submitted a CD-ROM containing a spreadsheet of transactions that were double taxed. The claimant submitted this documentation without proof of invoices, tax returns, or cash register receipts verifying that the sales occurred or that sales tax was remitted twice on the sales. The Ohio Department of Taxation was unable to verify the information provided by the claimant.

JAN 29 2020

Although the claimant was given an opportunity to provide proof that it twice remitted sales tax for the same transactions, no additional information was provided. The evidence submitted is insufficient to warrant a refund of the sales tax.

Therefore, the claim for a refund is denied.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 23 2020

Lakewood One Stop LLC
13100 Madison Ave
Lakewood, OH 44107

Re: Assessment No. 100001077768
Sales Tax
Account No. 18-905237

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
$106,252.38	$10,328.59	$53,125.92	$169,706.89

This assessment is the result of an audit of the petitioner's sales from September 1, 2014 through October 31, 2017. A hearing was held on October 29, 2019.

It should be noted that the assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-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-C-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections.

The petitioner is required to maintain primary and secondary records of sales pursuant to R.C. 5739.11 and Ohio Adm.Code 5703-9-02. The petitioner did not maintain complete records for the period at issue. The petitioner provided z-tapes that did not differentiate taxable and exempt sales. Audit Remarks, Page 10. Therefore, a mark-up analysis was conducted using supplier purchase summaries and the petitioner's purchase invoices. 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).

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Audit Methodology

The petitioner was provided with a Memorandum of Agreement and a Ten-Day letter. The Memorandum outlined a proposed mark-up audit. The Ten-Day letter gives the petitioner ten days to provide additional records or propose an alternative audit methodology. The petitioner signed both documents and did not provide an alternative methodology, so the audit proceeded as outlined in the Memorandum.

The mark-up analysis was conducted using January 1, 2016 through December 31, 2016 as the sample period. The auditor used distributer data and petitioner purchase invoices to determine beer, wine, cigarettes, other alcohol, pop, energy drinks, other tobacco products, and taxable merchandise purchases. Once these were established, mark-up percentages were applied to the total sample period inventory purchases for each category to determine calculated sales for the sample period. State minimum mark-ups were used for the categories of beer, wine, and cigarettes. Mark-up percentages for all other categories were based on costs listed on reviewed invoices, sales prices recapped during the store tour, or industry average pricing. Audit Remarks, Page 11. The petitioner is not an authorized food stamp vendor, therefore no reduction in the allowance for pop and energy drinks was given. Cigarette rebates from RJ Reynolds were applied.

The calculated taxable sales from all categories were totaled and divided by the sum of the sample amounts for the entire sample period. The resulting taxable percentage of estimated gross sales were multiplied by the reported gross sales for each non-sampled month of the audit period to determine the calculated monthly taxable sales for the audit period. Tax liability for the sample period was calculated on the actual calculated monthly taxable sales for that sample period.

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

Mark-Up Percentages

The petitioner contends that the mark-up percentages used in the audit were incorrect. Specifically, the petitioner contends that the audit overstated mark-ups for beer, wine, cigarettes, other tobacco products, and pop.

As an initial matter, the petitioner signed the Memorandum of Agreement consenting to the audit methodology, including mark-up percentages for all categories of taxable products. Further, Ohio law sets mandatory minimum mark-up percentages for beer, wine, and tobacco products. Mark-up percentages for all other categories were based costs listed on reviewed invoices, sales prices recapped during the store tour, or industry average pricing.

The petitioner failed to provide sufficient evidence to support their contention. Without reliable information on which to base a decision, the objections are denied.

JAN 23 2020

Adjusted Sales

The petitioner objects to the adjusted sales figures for 2014 and 2015. The petitioner contends they only started the business in 2014 and that these figures are too high. Additionally, the petitioner contends that road construction from April to October of the sample period, as well as a four-day power outage outside the sample period, had a negative effect on sales.

The figures used to determine adjusted gross sales were taken from sales tax returns filed by the petitioner. The petitioner failed to provide any information to support the contention that these figures were inaccurate, or that sales were in any way affected by construction or power loss. The Tax Commissioner refuses to speculate and will not make adjustments based on estimates. The objection is denied.

Petitioner Audit

The petitioner contends that he conducted his own audit and that the figures reached during this audit were different from those determined by the Tax Commissioner. The petitioner did not produce those results for review by the Tax Commissioner. The petitioner failed to prove error in the assessment. The objection is denied.

Penalty Remission

The petitioner was cooperative during the course of the audit and provided all available documents. Based on the totality of circumstances, a reduction of the penalty is appropriate.

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$106,252.38	$10,328.59	$21,250.32	$137,831.29

Current records indicate that payments of $785.40 have been applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

JAN 10 2020

M & M Cycle Inc.
8315 Milan Rd.
Sandusky, OH 44870

RE: Refund Claim No.: 201804958
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $604.43, 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). R.C. 5739.07 allows a claimant 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 $604.43 for the period from October 1, 2014 through October 31, 2014. 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 provided evidence in the form of an Ohio Business Gateway receipt and a profit and loss statement for the period at issue. The profit and loss statement included handwritten notes indicating that a motorcycle sale occurred in which the claimant paid the sales tax to the Clerk of Courts. The claimant failed to submit documentation to corroborate the sale or payment of the sales tax, such as an invoice, Vehicle Identification Number (VIN), or a clerk of courts receipt verifying that sales tax was paid twice on the sale of the motorcycle. 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.

Therefore, the claim for a refund is denied.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: JAN 10 2020

M & M Cycle Inc.
8315 Milan Rd.
Sandusky, OH 44870

RE: Refund Claim No.: 201804959
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $1,447.19, 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). R.C. 5739.07 allows a claimant 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 $1,447.19 for the period from November 1, 2014 through November 30, 2014. 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 provided evidence in the form of an Ohio Business Gateway receipt and a profit and loss statement for the period at issue. The profit and loss statement included handwritten notes indicating that a motorcycle sale occurred in which the claimant paid the sales tax to the Clerk of Courts. The claimant submitted this documentation without proof of an invoice, Vehicle Identification Number (VIN), or a clerk of courts receipt verifying that the sale occurred or that sales tax was paid twice on the sale. 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.

Therefore, the claim for a refund is denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: JAN 22 2020

Thomas Madliger
9094 Glenridge Blvd
Dayton, OH 45458

Re: 46 Assessments
Sales Tax (Responsible Party)
PEQ Services & Solutions, Inc.
Vendor's License No. 89-579615

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
100001098076	09/01/2014-09/30/2014	$3,143.77
100001098088	07/01/2014-07/31/2014	$3,012.72
100001098089	12/01/2014-12/31/2014	$3,415.82
100001098090	04/01/2014-04/30/2014	$1,788.46
100001098091	02/01/2014-02/28/2014	$3,049.36
100001098092	05/01/2014-05/31/2014	$2,055.30
100001098093	08/01/2014-08/31/2014	$3,019.30
100001098094	06/01/2014-06/30/2014	$2,186.28
100001098095	10/01/2014-10/31/2014	$3,462.38
100001098097	11/01/2014-11/30/2014	$3,124.66
100001098098	09/01/2015-09/30/2015	$3,416.01
100001098099	01/01/2015-01/31/2015	$3,418.62
100001098100	03/01/2015-03/31/2015	$3,416.75
100001098101	05/01/2016-05/31/2016	$3,437.99
100001098102	11/01/2016-11/30/2016	$3,426.72
100001098103	08/01/2016-08/31/2016	$3,436.75
100001098104	06/01/2016-06/30/2016	$3,432.01
100001098105	07/01/2017-07/31/2017	$3,444.41
100001098106	10/01/2017-10/31/2017	$3,442.16
100001098107	04/01/2015-04/30/2015	$3,419.00
100001098108	05/01/2015-05/31/2015	$3,416.38
100001098109	02/01/2015-02/28/2015	$3,416.01
100001098110	10/01/2015-10/31/2015	$3,416.75
100001098111	11/01/2015-11/30/2015	$3,418.25
100001098112	08/01/2015-08/31/2015	$3,423.10
100001098113	07/01/2015-07/31/2015	$3,427.22

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100001098114	12/01/2015-12/31/2015	$3,416.56
100001098115	06/01/2015-06/30/2015	$3,419.37
100001098116	10/01/2016-10/31/2016	$3,425.60
100001098117	03/01/2016-03/31/2016	$3,449.02
100001098118	12/01/2016-12/31/2016	$3,427.72
100001098119	07/01/2016-07/31/2016	$3,437.06
100001098120	02/01/2016-02/29/2016	$3,455.18
100001098121	04/01/2016-04/30/2016	$3,443.79
100001098122	09/01/2016-09/30/2016	$3,423.48
100001098123	01/01/2016-01/31/2016	$3,419.18
100001098125	06/01/2017-06/30/2017	$3,444.91
100001098126	04/01/2017-04/30/2017	$3,442.91
100001098127	01/01/2017-01/31/2017	$3,425.73
100001098137	08/01/2017-08/31/2017	$3,425.72
100001098138	11/01/2017-11/30/2017	$3,427.21
100001098139	05/01/2017-05/31/2017	$3,442.91
100001098140	02/01/2017-02/28/2017	$3,426.96
100001098141	03/01/2017-03/31/2017	$3,425.97
100001098142	09/01/2017-09/30/2017	$3,442.16
100001098250	12/01/2017-12/31/2017	$3,427.47
	Total	$151,715.09

These are responsible party assessments. Peq Services & Solutions, Inc. (hereinafter "Peq Services") incurred sales tax liability resulting in sales tax assessments. These assessments were never satisfied by Peq Services and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns, those in charge of, or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Peq Services has been derivatively assessed against Thomas Madliger. Therefore, the only issue that can be considered is whether the petitioner, Thomas Madliger, is a responsible party under R.C. 5739.33 for the periods shown above.

The assessments were made against the corporation for failure to file returns for the periods in question. A representative for the corporation provided information to the Department of Taxation that demonstrated that the company was sold before the assessed periods. Consequently, the corporate assessments were cancelled. Because the underlying corporate assessments have been cancelled, the petitioner is not a responsible party for the assessed periods.

Therefore, the assessments are cancelled.

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.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 2 8 2020

Mid Ohio Spirits LLC
349 W Church St
Newark, OH 43055

Re: Assessment No. 100000825079
Sales Tax
Account No. 45-046791

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
$140,330.94	$9,898.61	$70,165.40	$220,394.95

The assessment is the result of an audit of the petitioner's sales from March 1, 2014 through December 31, 2016. A hearing was held on September 12, 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, Ohio Adm.Code 5703-9-02. The petitioner did not maintain z-tapes or other sales records for the period at issue. Audit Remarks, Page 10. Therefore, a mark-up analysis was conducted using inventory purchase invoices supplied by the taxpayer and their suppliers. The Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. R.C. 5739.13. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

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

Audit Methodology

As noted above, a mark-up analysis was used to calculate taxable sales. The petitioner did not sign the Memorandum of Agreement outlining the audit methodology. A ten-day letter was issued, allowing the petitioner the opportunity to provide an alternative audit method; however, none was

submitted. Both the Memorandum of Agreement and ten-day letter were emailed to the petitioner's representative on May 19, 2017. Audit Remarks, Page 7. A mark-up analysis was used to calculate taxable sales based upon a block sample period of January 1, 2015 through December 31, 2015. Inventory purchase invoices maintained by the petitioner were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period. Where complete inventory purchase records were not available, information obtained directly from the distributor was used.

The auditor calculated the taxable sales of beer, wine, cigarettes, other tobacco products, pop and soft drinks, energy drinks, and other taxable merchandise. The purchases allocated to each category were totaled and multiplied by the applicable mark-up percentage to calculate taxable sales for each inventory category.

The remaining calculated taxable sales were then totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the petitioner for the entire sample period. The resulting taxable percentage of reported gross sales (151.7327%) was then applied to gross sales for each period of the audit to arrive at a calculated taxable sales figure for each reporting period. The tax rate was then applied to arrive at the sales tax liability. The petitioner was given credit for sales tax paid with its sales tax returns. The unpaid tax liability was assessed.

Mark-up Percentages

The petitioner contends the mark-up percentages are higher than those used by the petitioner in the regular course of their business. 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 provided calculations using their proposed percentages. The petitioner has not met their burden because the petitioner did not provide evidence to support the proposed mark-up percentages. Additionally, the petitioner suggests mark-up percentages which are below Ohio minimum mark-up requirements for beer and wine. Ohio Adm. Code OAC 4301:1-1-72(B)(3) and 4301:1-1-03(C)(2)(c). The objection is denied.

Items Purchased for Other Stores

The petitioner contends some of the purchases used for the audit were items purchased for another store run by the petitioner. Assessments are presumptively valid, and the burden is on the petitioner to present sufficient evidence to demonstrate errors in the assessment. The petitioner provided no evidence to support that the purchases relied on by the auditor were not later sold by the business under audit. The objection is denied.

Cigarette Coupons

The petitioner contends they should receive credit for coupons that were redeemed on the sale of cigarettes. The petitioner submitted evidence from various manufacturers of these coupons. Sales tax is computed based on the price of the sale. R.C. 5739.025(A). The definition of price includes consideration received by the vendor from a third party. R.C. 5739.01(H)(1)(b). The petitioner presented evidence of coupons accepted on cigarettes. The evidence also shows the petitioner

JAN 28 2020

receiving consideration for the discount allowed by these coupons. Therefore, the price of the taxable sale was not reduced. The petitioner is not entitled to reduce the amount of sales tax that is due on these transactions because they received consideration from a third party for the sale. 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
$140,330.94	$9,898.61	$42,099.14	$192,328.69

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

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: JAN 29 2020

Mylers Rock Garden Lounge, Inc.
5710 Telegraph Rd.
Toledo, OH 43612

RE: Assessment No.: 100000935548
Tax Type: Sales
Account No.: 48-161902

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
$42,238.34	$3,563.53	$21,118.99	$66,920.86

The petitioner operates as a bar and restaurant. This assessment is the result of a mark-up audit of the petitioner's sales for the period from March 1, 2014 to April 30, 2017. The petitioner filed a petition for reassessment and requested abatement of the penalty. A hearing was held in this matter on Tuesday, January 7, 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 purchases or summaries obtained directly from the petitioner's distributors, as the petitioner failed to maintain complete primary sales records as required by R.C. 5739.11. Utilizing these records, the auditor calculated the taxable beer – bottle and can, beer – draft, beer – blended rate, liquor – blended rate, mixed beverages – bottle and can, and wine. Each category was assigned a mark-up percentage based on evidence from the petitioner, industry standards, and state minimum requirements.

The inventory purchase summaries obtained directly from some of the petitioner's beer distributors did not delineate the amount of inventory purchases allocable to draft versus bottles and cans. Therefore, the auditor calculated a blended markup rate for the beer purchases from those distributors. The

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blended rate was calculated by further weighing the weighted mark-up percentages calculated for the beer – bottle or can and the beer – draft categories based on the product sales dollar weights, and then summing the two weighted percentages. The two category weights were based on an analysis of a representative sample of detailed sales records for the audit period.

A sample period of January 1, 2015 through December 31, 2015 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. In instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a comparable distributor.

The mark-up percentages for all inventory categories were calculated as weighted averages of a representative sample of the most popular premium, standard, and economy products for each inventory category. The mark-up percentages for each product were determined by calculating a weighted average of the product sales prices, subtracting the product cost per serving, and dividing the difference by the product cost per serving. The petitioner's sales prices were derived from a drink price list, as well as information provided on the Bar and Restaurant Liquor Permit questionnaire provided by the petitioner. The weights for the various sales prices were determined based on the petitioner's sales records for the period November 2015. Serving sizes, including the fluid ounce serving sizes of poured alcoholic drinks, were derived from the Bar and Restaurant Product Workpapers completed with the assistance of the petitioner. Individual product mark-up percentages were weighted based upon product sales volume, which were determined from an analysis of the total dollar cost of product inventory purchased from inventory vendor purchase invoices for the period November 2015. The auditor allowed a percentage reduction of beer – draft, beer – blended rate, and liquor to account for spillage and over-pours. The categorical sales totals for the sample period were reduced by the percentages for these categories to calculate the categorical taxable sales for 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 calculated taxable sales for each audit sample period from all categories were totaled and divided by the sum of the gross sales reported on the sales tax return filed by the petitioner to determine the taxable percentage of gross sales of 147.22 percent. The taxable percentage of reported gross sales was multiplied by the reported monthly gross sales for the audit period to determine the sales tax liability. The calculated taxable sales were multiplied 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).

The petitioner contends that the mark-up audit is flawed and does not accurately calculate the amount of sales tax because it fails to account for a breakdown of single liquor shots versus liquor shots in mixed drinks. During the audit, it was noted that the petitioner sells liquor as single shot mixed drinks and multiple shot cocktail drinks. However, the top selling mixed drinks that the petitioner reported were mostly one alcohol with a non-alcoholic mixer; therefore, they were not included in the markup percentage. Audit Remarks, Page 5. Further, the petitioner did not provide records of recipes for all mixed drinks. The petitioner did not provide evidence in the form of primary records to support how the calculation is inaccurate. The petitioner failed to prove error in the assessment. Therefore, this objection is denied.

Sales Tax Calculation

The petitioner objects to this assessment and contends that the mark-up analysis was flawed, and the assessment was significantly overstated. The petitioner contends that it provided sufficient evidence for the Department to conduct a regular audit rather than a mark-up audit.

The petitioner states that all pertinent records were provided but not considered by the auditor. The petitioner did not provide complete evidence of primary records to calculate sales tax liability. Specifically, the petitioner was unable to produce the POS reports for January and June of 2015. During the audit, the petitioner stated in an email dated December 20, 2017 that it could not provide the POS reports for the months of January and June.

Since the petitioner did not comply with its statutory duty under R.C. 5739.11 to maintain and provide complete and accurate primary records to calculate sales tax liability during the audit period, the Department sent a memorandum of agreement to the petitioner that specified the methodology of the audit. The agreement was provided to the petitioner with a ten-day correspondence requesting that if the petitioner disagreed with the audit methodology, an alternative methodology must be submitted in written form within ten days. The petitioner acknowledged receipt of the ten-day letter but did not submit an alternate audit methodology or sign the memorandum of agreement. The Department received additional records from the petitioner on December 13, 2017, after the deadline. However, the Department reviewed the documentation provided by the petitioner and determined that it was incomplete and proceeded with the mark-up audit. Audit Remarks, Page 4. The audit findings were revised on March 13, 2018 to account for documentation submitted by the petitioner. Audit Remarks, Page 6. The revised audit findings contained a tax liability of roughly $57,858 less than the preliminary proposed findings sent to the petitioner on November 3, 2017.

The petitioner states that that the auditor failed to make a good faith effort to reach an agreement in selecting a representative sample. The petitioner later states that the auditor delineated from the originally proposed audit review without taxpayer agreement and decided to use a one-month sample period of November 2015. The petitioner's statements appear to contradict rather than support the petitioner's contentions that the petitioner never agreed to a sample period of January 1, 2015 through December 31, 2015. Additionally, during the audit, the petitioner agreed to use November 2015 to calculate the mark-up percentages because it could not provide purchase records for all of 2015. The petitioner failed to provide evidence of an alternative calculation or dispute how the calculation was

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inaccurate. Therefore, the petitioner failed to demonstrate error in the assessment and these objections are denied.

Inventory

The petitioner provides that the purchase pattern explained in the audit with a sample period of November 2015 does not match inventory for the entire period because the petitioner purchases inventory on an as-needed basis, with holidays contributing to large alcohol sales. No other documentation was provided by the petitioner.

The month of November 2015 was used to calculate the mark-up percentages which were applied to the entire sample period of January 1, 2015 through December 31, 2015. The petitioner did not submit an alternative methodology upon receipt of the memorandum of agreement and ten-day letter. Additionally, the audit methodology utilized in calculating the sales tax liability does not include the beginning or ending inventory totals. While the Tax Commissioner acknowledges that it is probably true that not all inventory purchased during the sample period was resold during the same period, it is probably also true that goods already held in inventory were sold during the sample period. Therefore, it stands to reason that the method used in calculating the sales tax liability already incorporates any inventory buildup into the calculation. Moreover, the Board of Tax Appeals rejected a similar argument in *Markho, Inc., d.b.a. One Stop Carry Out and One Stop Mini Mart v. Tracy*, BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999). The petitioner failed to prove error in the assessment; therefore, this objection is denied.

Discounts

The petitioner contends that the assessment was overstated and should be reduced to account for shot specials. The petitioner provides that roughly $180,000 was over-assessed because shot specials were not considered.

The Department used the Bar and Restaurant Liquor Permit Questionnaire completed, signed, and dated by the petitioner on December 15, 2017. The petitioner stated that it never had a happy hour on both the Bar and Restaurant Liquor Permit Questionnaire and the Supplemental Questionnaire. Additionally, the petitioner provided that no coupon discounts were accepted. During the hearing, the petitioner provided POS reports which reflected shot specials. However, the POS reports did not identify what liquors and mixed drink recipes were used to account for shot specials. Moreover, shot special sales accounted for less than four percent of liquor sales according to the November 2015 liquor data. The petitioner has not provided evidence to support this contention. The objection is denied.

Notice

The petitioner contends that many communications sent from the Department were not received, including the initial notice of audit commencement packet, and such failure to receive notice of audit commencement was a violation of R.C. 5703.51. The petitioner states that it did not receive notice of

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the audit until November 3, 2017. However, the Department sent the audit commencement letter packet on August 4, 2017 with proof of delivery tracking. The USPS tracking information confirms that an individual accepted the package on August 10, 2017 at 3:55 p.m. Therefore, this objection lacks merit and is denied.

Spillage

The petitioner objects to the assessment and contends that no spillage allowances were permitted for purchases of beer draft and mixed/malt beverages. The auditor allowed a percentage reduction of beer – draft, beer – blended rate, and liquor to account for spillage and over-pours. Audit Remarks, Page 5. The petitioner's contention lacks merit; therefore, this objection is denied.

Penalty

The petitioner seeks abatement of the penalty associated with the assessment. The evidence and circumstances support partial abatement of the penalty. Therefore, the request for a penalty abatement is granted in part.

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$42,238.34	$3,563.53	$8,447.51	$54,249.38

Current records indicate that no payments have been made toward the assessment, leaving a balance due of $54,249.38. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: JAN 2 2 2020

Over the Coals, Inc.
7581 Pearl Rd.
Cleveland, OH 44130

Re: Assessment No. 100000813123
Sales Tax
Account No. 18-451253

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
$187,709.24	$17,223.75	$93,854.54	$298,787.53

The petitioner operates a bar and restaurant. This assessment is the result of an audit of the petitioner's sales from April 1, 2013 through June 30, 2016. A hearing was held on November 5, 2019.

The petitioner is required to maintain primary and secondary records of sales pursuant to R.C. 5739.11 and Ohio Adm.Code 5703-9-02. The petitioner did not maintain adequate sales records. Audit Remarks, Page 8. Therefore, a mark-up analysis was conducted using supplier purchase summaries and the petitioner's purchase invoices. 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).

It should be noted that the assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-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-C-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections.

Adjusted Gross Sales

A mark-up analysis was used to calculate taxable sales. A Memorandum of Agreement and a Ten-Day letter outlining the audit methodology and offering the petitioner the opportunity to propose alternate audit methodology were sent to the petitioner. Neither document was signed, and the petitioner did not propose an alternative audit methodology. The mark-up analysis used to calculate taxable sales was based upon a block sample period of January 1, 2015 through December 31, 2015. Inventory purchase invoices obtained directly from the petitioner were the primary documents reviewed to determine the total taxable inventory purchased for sale during the sample period.

The calculated taxable sales of all taxable inventory categories from the sample period were totaled and divided by the sum of the gross sales on the petitioner's sales tax returns filed for the same period, resulting in a taxable percentage of reported gross sales (117.23%). This figure was then multiplied by the reported monthly gross sales for the entire audit period to determine the calculated taxable sales. Monthly calculated taxable sales were then multiplied by the applicable tax rate in effect throughout the audit period to determine gross sales tax liability by month. Credits representing tax reported and paid monthly via the petitioner's sales tax returns were subtracted from the monthly gross sales tax liability to determine unreported sales tax liability by month. Finally, these monthly tax liability figures were combined to determine total tax liability.

The petitioner objected to the sample period adjusted gross sales figure used in the determination of tax liability. The petitioner provided additional information to the Tax Commissioner in support of this objection. Upon review it was determined that the information supported a reduction of the adjusted gross sales figures used in the assessment and a corresponding reduction in tax liability.

Penalty Remission

The petitioner failed to maintain adequate records as required by statute, necessitating a mark-up audit and corresponding penalties. However, the petitioner contends that it has updated the point-of-sale system to more accurately reflect exempt and taxable sales, especially in the case of food orders. The petitioner was cooperative during the course of the audit and appeal. Based on the totality of the circumstances, a partial penalty remission is justified.

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$125,617.65	$11,373.98	$37,685.14	$174,676.77

Current records indicate that no payments have been applied on these assessments, leaving a balance due of $174,676.77. 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

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this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN - 6 2020

Joseph Pastorek
6607 Dorr St
Toledo, OH 43615

Re: 27 Assessments
Sales Tax (Responsible Party)
Pastorek's Body Shop, Inc
Vendor's License No. 48-166674

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
100000927383	05/01/2009-05/31/2009	$721.48
100000927384	09/01/2009-09/30/2009	$1,584.71
100000927386	07/01/2009-07/31/2009	$1,586.02
100000927387	12/01/2009-12/31/2009	$673.06
100000927388	11/01/2009-11/30/2009	$641.75
100000927391	06/01/2009-06/30/2009	$1,470.39
100000927393	03/01/2009-03/31/2009	$401.78
100000927394	05/01/2010-05/31/2010	$963.53
100000927395	07/01/2010-07/31/2010	$686.36
100000927396	09/01/2010-09/30/2010	$1,059.50
100000927397	06/01/2010-06/30/2010	$1,811.30
100000927398	03/01/2010-03/31/2010	$558.10
100000927399	10/01/2009-10/31/2009	$401.89
100000927400	04/01/2009-04/30/2009	$864.94
100000927401	12/01/2010-12/31/2010	$1,183.49
100000927402	08/01/2010-08/31/2010	$896.15
100000927403	04/01/2010-04/30/2010	$479.89
100000927404	01/01/2010-01/31/2010	$483.28
100000927405	01/01/2011-01/31/2011	$999.72
100000927406	04/01/2011-04/30/2011	$521.89
100000927407	07/01/2011-07/31/2011	$551.57
100000927408	05/01/2011-05/31/2011	$559.43
100000927409	09/01/2011-09/30/2011	$975.75
100000927410	08/01/2011-08/31/2011	$476.47
100000927411	06/01/2011-06/30/2011	$962.21
100000927412	03/01/2011-03/31/2011	$731.94
	Total	$22,246.60

These are responsible party assessments. Pastorek's Body Shop, Inc. incurred sales tax liability resulting in assessments for periods shown above. These assessments were never satisfied by Pastorek's Body Shop, 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 Pastorek's Body Shop, Inc. has been derivatively assessed against Joseph Pastorek. 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 held on November 20, 2019.

The petition for reassessment does not dispute the fact that the petitioner is a responsible party for Pastorek's Body Shop, 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 attacks the underlying assessment. These arguments cannot be considered. The petitioner operated Pastorek's Body Shop, Inc. and was found criminally liable for failure to file sales tax returns in relation to the underlying corporate liability. 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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 3 1 2020

Kinjal Patel
4125 Southwyck Rd.
Uniontown, OH 44685

Re: Assessment No. 100001011523
Sales Tax (Responsible Party)
Prachi11, Inc.
Account No. 77-194354

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	Pre-Assessment Interest	Penalty	Total
$69,932.59	$6,271.98	$34,966.14	$111,170.71

This is a responsible party assessment. Prachi11, Inc. (Prachi) incurred sales tax liability resulting in an assessment for the period shown above. This assessment was never satisfied by Prachi and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns and those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Prachi has been derivatively assessed against Kinjal Patel. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period shown above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was requested and scheduled for January 7, 2020. The petitioner did not appear for the hearing.

The petition for reassessment contends that the petitioner was not a responsible party associated with Prachi and that the petitioner did not have sufficient responsibilities associated with the corporation. The petitioner offers no evidence in support of this contention. The assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508 (Apr. 5, 1999) citing, *Federated Department Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213; *Automotive Warehouse, Inc. v. Limbach*, BTA No. 87-D-652 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. In the instant case, the petitioner has not supplied any supporting documentation at all to support its contentions.

On the Responsible Party Questionnaire completed at the time of the underlying assessment, the petitioner declared that he was responsible for overall fiscal responsibilities, had the authority to sign checks, exercised control over outside accounting services, and was assigned responsibility

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to file Ohio business tax returns. Additionally, petitioner signed the application for vendor's license on May 9, 2013 as the sole responsible party within the corporation. The petitioner is also listed as the sole owner of the business on the liquor license. An owner of a corporation is responsible for all of the corporation's operations including fiscal operations.

Based upon the available evidence, the Tax Commissioner finds that the petitioner is responsible and liable for amounts due under R.C. 5739.33. Therefore, it is the order of the Tax Commissioner that the assessments stand as originally issued.

No determination has been made regarding payments made against the underlying assessments. Therefore, it is possible that payments have been made that are not reflected in this final determination. Proper credit will be given at the collection stage. Any post-assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN - 6 2020

Pedtke Enterprises Inc.
7501 Jacks Lane
Dayton, OH 45315

RE: Refund Claim No.: 201805332
Tax Type: Sales
Account No. 89-279791

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $1,599.19, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was not requested.

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

The claimant is seeking a refund of the sales tax paid on the remaining amount of $1,599.19 plus applicable interest 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 provided a letter stating that there were no changes in the sales tax liabilities for this period, but rather the claimant made two payments in error for the same period. The claimant provides that its accountant made a payment through Ohio Business Gateway in the amount of $1,589.98 to satisfy the claimant's September 2017 sales tax obligations, and the claimant's bookkeeper submitted a check in the amount of $1,599.19 to the Ohio Department of Taxation to satisfy the same obligation. The claimant provided evidence in the form of an Ohio Business Gateway receipt for the reporting period and a copy of the referenced check.

The amount listed on the check submitted by the claimant's bookkeeper did not match the amount owed on the original or amended return for September 2017. Since the claimant did not designate the purpose or intended application of the check, the Department of Taxation applied the funds to the claimant's outstanding sales tax liabilities:

Assessment Number	Assessment Period	Payment Amount
100000220821	02/01/2015 – 02/28/2015	$1,581.07
0620111437442	02/01/2011 – 02/28/2011	$4.87
100000090872	07/01/2014 – 07/31/2018	$13.25
	Total Payment (Check #15106)	**$1,599.19**

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JAN - 6 2020

R.C. 5739.072 permits the Tax Commissioner to apply refundable amounts to any tax liability if the debt has become final. The claimant did not demonstrate that it made an overpayment of tax as it owed sales tax on certified assessments from prior periods. 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 paid by the claimant.

Therefore, the claim for a refund is denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:
JAN 10 2020

Piqua Steel Company, Inc.
4243 W. U.S. Route 36
Piqua, OH 45356

Re: Refund Claim No. 201901555
Filed on November 7, 2018

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $10,552.50 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 purchase of two vehicles. The claimant provided copies of completed Transportation for Hire questionnaires for both. Upon initial review, the claim was disallowed. The claimant disagreed and requested reconsideration of the matter. A hearing was not requested.

The Transportation for Hire questionnaires initially submitted by the claimant listed hauling goods for their own company as seventy-five percent of vehicle usage for both vehicles. However, the petitioner used a red pen to adjust the percentages to show fifty-five percent of the usage as hauling goods for others.

The agent reviewing the refund claim requested additional information to support the changes to the questionnaires. None was provided by the petitioner. The hearing officer also requested this additional supporting information, but again none was provided. Without documentation to support the claimed usage of these vehicles, the Tax Commissioner cannot grant a refund.

Accordingly, this refund claim is denied.

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

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

JEFFREY A. MCCLAIN
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: JAN 10 2020

Powell Podium Performance & Service, LLC
356 W. Olentangy St.
Powell, OH 43065

RE: Refund Claim No: 201806120
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $1,806.00, 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). R.C. 5739.07 allows a claimant 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 $1,806.00 for the period from August 1, 2017 through August 31, 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 provided evidence in the form of Ohio Business Gateway receipts for July 1, 2017 through September 31, 2017 but failed to submit the requested documentation to support the claimant's contention. Further, the amount of the requested refund does not match the amount owed on the original return, the amended sales tax return for August 2017, or the amount remitted on the August 2017 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.

Therefore, the claim for a refund is denied.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: JAN 2 2 2020

PS Sandhu, Inc.
727 W. 3rd St.
Dayton, OH 45402

Re: Assessment No. 100001011738
Sales Tax
Account No. 57-195454

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
$117,210.49	$9,671.57	$58,604.97	$185,487.03

The petitioner operates a carryout. This assessment is the result of an audit of the petitioner's sales from August 1, 2014 through December 31, 2017. This is the second audit of this location. A hearing was held on October 17th, 2019.

The petitioner waives all objections save for penalty remission. The petitioner was timely and responsive to the auditor's requests for information during the course of the assessment. Additionally, the petitioner has installed a new point-of-sale system in order to better track the company's transactions and the taxes collected. Based on the totality of the circumstances, a partial penalty remission is granted.

Accordingly, the assessment has been adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$117,210.43	$9,671.56	$35,162.90	$162,044.89

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 unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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JAN 2 2 2020

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 29 2020

Quad-K Leasing, LLC
20002 North 19th Ave
Phoenix, AZ 85027

Re: Refund Claim No. 201703266
Refund period: January 1, 2014 – December 31, 2015
Account No. 25-319991

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $91,817.79 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 claimant's transportation services between January 1, 2014 and December 31, 2015. A hearing was held.

Upon initial review, the claim was disallowed. The reviewing agent requested additional documentation, specifically proof of payment, invoices, and lease agreements. The claimant provided additional information including invoices, checks, transaction logs, and a master lease agreement. Along with these documents, the claimant also submitted an updated Application for Sales/Use Tax Refund form for $88,665.53. After review of this additional information, the reviewing agent determined that the documentation provided supported the updated refund request.

Accordingly, a refund in the amount of $88,665.53 with appropriate interest is hereby authorized.

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: JAN 29 2020

Angela C. Quinn
785 Hardwick Ct.
Tipp City, OH 45371

Re: 46 Assessments
Sales Tax (Responsible Party)
PEQ Services + Solutions, Inc.
Vendor's License No. 89-579615

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
100001098134	02/01/2014-02/28/2014	$3,049.36
100001098135	07/01/2014-07/31/2014	$3,012.72
100001098136	06/01/2014-06/30/2014	$2,186.28
100001098146	10/01/2014-10/31/2014	$3,462.38
100001098147	12/01/2014-12/31/2014	$3,415.82
100001098148	04/01/2014-04/30/2014	$1,788.46
100001098149	08/01/2014-08/31/2014	$3,019.30
100001098150	04/01/2015-04/30/2015	$3,419.00
100001098151	10/01/2015-10/31/2015	$3,416.75
100001098152	01/01/2015-01/31/2015	$3,418.62
100001098153	02/01/2015-02/28/2015	$3,416.01
100001098154	07/01/2015-07/31/2015	$3,427.22
100001098155	06/01/2015-06/30/2015	$3,419.37
100001098156	11/01/2015-11/30/2015	$3,418.25
100001098157	09/01/2014-09/30/2014	$3,143.77
100001098159	11/01/2014-11/30/2014	$3,124.66
100001098160	05/01/2014-05/31/2014	$2,055.30
100001098161	05/01/2015-05/31/2015	$3,416.38
100001098162	08/01/2015-08/31/2015	$3,423.10
100001098163	12/01/2015-12/31/2015	$3,416.56
100001098164	09/01/2015-09/30/2015	$3,416.01
100001098165	04/01/2016-04/30/2016	$3,443.79
100001098166	10/01/2016-10/31/2016	$3,425.60
100001098167	03/01/2015-03/31/2015	$3,416.75
100001098168	09/01/2016-09/30/2016	$3,423.48
100001098169	06/01/2016-06/30/2016	$3,432.01
100001098170	11/01/2016-11/30/2016	$3,426.72
100001098171	05/01/2016-05/31/2016	$3,437.99

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JAN 29 2020

100001098172	09/01/2017-09/30/2017	$3,442.16
100001098174	12/01/2017-12/31/2017	$3,427.47
100001098175	07/01/2017-07/31/2017	$3,444.41
100001098176	05/01/2017-05/31/2017	$3,442.91
100001098177	03/01/2016-03/31/2016	$3,449.02
100001098178	08/01/2016-08/31/2016	$3,436.75
100001098179	12/01/2016-12/31/2016	$3,427.72
100001098180	02/01/2016-02/29/2016	$3,455.18
100001098181	07/01/2016-07/31/2016	$3,437.06
100001098182	01/01/2016-01/31/2016	$3,419.18
100001098183	04/01/2017-04/30/2017	$3,442.91
100001098184	11/01/2017-11/30/2017	$3,427.21
100001098185	08/01/2017-08/31/2017	$3,425.72
100001098186	10/01/2017-10/31/2017	$3,442.16
100001098187	03/01/2017-03/31/2017	$3,425.97
100001098188	01/01/2017-01/31/2017	$3,425.73
100001098197	02/01/2017-02/28/2017	$3,426.96
100001098173	06/01/2017-06/30/2017	$3,444.91
	Total	$151,715.09

The petitioner contends that she was not a responsible party during the periods at issue.

These are responsible party assessments. PEQ Services + Solutions, Inc. incurred sales tax liability resulting in multiple assessments. PEQ Services + Solutions, Inc. was sold and closed as a separate entity on March 31, 2014, and due to this closure, all underlying assessments after this date have been cancelled. An assessment from February 2014 was never satisfied by PEQ Services + Solutions, Inc. and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of PEQ Services + Solutions, Inc. has been derivatively assessed against Angela Quinn. 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. The underlying substantive issues cannot be considered. No hearing was held.

The petitioner acted as vice president for PEQ Services + Solutions, Inc., and is listed as such on the original vendor's license application filed on March 7, 2007. As vice president, the petitioner would have had the authority to exercise control of the corporation's fiscal responsibilities, including remitting tax. Despite the subsequent sale of PEQ Services + Solutions, Inc., the sale, dissolution, termination, or bankruptcy of a corporation does not discharge an officer's liability to file returns or remit tax. See R.C. 5739.33. The petitioner failed to provide evidence that she was not a responsible party for the period of February 1, 2014 through February 28, 2014.

Accordingly, assessment number 100001098134 is affirmed and the remainder of the assessments are cancelled.

JAN 29 2020

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.

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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: JAN 2 2 2020

Red Fitness 24/7 Cincinnati LLC
C/O Michael Palumbo
2345 Bixler Dr
Mogadore, OH 44260

Re: Assessment #: 100000740314
Sales Tax
Account No. 92-200015
Audit Period: 01/01/2013 – 02/28/2014

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
$76,861.78	$9,469.93	$38,430.86	$124,762.57

The petitioner operated a professional health and fitness center. The petitioner was unresponsive during the audit. Accordingly, the Department issued an estimated assessment based on a business similar in nature. The petitioner objects to the assessment issued. A hearing was held on December 17, 2019.

Sales Tax Liability

Sales of all tangible personal property are presumed to be subject to sales tax. Therefore, vendors must maintain complete, accurate and adequate records to establish proof of exempt sales. Ohio Adm.Code 5703-9-02. Taxable sales include all transactions by which physical fitness facility service is or is to be provided. R.C. 5739.01(B)(3)(n). The petitioner does not dispute that the services performed during the audit period were taxable. 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.

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.*

JAN 22 2020

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.

The petitioner did not provide any records for the auditor to review during the audit. The auditor sent an Audit Commencement Letter (ACL) to the petitioner on October 24, 2014 requesting records for review. Because the petitioner was non-responsive, the auditor followed up with a second letter dated May 6, 2015. The petitioner again failed to provide any of the requested documentation. As such, the Department used an alternative method to calculate outstanding tax liability by conducting a six-month analysis of a similar store from a comparable neighborhood. The auditor used the period of July 1, 2012 through December 31, 2012 and analyzed sales data for the six-month period and generated a sales amount from the similar store's sales figures. The auditor issued an assessment based on the information available.

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). Here, the petitioner did not provide any evidence, let alone sufficient evidence that demonstrates error. The petitioner did not provide any records with the petition and did not provide any records during the hearing. The petitioner has provided no information to demonstrate error in the assessment. *Id.*

Accordingly, the Department denies the petitioner's objections to the assessment.

Responsible Party

The petitioner contends that he is not a responsible party for this assessment. The issue of who is a responsible party is a separate matter from the assessed tax liability. Therefore, this issue cannot be considered.

The assessment is affirmed as issued.

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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JAN 2 2 2020

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 2 2 2020

Red Fitness 24/7 LLC
C/O Michael Palumbo
2345 Bixler Dr
Mogadore, OH 44260

Re: Assessment #: 100000739213
Sales Tax
Account No. 92-200020
Audit Period: 01/01/2013 – 02/28/2014

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

	Pre-Assessment		
Tax	Interest	Penalty	Total
$66,595.74	$8,205.06	$33,297.84	$108.098.64

The petitioner operated a professional health and fitness center. The petitioner was unresponsive during the audit. Accordingly, the Department issued an estimated assessment based on a business similar in nature. The petitioner objects to the assessment issued. A hearing was held on December 17, 2019.

Sales Tax Liability

Sales of all tangible personal property are presumed to be subject to sales tax. Therefore, vendors must maintain complete, accurate and adequate records to establish proof of exempt sales. Ohio Adm.Code 5703-9-02. Taxable sales include all transactions by which physical fitness facility service is or is to be provided. R.C. 5739.01(B)(3)(n). The petitioner does not dispute that the services performed during the audit period were taxable. 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.

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.

JAN 2 2 2020

The petitioner did not provide any records for the auditor to review during the audit. The auditor sent an Audit Commencement Letter (ACL) to the petitioner on October 24, 2014 requesting records for review. Because the petitioner was non-responsive, the auditor followed up with a second letter dated May 6, 2015. The petitioner again failed to provide any of the requested documentation. As such, the Department used an alternative method to calculate outstanding tax liability by conducting a six-month analysis of a similar store from a comparable neighborhood. The auditor used the period of July 1, 2012 through December 31, 2012 and analyzed sales data for the six-month period and generated a sales amount from the similar store's sales figures. The auditor issued an assessment based on the information available.

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). Here, the petitioner did not provide any evidence, let alone sufficient evidence that demonstrates error. The petitioner did not provide any records with the petition and did not provide any records during the hearing. The petitioner has provided no information to demonstrate error in the assessment. *Id.*

Accordingly, the Department denies the petitioner's objections to the assessment.

Responsible Party

The petitioner contends that he is not a responsible party for this assessment. The issue of who is a responsible party is a separate matter from the assessed tax liability. Therefore, this issue cannot be considered.

The assessment is affirmed as issued.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 2 2 2020

Red Fitness 24/7 Severance LLC
C/O Michael Palumbo
2345 Bixler Dr
Mogadore, OH 44260

Re: Assessment #: 100000740384
Sales Tax
Account No. 92-200017
Audit Period: 01/01/2013 – 02/28/2014

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
$66,595.74	$8,212.38	$33,297.84	$108.105.96

The petitioner operated a professional health and fitness center. The petitioner was unresponsive during the audit. Accordingly, the Department issued an estimated assessment based on a business similar in nature. The petitioner objects to the assessment issued. A hearing was held on December 17, 2019.

Sales Tax Liability

Sales of all tangible personal property are presumed to be subject to sales tax. Therefore, vendors must maintain complete, accurate and adequate records to establish proof of exempt sales. Ohio Adm.Code 5703-9-02. Taxable sales include all transactions by which physical fitness facility service is or is to be provided. R.C. 5739.01(B)(3)(n). The petitioner does not dispute that the services performed during the audit period were taxable. 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.

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.

JAN 2 2 2020

The petitioner did not provide any records for the auditor to review during the audit. The auditor sent an Audit Commencement Letter (ACL) to the petitioner on October 24, 2014 requesting records for review. Because the petitioner was non-responsive, the auditor followed up with a second letter dated May 6, 2015. The petitioner again failed to provide any of the requested documentation. As such, the Department used an alternative method to calculate outstanding tax liability by conducting a six-month analysis of a similar store from a comparable neighborhood. The auditor used the period of July 1, 2012 through December 31, 2012 and analyzed sales data for the six-month period and generated a sales amount from the similar store's sales figures. The auditor issued an assessment based on the information available.

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). Here, the petitioner did not provide any evidence, let alone sufficient evidence that demonstrates error. The petitioner did not provide any records with the petition and did not provide any records during the hearing. The petitioner has provided no information to demonstrate error in the assessment. *Id.*

Accordingly, the Department denies the petitioner's objections to the assessment.

Responsible Party

The petitioner contends that he is not a responsible party for this assessment. The issue of who is a responsible party is a separate matter from the assessed tax liability. Therefore, this issue cannot be considered.

The assessment is affirmed as issued.

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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 2 2 2020

Red Fitness 24/7 Westlake LLC
C/O Michael Palumbo
2345 Bixler Dr
Mogadore, OH 44260

Re: Assessment #: 100000739210
Sales Tax
Account No. 92-200018
Audit Period: 01/01/2013 – 02/28/2014

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

	Pre-Assessment		
Tax	Interest	Penalty	Total
$93,124.68	$11,476.05	$46,562.34	$151,163.07

The petitioner operated a professional health and fitness center. The petitioner was unresponsive during the audit. Accordingly, the Department issued an estimated assessment based on a business similar in nature. The petitioner objects to the assessment issued. A hearing was held on December 17, 2019.

Sales Tax Liability

Sales of all tangible personal property are presumed to be subject to sales tax. Therefore, vendors must maintain complete, accurate and adequate records to establish proof of exempt sales. Ohio Adm.Code 5703-9-02. Taxable sales include all transactions by which physical fitness facility service is or is to be provided. R.C. 5739.01(B)(3)(n). The petitioner does not dispute that the services performed during the audit period were taxable. 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.

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.

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The petitioner did not provide any records for the auditor to review during the audit. The auditor sent an Audit Commencement Letter (ACL) to the petitioner on October 24, 2014 requesting records for review. Because the petitioner was non-responsive, the auditor followed up with a second letter dated May 6, 2015. The petitioner again failed to provide any of the requested documentation. As such, the Department used an alternative method to calculate outstanding tax liability by conducting a six-month analysis of a similar store from a comparable neighborhood. The auditor used the period of July 1, 2012 through December 31, 2012 and analyzed sales data for the six-month period and generated a sales amount from the similar store's sales figures. The auditor issued an assessment based on the information available.

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). Here, the petitioner did not provide any evidence, let alone sufficient evidence that demonstrates error. The petitioner did not provide any records with the petition and did not provide any records during the hearing. The petitioner has provided no information to demonstrate error in the assessment. *Id.*

Accordingly, the Department denies the petitioner's objections to the assessment.

Responsible Party

The petitioner contends that he is not a responsible party for this assessment. The issue of who is a responsible party is a separate matter from the assessed tax liability. Therefore, this issue cannot be considered.

The assessment is affirmed as issued.

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.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 29 2020

RO 2091 Grafton, Inc
2091 Grafton Rd.
Elyria, OH 44035

Re: Assessment No. 100000948166
Sales Tax
Account No. 47-078252

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
$55,278.15	$4,088.98	$27,638.96	$87,006.09

The petitioner owns and operates a convenience store. This assessment is the result of a field audit of the petitioner's sales for the period of July 1, 2014 to September 30, 2017. A hearing was held on October 23, 2019.

The petitioner is required to maintain primary and secondary records of sales pursuant to R.C. 5739.11 and Ohio Adm.Code 5703-9-02. The petitioner did not maintain complete records for the period at issue. The petitioner could not locate all purchase invoices for the audit period. Audit Remarks, Page 3. Therefore, a mark-up analysis was conducted using supplier purchase summaries and the petitioner's purchase invoices. 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).

It should be noted that the assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-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-C-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections.

Audit Methodology and Taxable Purchases

A Memorandum of Agreement outlining the proposed audit methodology and a Ten-Day letter giving the petitioner the opportunity to provide additional evidence or to propose an alternative

audit methodology were sent to the petitioner. Neither document was signed and the petitioner did not propose an alternative audit methodology. A mark-up analysis was used to calculate taxable sales based upon a block sample period from January 1, 2016 through December 31, 2016. Inventory purchase invoices supplied by the petitioner and petitioner's suppliers were the primary documents reviewed to determine the total taxable inventory purchased for sale during the sample period.

Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco products, other taxable groceries, soft drinks and mixers, energy drinks, kerosene, and propane. Each category was assigned a mark-up percentage based on state minimums, information provided by the petitioner in the Product Checklist, or agreed to by all parties. Audit Remarks, Page 6. A 25 percent reductions was allowed for the soft drink and energy drink categories to account for food stamp sales.

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 (110.2474%). 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.

Purchase Double Counting

The petitioner contends that the Tax Commissioner doubled sample period taxable purchases in the assessment. Specifically, the petitioner contends that purchases from supplier Albert Guarnleri were also included in the figures from A&S Distributers. In support of this contention, the petitioner provided a letter and a sample period sales report from A&S purporting to show the double counting of inventory purchases. A handwritten note on the summary states that these totals included Albert Guarnleri.

The summary sales report lacks sufficient detail to support the contention. A handwritten attestation cannot be used as proof of a contention without independent verification. The summary provided shows only total purchases for each product category over the sample year, for example cigarettes or supplies. These categories are not broken down into supplier detail, and no Albert Guarnleri statements were provided that could be referenced to this summary. The petitioner failed to provide sufficient evidence to support their contention. The objection is denied.

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Inclusion of Non-Taxable Purchases in Taxable Purchase Measure

The petitioner contends that the Tax Commissioner included non-taxable items in the taxable purchases measure from suppliers Eby Brown, Pepsi, and Coca-Cola. In support of this contention the petitioner provided vendor purchase summaries and supplier invoices. The information provided was insufficient to support the contention that non-taxable items were included in the taxable purchase measure. These objections are denied.

Cigarette Rebates

The petitioner contends that the Tax Commissioner failed to apply cigarette rebates. The petitioner provided invoice summaries in support of this contention. The information provided was only invoice totals alone. There was no detail to explain the type of payments made. The Department has insufficient evidence to determine the payments were cigarette rebates. The objection is denied.

Theft

The petitioner contends that the assessment must be adjusted for theft. In support of this contention the petitioner provided two police reports regarding burglaries that occurred in the sample period (October 14, 2016 and November 27, 2016).

The documentation supplied does not quantify the amount of loss attributed to taxable items. Attached to both police reports are handwritten notes stating purported losses. These figures are not verified, nor is it clear when the notes were written. Further, in the body of both reports the petitioner states that they were unsure of the type or number of products lost in the burglaries. The petitioner failed to show the amount of loss and prove error in the assessment. The objection is denied.

Shrinkage

The petitioner also argues for a national average 1.85% reduction in taxable sales. The petitioner seeks an adjustment for this shrinkage. No credit can be given for unsubstantiated losses. The objection is denied.

Penalty Remission

The petitioner requests a penalty remission. The facts and circumstances support a partial abatement of the penalty.

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Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$55,278.15	$4,088.98	$19,347.18	$78,714.431

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

0000000196

Date: JAN 22 2020

SABF, Inc.
4954 Portage St. NW
North Canton, OH 44720

Re: Assessment No. 100001131737
Sales Tax
Account No. 76-142174

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
$211,111.15	$19,298.65	$105,555.46	$335,965.26

The petitioner owns and operates a bar and restaurant. This assessment is the result of a field audit of the petitioner's sales for the period of January 1, 2015 to January 31, 2018. A hearing was held on November 12, 2019.

It should be noted that the assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-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-C-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections.

Audit Methodology

The auditor and petitioner agreed on 2016 as the sample year for the review the petitioner's records. Audit Remarks, Page 6. The auditor was provided with daily recaps of z-tapes for the sample year. The petitioner also provided an updated drink menu, which was utilized by the auditor rather than Bar and Restaurant workpapers. After review of the 2016 z-tapes, the auditor determined there was evidence of tax collected and not remitted and requested z-tapes for the remainder of the audit period. Audit Remarks, Page 7. Incomplete tapes were provided by the petitioner in response to this request. Days that the business was closed due to holidays, snow, and bad weather were not included. The sales information on the second group of z-tapes was presented in a different manner, as well, due to a change in the petitioner's POS systems in 2017. Audit Remarks, Page 7.

In order to verify that he information on the z-tapes was accurate, the auditor used the available beer, wine, and liquor purchase data. Comparing the two z-tape formats, one of which included itemized figures for beer, wine and liquor sales, and estimating any periods missing from the tapes, the auditor

was able to estimate that beer and wine comprised one-half of relevant purchases. With a standard 200% industry mark-up applied, the sales on the z-tapes appeared reasonable. Liquor purchases were approximately one-fourth of the total relevant purchases, and with a standard 300-400% mark-up applied those sales figures appeared valid as well. From these calculations the auditor determined the information from both POS systems was a reliable source from which to calculate audit liability. Audit Remarks, Page 9.

The auditor recapped the information on both groups of z-tapes. The first group broke tax into three categories: pop, sales, and VAT. The second group broke tax into two categories: tax and VAT. After discussion with the petitioner, the auditor determined that "VAT" is the tax collected on sales of liquor. Audit Remarks, Page 7. The petitioner's representative claimed that the "VAT" category was automatically programmed into the POS but did not pertain to the petitioner's business. This tax was recorded on the daily z-tapes, however, and was therefore treated as the applicable tax collected on liquor by the auditor. "Pop tax" was the tax collected on pop sales, and "Sales tax" was the tax collected on food consumed on the premises. Audit Remarks, Page 7.

Based on a comparison of the z-tapes provided and the petitioner's UST-1 filings over the audit period, the auditor divided the figures into two categories to calculate tax liability. The first category covers those with z-tapes that reported sales tax collected that was higher than that reported on the petitioner's UST-1. This was treated as sales tax collected not remitted. Audit Remarks, Page 9.

The second category of tax liability is the periods with incomplete or missing z-tapes. In this situation, gross sales were calculated by taking all months in which z-tapes were provided for three-quarters, or twenty-four days of the month, and then calculating an average daily sales figure. This average was then multiplied by the number of days in a given month to determine the daily gross sales. This figure was then multiplied by the taxable percentage of sales on the z-tapes (97.0383%) to determine monthly taxable sales. The auditor then subtracted the amount remitted on the UST-1 for that given month to arrive at remaining tax liability. Audit Remarks, Page 10.

The total tax due is the combination of both categories, tax collected not remitted and sales tax due.

Tips Included in Gross Sales Calculation

The petitioner contends that tips for servers are included in the price of sales entered into the POS systems, inflating sales figures. In support of this contention, the petitioner provided additional documentation in the form of handwritten notes on audit worksheets. No additional documentation in the form of receipts, employee handbooks, or pricing guides was provided to verify these figures.

The Tax Commissioner cannot rely on estimates or figures provided without verification. The objection is denied.

Sales Overstated

The petitioner objects that the sales figures used by the auditor were overstated. The figures used were provided by the petitioner's z-tapes and UST-1 forms filed with the state. The petitioner provided no documentation from POS systems or any other source to contradict the figures previously provided to the Department via monthly sales reporting, or to the auditor in the course of the assessment. The objection is denied.

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Penalty Remission

The petitioner requests a penalty remission. The evidence in the file shows that the petitioner failed to remit all of the sales tax collected. Audit Remarks, Page 9. The request is denied.

Accordingly, the assessmenpt is affirmed as issued.

Current records indicate that no payments have been applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any 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: JAN - 9 2020

Shree Shivam, Inc.
1559 W. Broad Street
Columbus, Ohio 43222

Re: Assessment No. 100000084952
Sales Tax
Ohio Tax Account No. 76151570

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-224, dated September 16, 2019. In that order, the Board remanded the case to the Tax Commissioner for further consideration.

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

	Total
Sales Tax	$42,466.14
Pre-assessment Interest	$4,875.93
Penalty	$6,369.92
Total	$53,711.99

A payment in the amount of $53,711.99 has been received in complete satisfaction of this assessment.

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

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

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: JAN 2 8 2020

Todd Smith
11261 Ballah Rd.
Orient, OH 43146

Re: Assessment No. 100001343638
Tax Type: Sales (Responsible Party)
Account No. 65-016999

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
$69,189.74	$12,199.26	$35,365.27	$116,754.27

This is a responsible party assessment. Smith's Property Maintenance, LLC incurred sales tax liability resulting in a sales tax assessment for the period of July 1, 2010 to February 28, 2018. This assessment was never satisfied by Smith's Property Maintenance, 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, those in charge of, or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Smith's Property Maintenance, LLC has been derivatively assessed against Todd Smith. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period of July 1, 2010 to February 28, 2018. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was scheduled for Tuesday, January 14, 2020; however, the petitioner waived his hearing by email on January 13, 2020.

Responsible Party

The petitioner objects to the assessment. The evidence indicates that the petitioner was President of Smith's Property Maintenance, LLC based on its business filings. The petitioner is identified as the President of the corporation on Ohio Business Gateway and is listed as an authorized representative and contact for copies of any operating agreements and bylaws on the company's Ohio Secretary of State business filings. The petitioner completed and signed the Responsible Party Questionnaire during the audit of the underlying assessment and listed himself as a member and sole responsible party of the corporation. During the audit, the petitioner completed and signed the Department's release and waiver of liability form regarding email communications listing

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himself as a member of the corporation. Further, the petitioner's own LinkedIn profile lists himself as the owner of Smith's Property Maintenance, LLC.[1]

After receiving notice of the audit commencement, the petitioner contacted the auditor to schedule the initial audit meeting and advised the auditor when to expect the return paperwork necessary to complete the audit. Audit Remarks, Page 4. During the audit, the petitioner stated he was collecting sales tax on invoices. *Id.* This demonstrates that the petitioner had supervision and control over the corporation's fiscal operations. The petitioner also appeared and contested the corporate underlying assessment at the scheduled hearing held on Thursday, September 12, 2019. The petitioner has not met his burden to demonstrate the assessment was in error. The objection is denied.

Underlying Assessment

The petitioner also submitted numerous objections 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, these objections cannot be considered as they relate to the underlying assessment.

Accordingly, the assessment shall stand as issued.

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

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

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

[1] LinkedIn, https://www.linkedin.com/in/todd-smith-79250b102/ (accessed January 14, 2020).

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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:
JAN 15 2020

George Snow
6733 Hobbs Landing Dr. E
Dublin, OH 43017

Re: Refund Claim No. 201806280
Filed on February 26, 2018

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of $2,916.00 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid. Upon initial review, the claim was disallowed. The claimant disagreed and requested reconsideration of the matter. A hearing was held on November 21, 2019.

The claimant contends they erroneously paid tax when titling a vehicle. The evidence in file supports their contention.

Accordingly, a refund in the amount of $2,916.00 with appropriate interest is hereby authorized.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: JAN 23 2020

Sunny Simru, Inc.
3297 Beekman St.
Cincinnati, OH 45225

Re: Assessment No.: 100000822601
Period: January 1, 2014 – December 31, 2016
Tax Type: Sales
Account No.: 31-388774

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
$63,284.76	$5,207.06	$31,642.31	$100,134.13

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 January 1, 2014 to December 31, 2016. The petitioner filed a petition for reassessment. A hearing was held in this matter on Wednesday, November 6, 2019. The petitioner's objections are addressed below.

Audit Methodology

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

A mark-up analysis was conducted using the petitioner's inventory purchases or summaries obtained directly from the petitioner's suppliers, as the petitioner failed to maintain primary sales records as required by R.C. 5739.11. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco, pop and soft drinks, and energy drinks and other beverages. Each category

was assigned a mark-up percentage based on evidence from the petitioner, industry standards, 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, 2015 through December 31, 2015 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. In the instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a comparable distributor. The 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 for the sample period from all categories were totaled and divided by the sum of the gross sales reported on the sales tax return filed by the petitioner to determine the taxable percentage of gross sales of 76.6980 percent. The taxable percentage of reported gross sales was multiplied by the reported monthly gross sales for the audit period to determine sales tax liability. The calculated taxable sales were multiplied by the applicable tax rate to determine the sales tax liability by month for the entire audit period. 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. See, *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

Vendor Receipts

The petitioner objects to the use of vendor receipts as overstated and inaccurate. Since the petitioner did not provide evidence of primary records or internal controls to calculate sales tax liability as required by Ohio Adm.Code 5703-9-02, 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 agreement and did not submit an alternate audit methodology. The petitioner did not provide any evidence to show that receipts were inaccurate. The petitioner failed to prove error in the assessment. Accordingly, this objection is denied.

Sales Tax Calculation

The petitioner contends that the taxable percentage of sales is overstated and should be reduced to account for non-taxable food items. During the audit, the auditor conducted a store tour and observed various food items that are not subject to sales tax. Audit Remarks, Page 2. While this audit was limited in scope as a convenience store mark-up audit, the auditor did not pick up sales of non-taxable food. As such, those sales would not have an impact on the sales tax liabilities of the petitioner. The

petitioner's contention fails to prove error in the assessment, as food as defined in R.C. 5739.01(EEE)(1) is not subject to sales tax. Therefore, this objection is denied.

Shrinkage

The petitioner contends that the taxable percentage of sales should be reduced to account for shrinkage from theft. Credit cannot be given for stolen merchandise without a police report or insurance claim. The petitioner did not state what inventory was stolen. Further, the petitioner did not raise this issue during the hearing.

A generalized statement of losses incurred from shrinkage does not meet the petitioner's burden. Moreover, the petitioner did not state in its Liquor Permit Operations Questionnaire that any significant events such as thefts affected the business during the audit period, except for a remodel of the store. The questionnaire was completed, signed, and dated by the petitioner on April 5, 2017. The petitioner has not provided any evidence to support this contention. The objection is denied.

Inventory

The petitioner acknowledges that the mark-up analysis is a valid method in ascertaining actual sales; however, the petitioner contends that the auditor should consider the size of the store as it does not have the capability to sell or store the inventory used in the mark-up audit methodology to calculate sales tax liability. No other information or documentation was provided by the petitioner.

During the audit, the auditor conducted a store tour and observed current inventory. Audit Remarks, Page 2. The auditor used all available information, including distributor records supplied by the petitioner to ascertain sales tax liability. Audit Remarks, Page 8. Additionally, the audit methodology utilized in calculating the sales tax liability does not include the beginning or ending inventory totals. While the Tax Commissioner acknowledges that it is probably true that not all inventory purchased during the sample period was resold during same period, it is probably also true that goods already held in inventory were sold during the sample period. Therefore, it stands to reason that the method used in calculating the sales tax liability already incorporates any inventory buildup into the calculation. Moreover, the Board of Tax Appeals rejected a similar argument in *Markho, Inc., d.b.a One Stop Carry Out and One Stop Mini Mart v. Tracy*, BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999). The petitioner failed to prove error in the assessment; therefore, this objection is denied.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payments have been made toward the assessment, leaving a balance due of $100,134.13. 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.

0000000219
JAN 23 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

0000000289

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 28 2020

WFMJ Television, Inc.
101 West Boardman St.
Youngstown, OH 44503

Re: Refund Claim No. 201501030
Filed August 25, 2014
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of $36,724.37 of sales tax filed pursuant to R.C. 5739.07.

The claimant ("WFMJ") is a provider of broadcasting services. Specifically, claimant offers local news and information, user-generated content, advertising, e-commerce, and other services.[1] According to its business registration, claimant's business purpose is to "own, lease, or otherwise acquire, and to manage, operate and control telecasting and radio systems or stations and any other means of communication * * * to carry on a general theatrical and amusement business * * * [.]"[2] The claimant operates both WFMJ, a local NBC affiliate, and WBCB, an affiliate of The CW.

The claimant filed its refund application on August 25, 2014. The agent of the Tax Commissioner who reviewed the refund application determined that the claimant had not presented an applicable exemption for the transactions it identified. The claimant subsequently appealed, providing further information and a separate exemption. 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). Additionally, "[t]ax-exemption statutes 'must be strictly construed, because exemptions are in derogation of the rights of all other taxpayers.'" *Cincinnati v. Testa*, 143 Ohio St.3d 371, 2015-Ohio-1775, 38 N.E.3d 847, ¶ 16, quoting *Panther II Transp., Inc. v. Seville Bd. of Income Tax Rev.*, 138 Ohio St.3d 495, 2014-Ohio-1011, 8 N.E.3d 904, ¶ 23. 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.

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[1] Bloomberg, <https://www.bloomberg.com/profile/company/6698596Z:US> (accessed January 7, 2020).
[2] Petitioner's Articles of Incorporation filed with the Ohio Secretary of State, Document ID F227_1974.

The claimant cites a general schedule of purchases that should be exempt. The claimant initially cited R.C. 5739.02(B)(53) for this proposition. The agent reviewing the claim denied the claimant's claim, noting that 5739.02(B)(53) only exempts the sale of actual cable service or programming. The claimant now submits that its enumerated purchases should be exempt under R.C. 5739.02(B)(34).

The claimant, as a television station, is not an exempt vendor under the statute it has cited. R.C. 5739.02(B)(34) exempts sales "to a telecommunications service vendor, mobile telecommunications service vendor, or satellite broadcasting service vendor of tangible personal property and services used directly and primarily in transmitting, receiving, switching, or recording any interactive, one- or two-way electromagnetic communications * * * [.]" Per R.C. 5739.01(AA)(1), "telecommunications service" does not include advertising or audio and video programming services; therefore the claimant is not a telecommunications service vendor and does not qualify for the exemption. The Commissioner cannot conclude that the claimant is entitled to a refund based upon the information it has provided.

Additionally, even if the claimant could demonstrate that they are a telecommunications service vendor, the claimant has failed to provide information that its purchases are used "directly and primarily" in transmitting, receiving, switching, or recording any interactive, one- or two-way electronic communications. The claimant's "detailed statement of usage" is merely a cite to R.C. 5739.02(B)(53). Without further information, the Commissioner cannot conclude that the claimant 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 or legal basis that it is a vendor to which R.C. 5739.02(B)(34) applies and that its purchases were directly and primarily used in telecommunications or satellite transmissions. 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

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 28 2020

JAN 28 2020

WFMJ Television, Inc.
101 West Boardman Street
Youngstown, OH 44503

Re: Refund Claim No. 201501035
Filed August 25, 2014
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of $157,215.45 of sales tax filed pursuant to R.C. 5739.07.

The claimant ("WFMJ") is a provider of broadcasting services. Specifically, claimant offers local news and information, user-generated content, advertising, e-commerce, and other services.[1] According to its business registration, claimant's business purpose is to "own, lease, or otherwise acquire, and to manage, operate and control telecasting and radio systems or stations and any other means of communication * * * to carry on a general theatrical and amusement business * * * [.]"[2] The claimant operates both WFMJ, a local NBC affiliate, and WBCB, an affiliate of The CW.

The claimant filed its refund application on August 25, 2014. The agent of the Tax Commissioner who reviewed the refund application determined that the claimant had not presented an applicable exemption for the transactions it identified. The claimant subsequently appealed, providing further information and a separate exemption. 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). Additionally, "[t]ax-exemption statutes 'must be strictly construed, because exemptions are in derogation of the rights of all other taxpayers.'" *Cincinnati v. Testa*, 143 Ohio St.3d 371, 2015-Ohio-1775, 38 N.E.3d 847, ¶ 16, quoting *Panther II Transp., Inc. v. Seville Bd. of Income Tax Rev.*, 138 Ohio St.3d 495, 2014-Ohio-1011, 8 N.E.3d 904, ¶ 23. 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.

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[1] Bloomberg, <https://www.bloomberg.com/profile/company/6698596Z:US> (accessed January 7, 2020).
[2] Petitioner's Articles of Incorporation filed with the Ohio Secretary of State, Document ID F227_1974.

The claimant cites a general schedule of purchases that should be exempt. The claimant initially cited R.C. 5739.02(B)(53) for this proposition. The agent reviewing the claim denied the claimant's claim, noting that 5739.02(B)(53) only exempts the sale of actual cable service or programming. The claimant now submits that its enumerated purchases should be exempt under R.C. 5739.02(B)(34).

The claimant, as a television station, is not an exempt vendor under the statute it has cited. R.C. 5739.02(B)(34) exempts sales "to a telecommunications service vendor, mobile telecommunications service vendor, or satellite broadcasting service vendor of tangible personal property and services used directly and primarily in transmitting, receiving, switching, or recording any interactive, one- or two-way electromagnetic communications * * * [.]" Per R.C. 5739.01(AA)(1), "telecommunications service" does not include advertising or audio and video programming services; therefore the claimant is not a telecommunications service vendor and does not qualify for the exemption. The Commissioner cannot conclude that the claimant is entitled to a refund based upon the information it has provided.

Additionally, even if the claimant could demonstrate that they are a telecommunications service vendor, the claimant has failed to provide information that its purchases are used "directly and primarily" in transmitting, receiving, switching, or recording any interactive, one- or two-way electronic communications. The claimant's "detailed statement of usage" is merely a cite to R.C. 5739.02(B)(53). Without further information, the Commissioner cannot conclude that the claimant 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 or legal basis that it is a vendor to which R.C. 5739.02(B)(34) applies and that its purchases were directly and primarily used in telecommunications or satellite transmissions. 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

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 2 9 2020

Wright Nutrition Inc
201 Energy Pkwy., Ste 400
Lafayette, LA 70508

Re: Refund Claim No. 20181466710
Refund Amount Requested: $17,845.42
Refund Period: October 1, 2014 – January 31, 2018
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund, in the amount of $17,845.42 in sales tax filed pursuant to R.C. 5739.07. The claim was initially partially approved in the amount of $4,165.91 plus applicable interest. The claimant disagreed and requested reconsideration of the matter. A hearing was not requested.

The claimant contends they overpaid sales tax on tangible personal property used in manufacturing and sales tax paid on packaging of tangible personal property produced for sale for the period from October 1, 2014 through January 31, 2018. The claimant's contentions are discussed below.

Proof of Payment

The initial examination of the claim found that the claimant failed to provide proof of payment for $12,726.32 of the requested refund. The claimant provided information from their accounts payable system. The provided information is sufficient to warrant a refund of $12,703.50 plus applicable interest.

McMaster-Carr Supply Company Transactions

The claimant contends that steel drums and an electric drum-style drain cleaner purchased from McMaster-Carr Supply Company are exempt. The exemption was claimed pursuant to R.C. 5739.011(B)(1) and 5739.011(B)(11) which state that production machinery and equipment that act upon the product or machinery and equipment that treat the materials or parts in preparation for the manufacturing operation *or* parts, components, and repair and installation services for such equipment are exempt from sales tax.

According to documentation submitted by the claimant, three of the items in question are steel drums used to hold and transport raw materials in the manufacturing process. The claimant does not state how the drums act upon the materials or treat them in any way in preparation for the manufacturing process. Based on the evidence submitted, the drums only store the raw material before it is used in the process. The manufacturing operation does not begin until the raw materials are committed to the manufacturing process. Ohio Adm.Code 5703-9-21(B)(1). As these drums are used to store and

transport the materials, the materials have not reached the point of commitment, therefore the manufacturing operation has not begun. Items used in any activity, including movement or storage of the materials before they are committed are taxable. Ohio Adm.Code 5703-9-21(B)(1). Further, tangible personal property used to store raw materials before the point of commitment are taxable. R.C. 5739.011(C)(2). No additional evidence has been submitted.

The drum-style drain cleaner is also taxable pursuant to R.C. 5739.011(C)(8) which states that equipment used to clean, repair, or maintain real or personal property in a manufacturing facility is not a thing transferred as exempted under R.C. 5739.02(B)(42)(g). The claim for refund on these transactions is denied.

ULINE Transaction

The claimant contends that storage racks purchased from ULINE are exempt as items used in packaging pursuant to R.C. 5739.02(B)(15). Packages include bags, baskets, cartons, crates, boxes, cans, wrappings, and other similar devices and containers. The claimant has not provided sufficient evidence to show that the storage racks are used in the packaging process or are similar to the devices delineated in R.C. 5739.02(B)(15). The claim for refund for this transaction is denied.

VWR International Transactions

The claimant made several purchases from VWR International including gloves, vial racks, tables, and an ultrasonic cleaner. The claimant contends that these items are exempt purchases pursuant to Ohio Adm.Code 5703-9-21(C)(6) which states in part that equipment used by a manufacturer to test raw materials or the completed product is exempt.

Vial Racks & Tables

Things that are merely used in the lab or other area where testing occurs, but play no part in the actual testing procedures, such as furniture, are taxable. Ohio Adm.Code 5703-9-21(C)(6). The claimant has not provided sufficient evidence that the vial racks or the tables are used in the testing procedure. Therefore, a refund on those items cannot be granted.

Gloves

Protective clothing such as gloves that are not attached to machinery are taxable. Ohio Adm.Code 5703-9-21(D)(7). Therefore, a refund for gloves purchased from this vendor cannot be granted.

Ultrasonic Cleaner

Finally, the claimant's contention that the ultrasonic cleaner is exempt because it is used to clean lab equipment used in testing is not accepted. Equipment used to clean, repair, or maintain real or personal property in a manufacturing facility is taxable. R.C. 5739.011(C)(8). The claim for refund for this transaction is denied.

Accordingly, a refund in the amount of $12,703.50 with appropriate interest is hereby authorized.

JAN 29 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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: JAN - 9 2020

Richard W. Christenson
7202 Chillicothe Rd.
Mentor, OH 44060-7106

Re: Assessment #: 100000295596
Consumer's Use Tax

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2018-2195, dated December 10, 2019. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

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

	Total
Tax	$16,543.81
Interest	$4,456.19
Penalty	$0.00
Total	$21,000.00

Payments totaling $21,000.00 have been made in full satisfaction of this assessment.

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

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

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: JAN 28 2020

DSW Shoe Warehouse, Inc.
810 DSW Drive
Columbus, OH 43219

Re: Assessment No. 100000205596
Use Tax
Account No. 97-139020

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

Tax	Pre-Assessment Interest	Total
$274,628.33	$30,561.45	$305,189.78

The petitioner is a nationwide shoe and accessory retailer with its headquarters in Columbus, Ohio. This assessment is the result of an audit of the petitioner's purchases for the period of January 1, 2010 through December 31, 2012. The petitioner requested and received a hearing.

As an initial matter, an assessment is presumptively valid. *R.K.E. 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).

Background

The transactions at issue are related to a contractual agreement (the "Agreement") for the petitioner to purchase access to the online e-mail marketing platform from Experian, also called CheetahMail. CheetahMail was an e-mail provider offered through Experian Marketing Services, a division of Experian PLC, a global information company.[1] Experian described CheetahMail as "the world's largest permission-based email marketing provider."[2] They provided a service to allow businesses the space, time, and "sheer Internet power" to send out mass marketing emails.[3]

[1] https://www.experianplc.com/media/news/2010/experian-launches-cheetahmail-email-marketing-service-in-india/
[2] *Id.*
[3] Audit Remarks, p. 24.

Specifically, CheetahMail provided the petitioner access to computer equipment in order to create, customize, and distribute emails.[4] Experian charged a monthly service fee determined by the number of emails sent out each month.[5] Under the terms of its contract, the petitioner was also given an account allowing for it to access "Experian Data", which the contract defines as "any business or consumer data that Experian provides to [DSW] pursuant to this Schedule" located in Attachment 1.[6] The petitioner's access under the contract includes reporting, data management tools, forms creation tools, a secure FTP transfer process setup, inbound support procedure setup, custom user interface, and training for DSW personnel "who will perform production processes to distribute the mailings[.]"[7] In short, the petitioner was purchasing access to Experian's database and the CheetahMail product's ability to segment and customize mass e-mails for marketing purposes.

Analysis

Pursuant to R.C. 5741.02(A)(1), Ohio imposes use tax on "the benefit realized in this state of any service provided." R.C. 5739.01(X) ties that term to the provision of the services that are included in the definition of "sale" under the sales tax. Ohio law includes in the definition of taxable sales all transactions for consideration involving automatic data processing, computer services, or electronic information services are provided. R.C. 5739.01(B)(3)(e). However, it does not include purchases where automatic data processing or electronic information services are incidental or supplemental to the service purchased. *Id.* Purchases are presumed taxable until the contrary is established. R.C. 5741.02(G).

The Petitioner's Purchases Were Taxable Automatic Data Processing

The first issue is whether the petitioner has demonstrated that its purchases were not taxable as automatic data processing services. "Automatic data processing" is defined in R.C. 5739.01(Y) as the "processing of others' data, including keypunching or similar data entry services together with verification thereof, or providing access to computer equipment for the purpose of processing data." Ohio Adm.Code 5703-9-46(A)(1)(a) further defines automatic data processing to include "automatic processing, changing the medium on which data is stored, and preparing business documents such as reports, checks, or bills, whether these activities are done by one person or several persons[.]"

Here, the petitioner was purchasing taxable automatic data processing services. The contract notes that the petitioner was purchasing access to both the CheetahMail platform and Experian's data. Specifically, the petitioner was purchasing e-mail services that included a "custom user interface setup" to CheetahMail, integration of DSW's subscription data and data hygiene processes, a campaign management tool that allowed DSW to fully design and deliver e-mail

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[4] Agreement Attachment 1 – E-mail Services.
[5] Audit Remarks, p. 24-25.
[6] Audit Remarks, p. 27 (noting ADP is "providing access to computer equipment for the purpose of processing data") and Agreement Section 1(n), Section 6.2, and Attachment 1 – Email Services.
[7] Agreement Attachment 1 – E-mail Services and Audit Remarks p. 26-28.

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JAN 28 2020

campaigns, access to a web based application, and delivery options.[8] The Agreement notes that DSW had and retained sole responsibility for the content of its mailings, data, and transmissions.[9] In short, Experian provided a service that processed DSW's data, changing the medium upon which the data was stored, and prepared business documents, i.e., marketing e-mails, based upon DSW's designs. This is taxable automatic data processing.

The petitioner states that the access was "to place rewards customer information to be retrieved by [Experian]" but that this was "merely incidental to the true object of the transaction[,] which is DSW's purchase of mass customer blast services."[10] At hearing and in a subsequent e-mail, the Commissioner requested further evidence for the petitioner's contention that DSW only has access to Experian's system for purposes of reporting. The Commissioner also requested evidence supporting DSW's contention that it did not purchase the campaign management tool (as enumerated in the contract) and that it was a "full service client." The Commissioner finally requested detailed explanations as to what the petitioner did with its Experian access, what data it accessed, and the extent and use of the campaign management tool. The petitioner provided no further evidence. Based upon the record, the Commissioner cannot conclude the petitioner has met its burden to show the assessment was in error.

The Petitioner's Purchases Constituted Taxable Electronic Information Services

The second issue is whether the petitioner has shown that these purchases were not taxable as electronic information services, which the Commissioner will address *arguendo*. Pursuant to R.C. 5739.01(B)(3)(e), electronic information services are provided when (a) the services are provided for "use in business" and (b) the "true object of the transaction is the receipt by the consumer" of those services. "Electronic information services" is defined in R.C. 5739.01(Y)(1)(c) as "providing access to computer equipment by means of telecommunications equipment for the purpose of either" (1) "[e]xamining or acquiring data stored in or accessible to the computer equipment" or (2) "[p]lacing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment."

The petitioner's purchases meet both definitions of electronic information services. The petitioner is purchasing access to Experian's web-based application for e-mail reporting, data management, segmenting, and access to Experian's database.[11] This is "examining or acquiring data stored in or accessible to computer equipment." R.C. 5739.01(Y)(1)(c). The petitioner is further purchasing access to Experian's data for retrieval by the terms of the Agreement and its attachments.

The petitioner cites *Marc Glassman, Inc. v. Levin*, 119 Ohio St.3d 254, 2008-Ohio-3819, 893 N.E.2d 476 for the proposition that DSW was not purchasing electronic information services and the "true object of what DSW is purchasing is the delivery of email and text messages."[12] The

[8] Agreement Attachment 1 – E-mail Services.
[9] Agreement Section 6.4(a).
[10] Petition for Reassessment, p. 3-4.
[11] Audit Remarks, p. 27-28, Agreement Attachment 1, Attachment 2, and Attachment 3.
[12] Petition for Reassessment, p. 4.

petitioner's contention that the case is analogous to this assessment is not well-taken. The Supreme Court of Ohio, solely deciding whether these purchases met the definition in R.C. 5739.01(Y)(1)(c)(1), determined that Marc Glassman, Inc. ("Glassman") was not consuming electronic information services where the insurance company reviewed data provided by a Glassman pharmacist through a separate provider and made a determination as to whether or not the data provided corresponded to an insured. The Court noted:

> What Marc Glassman received from the insurance companies through its provider was not access to the data maintained by the insurance companies, but rather a conclusion formulated by the insurer in response to a routine request. This conclusion did not consist of pure data; rather, it was a preliminary determination that the purchase was covered by insurance—a determination that was even documented with an "authorization number."

Glassman, 119 Ohio St.3d, ¶ 8. The distinction lies in the fact that Glassman never actually received access to the insurer's data – it only received a notification of what the insurance company determined based upon its own data. The petitioner has not alleged specifically how CheetahMail or Experian provided the petitioner with conclusions based upon CheetahMail or Experian's data. The contract only reflects data access and the petitioner's access to a system for segmenting and customizing mass marketing e-mails. This is a taxable electronic information service.

The purchases also meet the second definition of electronic information service. The contract clearly states that Experian placed its data into a system for retrieval by the petitioner. The petitioner has failed to offer any evidence in contradiction. Therefore, these purchases meet the second definition of an electronic information service.

At hearing and in a subsequent e-mail, the Commissioner requested evidence related to the petitioner's use of CheetahMail and Experian. The petitioner failed to provide any of the requested evidence. Based upon the record, the Commissioner cannot conclude the petitioner has met its burden to show error in the assessment.

The Petitioner Has Offered No Evidence for Its Claim that Use Tax Should Be Apportioned

The petitioner further states that any use tax should be proportioned through the nationwide rewards members it claims it used Experian to contact. This fails for three reasons.

First, Ohio's use tax is levied on benefits realized in this state. R.C. 5741.02(A)(1). It is undisputed that the petitioner consumed Cheetahmail's services in Ohio.

Second, the petitioner claims that, because its rewards customers are receiving these mass e-mails across the country, the benefit of the Cheetahmail services is not realized until its customers go to a DSW store to use their e-mail rewards. Essentially, DSW is arguing that the e-mail recipients are the ultimate consumers of Cheetahmail. A consumer is any person who has purchased a service for use in the state of Ohio. R.C. 5741.01(F). The purchaser of the service

was DSW. Additionally, a consumer does not include a person who receives a service without any charge. *Id.* There is no evidence that the e-mail recipients were charged to receive these e-mails.

Third, at hearing and in a subsequent e-mail, the Commissioner requested any evidence in support of DSW's sourcing contentions, including the proportion that should be sourced to Ohio. The petitioner failed to provide any of the requested information. Accordingly, the Commissioner cannot conclude the petitioner has met its burden to show error in the assessment.

Therefore, the assessment is affirmed.

Current records indicate that a payment of $224,041.77 has been applied on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any 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

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: JAN - 6 2020

John L. Johns
98 2nd Street
Elyria, OH 44035

Re: Assessment No. 100001072958 and 100001072959
Consumer's Use Tax

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

Assessment No.	Tax	Pre-Assessment Interest	Penalty		Total
100001072958	$1,350.00	$39.18	$202.50		$1,591.68
100001072959	$675.00	$19.59	$101.25		$795.84
				Total	$2,387.52

A hearing was scheduled for November 6, 2019. The petitioner failed to appear.

This assessment was issued based upon the conduct of a special audit of a motor vehicle and trailer title transfer. The petitioner purchased a semi-truck and trailer without the payment of tax on February 27, 2018. The Ohio Department of Taxation was unable to verify the exempt use of the items. Accordingly, these assessments were issued.

The petitioner claims exemption on two separate grounds. First, the petitioner contends that the purchases were claimed under the transportation for hire exemption, R.C. 5739.02(B)(32), at the time title was issued. Alternatively, the petitioner contends that the transfers were solely for insurance purposes and that no money was exchanged.

The petitioner provided no evidence to support either of these claims. There are no PUCO or Department of Transportation identification numbers, driver logs, invoices, or other information provided to support the claim that the semi-truck and trailer were used as transportation for hire. As to the second claim, titles to both the semi-truck and trailer show purchase prices of $20,000 and $10,000 respectively. The petitioner has provided no evidence, in the form of signed affidavits from the grantee or other acceptable documentation, that these amounts were not paid, or that no consideration changed hands in the transactions. The petitioner failed to provide sufficient evidence to support his claims.

Accordingly, the assessments are affirmed as issued.

JAN - 6 2020

Current records indicate that no payments have been applied on these assessments, leaving a balance of $2,387.52. 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 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: JAN - 9 2020

JP Transport, Inc
6469 Nicholas Dr.
Columbus, OH 43235

Re: Assessment No. 100000948906
Consumer's Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$4,266.86	$67.76	$640.03	$4,974.65

This assessment was issued based upon the conduct of a special audit of a motor vehicle title transfer. The petitioner purchased a vehicle without the payment of tax. The Ohio Department of Taxation was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. A hearing was held on November 14, 2019.

The petitioner contends that the vehicle is exempt under R.C. 5739.02(B)(32). Based on a review of the evidence presented after the hearing, the petitioner's contentions are well taken.

Accordingly, the assessment is cancelled.

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

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

Jeffrey A. McClain

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: JAN 2 9 2020

Knox Energy Inc.
11872 Worthington Rd.
Pataskala, OH 43062

Re: Assessment Serial No.: 100001345153
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$9,425.00	$343.98	$1,413.75	$11,182.73

This assessment is the result of an office audit of the petitioner's purchase of a crane carrier. The petitioner purchased a 1984 Cooper Crane Carrier on October 29, 2018 without the payment of tax. The exempt use of the vehicle could not be verified. Accordingly, this assessment was issued. The petitioner objected to the assessment. A hearing was not requested. The petitioner withdrew its petition for reassessment via email on January 23, 2020.

Accordingly, the appeal is dismissed.

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

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (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: JAN - 9 2020

Liquid Luggers LLC
c/o JaSar Recycling
183 Edgeworth Ave.
East Palestine, OH 44413

Re: Assessment Serial No.: 100001054127
Consumer's Use Tax
Account No.: 97-302592

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

Tax	Pre-Assessment Interest	Penalty	Total
$36,448.59	$5,251.93	$5,467.03	$47,167.55

This assessment is the result of a field audit of the petitioner's purchases for the period between January 1, 2012 and June 30, 2015. During the audit, the petitioner mentioned that it had several trucks and trailers that were exempt due to the "Highway Transportation for Hire" exemption. The exempt use of the vehicles could not be verified and, therefore, this assessment was issued. The petitioner objects to $20,793.22 of the assessment and contends that its trailer and the repairs and maintenance to that trailer were exempt as transportation for hire because the trailer was used to haul property for its customers and fees were charged for those services. A hearing was held in this matter on Thursday, October 24, 2019.

The issue is whether the petitioner qualifies for the exemption. R.C. 5739.02(B)(32) exempts "the sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are *primarily* used for transporting tangible personal property by a person engaged in highway transportation for hire." (Emphasis added.) Accordingly, to qualify for the exemption, the petitioner must be licensed by the Public Utility Commission of Ohio (PUCO) or the United States Department of Transportation (USDOT) authorizing it to transport personal property belonging to others for consideration and the equipment for which the exemption is claimed must be "primarily used for transporting tangible personal property belonging to others." It is the primary use of the equipment that will determine whether the exemption applies. R.C. 5739.01(Z).

An assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *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). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections.

Leasing of Vehicles

The petitioner leased trucks used in the fracking industry. The petitioner contends that it rented its equipment, including vehicles, to customers but did not operate any of the rented equipment for its customers. Audit Remarks, Page 6. Occasionally the petitioner installed equipment, such as rig mats, for its customers which required the petitioner to deliver the items to the customers. In this instance, the petitioner is primarily moving its own goods. When the petitioner leased its trucks or trailers, its customers were renting such equipment and the equipment remained the personal property of the petitioner during transport. Additionally, the rented vehicles were not operated by the petitioner. Customers merely purchased the right to use the petitioner's equipment for a limited period to transport their own personal property. Therefore, the petitioner was not primarily using the trailer to transport personal property belonging to others for consideration as provided by R.C. 5739.02(B)(32).

Alternatively, the petitioner did not submit a completed usage questionnaire from the Ohio Department of Taxation that requests a percentage breakdown of the use of the vehicle, which should add up to 100 percent. During the hearing, the petitioner confirmed it was unable to provide a percentage breakdown of the use of the vehicle. After the hearing, the petitioner stated that it submitted an Ohio Department of Taxation Transportation for Hire Questionnaire during the audit. Departmental records indicate that the petitioner did not submit the Questionnaire or any other documentation to verify the primary use of the vehicle. Since there are no records to verify the use of the vehicle was exempt, the petitioner failed to prove error in the assessment.

The petitioner erroneously concludes that because it maintained a PUCO certificate, it automatically engaged in highway transportation for hire. While the petitioner provided valid PUCO and US DOT license numbers during the audit period, it did not provide any information as to the use of the vehicle other than an uncorroborated statement that the company engages in transportation for hire as evidenced by its PUCO number. As provided in *Rumpke Container Serv., Inc. v. Zaino*, 94 Ohio St.3d 304, 762 N.E.2d 995 (2002), even if the petitioner had a permit or certificate within the meaning of R.C. 5739.01(Z)(1), it did not show that it was transporting personal property belonging to others for consideration. The petitioner has failed to demonstrate that it meets the requirements for this exemption. The objection is denied.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payments have been made toward the assessment, leaving a balance due of $47,167.55. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 3 1 2020

Myers Industries, Inc.
1293 South Main St.
Akron, OH 44301

Re: Assessment No. 100000130732
Use Tax

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

Tax	Pre-Assessment Interest	Total
$451,066.66	$71,514.40	$522,581.06

The assessment was issued based upon an audit of the petitioner's purchases for the period of January 1, 2008 through December 31, 2012. The petitioner requested and received a personal appearance hearing.

The petitioner objects to a portion of the assessment regarding transactions with Twinsburg Staffing, Inc. dba Integrity Staffing/Staffmatrix ("Integrity") it believes should be excluded under R.C. 5739.01(JJ)(3). This contention is well taken. The transactions with Integrity shall be removed from the assessment. Therefore, the assessment shall be modified as follows:

Tax	Pre-Assessment Interest	Total
$382,772.80	$60,651.89	$443,424.69

Current records indicate that a payment of $522,581.06 has been received in complete satisfaction of this assessment. A refund is due in the amount of $79,156.37 plus applicable interest.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JAN 15 2020

PCM OH, Inc.
Attn: Tax Department
1940 E. Mariposa Avenue
El Segundo, CA 90245

Re: Assessment No. 100000899410
Use Tax
Ohio Tax Account #: 97-174994

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

Tax	Pre-Assessment Interest	Penalty	Total
$555,512.49	$59,793.35	$83,326.87	$698,632.71

The petitioner did not request a hearing.

The petitioner is in the business of software and hardware installation, help desk services, virtual solutions, software, hardware, staff augmentation, IT Services, and computer consulting services. Within Ohio, the petitioner maintains a data center in New Albany and a sales office in Lewis Center. This assessment is the result of a field audit of the petitioner's purchases for the period of January 1, 2013 through December 31, 2015. The assessed transactions include purchases of taxable business fixtures and tangible personal property, such as purchases of specialty electrical systems for the data center, exterior signage, raised flooring for business use, carpeting, and other similar items.

The petitioner appealed with a general objection regarding the assessed business fixtures. The petition for reassessment asserts that the petitioner's contractor was obligated to pay any taxes due and did so. The petitioner included a letter from the Daimler Group ("Daimler") and cited Ohio Adm.Code 5703-9-14 in support. The petitioner argues that Daimler's payments should offset this assessment and that the petitioner does not have any use tax liability as a result.

An assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc.*,

dba Forest Hills Eagle v. Tracy, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

The Petitioner Failed to Show Error in the Assessment

Generally, construction contractors are the consumers of materials or taxable services for incorporation into real property. R.C. 5701.02 and Ohio Adm.Code 5703-9-14(D)(1). However, the petitioner was assessed for taxable purchases of tangible personal property and business fixtures of which it was the consumer. *See* R.C. 5701.03. The petitioner's argument makes three assumptions: first, that its purchases were of materials to be incorporated in real property; second, that this was a construction contract as defined in Ohio Adm.Code 5703-9-14(A); and, third, that Daimler was a construction contractor as defined in the Ohio Administrative Code. Ohio Adm.Code 5703-9-14(A) and Ohio Adm.Code 5703-9-14(D)(1). It has not advanced any legal or factual argument in support of these presuppositions. The petitioner did not provide any exemption certificates related to the alleged construction contract as required by Ohio Adm.Code 5703-9-14(D)(2). The petitioner further did not identify the objected transactions. The auditor noted in his remarks that he explained the relevant use tax code sections with the petitioner, yet it has still not provided any rationale as to why the assessed items are not business fixtures. Audit Remarks, Page 19. The petitioner has not shown any evidence or provided any justification for the assumptions in its objection.

The petitioner has not met its burden to show error in the assessment. The petitioner's sole evidentiary support is a written statement from Daimler that it and all its subcontractors paid tax on all purchases related to the construction of the data center. The petitioner did not submit any invoices, spreadsheets, receipts, or other information to corroborate this blanket assertion. Evidence that is summary in nature without any further corroboration from primary records does not meet the taxpayer's burden to prove error in a use tax assessment. R.C. 5741.15; *see Bay Mechanical & Electrical Corporation v. Levin*, BTA No. 2008-K-1687, 2011 WL 2446198 at *3 (June 14, 2011), *aff'd sub nom. Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, 978 N.E.2d 882, ¶ 36; *see also In re Allied Construction Industries, Inc.*, 602 B.R. 645, 671 (Bankr.N.D.Ohio 2019) ("Moreover, the entire use tax audit process relies on businesses maintaining written records. To overturn audit findings where no documents have been produced would be contrary to the foundation the use tax assessment system is built upon."), citing *Kern v. Tracy*, 72 Ohio St.3d 347, 349, 650 N.E.2d 428, 429 (June 28, 1995). Regardless as to the legality of the petitioner's argument, it has not provided any proof of payment, a list of contested transactions, or any relevant, probative evidence that would allow the Commissioner to verify and quantify any correction of a claimed error in the assessment. "Although the appellant is not precluded from contesting the audit, if it is claimed that the liability * * * is excessive, the burden is upon appellant to establish its actual tax liability or any other error in the assessment by competent, probative evidence." *MDV Enterprises, Inc. v. Wilkins,* BTA No. 2004-A-1319, 2006 WL 1367916 (May 5, 2006) (citations omitted). As a result, the petitioner has failed to show any error in the assessment.

Construction Contractor's Payments

The petitioner's argument is nearly identical to the one rejected by the Board of Tax Appeals ("BTA") in *Meijer Inc. v. Tracy*, BTA No. 97-M-1618, 2001 WL 128070 (Feb. 8, 2001). There, retail company Meijer stated that its construction contractors had mistakenly paid use tax on signage, a business fixture, believing the materials to be incorporated into real property. Meijer argued that its use tax assessment should be offset by those taxes paid as a result. As the BTA stated:

> We would note that we have been provided with no evidence that Meijer's contractors paid use tax upon its purchases. Even if we had been provided such evidence, however, we would not agree that Meijer's assessment should be reduced. If the contractors had paid such use taxes to the state, Meijer's request would be to apply the use taxes paid by another to its assessment. Meijer has not provided us with such authority. The refund provisions under the sales and use tax statutes require the Tax Commissioner to refund taxes erroneously paid to the consumer when the consumer has paid directly to the treasurer of the state or to a vendor when the vendor collected and paid over the taxes. R.C. 5739.07. *The statutes contain no provision for crediting taxes paid by one consumer to the account of another.*

Id (emphasis added). The petitioner has identified no legal avenue to support its argument. Its objection fails as a matter of law.

The petitioner has failed to show any error in the assessment. Therefore, the assessment shall stand as issued.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 15 2020

Sean Pellerite
26965 Valeside Lane
Olmsted Township, OH 44138

Re: Refund Claim No. 201806885
Refund Amount Requested: $1,916.28
Refund Period: March 2018
Account #: 95-507019
Use Tax

This final determination of the Tax Commissioner hereby vacates and replaces the final determination, issued November 8, 2019.

This is the final determination of the Tax Commissioner with regard to an application for refund 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 claimant, Sean Pellerite, purchased a vehicle in Virginia and had it shipped to Ohio in March of 2018. Mr. Pellerite made a payment of $24,000 to cover the sale, of which $12,000 was from the claimant, and the other $12,000 was provided by a lender. The claimant later discovered that the VIN number had been changed, and the car was stolen. The claimant requests a refund of the use tax paid on the vehicle.

Pursuant to Ohio Adm.Code 5703-9-07(A)(4), an application for refund filed by a customer must show that the tax was remitted to the vendor or directly to the state and provide applicable supporting documentation. Further, if a customer returns or rejects merchandise and the vendor fails to refund or credit the customer's account with the full purchase price and applicable tax, the transaction cannot be treated as a return of merchandise for purposes of reporting sales or use tax. Ohio Adm. Code 5703-9-11. Moreover, the Board of Tax Appeals has explicitly stated that in order for a customer to receive a refund of the tax, the customer must first receive a full refund of the purchase price, including tax. *Buick Youngstown Co. v. Tracy*, BTA No. 93-R-1130, 1994 WL 193898 (May 13, 1994).

The claimant provided a copy of the title and the purchase agreement proving that use tax had been paid to the state. The claimant also provided proof that the customer's $12,000 down payment had been returned to the customer. The claimant made a payment of $313.97 towards the loan to the lender leaving an outstanding balance of $11,686.03. The claimant provided proof that the remaining balance on the loan was returned to the lender and submitted proof that the initial payment made towards the

JAN 15 2020

loan was returned. The claimant requested a refund of $1,916.28, however the evidence shows that the claimant paid $1,915.23 in use tax.

Therefore, a refund in the amount of $1,915.23 with appropriate interest is hereby authorized.

If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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

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: JAN 2 3 2020

Transglobal, Inc
225 N Patterson Street
Carey, OH 43316

Re: Assessment No. 100000644647
Consumer's Use Tax
Account No. 97-303978

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5741.14 concerning a consumer's use tax assessment.

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

Tax	$130,000.00
Penalty	$10,000.00
Interest	$10,000.00
Balance Due	$150,000.00

The modified assessment has been paid in full.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: JAN 29 2020

Triumph Thermal Systems LLC
200 Railroad St.
Forest, OH 45843

RE: Refund Claim No. 201503832
Use Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $17,393.01, in sales tax filed pursuant to R.C. 5739.07 and 5741.10. The claim was initially granted in part with a refund of the sales tax paid in the amount of $12,794.25 plus applicable interest. The claimant disagreed with the partial 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). R.C. 5739.07 allows a claimant to request a refund of tax illegally or erroneously paid.

The claimant is a manufacturer of aircraft heat exchange, transfer systems, and temperature control components. The claimant is seeking a refund of tax paid on the remaining amount of $3,745.20 plus applicable interest for the period from September 27, 2010 through June 15, 2014. The claimant contends that it erroneously paid sales tax on purchases which were either exempt from tax or tax was paid twice on the same transactions due to the vendor collecting the incorrect sales tax. The claimant provides that while sales tax was collected from the vendor, the claimant also remitted tax on its use tax returns, which resulted in doubly taxed transactions.

The Department informed the claimant during the initial denial that the Department requires additional evidence to support the sales tax exemptions claimed on the refund application, and proof that sales tax was paid twice on the transactions. The Department provided the claimant with a spreadsheet of requested information needed to permit a refund of the remaining amount.

The claimant provided a packet and DVD of information summarizing its analysis of its claimed exemptions. The claimant also provided the previously submitted information of invoices, cancelled checks, and use tax returns. The claimant also submitted information from transaction where they contend tax was paid twice.

Double Taxed Transactions

The claimant contends that it paid tax twice on multiple transactions because it remitted use tax to account for insufficient sales tax collection by the vendor. The claimant erroneously remitted

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the full use tax amount on some transactions rather than the remaining tax balance. The claimant provided sufficient evidence to warrant a refund of tax paid on twice taxed transactions. However, in some circumstances the claimant requested a refund of sales tax using an incorrect county tax rate or an incorrect refund tax base in its calculation, which already included sales tax. Therefore, this objection is granted in part.

Prescription Eyeglasses

The claimant contends that its prescription eyeglass purchases are exempt as non-taxable services in accordance with R.C. 5739.01(B)(3). The citation included by the claimant does not support its contention as it refers to the general definition of transactions which are considered sales. Further, the information provided by the claimant does not explain why the transactions are exempt from sales tax. The claimant fails to elaborate which section of the Ohio revised Code provides an exemption for the purchases at issue.

Additionally, while current law provides an exemption for prescription eyeglasses as prosthetic devises under R.C. 5739.02(B)(19), this tax exemption did not exist at the time of claimant's purchases. R.C. 5739.01(JJJ) did not include prescription eyeglasses under the definition of "prosthetic devices" until July 1, 2019. The transactions in which the claimant requests a refund of tax paid occurred prior to 2014. Therefore, even if the claimant had provided the appropriate statute, the transactions would not qualify.

The claimant has not satisfied its burden that the claimant is entitled to a refund for the aforementioned exemptions. However, the use tax returns provided by the claimant support that the claimant is entitled to a refund for overpayments of use tax. The evidence provides that the claimant used the wrong county tax rate when remitting use tax. Therefore, the claimant is entitled to a refund for overpayments of use tax remitted.

Manufacturing and Processing of Component Parts

The claimant provides that purchases from various vendors were exempt from sales tax as items used primarily in manufacturing and replacement parts for manufacturing equipment pursuant to R.C. 5739.01(B)(42)(g). The claimant cites R.C. 5739.01(B)(42)(g) for the exemption of use of the thing transferred primarily in a manufacturing operation to produce tangible personal property for sale; however, the Department of Taxation understands that the claimant likely intended to include the exemption provided in R.C. 5739.02(B)(42)(g). The refund request for tax paid on purchases exempt as manufacturing and processing are addressed below by vendor name.

Fastenal

The claimant contends that it erroneously paid use tax in the amount of $746.65 for various purchases from the vendor Fastenal Company in which the vendor did not collect the sales tax owed. The claimant provided purchase orders with items highlighted and use tax returns showing

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tax paid on purchases from the vendor. However, there are discrepancies between the figures the claimant submitted. The items highlighted in the purchase orders do not correspond to the requested refund amount. Further, the information provided by the claimant does not support the amount filed on the amended return for this period.

The Department informed the claimant during the initial denial that the Department required additional evidence to support the sales tax exemption of manufacturing for these purchases, including a detailed statement of the usage for the parts claimed as exempt. Although the claimant was given an opportunity to provide proof that the purchases in question qualified under R.C. 5739.02(B)(42)(g), no additional information was provided. The Department conducted a cursory review of the invoices provided to determine if any highlighted purchases were inherently exempt from sales tax; however, many of the items highlighted are specifically listed as taxable tangible personal property pursuant to statute. Since the claimant did not provide evidence of usage, the exempt nature of the transactions cannot be established. The claimant has not satisfied its burden that the claimant is entitled to a refund. Therefore, the refund request is denied.

Information Handling

The claimant contends that it erroneously paid use tax in the amount of $140.00 for a purchase of engineering software from the vendor, Information Handling, in which the vendor did not collect the sales tax owed. The claimant provided a purchase order and a use tax return showing tax paid on the purchase.

Ohio Adm.Code 5709-3-21(D)(1) provides that software used for communication, ordering, billing, inventory control, or record keeping, including testing or production records, is taxable. The Department requested a detailed statement from the claimant regarding the online database and whether the claimant could manipulate the database. Although the claimant was given an opportunity to provide proof that the purchase in question qualified under R.C. 5739.02(B)(42)(g), no additional information was presented to the Department to explain the usage and capabilities of the database. Since the claimant failed to provide evidence that the database is manipulated for use in the continuous manufacturing operation, the claimant's refund request is denied.

Non-taxable Services for Video Production

The claimant contends that its purchase of video production services for a health and safety video is exempt as a non-taxable service in accordance with R.C. 5739.01(B)(3). The citation included by the claimant does not support its contention as it refers to the general definition of transactions which are considered taxable sales. Further, the information provided by the claimant does not explain why the transaction is exempt from sales tax or provide a detailed statement of the invoice, which was the reason for the initial denial. The claimant has not satisfied its burden that the claimant is entitled to a refund as it failed to specify why the service was not subject to sales tax. The claimant's refund request for this transaction is denied.

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Research and Development

The claimant provides that purchases of services from various vendors were exempt from sales tax as maintenance services used in the development and design of a product pursuant to R.C. 5739.01(B)(42)(i). The claimant cites R.C. 5739.01(B)(42)(i) for the exemption of use of the thing transferred as qualified research and development equipment; however, the Department of Taxation understands that the claimant intended to include the exemption provided in R.C. 5739.02(B)(42)(i). The claimant's refund request for tax paid on services exempt as qualified research and development are addressed below by vendor name.

Key Blue Prints, Inc.

The claimant contends that it erroneously paid use tax in the amount of $85.04 for purchases of maintenance services on format printers used in the development and design of a product from the vendor, Key Blue Prints, Inc., in which the vendor did not collect the entire sales tax owed. The claimant provided purchase orders and use tax returns showing the difference in tax collected from the vendor and tax remitted by the claimant on the purchases.

R.C. 5739.02(B)(42)(i) provides that only *qualified* research and development equipment is eligible for exemption from taxation. (Emphasis added.) According to R.C. 5739.01(HH), qualified research and development equipment is defined in part as capitalized tangible personal property and leased personal property that would be capitalized if purchased, used by a person primarily to perform research and development. In Tax Commissioner Opinion 03-0003, the Tax Commissioner states in part, "... equipment used in research and development will be considered 'capitalized' as that term is used in R.C. 5739.01(HH) if the property has a useful life substantially beyond the taxpayer's annual accounting period in which the property was acquired or constructed." The Opinion provides that such property is chargeable to a capital account and subject to depreciation. In order for the exemption to apply, the claimant must provide proof that the equipment is capitalized, and therefore constitutes qualified research and development equipment.

The Department gave the claimant an opportunity to provide proof of the exempt use of the equipment under R.C. 5739.02(B)(42)(i); however, no information was presented to support the exemption listed by the claimant. Since the claimant failed to provide evidence to support its contention, the claimant's refund request for purchases made through this vendor must be denied.

Spaceclaim Corp.

The claimant contends that it erroneously paid use tax in the amount of $1,199.80 for engineering 3D modeling software used to aide in the design of manufactured goods from the vendor, Spaceclaim Corp., in which the vendor did not collect the entire sales tax owed. The claimant provided purchase orders and use tax returns showing the difference in sales tax

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collected from the vendor and use tax remitted by the claimant on the purchases. The Department requested that the claimant provide evidence of the exempt use of the software, including proof that the software was capitalized. As with Key Blue Prints, Inc., the claimant failed to provide the requested information to support its contention that the software was exempt under R.C. 5739.02(B)(42)(i). Therefore, the claimant's refund request is denied.

Separately Stated Support Fees

The claimant provides that purchases of services from two vendors were exempt from sales tax pursuant to Ohio Adm.Code 5703-9-59(C)(2) as support services involving optional computer software maintenance contracts. The claimant contends that it erroneously paid use tax in the amount of $391.47 for purchases from two vendors for separately stated support fees for software maintenance. The claimant provided purchase orders and use tax returns showing the difference in sales tax collected from its vendors and use tax remitted by the claimant on the purchases.

The Department informed the claimant during the initial denial that the Department required additional evidence to support the sales tax exemption claimed for these purchases, including a detailed statement of what remote support was received, such as help desk support or support on taxable software. Although the claimant was given an opportunity to provide support, no additional information was presented to the Department. The claimant has not satisfied its burden that the claimant is entitled to a refund. Therefore, the refund request for these purchases is denied.

Therefore, the claim for a refund is granted in the adjusted amount of $397.95 plus applicable interest.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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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:

JAN 2 2 2020

Windsor Fashions, Inc.
4533 Pacific Boulevard
Vernon, CA 90058

Re: Assessment No. 100000824070
Use Tax
Ohio Tax Account No. 97304030

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-251, dated November 18, 2019. In that order, the Board remanded the case to the Tax Commissioner for further consideration.

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

	Total
Sales Tax	$81,852.93
Pre-assessment Interest	$10,340.25
Post Assessment Interest	$7,124.48
Penalty	$0.00
Total	**$99,317.66**

Payments and credits totaling $99,317.66 have been received in complete satisfaction of this assessment.

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

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

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: JAN 28 2020

Youngstown Ohio Hospital Company LLC
P.O. Box 449
Youngstown, OH 44501

Re: Assessment No. 100000552027
Use Tax
Account No. 97-803744

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

Tax	Pre-Assessment Interest	Total
$396,748.06	$26,021.55	$422,769.61

The assessment is the result of an audit of the petitioner's purchases from January 1, 2013 through December 31, 2015. The initial hearing on this matter was held with the representative but the representative requested a continuance during the hearing, which was granted. A second hearing was scheduled for May 7, 2019 but the petitioner failed to appear.

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

Audit Methodology

A block sample analysis of expenses and a comprehensive review of capital assets was used to calculate use tax due based upon a sample period of January 1, 2015 through December 31, 2015. The petitioner and auditor agreed the sample period was representative of the petitioner's business. Audit Remarks, Page 5. Furthermore, the petitioner signed a memorandum of agreement that specified the methodology of the audit. The agreement specified that the audit would be conducted using a block sample of expenses, as well as a comprehensive review of capitalized assets. The audit agreement is binding and enforceable. When entering into a valid, enforceable agreement, the petitioner waives any objection it may have regarding the method used to determine sales. *Markho, Inc. dba One Stop Carry Out and One Stop Mini Mart v. Tracy,* BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999), citing *Akron Home Medical Services v. Lindley,* 25 Ohio St.3d 107, 495 N.E.2d 417 (1986). *See also Shaheen, Inc. dba Abe's Quick Shoppe v. Tracy*, BTA No.

96-M-1231, 1998 WL 127061 (Mar. 20, 1998), citing *Akron Home Medical Services v. Lindley,* 25 Ohio St.3d 107, 495 N.E.2d 417 (1986). The petitioner's objections will be addressed by vendor.

Airgas Great Lakes, Inc.

The petitioner contends their purchases of oxygen storage tanks are exempt because they were purchases of oxygen dispensing equipment. Medical oxygen dispensing equipment is exempt from sales and use tax when purchased by a hospital. R.C. 5739.02(B)(18). Statutes allowing a tax exemption are to be strictly construed. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). The burden is on the party claiming an exemption to prove the transaction in question meets the requirements of the exemption. *OCLC Online Computer Library Ctr., Inc. v. Kinney*, 11 Ohio St.3d 198, 464 N.E.2d 572 (1984). The petitioner submitted a contract and invoice showing the purchase of two bulk storage tanks for medical oxygen. This evidence is insufficient to overcome the petitioner's burden. The evidence does not show the tanks were used for dispensing medical oxygen, merely storing it. The objection is denied.

B.E. Smith, Inc.

The petitioner contends the Interim OR Director supplied by B. E. Smith, Inc. was not a taxable employment service because the service was for medical services. Providing employment services is considered a taxable transaction but there is an exclusion from the definition of taxable employment services for medical services. R.C. 5739.01(JJ)(2). Medical and health care services are those involved in patient care. Department of Taxation Information Release ST 1993-08. The petitioner stated during the audit that the position did not involve patient care. Audit Remarks, Page 9. The burden is on the petitioner to prove the transactions are excluded from the definition of taxable employment services per R.C. 5739.01(JJ)(2). The petitioner provided the contract with B. E. Smith, Inc. and the invoice for the temporary employee. This evidence does not demonstrate the position involved patient care. Therefore, the petitioner has not shown that the transaction was improperly included in the assessment. The objection is denied.

Calyx, Inc.

The petitioner contends the transaction with Calyx, Inc. was exempt as it was for calibration services and should be removed from the audit calculation. Calibration services are considered taxable if repairs or adjustments are performed along with the calibration. *Dayton Testing Laboratory, Inc. Tracy*, BTA No. 93-T-339, 1994 WL 693441 (Dec. 5, 1994). In *Dayton Testing*, the taxpayer presented testimony and evidence to the Board of Tax Appeals which showed the calibrations performed. The petitioner has presented no such evidence with their petition for reassessment. The invoice submitted by the petitioner merely states the transaction was for "CE Test Equipment." The burden is on the petitioner to show error in the assessment. The objection is denied.

Fresenius Management of Indiana, Inc. and Johnson and Johnson Consumer Co.

The petitioner contends these transactions are exempt as purchases of prosthetic devices or repair

parts for prosthetic devices. Sales of prosthetic devices made pursuant to a prescription for a human being are exempt from sales tax. R.C. 5739.02(B)(19). Statutes allowing a tax exemption are to be strictly construed. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). The burden is on the party claiming an exemption to prove the transaction in question meets the requirements of the exemption. *OCLC Online Computer Library Ctr., Inc. v. Kinney*, 11 Ohio St.3d 198, 464 N.E.2d 572 (1984). The petitioner did not present evidence that the purchases in question were made pursuant to a prescription. The petitioner has not met its burden. The objection is denied.

Seaspine Sales LLC and Johnson and Johnson Consumer Co. Invoice 914760180

The petitioner contends invoices from Seaspine Sales LLC and Johnson and Johnson Consumer Co. invoice 914760180 are tax exempt purchases. The petitioner presented sufficient documentation to support their contention. The objection is allowed.

Johnson and Johnson Consumer Co. Invoices 914330947, 914497696, and 914760180

The petitioner contends the transactions on these invoices are exempt from taxation. The petitioner was not assessed tax liability on these transactions in the audit. Therefore, no adjustment can be made and the objection is denied.

Johnson and Johnson Consumer Co. Invoice 914427304

The petitioner submitted this invoice with their petition for reassessment. The petitioner did not specify why this product should be considered exempt from taxation. Additionally, this item appears to be tangible personal property consumed by the petitioner. The burden is on the petitioner to show error in the assessment. The objection is denied.

Trinity Door Systems, Inc.

The petitioner contends tax was improperly accrued on a transaction with Trinity Door Systems because the transaction was the repair of real property. From the invoice that was provided, it appears that a door in the "Hallway to Cath Lab" was repaired. The petitioner has not provided any information about the door, but the invoice indicates that the door featured an electric motor and a computerized control box. The door appears to be a specialized door which would be considered a business fixture. Business fixtures are considered personal property, not real property. R.C. 5701.03(A). The sale or use of tangible personal property is presumed taxable. *Moulton Gas Service, Inc. v. Zaino*, 97 Ohio St.3d 48, 2002-Ohio-5309, 776 N.E.2d 72 ¶ 12. An item is considered a business fixture if it is devoted primarily to the business conducted on the premises instead of primarily to the use of the land. *Funtime, Inc. v. Wilkins*, 105 Ohio St.3d 74, 2004-Ohio-6890, 822 N.E.2d 781. The burden is on the petitioner to show error in the assessment. The petitioner submitted additional evidence but did not explain how the additional evidence proves error in the assessment. This is insufficient to overcome the petitioner's burden. The objection is denied.

Leases

The petitioner contends tax on the lease of a Da Vinci IS 3000 was paid at the inception of the lease. The petitioner provided a lease signed by a different company. The petitioner did not provide sufficient documentation to show proper tax on that lease was paid or an explanation of how that lease relates to the petitioner. The objection is denied.

The petitioner contends tax was improperly assessed on a lease for a Restoris Hip Application Bio Robot. The explanation as to why tax liability on this lease should be altered by the petitioner only states "monthly rental." Petition for Reassessment, Page 2. The petitioner does not expand on why this should reduce their tax liability. Furthermore, the petitioner submitted evidence regarding this lease that suggests the lease in question was not a month to month rental during the audit period. The burden is on the petitioner to show error in the assessment. The objection is denied.

Fixed Assets

The petitioner contends twelve transactions concerning fixed assets are exempt as construction contracts. Construction contractors are considered the consumers of their materials when, pursuant to a contract, tangible personal property is incorporated into real property. R.C. 5739.01(B)(5). However, business fixtures are considered personal property, not real property. R.C. 5701.03(A). The sale or use of tangible personal property is presumed taxable. *Moulton Gas Service, Inc. v. Zaino*, 97 Ohio St.3d 48, 2002-Ohio-5309, 776 N.E.2d 72 ¶ 12. An item is considered a business fixture if it is devoted primarily to the business conducted on the premises instead of primarily to the use of the land. *Funtime, Inc. v. Wilkins*, 105 Ohio St.3d 74, 2004-Ohio-6890, 822 N.E.2d 781. The burden is on the petitioner to prove error in the assessment. This burden means the petitioner must do more than merely restate the exemption. *Safety-Kleen Corp. v. Tracy*, BTA No. 95-L-1092, 1998 WL 887688 (Dec. 11, 1998), citing *Stotts-Friedman Co. v. Lindley*, 69 Ohio St.2d 348, 432 N.E.2d 202 (1982). The petitioner merely states the contracts in question are construction contracts. They do not provide an explanation as to why these installations should be considered real property. A review of the disputed transactions shows they appear to be specialized business fixtures. The objection is denied.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Total
$396,506.34	$25,777.03	$422,283.37

Current records indicate that payments of $372,853.91 have been applied on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post-assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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JAN 28 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

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Tax Commissioner