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

FINAL DETERMINATION

Date:

MAR 2 0 2020

Elaine T. Bologna
First Property Investments, Ltd.
1005 Robinwood Hills Drive
Akron, OH 44333

Re: Ohio Tax Account #: 95190646
Tax Type: Commercial Activity Tax
Assessment No. 100000782805
Period: 01/01/2016 – 12/31/2016

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

Tax	AMT	Interest	Penalties	Total
$500.00	$2,600.00	$40.07	$620.00	$3,760.07

The Department of Taxation issued an assessment because the petitioner, First Property Investments, Ltd., (hereinafter "the petitioner") did not file a return and remit its CAT for the period in question. The petitioner also failed to pay the annual minimum tax ("AMT") owed for tax year 2017. Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed an estimated 2017 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 additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner objects to the assessment, but did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

On September 10, 2016, the petitioner filed a CAT CR Request to Cancel attempting to retrospectively cancel its account effective 01/01/2015. However, the petitioner failed to timely file the form on or before May 10th of the current calendar year to avoid being subject to CAT and the AMT for the relevant calendar year. After reviewing the CAT CR and verifying that the petitioner's operations had ceased, the Department concluded that the operations ceased on or around 09/12/2017 and cancelled its CAT account accordingly. The petitioner has not submitted documentation sufficient to refute this cancellation date and the evidence currently available to the Tax Commissioner indicates that the 09/12/2017 cancellation date is accurate based on the facts and circumstances.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] Documentation in the file shows that a

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department

CAT account has been established for the petitioner. Current records indicate that the 2016 CAT return has not been filed and no payment has been received for the 2017 AMT. 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 or not 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.

Therefore, 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 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 (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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records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

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FINAL DETERMINATION

Date:

MAR 2 0 2020

Bridgers Coaches, Inc.
P.O. Box 430
Newport, AR 72112

Re: Commercial Activity Tax
Tax Period: 01/01/2015 – 12/31/2015
Assessment.: 100000603479

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 Amount Due	2016 Annual Minimum	Pre-assessment Interest	Penalties	Balance
$500.00	$2,600.00	$75.46	$620.00	$3,795.46

The Department of Taxation issued this assessment because the petitioner, Bridgers Coaches, Inc., failed to file a CAT return for the period in question in accordance with R.C. 5751.09(A). Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). The petitioner was assessed for failure to file penalties and for late payments pursuant to R.C. 5751.06(A) and additional tax penalties pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner did not request a hearing, so this matter is decided based upon the evidence available to the Tax Commissioner and evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] Documentation in the file shows that a CAT account has been established for the petitioner, and that a 2015 CAT return has not be received. The petitioner was required under R.C. 5751.051(A)(5) to file a 2015 CAT return reporting its taxable gross receipts regardless whether or not 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.

Accordingly, the assessment is affirmed.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefle system.

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Current records indicate that the petitioner has made no payments on the above-referenced assessments. Due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Post-assessment interest will be added to the assessments as provided by law.** Payments shall be made payable to "Ohio Treasurer." Payments should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio, 43216-1090.

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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:

MAR 2 0 2020

Andrew N. Brooks
508 Kasberg Dr
Temple, TX 76502

Re: Ohio Tax Account #: 93113044
Tax Type: Commercial Activity
Assessment #: 100000794193
Reporting Period: 01/01/2016 – 12/31/2016

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

Tax Due	2017 AMT	Interest	Penalties	Total
$500.00	$2,600.00	$41.08	$620.00	$3,761.08

The Ohio Department of Taxation assessed Andrew N. Brooks (hereinafter referred to as "the petitioner") for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] The petitioner's 2016 annual CAT return and 2017 annual minimum tax ("AMT") payment were due by May 10, 2017. Current records indicate that no CAT return has been filed for the 2016 annual tax period and no payment has been received for the 2017 AMT. 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 or not it incurred $150,000 or more of gross receipts for the calendar year. Information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

Accordingly, the assessment is affirmed as issued.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

MAR 2 0 2020

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

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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:

MAR 2 0 2020

Discovery Dive Charters & Tours, Inc.
17304 Neff Rd
Cleveland, OH 44119

Re: Ohio Tax Account #: 95019700
Tax Type: Commercial Activity
Assessment #: 100000763292
Reporting Period: 01/01/2016 – 12/31/2016

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

Tax Due	2017 AMT	Interest	Penalties	Total
$500.00	$2,600.00	$36.33	$620.00	$3,756.33

The Ohio Department of Taxation assessed Discovery Dive Charters & Tours, Inc. (hereinafter referred to as "the petitioner"), for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] The petitioner's 2016 annual CAT return and 2017 annual minimum tax ("AMT") payment were due by May 10, 2017. Current records indicate that no CAT return has been filed for the 2016 annual tax period and no payment has been received for the 2017 AMT. 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 or not it incurred $150,000 or more of gross receipts for the calendar year. Information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

Accordingly, the assessment is affirmed as issued.

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

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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:

MAR 2 0 2020

Linda S. Dorr
L & M Cleaning
5031 N Genoa Clay Center Rd
Curtice, OH 43412-9618

Re: Ohio Tax Account #: 96206284
Tax Type: Commercial Activity
Assessment #: 100000779647
Reporting Period: 01/01/2016 – 12/31/2016

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

Tax Due	2017 AMT	Interest	Penalties	Total
$500.00	$2,600.00	$38.71	$620.00	$3,758.71

The Ohio Department of Taxation assessed Linda S. Dorr (hereinafter referred to as "the petitioner") for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] The petitioner's 2016 annual CAT return and 2017 annual minimum tax ("AMT") payment were due by May 10, 2017. Current records indicate that no CAT return has been filed for the 2016 annual tax period and no payment has been received for the 2017 AMT. 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 or not it incurred $150,000 or more of gross receipts for the calendar year. Information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

Accordingly, the assessment is affirmed as issued.

MAR 2 0 2020

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

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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: MAR 20 2020

John P. Reber, DVM, Inc.
PO Box 328
Apple Creek, Ohio 44606

Re: Ohio Tax Account #: 95259426
Tax Type: Commercial Activity Tax
Assessment No. 100000768098
Period: 01/01/2016 – 12/31/2016

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

Tax	AMT	Interest	Penalties	Total
$500.00	$2,600.00	$37.35	$620.00	$3,757.35

The Department of Taxation issued an assessment because the petitioner, John P. Reber, DVM, Inc., (hereinafter "the petitioner") did not file a return and remit its CAT for the period in question. Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed an estimated 2017 annual minimum tax ("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 additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner objects to the assessment, but did not request a hearing on this matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] Documentation in the file shows that a CAT account has been established for the petitioner. Current records indicate that the 2016 CAT return has not been filed and no payment has been received for the 2017 AMT. 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 or not 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.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

Therefore, the assessment is affirmed. MAR 2 0 2020

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 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 (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

0000000372

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FINAL DETERMINATION

Date: MAR 27 2020

Laser Products Industries, Inc.
1344 Enterprise Dr
Romeoville, IL 60446-1016

Re: Ohio Tax Account #: 96211181
Tax Type: Commercial Activity
Assessment #: 100000901573
Reporting Period: 01/01/2016 – 01/31/2016

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

Tax Due	2016 AMT	Interest	Penalties	Total
$0.00	$150.00	$9.39	$65.00	$224.39

The Ohio Department of Taxation assessed Laser Products Industries, Inc. (hereinafter referred to as "the petitioner"), for failing to pay its 2016 CAT annual minimum tax ("AMT") pursuant to R.C. 5751.03(B)(1). The Department assessed the petitioner a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] Additionally, pursuant to R.C. 5751.03(B)(1) "[all CAT] taxpayers with annual taxable gross receipts of one million dollars or less for the calendar year, [pay an AMT of] one hundred fifty dollars." Records indicate that a CAT account has been established for the petitioner and that the petitioner's 2016 annual CAT return and first time AMT payment were due by May 10, 2017. Current records indicate that the petitioner filed its 2016 CAT return on October 13, 2017, showing taxable gross receipts of less than one million dollars for the 2016 calendar year and a first time AMT of $150.00 due. Furthermore, records reflect that the 2016 AMT interest amounts assessed are based upon the untimely return filed by the petitioner and the best information available, and the penalties are reasonable based on the facts and circumstances.

Accordingly, the assessment is affirmed as issued.

Current records indicate that a payment of $227.65 was made on this assessment during the pendency of this appeal. After accounting for applicable statutory interest, the $227.65 payment results in a full

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system.

payment, leaving no additional 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.**

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Office of the Tax Commissioner
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FINAL DETERMINATION

Date: MAR 27 2020

FARO Technologies, Inc.
FKA: Laser Projection Technologies, Inc.
250 Technology Park
Lake Mary, FL 32746

Re: Ohio Tax Account #: 93061240
Tax Type: Commercial Activity Tax
Assessment No. 100000796385
Period: 01/01/2016 – 12/31/2016

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

Tax	AMT	Interest	Penalties	Total
$500.00	$2,600.00	$41.08	$620.00	$3,761.08

The Department of Taxation issued an assessment because the petitioner, Laser Projection Technologies, Inc., (hereinafter "the petitioner") did not file a return and remit its CAT for the period in question. The petitioner also failed to pay the annual minimum tax ("AMT") owed for tax year 2017. Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed an estimated 2017 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 additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner objects to the assessment but did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

R.C. 5751.10 mandates any person for the tax imposed under this chapter who sells the trade or business to pay the applicable penalties and interest within forty-five date the date of selling or quitting the trade or business. Here, the Department records indicate that during the pendency of the petition period the petitioner's successor acquired the petitioner's business. However, the records further indicate that the petitioner has failed to remit the tax, penalties and interest after selling its business as required by R.C. 5751.10. Therefore, the petitioner is still subject to remit the tax, penalties, and interest.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] Evidence in the file shows that a CAT account has been established for the petitioner, and that a 2016 CAT return has not be received. The

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

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.

Therefore, the assessment is affirmed.

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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: MAR 2 0 2020

Lease Investment Company, LLC.
5925 Farm Pond Rd
Apex, NC 27523-7578

Re: Ohio Tax Account #: 96090096
Tax Type: Commercial Activity
Assessment #: 100000778534
Reporting Period: 01/01/2016 – 12/31/2016

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

Tax Due	2017 AMT	Interest	Penalties	Total
$500.00	$0.00	$6.25	$100.00	$606.25

The Ohio Department of Taxation assessed Lease Investment Company, LLC. (hereinafter referred to as "the petitioner"), for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment and asserted that they have ceased operations in Ohio. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] The petitioner's 2016 annual CAT return and 2017 annual minimum tax ("AMT") payment were due by May 10, 2017. Current records indicate that no CAT return has been filed for the 2016 annual tax period and no payment has been received for the 2017 AMT. 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 or not it incurred $150,000 or more of gross receipts for the calendar year. Information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

Accordingly, the assessment is affirmed as issued.

MAR 2 0 2020

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000377

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

FINAL DETERMINATION

Date: MAR 27 2020

Lynde Supply, Inc.
P.O. Box 13686
Dayton, OH 45413-0686

Re: Ohio Tax Account #: 95213068
Tax Type: Commercial Activity
Assessment #: 100000574389
Reporting Period: 01/01/2015 – 12/31/2015

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5703.60 concerning the following commercial activity tax ("CAT") corrected assessment:

Tax Due	2016 AMT	Interest	Penalties	Total
$0.00	$150.00	$6.27	$65.00	$221.27

The Ohio Department of Taxation assessed Lynde Supply, Inc. (hereinafter referred to as "the petitioner"), for failing to pay its 2016 CAT annual minimum tax ("AMT") pursuant to R.C. 5751.03(B)(1). The Department assessed the petitioner a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] Additionally, pursuant to R.C. 5751.03(B)(1) "[all CAT] taxpayers with annual taxable gross receipts of one million dollars or less for the calendar year, [pay an AMT of] one hundred fifty dollars." Records indicate that a CAT account has been established for the petitioner. The petitioner's 2015 annual CAT return and 2016 AMT payment were due by May 10, 2016. Current records indicate that the petitioner filed its 2015 CAT return on March 24, 2017, showing taxable gross receipts of less than one million dollars for the 2015 calendar year but it failed to remit a payment for the 2016 AMT, as required by law. Furthermore, records reflect that the 2016 AMT interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payments have been applied to this assessment, leaving the full balance

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system.

due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Ohio Treasurer." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAR 2 0 2020

Mearamen, Inc.
2762 Martin Road
Dublin, OH 43017

Re: Ohio Tax Account #: 95075694
Tax Type: Commercial Activity Tax
Assessment No. 100000784233
Period: 01/01/2016 – 12/31/2016

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

Tax	AMT	Interest	Penalties	Payment	Total
$500.00	$2,600.00	$39.29	$590.00	$150.00	$3,579.29

The Department of Taxation issued an assessment because the petitioner, Mearamen, Inc. (hereinafter "the petitioner") did not file a return and remit its CAT for the period in question. The petitioner also failed to pay the annual minimum tax ("AMT") owed for tax year 2017. Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed an estimated 2017 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 additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner objects to the assessment, but did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] Documentation in the file shows that a CAT account has been established for the petitioner, 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.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefle system.

Therefore, the assessment is affirmed.

MAR 2 0 2020

Current records indicate that payment the $150.00 reflected above 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 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 (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: MAR 27 2020

MEO Business Group LLC
Sunshine Pediatric Therapy Services
7461 Madeira Pines Dr.
Cincinnati, OH 45243-0016

Re: Ohio Tax Account #: 93128919
Tax Type: Commercial Activity Tax
Assessment No.: 100000783517
Period: 09/01/2016 – 12/31/2016

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5703.60 concerning the following commercial activity tax ("CAT") corrected assessment.

Tax	Interest	Penalty	Payment	Total
$150.00	$0.79	$50.00	($150.00)	$200.79

The Department of Taxation issued an assessment because the petitioner, MEO Business Group, LLC did not file a return and remit its 2016 CAT. However, after the original assessment, the petitioner timely submitted its CAT return for the reporting period. On November 22, 2017, the Department issued the corrected assessment currently considered to account for the petitioner's untimely 2016 CAT Return. In response to the corrected assessment, the petitioner filed a timely petition for reassessment objecting to the corrected assessment and requesting an abatement of penalties assessed. The petitioner did not request a hearing on this matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.06(F), it allows the Tax Commissioner to abate all or a portion of any penalty. In this case, the evidence and circumstances indicate the petitioner's payment of the tax and interest assessed and its compliance with CAT obligations following the assessment, support a full abatement of the penalty.

Therefore, the corrected assessment is adjusted as follows:

Tax	Interest	Penalty	Overpayment	Refund
$150.00	$0.79	$0.00	($50.00)	$50.00

Current records indicate that a payment of $50.79 has been made on this assessment, leaving a refund of $50.00 due to the petitioner. This overpayment will be refunded to the petitioner. If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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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: MAR 20 2020

Natures Corner
Natures Corner Greenhouses
3810 Applegate Avenue
Cincinnati, OH 45211

Re: Ohio Tax Account #: 93112667
Tax Type: Commercial Activity Tax
Assessment No. 100000759230
Period: 01/01/2016 – 10/31/2016

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

Tax	AMT	Interest	Penalties	Total
$500.00	$0.00	$5.81	$100.00	$605.81

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

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] Documentation in the file shows that a CAT account has been established for the petitioner. Current records indicate that the 2016 CAT return has not been filed. 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 or not 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.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

Therefore, the assessment is affirmed.

MAR 2 0 2020

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 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 (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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FINAL DETERMINATION

Date: MAR 27 2020

OS TVM Logistics Co.
8938 South Ridgeland Avenue
Oaklawn, IL 60453

Re: Ohio Tax Account #: 93139746
Tax Type: Commercial Activity Tax
Assessment No.: 100001012345
Reporting period: 01/01/2011 – 12/31/2017

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

Tax Due	Interest	Penalty	Payment	Total Due
$50,636.00	$6,309.00	$2,532.00	$(56,945.00)	$2,532.00

The Department of Taxation assessed the petitioner after conducting an audit of its CAT account for the period in question. Through that audit, the Department's audit staff identified that the petitioner had substantial nexus with the State of Ohio in accordance with R.C. 5751.01(H)(3) and further that it had receipts situsable to Ohio pursuant to both R.C 5751.033(E) and 5751.033(G). Based on findings of the audit, the Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment.

The petitioner does not contest that tax and interest amounts assessed, but contends that its initial failure to comply with its CAT obligations was due to its unfamiliarity with Ohio's CAT. R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The evidence and circumstances, including the petitioner's untimely filing of the required returns, its payment of the tax and interest assessed, and its compliance with its CAT obligations following the assessment, support a full abatement of the penalties.

Therefore, the assessment shall be adjusted as follows:

Tax Due	Interest	Penalty	Payment	Total Due
$50,636.00	$6,309.00	$0.00	$(56,945.00)	$0.00

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

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MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAR 27 2020

Perma-Gro Landscape Company, Inc.
11330 Exmoor Dr
Painesville, OH 44077

Re: Ohio Tax Account #: 95258252
Tax Type: Commercial Activity
Assessment #: 100000790611
Reporting Period: 01/01/2016 – 12/31/2016

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

Tax Due	2017 AMT	Interest	Penalties	Total
$500.00	$2600.00	$40.74	$620.00	$3,760.74

The Ohio Department of Taxation assessed Perma-Gro Landscape Company, Inc. (hereinafter referred to as "the petitioner"), for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] Records indicate that a CAT account has been established for the petitioner and that the petitioner's 2016 annual CAT return and 2017 annual minimum tax ("AMT") payment were due by May 10, 2017. Current records indicate that no CAT return has been filed for the 2016 annual tax period and no payment has been received for the 2017 AMT. 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 or not it incurred $150,000 or more of gross receipts for the calendar year. Information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

Accordingly, the assessment is affirmed as issued.

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

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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: MAR 27 2020

Ship US Holdco, Inc.
Attn: Accounting Department
600 Morgan Falls Road
Atlanta, Georgia 30350

Re: Assessment No. 17201434523508
Commercial Activity Tax 1/1/2011 through 12/31/2012

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-378, dated January 23, 2020. In that order, the Board remanded the case to the Tax Commissioner for further proceedings.

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

	Total
Tax	$ 110,000.00
Interest	$ 20,000.00
Total	$ 130,000.00

A payment in the amount of $130,000.00 has been received in complete satisfaction of this assessment.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAR 2 0 2020

Skip Dieball, LLC
9599 Groh Rd.,
Grosse Ile, MI, 48138-2171

Re: Ohio Tax Account #: 95174275
Tax Type: Commercial Activity Tax
Assessment No. 100000798720
Period: 01/01/2016 – 12/31/2016

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

Tax	AMT	Interest	Penalties	Total
$500.00	$2,600.00	$41.08	$620.00	$3,761.08

The Department of Taxation issued an assessment because the petitioner, Skip Dieball, LLC (hereinafter "the petitioner") did not file a return and remit its CAT for the period in question. The petitioner also failed to pay the annual minimum tax ("AMT") owed for tax year 2017. Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed an estimated 2017 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 additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner objects to the assessment, but did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Documentation in the file shows that prior to the assessment, the Department sent the petitioner a letter asking to provide documents detailing the value of ownership interest and registration because the petitioner is registered as the primary member of a combined taxpayer group. The petitioner has not filed any documents to cancel their CAT account or remove a Member to/from Group Commercial Activity. Thereafter, on February 19, 2020, the hearing officer sent a letter to the petitioner, requesting that the petitioner file its 2016 CAT return and pay any 2017 AMT owed by March 11, 2020 and submit the other documents mentioned previously. However, current records indicate that the petitioner did not file its 2016 CAT return, made any payment for the 2017 AMT or submit the relevant documents.

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 the petitioner. 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 or not 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.

Therefore, 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 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 (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: MAR 20 2020

State Line Nursery
6225 Lewis Ave
Temperance, MI 48182-1012

Re: Ohio Tax Account #: 96074629
Tax Type: Commercial Activity
Assessment #: 100000796189
Reporting Period: 01/01/2016 – 12/31/2016

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

Tax Due	2017 AMT	Interest	Penalties	Total
$500.00	$2,600.00	$41.08	$620.00	$3,761.08

The Ohio Department of Taxation assessed State Line Nursery (hereinafter referred to as "the petitioner") for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment and asserted that as of October 2016 the business closed and was no longer doing business. However, no other evidence was provided to substantiate the assertion. Furthermore, the petitioner did not request a hearing on the matter; therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] The petitioner's 2016 annual CAT return and 2017 annual minimum tax ("AMT") payment were due by May 10, 2017. Current records indicate that no CAT return has been filed for the 2016 annual tax period and no payment has been received for the 2017 AMT. 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 or not it incurred $150,000 or more of gross receipts for the calendar year. Information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

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

Accordingly, the assessment is affirmed as issued.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: MAR 2 0 2020

Tilton Equipment Company
P.O. Box 68
Rye, NH 03870

Re: Ohio Tax Account #: 95260034
Tax Type: Commercial Activity Tax
Assessment No.: 100000760365
Period: 01/01/2016 – 12/31/2016

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

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

The Department of Taxation issued an assessment because the petitioner, Tilton Equipment Company (hereinafter "the petitioner") did not file a return and remit its CAT for the period in question. The petitioner also failed to pay the annual minimum tax ("AMT") owed for tax year 2017. Consequently, the petitioner was assessed estimated tax pursuant to R.C. 5751.09(A). The petitioner was also assessed an estimated 2017 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 additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). The petitioner objects to the assessment, but did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] Documentation in the file shows that a CAT account has been established for the petitioner. Current records indicate that the 2016 CAT return has not been filed and no payment has been received for the 2017 AMT. 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 or not 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.

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

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Therefore, 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 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 (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

FINAL DETERMINATION

Date: MAR 18 2020

Turner Construction Company
Attn: Marisa Pallotta, Senior Tax Director
3 Paragon Dr.
Montvale, NJ 07645

Re: Refund Claim - 115052753
Commercial Activity Tax – Account 95228440
Tax Periods– 07/01/2009 – 03/31/2013

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

Period	Refund Requested
07/01/2009 – 03/31/2013	$5,028,596.00

I. FACTUAL BACKGROUND

Turner Construction Company (hereinafter "Turner") is an international construction management company headquartered in New York City, New York. It is a subsidiary of the German construction company Hochtief. Turner provides services including construction management, general contracting, consulting, construction procurement, insurance services, and risk management. Turner has 46 offices in the U.S. and is active in 20 countries worldwide and has Ohio offices in Cincinnati, Columbus, and Worthington. It averages around 1,500 projects per year. The claimant contends that it is entitled to the agency exclusion from the CAT and requests a refund of amounts related to the following projects:

- Queen City Interiors
- SPD CLE Key Bank Cleveland
- SPD CLE Greater Cleveland Partnership Contract
- UH Risman MOB Contract
- Clev.Convention Ctr. – Medical MMPI
- OSU Project One

II. PROCEDURAL BACKGROUND

It should first be noted that the Department's audit staff previously concluded that there was sufficient evidence to establish an agency relationship for thirty-five projects; only the facts and circumstances of the six projects listed above were considered insufficient to establish agency. The Department denied the claimant's refund request relating to the six remaining projects due to a lack of evidence supporting the

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purported agency relationship with the parties involved in the contracts. The claimant objects to the denial and requested a hearing on the matter in accordance with R.C. 5703.70. The hearing was conducted at the Department's offices in Columbus, Ohio, and this matter is decided upon the totality of evidence currently available to the Tax Commissioner.

III. CLAIMANT'S CONTENTIONS

During the tax periods at issue, Turner contracted with several owner-developers (hereinafter "owner[s]" or "owner-developers") for construction projects. The claimant contends that it was also bound to pay a portion of its fees to subcontractors used to complete its construction projects. It contends that the amounts Turner paid subcontractors under the agreements were properly excluded from Turner's gross receipts under the CAT agency exclusion for the period in question. The claimant argues that even though it is explicitly designated an independent contractor—and not an agent—in the six contracts in question, and the subcontractors are also not deemed agents of the owners or Turner, the explicit contractual language governing the agreements should be overridden because the parties' conduct constitutes an agency relationship pursuant to Ohio Adm,Code 5703-29-13(C)(2)(c).

IV. AUTHORITY

A. APPLICATIONS FOR CAT REFUNDS

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

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

B. A TAX MEASURED BY GROSS RECEIPTS

The CAT is imposed on the privilege of doing business in Ohio and is measured by gross receipts, and is imposed on persons receiving the gross receipts, not on the purchaser. R.C. 5751.02(A). "Gross receipts" is 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. EXCLUSION FOR AMOUNTS RECEIVED AS AN AGENT – R.C. 5751.01(F)(2)(l)

While exclusions are generally not allowed when computing gross receipts for CAT purposes, Chapter 5751 specifies some receipts that taxpayers may exclude pursuant to R.C. 5751.01(F)(2). Division (F)(2)(l) of that section provides that "[p]roperty, money, and other amounts received or acquired by an

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agent on behalf of another in excess of the agent's commission, fee, or other remuneration" are excluded from the definition of "gross receipts."

D. RELEVANT AUTHORITY ON AGENCY

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

Ohio 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 an agency relationship created by contractual terms, the regulation states the following:

> In the case of a person enumerated in division (P)(2) of section 5751.01 of the Revised Code who 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 this statutory definition and administrative authority is the common law principal of actual authority, which is the standard under which agency can be established between entities such that they may be subject to the CAT's agency exclusion.[3] Actual authority is "an expression of intent by the principal that the agent act on behalf of the principal, along with the understanding of the agent.[4] The primacy of a putative agent's authority to act for another arises by virtue of R.C. 5751.01(P)'s definition of "agent," which uses the term "authorized" to modify "person."[5] Stated differently, where a company is not endowed with actual authority to bind another entity, no agency relationship is formed, and no exclusion may be claimed.

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

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

[3] *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929.

[4] *Id.*, citing 1 Restatement of Law 3d, Agency, Section 3.01.

[5] *Willoughby Hills Development and Distribution, Inc. v. Testa*, 155 Ohio St.3d 276, 2018 WL 5833000, 2018 -Ohio- 4488 (Nov. 7, 2018).

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

E. AGENCY AND COST-PLUS CONTRACTS

R.C. 5751.01(P) defines "agent" to include certain individuals acting on behalf of another. Ohio Adm.Code 5703-29-13(C)(2)(c) outlines several sample factual scenarios within which a general contractor bound by a cost-plus contract could be permitted to exclude money received from an owner meant to be paid to subcontractors from the general contractor's gross receipts. Specifically, former Ohio Adm.Code 5703-29-13(C)(2)(c), applicable for the period in question, provides that an agency relationship will be found where the following factors are present:

(i) The general contractor is required to act in the owner's best interest with respect to cost issues;
(ii) The general contractor, when bidding out the work, has an agreement in writing with the subcontractors that states that the general contractor is acting as the owner's agent and not as an agent of the subcontractors; and
(iii) The general contractor acts as a conduit with respect to payments made to the subcontractors under the agreement.

If the conditions set forth in 5703-29-13(C)(2)(c) are met, the rule provides that the payments the general contractor receives in order to pay the subcontractors may be excluded from the general contractor's gross receipts pursuant to R.C. 5751.01(P)(2).

F. NARROW CONSTRUCTION OF EXCLUSIONS

Taxpayers claiming exemption or exclusion from taxation must affirmatively establish their right thereto.[11] 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.[12] Thus, in determining whether the

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[6] Ohio Admin.Code 5703-29-13(B)(1) citing *Hanson v. Kynast*, 24 Ohio St.3d 171, 173, (1986).
[7] *Id.*
[8] *Willoughby Hills Development and Dist., Inc. v. Testa*, 155 Ohio St.3d 276, 2018 WL 5833000.
[9] *Id.*, citing 1 Restatement of the Law 3d, Agency, Section 3.01.
[10] *N&G Construction, Inc. v. Lindley*, 56 Ohio St.2d 415, 418 (1978), citing *Gulf Oil Corp. v. Kosydar*, 44 Ohio St.2d 208 (1975) (paragraph two of the syllabus) and *Canton v. Imperial Bowling Lanes, Inc.*, 16 Ohio St.2d 47 (1968) (paragraph four of the syllabus).
[11] *Dayton Sash & Door Co. v. Glander*, 36 Ohio St.2d 120, 304, 304 N.E.2d 388 (1973). *See Gardner Plumbing, Inc. v. Cottrill* (1975), 44 Ohio St.2d 111, 115, citing *Union Mutual Life Ins. Co. v. McMillen* (1873), 24 Ohio St. 67. Also see *Memorial Park Golf Club, Inc., supra.*
[12] 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)

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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.[13]

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.[14] 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.[15] 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.

V. ANALYSIS

The claimant's argument that it should be permitted to exclude gross receipts associated with its transactions with the owners and subcontractors at issue pursuant to R.C. 5751.01(F)(2)(l) is not well taken. The claimant's contention that an agency relationship existed between Turner and the owner-developers, and between Turner and its subcontractors does not withstand a strict, narrow reading of the Revised Code and the relevant authority. Turner is explicitly deemed an independent contractor in its agreements and not the owners' agent or employee. Thus, the claimant's assertion that an agency relationship existed between the owners and Turner must be such that it overrides explicit language in the contract that Turner operate in the capacity of an independent contractor. In other words, and in accordance with Ohio Adm.Code 5703-29-13(C)(2)(a), the Tax Commissioner will presume that no agency relationship existed and the person claiming the agency relationship will include the total amount received in its gross receipts.

Even looking beyond the wording of those contracts to the facts and circumstances of the situation, it is evident from the interactions between Turner and the owner-developers and described in the following sections that the owners neither have nor exert control over Turner in a way that would constitute an agency relationship. It is clear from the facts that Turner operates its construction business in a purely transactional capacity, and its contracts were not drafted to establish the control dynamics of an agency relationship. Thus, where no agency exists within the meaning of Ohio law, no agency exclusion may be claimed for CAT purposes. Therefore, absent an exclusion prescribed under Ohio law, the evidence available to the Tax Commissioner indicates that the correctly reported and remitted CAT on its initial returns during the period in question.

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[13] 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.

[14] *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.*

[15] Supra. Footnote 9.

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A. THE CLAIMANT AND THE OWNER-DEVELOPERS WERE ENGAGED IN A BUSINESS RELATIONSHIP CONCEIVED FOR THEIR MUTUAL ECONOMIC GAIN—NOT AN AGENCY RELATIONSHIP.

As described above, the agreements made between Turner and the owner-developers explicitly label Turner as an independent contractor. The claimant contends, however, that despite its contractual designation, it should still be considered an agent for CAT purposes. Under 5751.01(P), an "agent" is a person authorized by another to act on its behalf to undertake a transaction for the other. Common law principles of agency and actual authority are instructive in determining whether an agency relationship exists for CAT purposes.[16] The claimant contends that it acts in the capacity of an agent and should, therefore, be deemed an agent, eligible for the agency exclusion, notwithstanding the contradictory contractual language.

For an agency relationship to exist under R.C. 5751.01(F)(2)(l), the supposed principal (in this case, the owners) must exercise the authority to bind the supposed agent (in this case, Turner). In the present case, however, the claimant performed its construction duties autonomously. It used its own employees and equipment; it had full autonomy in soliciting, hiring, and utilizing subcontractors, and it performed its services "in accordance with the professional care, skill, diligence, and quality that prevail among construction and construction management firms, experienced and specializing in the construction … of projects of similar scope," and not in accordance with the explicit orders and control of the owners.[17]

Of the six contracts at issue in this matter, only two explicitly use the term "agent" or "agency," with respect to the relationship between Turner and the owner-developer. In Section 18.9 of the Cleveland Convention Center contract, Turner is not only deemed an "independent contractor," but the agreement's language goes further by stating that Turner "shall not be deemed an agent, employee or partner of [the owner-]Developer. Nothing contained in this Agreement shall be construed as constituting a joint venture or partnership between [Turner] and [the owner-]Developer." Conversely, in the OSU Project One contract, the Breakdown of Construction Budget exhibit contains a column that designates certain portions of the contracts "CM-Agency Contracts." Accordingly, the Department's audit staff concluded that those portions of the contracts presumed an agency relationship and granted the exclusion for that portion of the contract for the tax periods in which the provision was effective. There are no explicit mentions or assignments of an agency relationship throughout the six remaining contracts. On the contrary, all of the contracts that the Department did not find an agency relationship for designated Turner as an "independent contractor," and none of the language or terms expressed therein satisfies the three-prong test under Ohio Adm.Code 5703-29-13.

As explained above, for an agency relationship to exist, Ohio Adm.Code 5703-29-13(B)(1) requires the principal to assert control over the agent. The claimant argues that under the terms of the Construction Management at Risk Agreement that governs the agreement between Turner and the owners, Turner operates under the direct control of the owners.

The claimant supports its contention by referencing guidance in the agreement with the owners directing Turner to perform such tasks as prepare estimates of the construction costs, inform the owner of potential subcontractors it seeks to hire, take reasonable steps to minimize personnel expenses, and capping them at a designated-level. However, this contractual language does not constitute an exertion of control by

[16] *Willoughby Hills Development and Dist., Inc. v. Testa* (2018), 155 Ohio St.3d 276, 2018 WL 5833000.

[17] See Article 1.7 of OSU Project One contract. Similar provisions are given in the other five contracts in dispute. See also, Article 1.1 and Articles 3 and 3.5 of the Queen City Interiors contract, Article 3.1 of the PSD CLE Key Bank Cleveland contract, Articles 1.4 and 3.1 of the UH Risman MOB contract, and Article 1.11 of the Clev. Convention Ctr. – Medical MMPI contract, *supra*.

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one party over another. Rather, the contractual language contains only suggestions, recommendations, and guidance with respect to Turner's conduct.

Most of the contractual terms in these contracts appear to be in place to keep owners abreast of developments with respect to the construction project or to inform them of unforeseen costs or delays. The terms identify that they comply with common practices in "comparable construction projects throughout the U.S." To presume, as the claimant insists, that such language is tantamount to the exertion of control by one party over another—instead of mere guidance—is to presume that all comparable construction projects, regardless of size of scope, are tantamount to principal-agency relationships, despite explicit language in the contracts that establish Turner as an independent contractor.

Merely keeping the owners informed of the identities of potential subcontractors is not sufficient to establish control. Under the each of the agreements in question, the owners neither retain the authority to select or dismiss subcontractors, nor do they have the authority to reject subcontractors unless they fail to meet Turner's own prequalification criteria. Moreover, Turner retains the authority to enlist personnel subject to the instruction that it "use all reasonable means to minimize personnel costs."[18] This language is not an assertion of control by the owners because Turner retains discretion in selecting and enlisting personnel. Turner is tethered only by the condition that it employ reasonable means in minimizing personnel costs. Agreeing to act in a reasonable manner is not sufficient to constitute an exertion of control by the owners. The provision is juxtaposed with the price cap on personnel. The claimant is directed not to exceed the anticipated costs for its services. However, this provision is a manifestation of guidance, not control, because should the claimant anticipate exceeding the provisional amount, it must only inform the owner-developers, and the agreement is subject to modification, and not rescission or revocation. That is, the terms in question are standard contractual terms providing guidance to the general contractor and assurances to the owner-developer that a project will be completed in accordance with industry standards.

The relevant authority holds that, in an agency relationship, an agent has the ability to make contracts on the principal's behalf, and generally the principal is bound by the agent's actions. The provisions of the contracts in question allow Turner to operate without the owner's actual authority. Here, not only does the language of the relevant contract designate Turner as an independent contractor, but the provisions of the owner's contract with Turner also demonstrate that Turner runs its own operation and is not an agent of the owner-developers. Accordingly, the claimant fails to establish an agency relationship for the six contracts in question, and the claimant's contentions are not well-taken.

B. THE CLAIMANT IS NOT ENTITLED TO DEDUCT GROSS RECEIPTS FROM TRANSACTIONS WITH ITS SUBCONTRACTORS UNDER OHIO ADM.CODE 5703-29-13.

The claimant argues for the use of the three-factor test of former Ohio Adm.Code 5703-29-13(C)(2)(c), in effect for the period in question, to determine agency. Under the relevant administrative rule, a general contractor bound by a cost-plus contract may exclude money received from an owner meant to be paid to subcontractors from the general contractor's gross receipts. However, additional fees for a specific amount of profit is considered a part of the general contractor's gross receipts for CAT purposes. This three-element test is stated as follows:

[18] See Articles 2.3.3, and 2.6 of the OSU Project One contract. See also Article 3.1 of the Queen City Interiors contract, Article 4.2.1 of the SPD CLE Key Bank Cleveland contract, Article 3.2 of the SPD CLE Greater Cleveland Partnership contract, Article 8.1.7 of UH Risman MOB contract, and Article 8.1.2 of Clev. Convention Center – Medical MMPI contract, *supra*.

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> [1] The general contractor is required to act in the owner's best interests with respect to cost issues. [2] The general contractor, when bidding out the work to subcontractors, has an agreement in writing with the subcontractors that states that the general contractor is acting as the owner's agent and not as an agent of the subcontractor. [3] The general contractor acts as a conduit with regard to any payments made to the subcontractors, in that the general contractor remits monies received from the owner to the subcontractors, provided that certain conditions are met.

The explicit language of the administrative rule applies to general contractors who had entered into cost-plus contracts. Ohio Adm.Code 5703-29-13(C)(2)(c) starts with the following language, "Alternatively, for example, a general contractor enters into a costs-plus contract with a property owner for the general contractor to construct an office building." To be eligible for the exclusion under this provision, a contractor must act as a conduit for compensation paid from the owner to a subcontractor. That is, under the present circumstances, Turner must act as a "conduit" for payments between the owner-developer and the subcontractors, and these expenses would be excluded from Turner's gross receipts because they are ostensibly paid from the developer-owner to the subcontractor with a minimal role played by Turner in facilitating the payments. Moreover, all of the above elements must be met for the general contractor to be considered an agent for CAT purposes; however, as described below, the claimant has not affirmatively established that a single one of the above elements applies to Turner, thus, Turner cannot claim the exclusion from its gross receipts for CAT purposes.

1. THE CONTRACTOR MUST ACT IN THE BEST INTEREST OF THE PRINCIPAL.

The first factor in the three-factor test examines whether the general contractor is required to act in the owner's best interests regarding cost issues. Of the numerous provisions in the contracts the claimant provided, none of them indicates that Turner is bound to act in the owner-developers' best interest. As discussed above, the contractual language the claimant provided to the record provides broad guidance to Turner in administering the construction project. In no way is Turner bound to the owners or deemed a fiduciary or agent. As an example, the agreement between Turner and OSU represents a mutual transactional relationship between two distinct entities. The agreement serves only to outline the roles and expectations of each party in the execution of the construction project. The agreement does not force or require Turner to act in the best interest of the principal either explicitly or implicitly. The claimant contends, however, that specific provisions demonstrate that Turner was directed to act in OSU's best interest and indicated that OSU exercises extensive control over Turner with regard to construction management, incurring costs, maintaining records, and selecting subcontractors, thereby ensuring Turner's activities meet OSU's best interests. There is no dispute that the explicit contractual language governing the agreement designates Turner as an independent contractor, and the accompanying contractual provisions implicitly support the designation.

2. THE CONTRACTOR IS AN AGENT OF THE PROPERTY OWNER-DEVELOPER.

The second factor of a cost-plus contract requires that the general contractor have an agreement with its subcontractors that states that it is working as the owner's agent. Here, the claimant does not satisfy this requirement because, once again, Turner operates as an independent contractor both through the explicit and implicit language of the contract. Moreover, the claimant provided no evidence that Turner—whether in writing or through its conduct—represents to the subcontractors that it is acting in the capacity of the owner-developers' agent.

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For each contract, the claimant presents the same argument with respect to the agency element: "Turner's agency relationship can be inferred from the preceding provisions within the agreement," addressing select provisions the claimant contends implicitly demonstrate the existence of an agency relationship between Turner and each owner-developer. Turner has the burden of proving agency because it is the party seeking to prove the existence of such a relationship under the present facts and circumstances. The party asserting the existence of an agency relationship bears the burden of proof an agency relationship exists amongst the parties in question within the meaning of R.C. 5751.01(P).[19] Merely presenting provisions of a contract absent provisions that tie them to a legal argument or the specific circumstances giving rise to the claim are insufficient to satisfy this burden. Contending that an "agency relationship can be inferred" shirks the claimant's burden, and places it on the Commissioner.

Because proving Turner is an agent of the property owner-developer is a necessary element in proving agency as required by the Code and as laid out in the claimant's own argument, failing to satisfy it negates the argument in its entirety regardless of the merits of the other prong. In this case, Turner did not satisfy its burden of proof for agency; therefore, the element is not satisfied. Because this argument is copied verbatim for each agreement in dispute, the claimant does not satisfy its burden for every contract. Moreover, because the burden is repeatedly not met in each agreement with respect to Ohio Adm.Code 5703-29-13, the entirety of the claimant's argument in this regard is not satisfied. Even where contentions affecting the first and third Cost Plus elements would be individually meritorious, the absence of an agency relationship, as described in the foregoing sections, precludes them from being considered herein.

3. THE CONTRACTOR MUST ACT AS A CONDUIT FOR PAYMENT TO THE SUBCONTRACTORS.

The third factor of a cost-plus contract requires the general contractor to remit payments from the owner to the subcontractors. Turner does not act as a conduit for transactions between the owner-developers and the subcontractors as described in Ohio Adm.Code 5703-29-13(C)(2)(c). The claimant provides several examples from the contract that it contends evidence the "conduit" relationship. However, none of the contractual language the claimant cites assigns liability to Turner for amounts owed to the subcontractors by the owners. Instead, the language assigns the subcontractors' operational costs exclusively to Turner. In fact, all expenses incurred through the hiring and use of subcontractors are assigned to Turner. The owner may be obligated to reimburse Turner for the subcontractors' expenses. The claimant references Article 2.12.2 of the OSU Agreement. Under the Article, payments made by the owner-developer to Turner's "work" include subcontractor expenses. Under Article 5.2.8, Turner is responsible for paying subcontractors within five days of a subcontractor's submission of its expense invoice. As such, Turner is never treated as a conduit between the owner-developers and the subcontractors as described in Ohio Adm.Code 5703-29-13(C)(2)(c). Therefore, there is insufficient evidence in the record to support the claimant's argument that Turner was required to remit payments from the owner to the subcontractors. As such, gross receipts associated with Turner's construction projects are not subject to the Ohio Adm.Code 5703-29-13 exclusion.

In summary, the three-factors required for the establishment of a cost-plus contract laid out in Ohio Adm.Code 5703-29-13(C)(2)(c) are not satisfied with respect to the relationship between the claimant and the owners. Therefore, the claimant has not affirmatively demonstrated that it should be permitted

[19] *Hanson v. Kynast* (1986), 24 Ohio St. 3d 171, 173, citing *Baird v. Sickler* (1982), 69 Ohio St.2d 652, 654; *Councell v. Douglas* (1955), 163 Ohio St. 292; *Bobik v. Indus. Comm.* (1946), 146 Ohio St. 187, 191-192; *Memorial Park Golf Club, Inc. v. Lawrence* (March 31, 2000), BTA No. 99-K-633.

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to claim the agency exclusion. On the contrary, the facts and circumstances presented in this case are inconsistent with each division (C)(2)(c) of Ohio Adm.Code 5703-29-13.

4. UNCERTAIN & ESTIMATED NATURE OF THE REFUND AMOUNTS CLAIMED.

Notwithstanding the foregoing sections and the findings contained therein, the claimant's proposed estimated refund tabulations are too uncertain to issue a refund in the amounts the claimant proposes. Evidence currently available to the Tax Commissioner indicates that the taxable gross receipts and CAT liabilities which were initially reported and remitted were accurate. Moreover, even if the claimant had demonstrated that it qualified for the agency exclusions it seeks, the estimated refund amounts claimed and supporting information submitted are collectively too speculative to show what amounts may have actually been erroneously overpaid during the periods at issue.

VI. CONCLUSION

The claimant's contention that it should be permitted to exclude gross receipts from its CAT under R.C. 5751.01(F)(2)(l) does not withstand scrutiny. According to the contractual language submitted by the claimant to the Department, Turner is not bound to act under the owner's authority in an agency capacity, and the owner-developers do not exert control over Turner's conduct through their contractual agreements. Turner does not have the actual authority necessary to bind the owner-developers to its purchases or bind the owners to liability for Turner's actions. As such, because no agency relationship exists, no agency exclusion can be granted with respect to the claimant's CAT liability.

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 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

0000000385

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

FINAL DETERMINATION

Date: MAR 27 2020

UT Logging
66739 Sam Russell Rd
Hamden, OH 45634

Re: Ohio Tax Account #: 96124986
Tax Type: Commercial Activity
Assessment #: 100000780092
Reporting Period: 01/01/2016 – 12/31/2016

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

Tax Due	2017 AMT	Interest	Penalties	Total
$500.00	$2,600.00	$38.71	$620.00	$3,758.71

The Ohio Department of Taxation assessed UT Logging (hereinafter referred to as "the petitioner") for failing to file its CAT return for the period in question. The Department assessed the petitioner an estimated tax pursuant to R.C. 5751.09(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

Pursuant to R.C. 5751.051(A)(5), every taxpayer shall file with the Tax Commissioner a tax return . . . [which] shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due, if any.[1] The petitioner's 2016 annual CAT return and 2017 annual minimum tax ("AMT") payment were due by May 10, 2017. Current records indicate that no CAT return has been filed for the 2016 annual tax period and no payment has been received for the 2017 AMT. 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 or not it incurred $150,000 or more of gross receipts for the calendar year. Information available to the Tax Commissioner indicates that the petitioner had taxable gross receipts during the period in question. Furthermore, records reflect that the tax and interest amounts assessed are based upon the best information available, and the penalties are reasonable based on the facts and circumstances.

Accordingly, the assessment is affirmed as issued.

Current records indicate that a $400.00 payment has been applied to this assessment, leaving a balance

[1] Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016 CAT return and remit payment for the tax period in question by using the Ohio Business Gateway or the Ohio telefile system.

of $3,358.71 due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Ohio Treasurer." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAR 20 2020

Versatitle Services, Ltd.
1007 Lexington Ave.
Mansfield, OH 44907-2247

Re: Assessment No. 100000812702
Commercial Activity Tax – 01/01/2016 – 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) amounts:

Tax	AMT	Interest	Additional Tax	Penalty	Total
$0.00	$150.00	$2.52	$15.00	$50.00	$217.52

The Department of Taxation issued this assessment because the petitioner failed to remit the CAT owed for tax year 2016 and tax year 2017 annual minimum tax (AMT). Thereafter, the petitioner submitted a petition contending its business closed and its CAT account should be cancelled effective December 31, 2016. The petitioner did not request a hearing; therefore, this matter shall be decided based upon the information in the file.

Subsequent to the assessment, the petitioner submitted sufficient documentation to cancel its consolidated elected taxpayer CAT account effective December 31, 2016. Since all the members in the consolidated account have been effectively closed as of December 31, 2016, the 2017 AMT is no longer owed. The petitioner also seeks penalty remission. 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	Additional Tax	Penalty	Total
$0.00	$0.00	$0.00	$0.00	$50.00	$50.00

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

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

MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAR 27 2020

Kurt Hagen
3 Egret Court
Tiburon, CA 94920

Re: Assessment Nos. 100000884218
Employer Withholding: 01/01/2013 – 12/31/2014

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

Tax	Interest	Penalty	Total
$21,023.80	$2,395.41	$10,511.98	$33,931.19

I. BACKGROUND

The Department assessed the petitioner as a responsible party of Salesforce.org Foundation (hereinafter "Salesforce") under R.C. 5747.07(G). Salesforce failed to fully remit Ohio income tax withholding for the periods identified above. Under such circumstances, R.C. 5747.07(G) holds officers or employees who are responsible for the filing and payment of withholding tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. The outstanding liability of the company has been derivatively assessed against the petitioner, Kurt Hagen, because he was identified as a responsible party.

The petitioner states that he believes that either a mistake has occurred or that he is a victim of fraud via identity theft. He also contends that he has no connection with the state of Ohio. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

II. AUTHORITY AND ANALYSIS

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

To the extent the petitioner does challenge the assessment against Salesforce, such contention cannot be considered. The only issue that can be considered in this matter is whether the petitioner is a responsible party under R.C. 5747.07(G) for the period assessed. The petitioner may not challenge the merits of the

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

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

The information currently available to the Department reflects that the petitioner was the Chief Financial Officer (CFO) of Salesforce during the periods at issue. The petitioner states on his LinkedIn account that he was the CFO, Director of Finance and Operations at Salesforce from August 2005 to November 2015. Records also reflects that the petitioner is listed as a responsible party based on the information received on Salesforce's original Ohio withholding registration form. For the reasons stated above, the outstanding liability of the corporation has been derivatively assessed against the petitioner because he had responsibility over the fiscal operations of the company during the periods assessed.

III. CONCLUSION

Therefore, according to the information available to the Department, the petitioner is the responsible party for the unpaid employer withholding taxes assessed. The petitioner has failed to submit evidence sufficient to support a finding that he was not a responsible party. Therefore, the petitioner can be held responsible for Salesforce's failure to file an Ohio income tax withholding return for the periods assessed.

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

Accordingly, the assessment is affirmed.

Current records indicate that $34,297.20 has been applied towards this assessment, resulting in a balance due of $0.00. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 17 2020

Michael S Murphy
1026 Delence St
Toledo, OH 43605-2403

Re: Four Assessments
Employer Withholding – Multiple Periods

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

Assessment Number	Periods	Tax	Interest	Penalty	Total
100001054390	01/01/2013-12/31/2013	$2,000.00	$281.27	$700.00	$2,981.27
100001054391	04/01/2013-06/30/2013	$128.95	$18.26	$17.52	$164.73
100001054392	07/01/2013-09/30/2013	$259.13	$40.18	$90.70	$390.01
100001054389	10/01/2013-12/31/2013	$156.58	$19.34	$18.86	$194.78

The Department assessed the petitioner as a responsible party of Michael Murphy & Son Concrete Fin (hereinafter "Murphy Concrete") under R.C. 5747.07(G). Murphy Concrete failed to fully remit Ohio income tax withholding for the periods at issue. The assessments were never fully satisfied by Murphy Concrete and remain outstanding. Under such circumstances, R.C. 5747.07(G) holds officers or employees who are responsible for the filing and payment of withholding tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. The outstanding liabilities of the Murphy Concrete have been derivatively assessed against the petitioner, Michael S Murphy, because he was identified as a responsible party.

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

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

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or "the officer or trustee exercises authority to sign checks *** drawn on the corporation's or trust's accounts, in payment of tax liabilities."

The petitioner contends that he was not a responsible party of Murphy Concrete for the periods at issue. The petitioner states that the tax account associated with this assessment does not belong to him. The petitioner also states that he has no knowledge about the existence of this business and denies ever being part of it. The petitioner further contends that he does not have any sons and has been married to his wife for 26 years, has two grown daughters, and resides in Toledo, Ohio. The petitioner has supplied the Department with copies of his 2013 federal tax return in which shows no record of ownership or involvement in Murphy Concrete. Department records reflect that the petitioner is not a corporate officer of Murphy Concrete and has not exercised management control or authority over employees of Murphy Concrete. Therefore, upon further review, the petitioner has submitted sufficient evidence to demonstrate that he was not a responsible party for the periods in question.

However, this final determination is intended to bind the Tax Commissioner only in the absence of evidence supporting a finding of responsibility under R.C. 5747.07(G). Should additional evidence become available which contradicts the testimony presented by the petitioner or any other information relied upon in the final determination, the petitioner may be subject to future reassessment.

Accordingly, these assessments are cancelled.

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

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. 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: MAR 2 0 2020

Gregory Abbott
185 Park Dr
Wilmington, OH 45177

Re: Assessment No. 100001119984
Employer Withholding Tax - Responsible Party
Reporting Period: 01/01/2011 – 12/31/2011

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 employer withholding tax responsible party assessment:

Tax	Interest	Penalty	Total
$911.10	$285.94	$318.88	$1,515.92

The Ohio Department of Taxation assessed Gregory Abbott (hereinafter referred to as "the petitioner") as a responsible party of Abbott Sign Company, LLC (hereinafter referred to as "Sign Company"), under R.C. 5747.07(G). Sign Company failed to fully remit Ohio income tax withholding for the period identified above. The assessment was never fully satisfied by Sign Company and remains outstanding. Under such circumstances, R.C. 5747.07(G) holds officers or employees who are responsible for the filing and payment of withholding tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. The outstanding liability of Sign Company has been derivatively assessed against the petitioner because he was identified to be a responsible party.

The petitioner objects to the assessment and requests a cancellation of the assessment based on his assertion that this obligation was discharged when he filed for Chapter 7 bankruptcy in 2012. However, the petitioner did not object to being named as a responsible party for Sign Company and he did not request a hearing on this matter; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

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

Former Ohio Adm. Code 5703-7-15(A)(1), in effect for the period in question, clarified R.C. 5747.07(G) by further defining "officer" or "corporate officer" to mean "the president, vice-president, treasurer, secretary, chief executive officer of a corporation, or any person holding a similar title or

MAR 2 0 2020

position in a corporation or business trust." Division (C)(3) and (5) of former Ohio Adm. Code 5703-7-15 also states that an officer of a corporation has demonstrated responsibility for the execution of the corporation's fiscal responsibilities if "[t]he officer or trustee exercises management control or authority over employees whose duties include the preparation, signing, or filing of returns or reports," or "the officer or trustee exercises authority to sign checks *** drawn on the corporation's or trust's accounts, in payment of tax liabilities."

Generally, personal liability for officers of a corporation for failure of a corporation to file returns or pay taxes is limited to those officers who have control or supervision or are charged with the responsibility of filing returns and making payments. *Weiss v. Porterfield*, 27 Ohio St.2d 117 (1971); *Spithogianis v. Limbach,* 53 Ohio St.3d 55 (1990). In *McGlothlin v. Limbach*, 57 Ohio St.3d 72 (1991), the Court held that a corporate officer who had nothing to do with the day-to-day operation of the business was nonetheless personally liable. Specifically, the Court stated: "In that case the corporate officer *had the authority* to control or supervise the tax return and tax payment activities of the corporation." *McGlothin*, supra, (emphasis added), at 73. Therefore, individuals who are owner-officers of a closely held corporation or limited liability company are ordinarily responsible for, or in charge of, a business's fiscal duties, or charged with supervision thereof.

Division (A) of R.C. 5747.13 authorizes the Tax Commissioner to make an assessment against any person liable for a tax deficiency based upon any information in the Commissioner's possession. Here, the petitioner was the president of Sign Company during the period assessed. With regard to the payment of trust fund taxes, an officer and director of a business has general fiscal responsibilities for that business and can, therefore, be responsible for the payment of such taxes to the state. *Seibenick v. Tracy*, BTA No. 1993-M-1087, unreported. Records reflect that the petitioner held himself out to be a responsible party, as President of Sign Company, during the period assessed. Furthermore, the petitioner has not demonstrated, objected to, or provided evidence that he was not a responsible party.

With regard to the allegation that the petitioner's tax liability was discharged by bankruptcy, Title 11 U.S.C.A. Section 523(a)(1)(A) of the Bankruptcy Code states that "[a] discharge under section 727…of this title does not discharge an individual debtor from any debt…for a tax…of the kind and for the periods specified in section…507(a)(8) of this title, whether or not a claim for such tax was filed or allowed." Section 507(a)(8) allows claims "of governmental units, only to the extent that such claims are for a tax required to be collected or withheld and for which the debtor is liable in whatever capacity." Records show that the petitioner filed for Chapter 7 bankruptcy, as an individual, on 4/25/2012 and was discharged as a Chapter 7 no asset case on 8/29/2012. Because the petitioner is an individual and received a Chapter 7 discharge, the "Exception to discharge" rules of Section 523(a)(1)(A) and Section 507(a)(8)(C) of the Bankruptcy Code applied, and thus, did not discharge the petitioner's tax liability.

According to the information available to the Tax Commissioner, the petitioner was responsible for fiscal duties at Sign Company during the period assessed. Furthermore, despite the petitioner's contentions to the contrary, he has failed to submit evidence sufficient to support that this liability was discharged in his individual Chapter 7 bankruptcy discharge. Therefore, the petitioner can be held responsible for Sign Company's failure to file an Ohio income tax withholding return for the period assessed.

Accordingly, the assessment is affirmed as issued.

MAR 2 0 2020

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 20 2020

Kimberly Lyon
4513 Boca Ct.
Gahanna, OH 43230

Re: Assessment No. 100000858360
Employer Withholding Tax – Responsible Party: 01/01/2014 – 12/31/2016

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

Tax	Interest	Penalty	Total
$2,797.81	$275.63	$1,398.96	$4,472.40

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

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

The petitioner's sole objection is to the penalty assessed. As stated above, pursuant to R.C. 5747.07(G) and the relevant caselaw, the only issue that can be considered is whether the petitioner is a responsible party. The petitioner does not object to being assessed as a responsible party for the periods in question. Moreover, the evidence available to the Tax Commissioner indicates that the petitioner was a responsible party of One Sparrow for the period at issue.

Accordingly, the assessment is affirmed.

Current records indicate that $3,309.81 has been applied towards this assessment, resulting in no balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.**

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAR 17 2020

Charles B. Debolt, Jr. & Linda L. Debolt
65979 McMillian Road
Bethesda, Ohio 43719

Re: Assessment No. 02201830522138
Individual Income Tax – 2017

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

Tax	Interest	Penalty	Total
$754.00	$16.11	$32.22	$802.33

The Department assessed the petitioners based on the unrebutted presumption that they were Ohio residents who failed to fully remit their Ohio tax liability for the tax period in question. The petitioners object to the assessment and included an "International Promissory Note" document signed by "*real man/real woman, authorized representative and Agents for Debtors*" and "Notice Agent is Notice to Principal, Notice to Principal is Notice to Agent" Affidavit. (Emphasis Added) with their petition for reassessment. The petitioners did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

As an initial matter, it must be noted that the petitioners' contention and documentation submitted with their petition for reassessment "fit into the 'tax protestor' category" and are composed of "a hodgepodge of unsupported assertions, irrelevant platitudes, and legalistic gibberish[,]" and as such, are without merit. (Internal citations omitted.) *Abraitis v. Testa*, 137 Ohio St.3d 285, 2013-Ohio-4725, ¶ 8, 998 N.E.2d 1149. The petitioners' assertions provide no colorable claims of error and simply include legalistic gibberish. Additionally, "[d]isagreement with the law in and of itself does not constitute good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it." *United States v. Miller*, 634 F2d 1134, 1135 (8th Cir. 1980) (quoting the trial court's instructions to the jury).

Ultimately, the petitioners have failed to supply evidence or arguments sufficient to demonstrate that refutes the accuracy of the tax and interest amounts assessed in this matter. On the contrary, the evidence currently available to the Tax Commissioner, including the 2017 Ohio individual income tax return that the petitioners filed, indicates that the tax and interest amounts assessed are correct. Furthermore, the penalty assessed is reasonable based on the facts and circumstances presented.

Accordingly, the assessment is affirmed.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 17 2020

Paige Dobkins
7875 Hackney Circle
Maineville, OH 45039

Re: Income Tax Refund File No. 1900410
Individual Income Refund Tax- 2016

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
2016	$1,217.00

I. BACKGROUND:

The claimant initially filed an Ohio individual income tax return reporting that she was a full-year resident of Ohio. However, on October 30, 2018, the claimant filed an application for refund on an amended Ohio individual income tax return for tax year 2016.[1] On the amended tax return, the claimant checked she was a part-year resident for 2016. The claimant also filed the 2016 Form IT RE – Reason and Explanation of Corrections and an Affidavit of Non-Ohio Residency/Domicile 2016. On the 2016 Ohio IT RE – the petitioner indicated that she filed the amended return in question because she was a non-resident of Ohio for the entire year of 2016. Additionally, on the Affidavit of Non-Ohio Residency/Domicile 2016 submitted, the petitioner stated she had at least one abode outside of Ohio for the entire 2016 – Miami, Florida. Therefore, she contends that she should not have filed a 2016 Ohio Income Tax Return and is now seeking a refund of $1,217.00, which is equivalent to the total tax she remitted for 2016. The claimant did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim pursuant to R.C. 5703.70.

II. APPLICABLE STATUTORY LAW:

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

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

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

The tests set forth in divisions (B), (C) and (D) of former R.C. 5747.24, applicable for the period in question, examine the number of Ohio contact periods to arrive at a presumption of whether the individual is an Ohio resident for that taxable year. Division (A)(1) of R.C. 5747.24 indicates that a person has a contact period if the person is away overnight from their abode located outside Ohio and while away spends at least some portion, however minimal, of each of two consecutive days in Ohio. R.C. 5747.24(E) indicates that the individual is presumed to have a contact period for any period that the individual does not prove was not a contact period. In this case, the evidence currently available to the Tax Commissioner reflects that the claimant had fewer than 183 contact periods with Ohio in 2016.

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

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

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

Under divisions (C) and (D) of former R.C. 5747.24, the burden shifts to the individual to prove that they were not domiciled in Ohio during the taxable year. Former Division (C) of R.C. 5747.24, applicable for the tax period at issue, states that an individual who has less than 183 contact periods with Ohio and who is not irrebuttably presumed under division (B) of this section to be not domiciled in this state is presumed to be domiciled in Ohio for the entire taxable year. An individual can rebut the presumption set forth in R.C. 5747.24(C) with a preponderance of the evidence to the contrary. The preponderance of the evidence standard has been described as that quantum of proof which produces in the mind of the trier of fact belief that what is sought to be proved is more likely true than not true. *In re Agler*, 19 Ohio St. 2d 70 (1969).

III. COMMON-LAW DOMICILE:

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

The Ohio Supreme Court has held that the "domicile of a person [is] where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention

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

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

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

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

IV. Facts & Circumstances:

The claimant contends she severed her Ohio domicile for tax year 2016 and established residency in Florida. As mentioned, the claimant had fewer than 183 contact periods with Ohio in 2016; therefore, the claimant must rebut the presumption of domicile with a preponderance of the evidence to the contrary. R.C. 5747.24(C). In support of her claim of not being domiciled in Ohio, the claimant provided the Tax Commissioner with an employment letter and wage statement from Carnival Cruise Line. However, this evidence is not indicative of the claimant's intent to remain in Florida indefinitely and does not show that she has abandoned her Ohio abode. Notably, the petitioner's 2016 wage and income statement reflect an Ohio address – 9112 Depalma Drive, Cincinnati, Ohio 45241 – as claimant's mailing address.

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

Physical presence is not, in and of itself, a determinative factor for the purpose of determining domicile. Here, even though the claimant was employed outside of Ohio in 2016, Department records reflect that the claimant retained her Ohio driver's license which continued to be registered to her parents' address located at 9112 Depalma Drive, Cincinnati, Ohio. Records further reflect that the petitioner's current residential Ohio address located at 7875 Hackney Circle, Maineville, Ohio 45039, which is an indication that the petitioner intended, and in fact, returned to Ohio. Moreover, Department records indicate that the claimant's used her parents address when she filed her individual federal and Ohio income tax return for the tax period in question. Additionally, the claimant has failed to provide any documents that show proof of that she maintained a Florida abode in 2016. Records also reflect that the claimant was registered to vote in Ohio during the period in question.

V. CONCLUSION:

The totality of the evidence available to the Tax Commissioner shows that the claimant's actions during 2016 are consistent with those of individuals maintaining an Ohio domicile while working in another state. Even though the claimant has provided evidence that she worked for Carnival Cruise Line, she has not provided any evidence indicating that she took affirmative steps to establish a new domicile somewhere other than Ohio. As discussed above, the claimant maintained and renewed significant ties to Ohio in the form of retaining her Ohio driver's licenses and using her Ohio parent's residence as her place of residence on various documents. Furthermore, the claimant has not demonstrated the intent to permanently reside in Florida. Moreover, these facts suggest that the claimant did not establish a new domicile in Florida because her residence in Florida was temporary in nature and tied to her employment.

Therefore, the claimant has failed to rebut the presumption that she was domiciled in Ohio for the entirety of tax year 2016 as required by R.C. 5747.24(C). Based on the Ohio law and the authority discussed above, the facts require the conclusion that the claimant continued to be domiciled in Ohio despite the claimant's work assignment outside the state. Consequently, the claimant's contention is not well taken, and the claimant is presumed to have been domiciled in Ohio for the tax year at issue.

Accordingly, the refund claim is denied in full.

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

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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: MAR 27 2020

Richard L. Hurst
320 Maywinn Rd.,
Defiance, OH 43512

Re: Assessment No. 02201819278544
Individual Income Tax – 2012

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	Penalties	Total
$730.00	$126.50	$362.50	$1,219.00

The Department assessed the petitioner for failing to fully remit his Ohio income tax for the 2012 tax year. Records reflect that the petitioner was audited by the Internal Revenue Service ("IRS") and had federal adjusted gross income for the period in question in an amount which would have resulted in an Ohio income tax liability exceeding one dollar and one cent. This information was reported to the Department by the IRS under authorization of Section 6103(d) of the Internal Revenue Code. The petitioner objects to the assessment and claims he is "not a federal, state, or municipal government employee. * * * I am not a seaman or a non-competent Indian." 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.

Ultimately, the petitioner failed to supply evidence or arguments sufficient to demonstrate that refutes the accuracy of the tax, interest, and penalty amount assessed in this matter. Furthermore, the information currently available to the Tax Commissioner indicates that the tax and interest amounts assessed are based upon the best information available, and the penalty is reasonable based on the surrounding facts and circumstances.

Therefore, the assessment is affirmed.

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

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

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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: MAR 2 0 2020

Harry E. Jackson & Carlos Eduardo B. Azevedo
5534 State Rd
Wadsworth, OH 44281

Re: Assessment No. 02201934479743
Individual Income Tax: 01/01/2017 – 12/31/2017

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

Tax	Interest	Penalty	Total
$1,131.00	$85.18	$170.36	$1,386.54

The Ohio Department of Taxation assessed the petitioners after making adjustments to the individual income tax return that they filed for the tax year at issue. The petitioners do not object to the tax and interest amounts assessed, but request an abatement of the late payment penalty. The petitioners did not request a hearing on this matter. Therefore, this matter is decided based upon the evidence currently available to the Tax Commissioner.

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

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$1,131.00	$85.18	$0.00	$1,216.18

Current records indicate that a payment of $1,216.18 has been made in full satisfaction of the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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:

MAR 20 2020

Deborah Lovejoy
4068 E. 147th Street
Cleveland, OH 44128

Re: Assessment No. 02201817267377
Individual Income Tax – 2016

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

Tax	Interest	Penalty	Total
$1,153.00	$53.83	$107.66	$1,314.49

The Department assessed the petitioner after making adjustments to the individual income tax return that she filed for the tax year in question. The petitioner subsequently filed a petition for reassessment objecting to the assessment. For the Tax Commissioner to exercise jurisdiction over this matter, the petitioner was required, pursuant to R.C. 5747.13(B), to file a petition for reassessment within sixty days of the service of the notice of assessment. According to Departmental records, the notice of assessment was served on July 3, 2018, in accordance with R.C. 5703.37. Records further reflect that the petitioner's petition for reassessment was postmarked October 5, 2018, which was more than sixty days after service of the assessment. Therefore, the Tax Commissioner must dismiss the petition. See *Hafiz v. Levin*, 120 Ohio St.3d 331, 2008-Ohio-6788 (2008).

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

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

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-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: MAR 17 2020

Jerry P Rable
3589 Sugar Creek Rd
Elida, OH 45807

Re: Two Assessments
Individual Income Tax – Multiple Periods

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

Assessment Number	Period	Tax	Interest	Penalty	Total
02201816364291	01/01/2015-12/31/2015	$0.00	$0.00	$1,500.00	$1,500.00
02201816364291	01/01/2016-12/31/2016	$0.00	$0.00	$1,500.00	$1,500.00
02201816364291	01/01/2017-12/31/2017	$0.00	$0.00	$1,500.00	$1,500.00
02201911308245	01/01/2018-12/31/2018	$0.00	$0.00	$1,500.00	$1,500.00

The Department assessed the petitioner based on the unrebutted presumption that he was an Ohio resident[1] who made a false claim for refund as contemplated under R.C. 5747.15 (A)(6) and (7). The petitioner filed a false and untimely 2015, 2016, 2017, and 2018 individual income tax returns which reported $0.00 of Federal Adjusted Gross Income (FAGI) and claimed a refund.

The petitioner objects to the assessment and contends that "the wages reported on his W-2 were erroneously reported" by his employer and further that he had no Ohio income tax liability for the periods in question. However, the petitioner has not submitted any evidence to support his contention or the false and untimely returns that he filed. The evidence currently available to the Tax Commissioner indicates that the petitioner is employed by the Ohio Department of Rehabilitation and Correction and earned at least $88,992 in 2015, $88,622 in 2016, $81,876 in 2017, and $93,099 in 2018, for services performed in Ohio, and therefore was subject to Ohio income tax in accordance with Chapter 5747 of the Ohio Revised Code. The petitioner has failed to comply with Ohio's tax law for multiple years despite repeated assessments issued in response to incomplete or false Ohio income tax returns that he filed.[2] "Disagreement with the law in and of itself does not constitute good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it." United States v. Miller, 634 F2d 1134, 1135 (8th Cir. 1980)

[1] The petitioner self-reported that he was a resident of the State of Ohio during the tax periods in question and did not identify any non-Ohio sourced income on the returns that he filed. The evidence available to the Tax Commissioner also reflects that the petitioner was an Ohio resident for the periods in question.

[2] Records reflect that the petitioner failed to correctly report income taxable to Ohio for tax years 2000, 2003, 2004, 2005, 2007, 2009, 2015, and 2016. Assessments for these periods have been certified to the Ohio Attorney General for collection in accordance with sections 5747.13(C) and 131.02 of the Revised Code.

(quoting the trial court's instructions to the jury). On the contrary, despite his disagreement, the petitioner is still required to comply with the established Ohio tax law.

R.C. 5747.13(E)(2) requires a taxpayer to pay the total tax, interest, and penalty assessed with the petition for reassessment if the taxpayer filed a tax return that the Tax Commissioner determines to be incomplete, false, fraudulent, or frivolous. In this case, the Tax Commissioner has determined that the petitioner's 2015, 2016, 2017, and 2018 returns were false and frivolous, and the petitioner did not pay the total amount of tax, interest and penalty with the petitions. Thus, the petitioner must pay the entire assessed amount prior to consideration of the petitions. Unless the taxpayer makes the required payments, the Tax Commissioner must dismiss the petitions.

Accordingly, these matters are dismissed for lack of jurisdiction, and the assessments stand as issued.

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

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

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

0000000392

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: MAR 27 2020

Mark & Elizabeth Weiss
1612 Landfall Dr.
Wilmington, NC 28405

Re: Assessment No. 02201800923777
Individual Income Tax - 2016

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

Tax	Interest	Penalty	Total
$12,880.00	$372.62	$745.24	$13,997.86

The Ohio Department of Taxation assessed the petitioners after making adjustments to the individual income tax return that the petitioners filed for the 2016 tax year. Specifically, the Department disallowed the petitioners' 2016 Ohio IT 1040 Schedule A, line 23 miscellaneous federal income tax deduction. The petitioners contend that they are nonresidents of Ohio, and they have amended their Ohio nonresident return to report the income they earned in North Carolina on the Ohio Schedule of Credits form instead of the Ohio Schedule A. The petitioners did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

Subsequent to the assessment, the petitioners filed a 2016 Ohio amended return. However, the petitioners still claimed an amount on the Ohio Schedule A as a miscellaneous federal income tax deduction. Line 23 of Ohio Schedule A is for adjustments only necessary when Ohio law fails to conform with changes made to federal income tax law. Since Ohio conformed to federal law for tax year 2016, there is no valid amount that can be deducted on this line for this tax year. R.C. 5701.11(B)(1). Accordingly, the amount claimed as a miscellaneous federal income tax deduction is disallowed.

However, nonresidents who earn or receive income within Ohio are able to claim the nonresident credit with respect to all items of income not earned and not received in Ohio. R.C. 5747.05(A). Accordingly, the petitioners have presented sufficient evidence including copies of their 1099s, W2s, and their federal return to show that they were not residents of Ohio and had limited Ohio sourced income. The Department has been able to verify the petitioners' nonresident credit, which shows a reduced tax amount due.

The Tax Commissioner may also abate penalties when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the petitioners claim that their failure to comply was due to reasonable cause and the evidence and circumstances support a partial abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Payments	Total
$111.00	$3.37	$50.00	($96.00)	$68.37

Current records indicate that $96.00 has been made on this assessment, leaving the adjusted balance due. However, due to processing and posting time lags, other payments may have been made that are not reflected in this final determination.

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
www.tax.ohio.gov

000000447

FINAL DETERMINATION

Date: MAR 27 2020

Norwood City
Attn: Law Dept
4645 Montgomery Rd
Norwood, OH 45212

Re:	DTE No:	YE 1073
	Auditor's No.:	16-007
	County:	Hamilton
	School District:	Norwood CSD
	Parcel Number(s):	651-0013-0074

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2019-249 which remanded the case to the Tax Commissioner for further consideration. This final determination concerns an application for exemption of real property from taxation, filed on January 25, 2016, in which the applicant seeks exemption of real property from taxation for tax year 2016 and remission of taxes, interest and penalties for 2014 and 2015 under R.C. 5709.08.

The applicant, the City of Norwood (hereinafter referred to as "City"), acquired title to the subject property on July 10, 2014, from Paycor, Inc. The applicant states in the application that exempt use of the subject property began on July 10, 2014.

Property for which an applicant seeks exemption from real property taxation must have been owned by the applicant and used for an exempt purpose as of the tax lien date of January 1st of the year in which the exemption is sought. (See *Christian Benevolent Assn. of Greater Cincinnati, Inc. v. Limbach* (1994), 69 Ohio St.3rd 296; R.C. 323.11; and R.C. 5713.08.) Here the applicant did not acquire ownership to the property until July 10, 2014. Therefore, exemption cannot be reviewed for tax year 2014 or before.

I. Factual Background

The evidence shows that the City acquired title to the subject property on July 10, 2014, from Paycor, Inc. The property comprises approximately half of the parking lot behind the main building on the Paycor, Inc. property. It is surrounded on three sides by the remaining Paycor property and on the fourth side by Ross Avenue on the north facing a residential area.

The application states the use of the property as: "City owned parking lot."

When the Tax Commissioner's examiner wrote on January 10, 2018 for further explanation how the property constitutes a "city owned parking lot", she noted that: "According to aerial footage the parking lot is part of Paycor." After which she asked: "Please explain?".

On January 23, 2018, the City's Law Director responded by writing: "The primary use of the land is as a parking lot, so that is the use which we listed."

The Law Director went on to write: "The land is being held in anticipation of future economic development, likely as a site for a public parking garage to support further development in that area." He added: "The parking is open to the public, and there are no fees charged."

A site inspection of the subject property by representatives of the Hamilton County Auditor's office during the pendency of this application revealed that signs at two of the primary entrances to the parking areas from the public streets prominently mark the property and the parking areas as: "PRIVATE PROPERTY"; "NO TRESPASSING"; "TRESPASSERS WILL BE PROSECUTED"; and "NO THRU TRAFFIC".

The aerial photos of the property show that the subject property follows no obvious land or geographic contours and carves out a central portion of the Paycor parking lot in an irregular shape leaving parts of the Paycor lot surrounding the subject property.

The aerial mapping also reveals that the remaining Paycor property and the subject city-owned property connected thereto are land-locked and surrounded on all four sides: by a restricted access highway on the south, by four-lane thoroughfares and other already developed commercial properties on the east and west, as well as by a residential neighborhood across the street from the north side.

II. Ohio Revised Code Sections 5709.01 and 5715.271

The rule in Ohio is that all real property is subject to taxation. R.C. 5709.01. Exemption from taxation is the exception to the rule. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St. 3d 186. Exemption statutes must be strictly construed. *American Society for Metals v. Limbach* (1991), 59 Ohio St. 3d 38, 40 and *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St. 3d 432.

R.C. 5715.271 provides:

> In any consideration concerning the exemption from taxation of any property, the burden of proof shall be placed on the property owner to show that the property is entitled to exemption. The fact that property has previously been granted an exemption is not evidence that it is entitled to continued exemption.

Therefore, the property owner has the burden of proof to show that its property is entitled to exemption.

III. Ohio Revised Code Section 5709.08

R.C. 5709.08 reads, in pertinent part, as follows:

> (A)(1) Real or personal property belonging to the state or United States used exclusively for a public purpose, and public property used exclusively for a public purpose, shall be exempt from taxation.

The Supreme Court of Ohio has held that there are three prerequisites which must be met in order for property to qualify for exemption under this statute: (1) the property must be public property; (2) the use thereof must be for a public purpose; and (3) the property must be used exclusively for a public purpose. *Carney v. Cleveland* (1962), 173 Ohio St. 56.

In *Cleveland v. Perk* (1972), 29 Ohio St.2d 161, the Ohio Supreme Court further held that:

> When *** private enterprise is given the opportunity to occupy public property in part and make a profit, even though in so doing it serves not only the public, but the public interest and a public purpose, such part of the property loses its identity as public property and its use cannot be said to be exclusively for a public purpose. A private, in addition to a public, purpose is then subserved.
>
> Id at 166.

The Supreme Court of Ohio more recently addressed the exemption of public property used by a private, for-profit entity in *City of Parma Heights v. Wilkins*, (2005) 105 Ohio St 3d 463:

> We have said in past cases that "whenever public property is used by a private citizen for a private purpose, that use generally prevents exemption." *Whitehouse v. Tracy* (1995), 72 Ohio St.3d 178, 181, 648 N.E.2d 503. The rule explained more than 30 years ago remains true today: "When * * * private enterprise is given the opportunity to occupy public property in part and make a profit, even though in so doing it serves not only the public, but the public interest and a public purpose," the property no longer meets the R.C. 5709.08 requirement that the property be "used exclusively for a public purpose." *Cleveland v. Perk* (1972), 29 Ohio St.2d 161, 166, 58 O.O.2d 354, 280 N.E.2d 653 (holding that areas of a city-owned airport that were leased to private entities for commercial enterprises were not exempt from real property taxes). And we have also noted that "one who is in the possession and control of property and is occupying, managing and operating the same as lessee is often to be treated as the owner thereof." *Carney v. Cleveland* (1962), 173 Ohio St. 56, 58, 18 O.O.2d 256, 180 N.E.2d 14
> ...
>
> Id. at 465.

Here the City of Norwood has acquired a portion of property from a for-profit corporation, Paycor, Inc., while allowing the for-profit corporation to retain effective control and use of the property in conjunction with the corporation's contiguous and indistinguishable parking lot areas and grounds, while relieving Paycor, Inc. of a portion of its former real property tax burden.

The subject property is prominently marked as "Private Property", with the additional emphasis of "No Trespassing", "Trespassers Will Be Prosecuted", and "No Thru Traffic" signage.

For the subject property, there is no evidence of concrete plans toward "a public parking garage to support further development in that area" as suggested by the City's Law Director. As noted, the property is surrounded on all sides by already developed commercial property, residential neighborhoods and highways, leaving no appreciable land to be developed to support a parking garage.

The subject property is clearly used for the direct benefit of Paycor, Inc., together with its employees, contractors and customers.

When the control and management of publicly owned property, such as the subject property herein, is left in the hands of a private for-profit entity, such as Paycor, Inc., that property loses its identity as public property used exclusively for a public purpose as anticipated in R.C. 5709.08, particularly when that publicly owned property is used by that private business to effectively gain a competitive advantage over other private businesses. At that point, even if the public may receive an incidental benefit, the primary use of the property has ceased to be public use.

Likewise, publicly owned real property must not be used with a view to a profit. Here, for-profit Paycor, Inc. receives a direct real property tax cost savings contributing to an increased opportunity for corporate profit from its cost-free use of the now publicly-owned property directly integrated with its property.

Due to the configuration of the property, Paycor, Inc. has exclusive control of the property on a day-to-day basis, not the City of Norwood.

Pursuant to R.C. 5715.271 the property owner has the burden of proof to show that its property is entitled to exemption. Here, the Applicant has failed to sustain its burden of proof that the subject property is eligible for real property tax exemption under R.C. 5709.08.

The City of Norwood has allowed a for-profit enterprise to use and occupy public property and to make a profit, or at the very least, operate with a view to profit from its occupancy and use of the public property. Even if, *arguendo,* Paycor's management of the property serves the public and is in the public interest, the property is occupied and used by a private entity, Paycor, Inc., to make a profit.

Therefore, the subject property does not qualify for exemption under R.C. 5709.08.

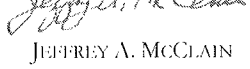
IV. Conclusion

The Tax Commissioner finds that the property described in the application is not entitled to be exempt from taxation and the application is therefore Denied.

The Tax Commissioner orders that any penalties charged through the date of the final determination in this matter be remitted.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. NOTICE WILL BE SENT PURSUANT TO R.C. 5715.27 TO THE COUNTY AUDITOR.

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

0000000451

FINAL DETERMINATION

Date: MAR 27 2020

City of Norwood
Attn: Law Department
4645 Montgomery Road
Norwood, Ohio 45212

Re:	DTE No.:	YE 1074
	Auditor's No.	16-008
	County:	Hamilton
	School District:	Norwood CSD
	Parcel Number:	651-0013-0004

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2019-250 which remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, the Tax Commissioner finds that the property described above qualifies for exemption from real property taxation pursuant to R.C. 5709.08 for tax years 2016, 2017, and 2018.

The Tax Commissioner therefore orders that the real property described above be entered upon the list of property in the county which is exempt from taxation for tax years 2016, 2017, and 2018. The Tax Commissioner further orders that any tax, interest and penalties charged against this property for tax year 2014 and 2015 though the date of this final determination in this matter be remitted. The subject property shall remain on the exempt list until either the county auditor or the Tax Commissioner restores the property to the tax list.

The Tax Commissioner further orders that any penalties charged against this property though the date of the final determination in this matter be remitted.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. NOTICE WILL BE SENT PURSUANT TO R.C. 5715.27 TO THE COUNTY AUDITOR.

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

0000000452

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: MAR 27 2020

Ankle & Foot Care Centers, LLP
8175 Market Street
Youngstown, Ohio 44512-6244

Re: Sales Tax
Refund Claim No. 033260074941

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-38, dated February 19, 2020. In that order, the Board remanded the case to the Tax Commissioner for further proceedings.

In resolution of this matter, the Tax Commissioner has agreed to grant a partial refund as follows:

	Total
Refund	$ 18,292.32
Interest	$ 7,954.95
Total	$ 26,247.27

Therefore, a refund in the amount of $26,247.27 is hereby authorized.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date:
MAR 18 2020

1810 N 4th LLC
1810 N 4th St.
Columbus, OH 43201

RE: Assessment No.: 100000899623
Sales Tax
Account No.: 25-902949

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

Tax	Pre-Assessment Interest	Penalty	Total
$354,765.16	$36,850.64	$177,382.46	$568,998.26

The petitioner operates as a bar with a full-service kitchen. This assessment is the result of a mark-up audit of the petitioner's sales from January 1, 2013 through December 31, 2016. The petitioner filed a petition for reassessment. A hearing was held on September 23, 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. While the petitioner maintained the primary sales records required by R.C. 5739.11, an error with its point of sale ("POS") system resulted in those records being inaccurate. Audit Remarks, Page 4. As these records were inaccurate, the auditor engaged in a mark-up analysis as permitted under R.C. 5739.13(A). *Id.* Utilizing the petitioner's records, the auditor calculated the taxable beer, liquor, wine, cigarettes, and other tobacco. Each category was assigned a mark-up percentage derived from the petitioner's purchase invoices and inventory purchase summaries obtained directly from distributors, suggested retail mark-up percentages, and state minimum requirements.

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The auditor sent a memorandum of agreement to the petitioner that specified the methodology of the audit. The agreement was provided to the petitioner with a ten-day correspondence requesting that if the petitioner disagreed with the audit methodology, an alternative methodology must be submitted in written form within ten days. The petitioner did not submit an alternate audit methodology or sign the memorandum of agreement but did sign the acknowledgement of the ten-day letter.

A sample period of January 1, 2013 through December 31, 2013 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 which the auditor attempted to reconcile with the petitioner's own purchase records.

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 254.28 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. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

The petitioner objects to the methodology of the mark-up audit. It states that the petitioner's tax liability is overstated as a result. At hearing and in a subsequent e-mail on September 23, 2019, the Tax Commissioner requested verifiable documentation from the sample year justifying this objection. The Tax Commissioner also requested calculations of the extent of the alleged overstated liability. The Tax Commissioner requested that this information be submitted by January 17, 2020. The petitioner failed to submit any evidence. The taxpayer's challenges to the conclusions reached by the mark-up analysis ignore the fact that such approach was necessitated due to the taxpayer's own failure to maintain accurate records. When this occurred, the Commissioner was not only entitled, but was required, to gather information from other sources and estimate the amount of taxes which should have been collected and remitted. R.C. 5739.13; *Brandy's Inc. v. Zaino*, 3rd Dist. Hancock No. 5-01-43, 2002-Ohio-1923, ¶ 25. While the

MAR 1 8 2020

taxpayer has challenged the accuracy of the audit conclusions, it failed to provide information to establish an alternative. Therefore, this objection is denied.

Calculation Errors

The petitioner's second objection is that "[e]rrors were discovered in the calculation method to determine taxable sales and sales tax liability." The petitioner did not identify the specific errors alleged. The petitioner did not submit any documentation or further evidence as requested. These calculations were necessary due to the petitioner's own errors in accounting for its faulty POS system. Therefore, this objection is denied.

Constitutional Rights

The petitioner further objects that the alleged overstatement created by the audit calculation violates its constitutional rights. It is well-established that the Tax Commissioner lacks jurisdiction to determine the constitutionality of a statute. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988). Because the petitioner's objections to R.C. 5739.13 are a constitutional challenge to the statute, the Tax Commissioner cannot make a determination on that challenge.

Spillage

The petitioner objected at hearing to the spillage allowance in the mark-up calculation. The Tax Commissioner requested any evidence as to what the petitioner believed the right amount of spillage allowance should have been. Additionally, the auditor set out the amount of spillage allowance in the memorandum of agreement that was provided to the petitioner. The petitioner was also provided a ten-day letter stating that if it objected to the methodology used as outlined in the memorandum, it should provide that information or another methodology within ten days. The petitioner failed to do so. The petitioner failed to provide evidence to show error in the assessment. Therefore, this objection is denied.

Penalty

The petitioner requests either full or partial penalty abatement. 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 in this matter, the Commissioner finds that a partial penalty abatement is reasonable here.

Therefore, the assessment shall be modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$354,765.16	$36,850.64	$141,905.91	$533,521.71

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

MAR 1 8 2020

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

0000000461

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

FINAL DETERMINATION

Date: MAR 27 2020

A & J Petroleum Inc.
213 E. Main St.
Gnadenhutten, OH 44629

RE: Assessment No.: 100000937129
Tax Type: Sales
Account No.: 79-042462

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
$84,456.91	$6,258.23	$42,228.27	$132,943.41

The petitioner operates a gas station and convenience store. This assessment is the result of a mark-up audit of the petitioner's sales for the period from July 1, 2014 through June 30, 2017. The petitioner filed a petition for reassessment and requested a reduction of the calculated sales tax liability, and a remission of the pre-assessment interest and penalty. A hearing was held in this matter on Tuesday, December 10, 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 records supplied by the petitioner and the petitioner's suppliers, as the petitioner failed to maintain primary sales records required by statute. Utilizing these records, the auditor calculated the taxable beer, cigarettes, other tobacco, pop and soft drinks, energy drinks, taxable merchandise, and propane. 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, the pop and energy drink categories were reduced by 25 percent to account for food stamp sales.

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, signed the memorandum of agreement, and did not submit an alternate audit methodology.

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 183.2957 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. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

Beer and Wine Sales

The petitioner contends that the audit methodology is erroneous because it overstates sales as the sample period did not include some taxable sales reported during the audit period, such as beer and wine. The petitioner provides that beer and wine sales did not occur during the sample period because the petitioner did not maintain a liquor permit during the sample period.

The petitioner and auditor mutually agreed to the sample period as a representation of the entire audit period to calculate taxable sales. Audit Remarks, Page 6. Wine sales were not assessed as there was no support to indicate it was part of the inventory purchase detail during the sample period. *Id.* Alternatively, wine sales would have accounted for merely three months of the three-year audit period since the petitioner did not maintain a C2 and D6 liquor permit for wine until March 1, 2017. As noted above, the petitioner was given credit for all sales tax remitted during the audit period.

During the ten-day correspondence period, the petitioner only contested the mark-up percentage in the memorandum of agreement for the category of beer. The petitioner included a cross through of the mark-up percentage used for beer and included a percentage which was below the state minimum authorized in Ohio Adm.Code 4301:1-1-72. The petitioner's distributor records also support that the petitioner made beer sales during the sample period. The Department verified with the Department of Liquor Control that the petitioner maintained a C1 permit for beer sales during the sample period and for the majority of the three-year audit period, as the effective date of the C1 permit was February 1, 2015. Therefore, the petitioner's contention that beer sales were not accounted for in the sample period is without merit. The petitioner has failed to demonstrate error in the assessment. The objection is denied.

Inventory Buildup

The petitioner also contends that the audit methodology is erroneous because it did not factor inventory buildup in the audit, which resulted in overstated sales. 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, (July 16, 1999). The petitioner failed to prove error in the assessment; therefore, this objection is denied.

Mark-up Percentages

The petitioner contends that the mark-up percentages used were overstated. 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 and beer are the mandatory minimums prescribed by R.C. 1333.11 and Ohio Adm.Code 4301:1-1-72. 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.

Spoilage and Breakage

The petitioner contends that the audit did not consider shrinkage from theft or breakage. During the audit, the auditor informed the petitioner that credit could not be given for stolen merchandise without a valid police report or insurance claim. Audit Remarks, Page 15. The petitioner could not provide any documentation of reported theft incidents. Audit Remarks, Page 10. Further, the petitioner could not state what inventory was stolen. The evidence and circumstances do not support adjustments for shrinkage from theft.

During the hearing, the petitioner requested that the Department consider breakage and spoilage of inventory. The petitioner stated that he did not have documentation to support this contention. A generalized description of losses incurred from shrinkage or breakage does not meet the petitioner's burden. Moreover, the petitioner stated on its Liquor Permit Operations Questionnaire that no significant events affected the business during the audit period. The questionnaire was completed, signed, and dated by the petitioner on September 11, 2017. The petitioner fails to state what inventory was spoiled. The petitioner has not provided any evidence to support these contentions; therefore, the objections are denied.

Pre-Assessment Interest

The petitioner requests abatement of the pre-assessment interest associated with the assessment. The Tax Commissioner lacks jurisdiction to abate pre-assessment interest added to an assessment pursuant to R.C. 5739.133. Therefore, this request cannot be allowed.

Penalty

The petitioner seeks abatement of the penalty associated with the assessment. The petitioner asserts that it attempted to comply with the law in good faith, and it timely filed its sales tax returns. The evidence and circumstances support a partial abatement of the penalty. The request for a penalty abatement is granted in part.

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$84,456.91	$6,258.23	$29,559.75	$120,274.89

Current records indicate that no payments have been made toward the assessment leaving a balance due of $120,274.89. 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 SIXTYDAY 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

0000000457

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

FINAL DETERMINATION

Date: MAR 27 2020

Abdalla LLC
3716 Refugee Rd.
Columbus, OH 43232

Re: Assessment No. 100001032198
Sales Tax
Account No. 25-315094

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
$103,311.65	$8,819.51	$51,655.59	$163,786.75

The petitioner operates a convenience store. The assessment is the result of an audit of the petitioner's sales May 7, 2014 through February 28, 2018. A hearing was held on October 17, 2019.

This assessment is the result of a mark-up analysis of the petitioner's purchases of inventory. The petitioner is required to maintain primary and secondary records of sales. R.C. 5739.11 and Ohio Adm.Code 5703-9-02. The petitioner did not provide z-tapes or other primary sales records for the period at issue. Audit Remarks, Page 3. 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

A mark-up analysis was conducted using the petitioner's inventory purchase records and the records supplied by the petitioner's suppliers. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco, other alcohol, pop & soft drinks, energy drinks, and other taxable merchandise. Each category was assigned a mark-up percentage based on evidence from the petitioner, industry standards, and state minimum requirements. The petitioner did not sign the Memorandum of Agreement outlining the audit methodology. A ten-day letter was issued on or about June 22, 2018 allowing the petitioner the opportunity to suggest an alternative audit methodology; however, none was submitted.

A sample period of January 1, 2017 through December 31, 2017 was used as a representation of the entire audit period to calculate taxable sales. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The totals for each category of taxable merchandise were summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales (538.7%). 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.

The taxpayer's challenges to the conclusions reached by the mark-up analysis ignore the fact that such approach was necessary due to the taxpayer's own failure to maintain complete and accurate records. When this occurred, the commissioner was not only entitled, but was required, to gather information from other sources and estimate the amount of taxes which should have been collected and remitted. R.C. 5739.13; *Brandy's Inc. v. Zaino*, 3rd Dist. Hancock No. 5-01-43, 2002-Ohio-1923, ¶25. While the taxpayer has challenged the accuracy of the audit conclusions, they failed to provide information to establish an alternative.

Inventory Already Taxed

At the hearing, the petitioner stated they have already paid tax on their purchases of inventory because they were charged sales tax by Sam's Club. This objection was not submitted in writing, however, it will be addressed below.

Every sale or use of tangible personal property is presumed taxable in Ohio and the burden is on the taxpayer to affirmatively establish the right to an exception. R.C. 5739.02(C); *Standard Oil Co. v. Peck*, 163 Ohio St. 63, 125 N.E.2d 342 (1955). The petitioner contends they purchased most of their inventory at Sam's Club. The petitioner contends sales tax was paid upon purchases at Sam's Club. The petitioner contends these purchases should be backed out of the audit results because tax was already paid on the inventory. A sales tax is levied on each sale of tangible

personal property in Ohio. R.C. 5739.02. The tax is a trust tax paid by the consumer to the vendor who then remits payment to the state. R.C. 5739.03(A). A sales tax assessment is not in error when sales tax was paid on the tangible personal property in question as part of an earlier transaction. *Presrite Corp, v. Limbach*, BTA No. 88-F-1127, 1992 WL 159613 (June 30, 1992). The presumption is every sale in Ohio is subject to tax. The failure to claim an exemption does not affect the taxability of a later sale. The subsequent sale is a different transaction involving a different amount of tax and the tax is levied on a different consumer. The amount of tax collected on subsequent sales changes because items are marked up when they are sold in a store. Additionally, sales tax is levied on the consumer, the vendor is merely trusted to collect and remit that tax. The failure to claim the resale exception when purchasing inventory may give rise to a refund claim but does not relieve a vendor of their duty to collect sales tax on behalf of the state. Furthermore, the petitioner did not submit evidence to support this claim. The objection is denied.

Additional Documents

The petitioner stated in their petitioner for reassessment "We have additional documents to provide to your office, these documents will help lower our tax liability." The petitioner did not provide any additionally evidence or further clarify this objection. The burden is on the petitioner to provide sufficient evidence to show error in the assessment. The petitioner has not met their burden with this general statement. The objection is denied.

Therefore, the assessment is affirmed.

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

0000000394

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

FINAL DETERMINATION

Date: MAR 27 2020

Aeroflex Wichita, Inc
383 N. Liberty Rd.
Powell, OH 43065

Re: Refund Claim No. 201803166
Filed October 18, 2017
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of $14,581.60 of sales tax filed pursuant to R.C. 5739.07.

The claimant ("Aeroflex") is a designer and manufacturer of communications and avionics equipment in Wichita, Kansas. This claim for refund is based upon several transactions that the claimant contends are exempt from taxation because the items were used to manufacture property for sale. A hearing was not requested.

The claimant filed its refund application on October 18, 2017. The agent of the Tax Commissioner who reviewed the refund application determined that the claimant failed to provide sufficient proof of sales tax paid. The agent further determined that the claimant had not provided any evidence of an exempt use of the purchases. The agent denied the claim, requesting cancelled checks or other proof of payment and a letter of usage for the items the claimant believes are exempt. The claimant subsequently appealed, providing a copy of purchase invoices that do not separately delineate sales tax and a statement regarding the general use of the purchases but that it would not provide the requested letter of usage. When a claimant provides additional information and does not request a hearing, the Commissioner shall review the information and make adjustments to the refund 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. Testimonial evidence alone is

generally insufficient to meet the taxpayer's burden. *R.L. Best Co. v. Testa,* 7th Dist. Mahoning No. 18 MA 0001, 2018-Ohio-5400, ¶ 34, *appeal not allowed*, 155 Ohio St.3d 1422, 2019-Ohio-1421, 120 N.E.3d 868, ¶ 34, *reconsideration denied*, 156 Ohio St.3d 1448, 2019-Ohio-2498, 125 N.E.3d 920, ¶ 34. 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.

Proof of Tax Paid

A taxpayer is entitled to a refund of taxes that were paid illegally or erroneously. R.C. 5739.07(B). This requires a claimant to provide information of undisputed facts that taxes were paid. *See AAA Fire Protection Co. v. Limbach*, BTA No. 84-G-206, 1987 WL 57487, *2 (June 4, 1987). The claimant has provided a summary spreadsheet and purchase invoices that do not contain line items for sales tax in support of its refund application. Despite the agent's request for cancelled checks or specific proof of payment, the claimant has not provided any further information. The claimant has not provided proof of taxes paid to Ohio. Therefore, the Tax Commissioner cannot conclude that the claimant has met its burden to show it is entitled to a refund.

Used in Manufacturing

The claimant provided general citations to Ohio Adm.Code 5703-9-21(C)(4) and 5703-9-21(C)(6) in support of its contention that its purchases were exempt as either necessary for the manufacturing operation or testing equipment. Ohio's sales tax does not apply to the purchase of an item intended for use "primarily in a manufacturing operation to produce tangible personal property for sale." R.C. 5739.02(B)(42)(g). "Manufacturing operation" is a defined term under R.C. 5739.01(S). As an initial matter, the claimant has not provided any information on its manufacturing processes, how these processes constitute a manufacturing operation for purposes of R.C. 5739.01(S), what tangible personal property it is producing for sale, or how its purchases are specifically used in the claimant's manufacturing processes. An agent of the Tax Commissioner requested a letter of usage for the items and the claimant stated it will not provide one. The claimant has provided no documentary evidence in support of its claim for exempt manufacturing purchases.

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 entitled to a refund on the sales tax paid on transactions it characterizes as exempt for use in manufacturing. 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: MAR 19 2020

AG Trucking, Inc.
2430 Lincolnway E.
P.O. Box 453
Goshen, IN 46527

RE: Refund Claim No.: 201803269
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $6,805.89, in sales tax filed pursuant to R.C. 5739.07. The claim was initially granted in part with a refund of the sales tax paid in the amount of $3,290.79 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 transportation services company. The claimant purchased various products, such as cleaning supplies and wash chemicals from ZEP Manufacturing Company during the refund period of October 20, 2014 through October 20, 2016. On January 2, 2014, the claimant submitted a Sales and Use Tax Blanket Exemption Certificate claiming that purchases from ZEP Manufacturing Company were exempt as 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 for hire being a common carrier. The claimant submitted a Department of Taxation sales tax application for refund on October 27, 2017 seeking a refund of the sales tax on the wash chemicals purchased from ZEP Manufacturing Company. The claimant provided a CD of invoices and cancelled checks, which identified the purchases of wash chemicals and the payment of sales tax.

The Department informed the claimant during the initial denial that the Department required additional evidence to support the sales tax exemption claimed on the refund application, such as a detailed statement of usage for the wash chemicals. The Department informed the claimant that the wash chemicals were disallowed based on ZEP Manufacturing's product descriptions, which described the wash chemicals as aesthetic cleaners, rather than cleaners used for maintenance.

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." Accordingly, to qualify for the exemption, the claimant 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).

The claimant supplied records to verify the use of its trailers for transporting tangible personal property belonging to others. The claimant submitted sufficient evidence to support that it is a person engaged in highway transportation for hire. However, the claimant failed to provide sufficient evidence to address the remaining issue as to how the wash chemicals purchased from ZEP Manufacturing Company are used in the maintenance of such trailers.

The claimant contends that two wash chemicals, FS Process Cleaner and ZEP TNT are required cleaners used in the maintenance of trailer tanks between loads. The claimant provides that Liquid Aluminum Sulfate is used as a wash coagulant which helps break down the oils in the trailers. The claimant provides that ZEP TNT is a cleaner used during the required cleaning by its customer, Cargill. The claimant contends that all wash chemicals are cleaners that are used in maintenance. However, the claimant does not elaborate on their use. Further, no evidence was provided by the claimant to indicate that the cleaners are required in order to transport property belonging to Cargill or others.

R.C. 5739.02 provides that all sales of tangible personal property are presumed taxable unless there is a specific exemption or exception from taxation listed in the statute. Laws relating to exemption from taxation are to be strictly construed against exemption. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). While R.C. 5739.01(Z) provides an exemption for maintenance included within transportation for hire, R.C. 5739.01(B)(3)(C) provides that washing and cleaning of a motor vehicle is taxable as included in the definition of the term "sale." The term "maintenance" is not defined in statute; however, Ohio case law has addressed the technical meaning of the term in the context of the transportation for hire exemption.

In *Pressure Cleaning, Inc. v. Limbach*, BTA No. 88-B-848, 1991 WL 113508 (May 10, 1991), the Board used various dictionary definitions of the term "maintenance" to derive its meaning. The Board interpreted "maintenance" in relevant part as acts that will preserve a piece of equipment from failure or decline, or will prevent a decline in an existing state or condition. Maintenance also includes steps necessary to keep equipment in a state of operating efficiency or operating condition. *Id.*

The claimant failed to provide sufficient evidence to support that the wash chemicals will preserve such motor vehicles from failure or decline or will keep the equipment in a state of operating efficiency. The evidence submitted is insufficient to warrant a refund of the sales tax. Accordingly, the objection is denied.

MAR 19 2020

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

0000000324

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

FINAL DETERMINATION

Date: MAR 19 2020

Amir Petroleum LLC
106 S. Alex Rd.
West Carrollton, OH 45449

RE: Assessment No. 100001351181
Sales Tax
Account No. 57-201158

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
$21,354.62	$1,960.05	$10,677.15	$33,991.82

The petitioner operates as a gas station and convenience store. This assessment is the result of an audit of the petitioner's sales from December 29, 2015 through July 31, 2018. A hearing was not requested.

The petitioner requested penalty abatement. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. See *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The records indicate that the petitioner failed to properly remit the full amount of sales tax collected during the audit period. Audit Remarks, Pages 6 & 10. The facts and circumstances do not support abatement of the penalty.

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments of $5,830.00 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post-assessment interest will be added to the assessment as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

0000000325

MAR 19 2020

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

0000000452

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: MAR 27 2020

Ankle & Foot Care Centers, LLP
8175 Market Street
Youngstown, Ohio 44512-6244

Re: Sales Tax
Refund Claim No. 033260074941

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-38, dated February 19, 2020. In that order, the Board remanded the case to the Tax Commissioner for further proceedings.

In resolution of this matter, the Tax Commissioner has agreed to grant a partial refund as follows:

	Total
Refund	$ 18,292.32
Interest	$ 7,954.95
Total	$ 26,247.27

Therefore, a refund in the amount of $26,247.27 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

0000000209

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: MAR - 5 2020

Nathan M. Bazler
16149 Wooster Rd.
Mount Vernon, OH 43050

Re: Refund Claim No. 201900327
Filed on June 28, 2018
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $5,953.16 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and provided additional information on the matter. A hearing was not requested.

On or about December 23, 2017, the claimant purchased a motor vehicle. The vehicle was registered in Ohio and tax was properly remitted. The claimant contends that the payment of tax was erroneous because the vehicle was returned. The sales tax is levied on the freedom of purchase, not on the goods themselves. *Sears, Roebuck and Co. v. Lindley*, 70 Ohio St.2d 249, 436 N.E.2d 1029 (1982). The sales tax attaches once the sale is complete. As such, the full purchase price must be returned to the purchaser in order to properly negate the sale and warrant a refund of sales tax. *See Buick Youngstown Co. v. Tracy*, BTA No. 93-R-1130, 1994 WL 193898 (May 13, 1994). The price includes the total amount of consideration received for tangible personal property and services. R.C. 5739.01(H)(1)(a). The sale of a warranty is a taxable sale. R.C. 5739.01(B)(7).

The claimant provided documentation of the purchase price and partial return of the purchase price. The purchase price is listed on the title with the Bureau of Motor Vehicles as $88,195. The claimant provided evidence $84,895 of the purchase price was refunded to him, the purchaser. This is $3,300 less than the listed purchase price. The amount matches the amount charged for "APP Major Guard" on the purchase paperwork. The "Major Guard" service covers repairs to the vehicle among other things and constitutes an extended warranty. The evidence provided shows a taxable service, a warranty, was provided as part of the purchase. No evidence was provided showing this amount was refunded to the claimant. A letter was sent to claimant requesting information regarding the outstanding amount on August 6, 2019. The claimant did not respond. As the full purchase price was not refunded to the purchaser a refund of the sales tax is not warranted.

Therefore, the claim for refund is denied.

0000000210

MAR - 5 2020

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

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

0000000400

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: MAR 27 2020

Darrick A. Benedict
3841 S. State Route 123
Morrow, OH 45152

Re: 6 Assessments
Tax Type: Sales (Responsible Party)
The Peace Full Guy
Vendor's License No.: 90-025122

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

Assessment No.	Filing Period	Total
100001278626	07/01/2015 – 12/31/2015	$2,945.95
100001278627	01/01/2016 – 06/30/2016	$6,230.17
100001278628	07/01/2016 – 12/31/2016	$9,016.23
100001278629	01/01/2017 – 06/30/2017	$11,851.27
100001278630	07/01/2017 – 12/31/2017	$14,967.19
100001278631	01/01/2018 – 06/30/2018	$17,904.50
	Total:	$62,915.31

These are responsible party assessments. The Peace Full Guy incurred sales tax liability resulting in sales tax assessments for the above periods. These assessments were never fully satisfied by The Peace Full Guy 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 The Peace Full Guy has been derivatively assessed against Darrick Benedict. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. No hearing was requested.

Responsible Party

The petitioner objects to the assessments. There are no business records associated with the company; therefore, the petitioner contends that he is not the responsible party for the debt that has been associated with The Peace Full Guy. These contentions are not well taken.

The evidence indicates that the petitioner is listed as the president/partner of the company on the application for a Delivery Vendor's License. The petitioner is listed as one of two general partners and was the sole signee on the filing to register the trade name The Peace Full Guy with Ohio. The petitioner was the sole signee on the trade name renewal form for The Peace Full Guy that was electronically filed on March 26, 2015.

The petitioner failed to provide any evidence to demonstrate that he is not the owner of the company. The petitioner failed to demonstrate that the assessments were in error. Therefore, it is determined that the petitioner was a responsible party of The Peace Full Guy, under R.C. 5739.33.

Underlying Assessment

The petitioner submitted an objection related to the amounts of the underlying assessments. Since these are responsible party assessments, the only issues that can be considered are 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.

Accordingly, the assessments are affirmed as issued.

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

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

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

Jeffrey A. McClain

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: MAR 27 2020

Adrienne M. Blake
1201 Sunset Dr.
Englewood, OH 45322

Re: 27 Assessments
Tax Type: Sales (Responsible Party)
DollFace Fit LLC
Account No.: 57-200514

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

Assessment No.	Filing Period	Total
100001361566	07/01/2015 – 07/31/2015	$3,009.27
100001361567	08/01/2015 – 08/31/2015	$3,004.17
100001361568	10/01/2015 – 10/31/2015	$3,003.85
100001361577	09/01/2015 – 09/30/2015	$3,004.01
100001361578	11/01/2015 – 11/30/2015	$3,012.71
100001361579	12/01/2015 – 12/31/2015	$3,427.39
100001361600	04/01/2016 – 04/30/2016	$4,558.27
100001361601	05/01/2016 – 05/31/2016	$4,550.60
100001361602	11/01/2016 – 11/30/2016	$4,537.99
100001361603	12/01/2016 – 12/31/2016	$4,563.05
100001361607	01/01/2016 – 01/31/2016	$3,739.56
100001361608	02/01/2016 – 02/29/2016	$3,835.95
100001361609	03/01/2016 – 03/31/2016	$4,396.66
100001361610	06/01/2016 – 06/30/2016	$4,542.69
100001361611	07/01/2016 – 07/31/2016	$4,535.52
100001361612	08/01/2016 – 08/31/2016	$4,527.85
100001361613	09/01/2016 – 09/30/2016	$4,554.15
100001361614	10/01/2016 – 10/31/2016	$4,536.51
100001361615	03/01/2017 – 03/31/2017	$4,536.67
100001361616	05/01/2017 – 05/31/2017	$4,537.66
100001361617	01/01/2017 – 01/31/2017	$4,536.01
100001361618	02/01/2017 – 02/28/2017	$4,536.01
100001361619	04/01/2017 – 04/30/2017	$4,536.67
100001361620	07/01/2017 – 07/31/2017	$4,536.01

100001361627	06/01/2017 – 06/30/2017	$4,564.37
100001361628	08/01/2017 – 08/31/2017	$4,558.10
100001361629	09/01/2017 – 09/11/2017	$4,558.10
	Total	$112,239.80

These are responsible party assessments. DollFace Fit, LLC incurred sales tax liability resulting in sales tax assessments for the periods listed above. These assessments were never satisfied by DollFace Fit, LLC and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns, those in charge of, or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liabilities of DollFace Fit, LLC have been derivatively assessed against Adrienne M. Blake. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 during the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was not requested.

Underlying Assessment

The petitioner submitted numerous objections related to the amounts of the underlying assessments. Since these are responsible party assessments, the only issues that can be considered are whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. *Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976). Therefore, these objections cannot be considered as they relate to the underlying assessments.

Responsible Party

The petitioner objects to the assessments. The evidence indicates that the petitioner is a responsible party. The petitioner is listed as the CEO of DollFace Fit, LLC on its business filings. The petitioner's own Facebook profile lists herself as the CEO of DollFace Fit, LLC.[1] The Ohio County Vendor's License Registration lists the petitioner as the responsible party. The petitioner is listed as the sole member of the company on the DollFace Fit Facebook page.[2] The petitioner signed her petition for reassessment as a representative of DollFace Fit, LLC.

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

In *McGlothin v Limbach,* 57 Ohio St.3d 72 (1991), the Court held that a corporate officer who had nothing to do with the day-to-day operation of the business was nonetheless personally liable.

[1] Facebook, https://www.facebook.com/adrienne.blake.5 (accessed March 11, 2020).
[2] Facebook, https://www.facebook.com/pg/dollfacefit/about/?ref=page_internal (accessed March 11, 2020).

McGlothin v Limbach (1991), 57 Ohio St.3d 73. Specifically, the Court stated: "[i]n that case the corporate officer had the authority to control or supervise the tax return and tax payment activities of the corporation." *Id.* Therefore, based upon the information available to the Tax Commissioner, it is determined that the petitioner is a responsible party of DollFace Fit, LLC under R.C. 5739.33.

Accordingly, the assessments shall stand as issued.

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

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 27 2020

Franklin Drive Thru LLC
980 1/2 E. Second St.
Franklin, OH 45005

Re: Assessment No. 100001455897
Sales Tax
Account No. 83-037191

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
$58,642.95	$6,437.03	$29,321.17	$94,401.15

The petitioner owns and operates a convenience store in Warren County. This assessment is the result of a field audit of the petitioner's sales for the period of January 1, 2015 to May 31, 2019. No hearing was requested.

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 3. Therefore, a mark-up analysis was conducted using supplier purchase summaries and the petitioner's purchase invoices.

It should be noted that the assessment is presumptively valid. *RKE Trucking Inc. v. Zaino* (2003), 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.

Audit Methodology

The petitioner was unable to produce any sales records or end of month reports to the auditor. Audit Remarks, Page 5. Per Ohio law, each vendor must maintain complete, accurate, and adequate primary and secondary records of all sales. Ohio Adm.Code 5703-9-02. 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. If any vendor fails to maintain such records, the Commissioner may audit and assess as provided in R.C. 5739.13. Ohio Adm.Code 5703-9-02(D).

R.C. 5739.13(A) allows the Tax Commissioner, in the absence of complete and accurate records, to make an assessment using any information in the Commissioner's possession. 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).

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. For Coke and Pepsi, missing invoices based on expected delivery dates were added to the purchases using an average of the invoices provided by the taxpayer. For supplier Keilson Dayton, only a single amount was provided in the distributer summary information. The difference in the amount between the summary and total invoices was allocated to each category based on the invoices reviewed.

Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco products, pop & soft drinks, energy drinks & other beverages, taxable merchandise, and other alcohol. 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.

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 (96.9630%). 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.

Mark-up Percentages

The petitioner contends that the mark-up percentages used in the audit were incorrect. Specifically, he contends that when filling out the mark-up percentages on the Carryout Product Checklist provided by the auditor, he grouped and calculated mark-ups by vendor, rather than by category. Additionally, the petitioner attempted to record "Gross Margins," rather than mark-up percentage in the appropriate column on the Checklist.

In addition to using the Carryout Product Checklist, the mark-up percentages used in the audit were derived from Ohio law and suggested retail mark-up percentages. Pursuant to R.C. 4301.041 in concert with Ohio Adm.Code 4301:1-1-72 and R.C. 4301.13 in concert with 4301:1-1-03, the Liquor Control Commission has determined mandatory minimum price mark-ups for both beer and wine at 25 percent and 50 percent respectively. Additionally, R.C. 1331.11(B) sets the minimum mark-up for cigarettes at 8 percent. In the instance of Other Tobacco and Pop & Soft drinks the auditor accepted additional

information provided by the petitioner and adjusted the corresponding mark-up accordingly. Audit Remarks, Page 9.

The mark-up percentages used on taxable items sold by the petitioner are either supported by state law, petitioner provided data, or like businesses. The petitioner failed to produce any evidence to support alternative mark-up calculations or discrepancies in the mark-ups used in the assessment. As the petitioner failed to bring additional evidence to support his contentions, this objection is denied.

Tobacco Rebates

The petitioner next contends that the assessment failed to take into consideration "tobacco buydown monies," which the Commissioner takes to mean rebates. The petitioner's contention is without merit.

On at least two occasions the petitioner was asked for rebate information. None were produced at those times; the petitioner claimed that all rebate payments were deposited into a business checking account and would be listed on bank statements. Credit was given by the auditor to the extent that the rebates could be verified. Audit Remarks, Page 8. No further rebates or any other documentation was provided to support the petitioner's contention. The objection is denied.

Breakage, Waste, and Theft

The petitioner contends that the audit failed to take into consideration the shrinkage of goods and inventory from breakage, theft, and spoilage. During the course of the assessment the petitioner completed a standard Liquor Permit Questionnaire with basic questions about his business practices, including questions about inventory management. On this questionnaire the petitioner claimed that physical inventory was taken once a year and at random on a monthly basis by department. Liquor Permit Questionnaire, questions 5 and 7 respectively. No records of these reviews were produced to the auditor. Audit Remarks, Page 8. Without a physical inventory taken both at the time of purchase and time of the audit it is impossible to measure breakage and waste.

Both on the Liquor Permit Questionnaire and over the course of the audit the petitioner contended that employee theft had reduced purchase inventory and should be taken into account. Liquor Permit Questionnaire, question 2; Audit Remarks, Page 7. Despite requests, the petitioner was unable to produce police reports, insurance claims, or any verification theft occurred or what products were lost. Without verification, losses for theft cannot be considered.

The objections are without support and are denied.

Inventory Growth

The petitioner contends that the audit failed to take into account inventory buildup during the tax years in question. This objection is without merit. As noted above, the petitioner admits in his Liquor Permit Questionnaire that he never took a physical inventory of his products. 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.

Therefore, the assessment 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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FINAL DETERMINATION

Date: MAR 27 2020

Kristen N. Grenamyer
217 Clingan Rd.
Struthers, OH 44471

RE: 18 Assessments
Sales Tax (Responsible Party)
Addressed In White, LLC
Vendor's License No.: 50-300926

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

Assessment No.	Time Period	Total
100001321128	6/1/16 – 6/30/16	$67.50
100001321130	10/1/16 – 10/31/16	$67.50
100001321131	11/1/16 – 11/30/16	$3,025.65
100001321132	5/1/16 – 5/31/16	$3,022.19
100001321133	4/1/16 – 4/30/16	$3,027.29
100001321134	3/1/16 – 3/31/16	$3,070.42
100001321135	5/1/17 – 5/31/17	$3,026.52
100001321136	12/1/17 – 12/31/17	$3,012.72
100001321137	11/1/17 – 11/30/17	$3,011.41
100001321138	1/1/17 – 1/31/17	$3,024.55
100001321139	2/1/17 – 2/28/17	$3,024.55
100001321140	6/1/17 – 6/30/17	$67.50
100001321141	4/1/17 – 4/30/17	$3,011.84
100001321142	5/1/18 – 5/31/18	$3,042.89
100001321143	1/1/18 – 1/31/18	$3,011.41
100001321144	2/1/18 – 2/28/18	$3,026.08
100001321145	3/1/18 – 3/31/18	$3,020.83
100001321146	4/1/18 – 4/30/18	$3,051.22
	Total	$45,612.07

These are responsible party assessments. Addressed In White, LLC incurred sales tax liability resulting in multiple assessments. These assessments were never fully satisfied by Addressed In White, LLC and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or

employees who are responsible for the filing and payment of sales tax returns, 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 Addressed In White, LLC has been derivatively assessed against Kristen Grenamyer. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalties can be considered. A hearing was requested but is deemed unnecessary.

The petitioner objects to these assessments. The petitioner contends that she has no relation to Addressed In White, LLC. The evidence available to the Department supports this contention.

Therefore, the assessments against Kristen Grenamyer, as the responsible party, are cancelled.

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

Current records indicate that no payments have been made on these assessments, resulting in no balance being due or owed. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 18 2020

Guru Kripa Inc.
3892 W. 130th St.
Cleveland, OH 44111

RE: Assessment No. 100001169451
Sales Tax
Account No. 18-805384

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
$78,071.93	$6,770.70	$39,035.83	$123,878.46

The petitioner operates as a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from April 16, 2015 through April 30, 2018. A hearing was not requested.

The petitioner requested a penalty abatement. The petitioner did not respond to numerous requests by the auditor. Audit Remarks, Page 7. The petitioner filed 26 late sales tax returns during the audit period out of 37 filings. Audit Remarks, Page 7. Given the totality of the circumstances, the request for a penalty abatement is denied.

Accordingly, the assessment is affirmed as issued.

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

MAR 1 8 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

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:

MAR 18 2020

On The Run Drive Thru LLC
1635 New Gambier Rd.
Mt. Vernon, OH 43050

RE: Assessment No.: 100001462240
Sales Tax
Account No.: 42-021436

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
$71,212.61	$7,219.40	$35,606.13	$114,038.14

The petitioner operates a drive-thru convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from January 1, 2016 through December 31, 2018. The petitioner filed a petition for reassessment and requested abatement of the penalty. No hearing was requested.

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 purchase records and the records supplied by the petitioner's suppliers. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco products, other alcohol products, pop & taxable beverages, energy drinks, propane, and other taxable merchandise. Each category was assigned a mark-up percentage based on evidence from the petitioner, auditor observed mark-up percentages, industry standards, and state minimum requirements.

MAR 1 8 2020

A sample period of January 1, 2018 through December 31, 2018 was used to calculate taxable sales as a representation of the business activity for the entire audit period. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. In instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was 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 117.3155 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).

Theft, Expired, and Damaged Inventory

The petitioner contends it did not receive proper credit for stolen, expired, and damaged inventory. The petitioner contends that many products included in the audit calculation belong to those categories, and as such, an industry standard credit should be applied to its account. The petition for reassessment presented no additional evidence 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. *See R & K Entertainment, Inc. v. Zaino*, BTA No. 2003-B-103, 2004 WL 1631689 (July 16, 2004) at *5. Therefore, this objection is denied.

Goods Consumed by Owner

The petition for reassessment states that there should have been a reduction in the sales tax liability because a significant amount of the goods purchased wholesale were consumed by the owner or shared with family and friends. The auditor denied the reduction request because taxable goods purchased wholesale that are consumed by the owner or given to friends are subject to use tax per Ohio Adm.Code 5703-9-04(A). Audit Remarks, Page 11. That section of the Ohio Administrative Code provides:

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> (A) A vendor, wholesaler, lessor, manufacturer, or other person who removes from inventory tangible personal property that was purchased without payment of sales or use tax on the basis that the tangible personal property was intended to be resold pursuant to division (E) of section 5739.01 of the Revised Code, and temporarily or permanently stores, uses, or otherwise consumes such tangible personal property in a taxable manner inconsistent with such claim of exception, shall accrue and pay use tax on the price of the tangible personal property, as defined in division (G) of section 5741.01 of the Revised Code.

The petitioner failed to provide evidence that any specific items included in the audit calculation were used by the owner or that use tax was paid on any of these items. Therefore, this objection is denied.

Food Stamps/EBT Sales

The petitioner contends it did not receive credit for food stamps sales. The auditor noted that the petitioner is not a registered SNAP retailer and did not provide any supporting records to illustrate otherwise. Audit Remarks, Page 10. The burden is on the petitioner to provide sufficient evidence to warrant adjusting a finalized audit. *Forest Hills*, *supra* at *4. The petitioner has provided no further documentation to substantiate its claim. Therefore, this objection is denied.

Penalty

The petitioner seeks abatement of the penalty. The petitioner admits to underreporting his sale tax liabilities in the petition for reassessment. The surrounding facts and circumstances do not warrant abatement of the penalty.

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments in the amount of $350.00 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

MAR 1 8 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

0000000322

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

FINAL DETERMINATION

Date: MAR 19 2020

Patzal, Inc.
2212 Wilson Ave.
Campbell, OH 44405

RE: Assessment No. 100001325736
Sales Tax
Account No. 50-101439

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
$61,138.71	$6,466.80	$30,569.25	$98,174.76

The petitioner operates as a bar and restaurant. This assessment is the result of a mark-up audit of the petitioner's sales from April 1, 2015 through May 31, 2018. A hearing was not requested.

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

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$61,138.71	$6,466.80	$21,398.36	$89,003.87

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

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MAR 19 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 19 2020

Cole Shafley
4859 Leybourne Dr.
Hilliard, OH 43026

RE: Assessment No. 100001427021
Sales Tax
Account No. 25-329012

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
$42,791.48	$4,228.93	$13,638.43	$60,658.84

The petitioner operates as a landscape and lawn care company. This assessment is the result of an audit of the petitioner's sales from November 1, 2013 through September 30, 2018. A hearing was not requested.

The petitioner requested a penalty abatement. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. See *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The audit team partially abated the penalty prior to the issuance of the assessment. Audit Remarks, Page 7. The auditor noted that the petitioner failed to properly remit any of the sales tax collected during the audit period. Audit Remarks, Page 5. The facts and circumstances do not support further abatement of the penalty.

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments of $47,048.37 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post-assessment interest will be added to the assessment as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the

MAR 19 2020

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 2 7 2020

Rachelle D. Shells
3591 Harvey Ave.
Cincinnati, OH 45229

Re: 4 Assessments
Tax Type: Sales (Responsible Party)
Heartical International LLC
Vendor's License No.: 31-387033

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

Assessment No.	Filing Period	Total
100001344276	07/01/2015 – 12/31/2015	$3,230.76
100001344309	01/01/2015 – 06/30/2015	$3,001.06
100001344328	01/01/2016 – 07/31/2016	$121.88
100001344337	01/01/2016 – 06/30/2016	$3,673.12
	Total	10,026.82

These are responsible party assessments. Heartical International LLC incurred sales tax liability resulting in sales tax assessments for the above periods. These assessments were never fully satisfied by Heartical International LLC and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Heartical International LLC has been derivatively assessed against Rachelle Shells. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. No hearing was requested.

The petitioner objects to the assessments. The petitioner contends that she has not been an active participant in the operations of Heartical International LLC since 2012. She states that she is not active on the business bank account, works no hours, receives no income, makes no purchases, pays no bills, hires no staff, and thus makes no decisions in the daily operations of the business. Further, in her petition for reassessment, the petitioner states that she has "tried to encourage the payment of said sales taxes with minimum success." The petitioner identifies another party, her business partner, whom she states should be the responsible party on the assessments. These contentions are not well taken.

The evidence indicates that the petitioner was listed as the sole officer and president of the limited liability company when applying for a County Vendor's license on April 12, 2010. The petitioner is listed as one of only two members on the articles of organization filed for Heartical International LLC, effective July 1, 2010. There have been no amendments to the articles of organization for Heartical International LLC filed with the state.

The petitioner contends that the other member of the company is actually the responsible party. However, the fact that one person may be responsible does not absolve another of liability. *Perry v. Tracy*, BTA No. 98-M-8, 1998 WL 741927 (Oct. 16, 1998). R.C. 5739.33 requires personal liability to fall on **any** officer or employee having the requisite indices of responsibility. *Beck v. Tracy*, BTA No. 96-K-156, 1997 WL 40124 (Jan. 17, 1997). (Emphasis added.) The petitioner was the sole signatory on the documents used to register the company for the county vendor's license, demonstrating she had some level of fiscal responsibility within the company.

The petitioner failed to provide any evidence to demonstrate that she is no longer a member of the company. The petitioner failed to demonstrate that the assessments were in error. Therefore, it is determined that the petitioner was a responsible party of Heartical International LLC, under R.C. 5739.33.

Accordingly, the assessments are affirmed as issued.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 27 2020

John Sousa
44020 New London Eastern Rd.
Sullivan, OH 44880

Re: 19 Assessments
Sales Tax (Responsible Party)
Financial Consultants Management LLC

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

Assessment	Time Period	Total
100001114844	05/01/2008 – 05/31/2008	$442.75
100001114845	07/01/2008 – 07/31/2008	$373.25
100001114846	07/01/2008 – 07/31/2008	$1,844.51
100001114848	06/01/2008 – 06/30/2008	$2,310.02
100001114849	08/01/2008 – 08/31/2008	$2,099.87
100001114850	09/01/2008 – 09/30/2008	$1,628.70
100001114851	11/01/2008 – 11/30/2008	$514.72
100001114853	01/01/2009 – 01/31/2009	$1,424.52
100001114854	04/01/2009 – 04/30/2009	$1,516.02
100001114858	09/01/2008 – 09/30/2008	$259.25
100001114859	10/01/2008 – 10/31/2008	$994.45
100001114860	10/01/2008 – 10/31/2008	$524.87
100001114861	11/01/2008 – 11/30/2008	$566.19
100001114862	12/01/2008 – 12/31/2008	$864.33
100001114863	12/01/2008 – 12/31/2008	$633.70
100001114864	02/01/2009 – 02/28/2009	$1,122.03
100001114865	03/01/2009 – 03/31/2009	$2,375.83
100001114866	05/01/2009 – 05/31/2009	$1,635.31
100001114867	06/01/2009 – 06/30/2009	$1,404.95
	Total:	$22,535.27

This is a responsible party assessment. Financial Consultants Management LLC incurred sales tax liability resulting in various assessments. These assessments were never satisfied by Financial Consultants Management LLC and remain outstanding. Under such circumstances, R.C. 5739.33

holds officers or employees who are responsible for the filing and payment of sales tax returns and those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Financial Consultants Management LLC has been derivatively assessed against John Sousa. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods assessed. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was held on November 11, 2019.

As an initial matter, Assessments are presumptively valid. *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing, *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983); *Automotive Warehouse, Inc. v. Limbach*, BTA No. 87-D-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove their objections. Unsupported testimonial evidence is insufficient to meet this burden. *R.L. Best Co. v. Testa*, 7th Dist. Mahoning No. 18 MA 0001, 2018-Ohio-5400, 2018 WL 6930501.

The petitioner objects to the assessments. The petitioner contends he is not a responsible party for the periods assessed. The petitioner contends he is not a responsible party because he merely managed a store for Financial Consultants Management LLC. As noted above, the burden is on the petitioner to provide evidence showing error in the assessments.

The petitioner is a responsible party for all assessed periods. A person is considered a responsible party when they are an officer of an entity and responsible for the entity's fiscal responsibilities. R.C. 5739.33. An officer includes a treasurer or secretary. Ohio Adm.Code 5703-9-49(A)(1). An officer is a responsible party under several circumstances. Additionally, if a person with an ownership interest in limited liability company performs any of these functions, they are considered an officer and a responsible party. *Id.* If the officer manages sales tax paid by consumers, they are a responsible party. Ohio Adm.Code 5703-9-49(C)(7). An officer is also responsible if they perform any other function which indicates control of the fiscal operations of the entity. Ohio Adm.Code 5703-9-49(C)(9). One example of functions which indicate control of fiscal responsibilities is the signing of a loan for the entity. *Wilson v. Testa*, BTA No. 2013-1249, 2014 WL 5406654 (September 19, 2014).

The petitioner is an officer of Financial Consultants Management LLC. The petitioner is listed as "Sec/Treas/Partner" on the application for vendor's license. In addition, the petitioner provided a form submitted to the Small Business Administration after the hearing which listed the petitioner as a 10% owner of Financial Consultants Management LLC. The petitioner stated they did not receive any distributions or benefits from this ownership and was never actually an owner. This does not absolve the petitioner of responsibility. The code makes no mention of ownership being dependent on benefits received; it is enough for the petitioner to possess an ownership interest. Ohio Adm.Code 5703-9-49(A)(1). The available evidence shows the petitioner was a part-owner of the entity.

The petitioner was responsible for the fiscal responsibilities of Financial Consultants Management

LLC. The petitioner stated at hearing he was manager of the location run by Financial Consultants Management LLC. As part of that position, the petitioner stated he had one check each day to pay for shipments. The petitioner stated he deposited funds from purchases in the bank account and had a debit card for the account. These funds would have included sales tax paid by consumers. The petitioner also stated he co-signed a loan for the company and provided collateral for the loan. The petitioner had authority to sign checks, managed funds which included sales tax, and was responsible for other fiscal responsibilities of Financial Consultants Management LLC. The petitioner has not provided evidence sufficient to show error in the assessments. The evidence shows the petitioner was an officer and partial owner responsible for the entity's fiscal responsibilities during the periods assessed. The objection is denied.

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

Therefore, the assessments are affirmed.

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

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO 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: MAR 13 2020

Sullivant Ave Inc
3464 Sullivant Ave
Columbus, OH 43204-1105

Re: Ohio Tax Account #: 25302191
Tax Type: Sales
Assessment #: 100000277330
Reporting Period: 06/01/2011-05/31/2014

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2019-186, dated February 26, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

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

	Total
Tax	$34,520.62
Interest	$5,010.35
Penalty	$0.00
Total	$39,530.97

Payments and credits totaling $39,530.97 have been made in full satisfaction of this assessment.

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

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

Jeffrey A. McClain

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: MAR - 5 2020

Tamara Enterprises LLC
5121 E. Main St.
Columbus, OH 43213

RE: Assessment No. 100001371677
Sales Tax
Account No. 25-317732

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

Tax	Pre-Assessment Interest	Penalty	Total
$39,249.14	$3,462.82	$19,624.42	$62,336.38

The petitioner operates as a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from January 1, 2016 through December 31, 2018. A hearing was not requested.

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

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$39,249.14	$3,462.82	$9,812.14	$52,524.10

Current records indicate that payments of $42,711.96 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

0000000208

MAR - 5 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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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: MAR 19 2020

Tarek Abu Kwiek
6832 Lynett Dr.
Cleveland, OH 44129

RE: Assessment No. 100001319424
Sales Tax
Account No. 18-800897

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
$30,257.59	$2,771.16	$15,128.69	$48,157.44

The petitioner operates as a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from June 1, 2015 through August 31, 2018. A hearing was not requested.

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

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$30,257.59	$2,771.16	$7,564.24	$40,592.99

Current records indicate that payments of $33,028.75 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

0000000327

MAR 1 9 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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FINAL DETERMINATION

Date: MAR 27 2020

thinkCSC Inc.
7420 Worthington Galena Rd.
Worthington, OH 43085

Re: Refund Claim No. 201804124
Filed December 11, 2017
Account No.: 25-284658
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of $1,963.40 of sales tax filed pursuant to R.C. 5739.07.

The claimant ("CSC") is a provider of IT services with its offices located in Worthington, Ohio. The claimant filed its application stating that a refund was due on several transactions with Chromocare, a company that appears to perform diagnostic and medicinal services. Specifically, the claimant stated that all transactions with Chromocare were capitalized as investments and that Chromocare would not pay them. The claimant stated that the invoices were "removed from the books" and that a refund is due on the amount of sales tax that the claimant contends it paid on an accrual basis for each of the transactions. The claimant did not cite any law in support. A hearing was not requested.

The claimant filed its refund application on December 11, 2017. The agent of the Tax Commissioner who reviewed the refund application determined that the claimant was seeking a bad debt exemption and that, as the Chromocare transactions were still on its books as a long-term investment account, the claimant presented no proof that it had either written off the debts on its federal income tax returns or on its ledger. The agent denied the claim. The claimant subsequently appealed, providing a copy of an updated ledger showing that the sales tax had been updated to a bad debt account. The claimant's information further reflected that the underlying transactions with Chromocare remained in its long-term investment account. 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.

The claimant has cited no fact or law that entitles it to an exemption. It appears that it is requesting a refund based upon the bad debt exclusion located in R.C. 5739.121(B). The definition of bad debt is located in R.C. 5739.121(A) and modified by Ohio Adm.Code 5703-9-44. "Bad debt" means any debt or account receivable arising from the sale of tangible personal property or a taxable service by the vendor upon which sales or use tax has been reported and paid in a prior reporting period which has become worthless or uncollectible during the period between the vendor's preceding tax return and the present return and which has been uncollected for at least six months. Ohio Adm.Code 5703-9-44(A). Specifically excluded from the definition of bad debt is "[s]ales tax charged on the purchase price" of the tangible personal property or taxable service that is uncollectable. Ohio Adm.Code 5703-9-44(A)(2).

The claimant initially did not write off any amounts. It voided the invoices in August of 2017 and included the transactions in its ledger in Account 1550 – Investments. After the agent sent the claimant an initial denial letter saying the amounts claimed had not been written off to bad debt, the claimant updated its books to write off $1,963.40 to Account 5600 – Bad Debt. The actual sales that the claimant states are bad debt remained in Account 1550.

The claimant has not shown that it is entitled to a refund. It is requesting back an amount it states it paid in sales tax and states that the sales tax was written off to bad debt. Sales tax is not bad debt for the purposes of the exclusion. Ohio Adm.Code 5703-9-44(A)(2). Sales of tangible personal property or services give rise to the bad debt exclusion. Ohio Adm.Code 5703-9-44(A). The claimant does not appear to claim at any point that the underlying transactions are bad debt. The claimant further provided no proof that sales or use tax was reported on these transactions as is required to meet the definition of "bad debt." *Id.* The claimant's own statements also indicate that it did not consider the underlying transactions bad debt, but an "investment" in a company in need of a cash infusion. The petitioner's views of these underlying transactions as investment and not uncollectable is further corroborated by the fact it has left the underlying transactions in the investment account. The claimant's characterizations of the Chromocare transactions do not reflect a debt that is worthless or uncollectible. The claimant has not shown that the amount it is requesting is a true bad debt and that the transactions meet the statutory definition of bad debt.

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 entitled to a refund on the sales tax paid on transactions it characterizes as investments. As a result, the Tax Commissioner concludes that the agent properly denied the refund.

Accordingly, the claim for refund is denied.

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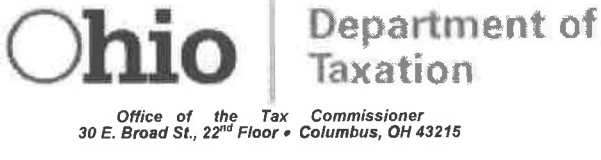

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: MAR 27 2020

Karen M. Willis
3565 Meese Rd. NE
Louisville, OH 44641

Re: 4 Assessments
Tax Type: Sales (Responsible Party)
This N That Wholesale
Account No.: 76-154131

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

Assessment No.	Filing Period	Total
100001384285	01/01/2017 – 06/30/2017	$3,014.47
100001384286	07/01/2018 – 12/31/2018	$2,994.99
100001384289	07/01/2016 – 12/31/2016	$113.00
100001384290	01/01/2018 – 06/30/2018	$3,039.39
	Total	$9,161.85

These are responsible party assessments. This N That Wholesale incurred sales tax liability resulting in sales tax assessments for the periods listed above. These assessments were never satisfied by This N That Wholesale 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 liabilities of This N That Wholesale have been derivatively assessed against Karen M. Willis. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 during the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was not requested.

Responsible Party

The petitioner objects to the assessments. The evidence indicates that the petitioner is the owner and sole proprietor of This N That Wholesale, based on the vendor's license application and the Ohio Secretary of State website. The petitioner registered the trade name, This N That Wholesale, on May 18, 2015. Furthermore, the petitioner stated in her petition for reassessment what she believes the actual financials should be for the above-listed periods, indicating that she had the authority to execute the financial responsibilities of the company. Therefore, it is determined that the petitioner is a responsible party of This N That Wholesale under R.C. 5739.33.

Underlying Assessments

The petitioner submitted objections related to the amounts of the underlying assessments. Since these are responsible party assessments, the only issue that can be considered are 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.

Accordingly, the assessments shall stand as issued.

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

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

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: MAR 19 2020

Nicholas Christlieb
11090 Clay St.
Montville, OH 44064

Re: 45 Assessments
Tax Type: Sales (Responsible Party)
Auntie's Antiques, LLC
Vendor's License No. 28-023270

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

Assessment No.	Filing Period	Total
100001118860	08/01/11 – 08/31/11	$742.85
100001118861	11/01/11 - 11/30/11	$694.87
100001118885	10/01/11 - 10/31/11	$667.19
100001118888	12/01/11 - 12/31/11	$466.50
100001118889	06/01/11 - 06/30/11	$505.92
100001118891	07/01/11 - 07/31/11	$793.24
100001118893	04/01/12 - 04/30/12	$309.19
100001118895	03/01/12 - 03/31/12	$651.12
100001118896	06/01/12 - 06/30/12	$357.74
100001118902	11/01/13 - 11/30/13	$820.19
100001118903	05/01/13 - 05/31/13	$484.40
100001118898	08/01/13 - 08/31/13	$701.76
100001118866	07/01/16 - 07/31/16	$746.22
100001118884	01/01/11 - 01/31/11	$491.88
100001118887	09/01/11 - 09/30/11	$710.76
100001118890	020/1/11 - 02/28/11	$738.48
100001118886	05/01/11 - 05/31/11	$549.90
100001118883	04/01/11 - 04/30/11	$643.79
100001118892	03/01/11 - 03/31/11	$404.35
100001118897	05/01/12 - 05/31/12	$278.47
100001118864	01/01/12 - 01/31/12	$383.83
100001118863	07/01/12 - 07/31/12	$340.50
100001118862	08/01/12 - 08/31/12	$371.34
100001118894	02/01/12 - 02/29/12	$447.82

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100001118905	01/01/13 - 01/31/13	$579.88
100001118865	06/01/13- 06/30/13	$540.65
100001118900	03/01/13 - 03/31/13	$406.61
100001118899	02/01/13 - 02/28/13	$647.76
100001118906	07/01/13 - 07/31/13	$701.49
100001118901	04/01/13 - 04/30/13	$706.58
100001118904	12/01/13 - 12/31/13	$793.86
100001118907	09/01/13 - 09/30/13	$623.81
100001118908	10/01/13 - 10/31/13	$687.82
100001118911	10/01/16 - 10/31/16	$789.62
100001118913	08/01/16 - 08/31/16	$791.01
100001118910	09/01/16 - 09/30/16	$707.51
100001118912	06/01/16 - 06/30/16	$695.83
100001118915	04/01/17 - 04/30/17	$513.16
100001118917	03/01/17 - 03/31/17	$852.07
100001118914	02/01/17 - 02/28/17	$832.40
100001118918	01/01/17 - 01/31/17	$815.56
100001118909	05/01/16 - 05/31/16	$628.89
100001118916	01/01/14 - 01/31/14	$560.92
100001118919	05/01/15 - 05/31/15	$713.55
100001118927	10/01/10 - 10/31/10	$3,845.98
	Total	$30,737.27

These are responsible party assessments. Auntie's Antiques, LLC incurred sales tax liability resulting in multiple assessments. These assessments were never fully satisfied by Auntie's Antiques, LLC and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Auntie's Antiques, LLC., has been derivatively assessed against Nicholas Christlieb. 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 Tuesday, January 21, 2020.

Responsible Party

The petitioner objects to the underlying corporate assessments; however, affirmed during the hearing that he is a responsible party for Auntie's Antiques, LLC. During the hearing, the petitioner agreed that he is the responsible party who oversees the day-to-day operations of the company. The petitioner also submitted an affidavit confirming that he is a responsible party. While the petitioner does not object to the responsible party assessments or challenge his status as the responsible party, it is important to note the petitioner is responsible based on the evidence. The petitioner's own LinkedIn profile lists himself as the Owner of Aunties Antique Mall from January

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2009 through the present.[1] In addition to the petitioner's own admissions, the evidence indicates that the petitioner was Vice President of Auntie's Antiques, LLC and is identified as such on its county vendor's license application. A 2013 Geaugamapleleaf.com article references the petitioner as the co-owner of the business.[2] Additionally, the petitioner displayed an advertisement featured in the February 2018 edition of DestinationGeauga.com identifying himself as the owner of Auntie's Antique Mall since 2009.[3] The petitioner has not met his burden to demonstrate the assessments were in error. Therefore, it is determined that the petitioner was a responsible party of Auntie's Antiques, LLC under R.C. 5739.33.

Underlying Assessment

The petitioner also submitted an objection related to the underlying corporate assessment. Since this is a responsible party assessment, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Therefore, this objection cannot be considered as it relates to the underlying assessments.

Accordingly, the assessments shall stand as issued.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

[1] LinkedIn, https://www.linkedin.com/in/nick-christlieb-7899a12b (accessed January 22, 2020).
[2] Ann Wishart, Geaugas Antique Mistique Draws Thousands of Collectors, (July 18, 2013) https://www.geaugamapleleaf.com/news/geaugas-antique-mistique-draws-thousands-of-collectors/ (accessed Jan. 22, 2020).
[3] Destination Geauga, https://www.destinationgeauga.com/wp-content/uploads/2018/02/2018DGVisitorsGuide-1.pdf (accessed January 22, 2020).

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

FINAL DETERMINATION

Date: MAR 19 2020

John Craigmiles
1928 Oakland Cres
Portsmouth, OH 45662

Re: Assessment No. 100001235089
Sales Tax (Responsible Party)
Buba's Inc.
Vendor's License No. 73-033128

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
$3,794.22	$71.07	$1,840.20	$5,705.49

This is a responsible party assessment. Buba's Inc. incurred sales tax liability resulting in a sales tax assessment for the period of November 1, 2014 through November 30, 2014. 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 Buba's Inc. was derivatively assessed against John Craigmiles.

The petitioner contends that he is not a responsible party as defined in R.C. 5739.33. In support of this position, the petitioner submitted a copy of a purchase agreement between the petitioner and a buyer. The agreement indicates that the petitioner sold all shares in the company to the buyer and resigned from the company in January of 2014. The assessed time period is November 2014. The evidence in file supports the petitioner's contention.

Accordingly, the assessment is cancelled.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date:

MAR 19 2020

Don Hofstetter
11090 Clay St.
Montville, OH 44064

Re: 45 Assessments
Tax Type: Sales (Responsible Party)
Auntie's Antiques, LLC
Vendor's License No.: 28-023270

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

Assessment No.	Filing Period	Total
100001118805	11/1/11 - 11/30/11	$694.87
100001118806	8/1/11 - 8/31/11	$742.85
100001118815	12/1/11 - 12/31/11	$466.50
100001118816	6/1/11 - 6/30/11	$505.92
100001118817	10/1/11 - 10/31/11	$667.19
100001118818	7/1/11 - 7/31/11	$793.24
100001118819	4/1/12 - 4/30/12	$309.19
100001118820	3/1/12 - 3/31/12	$651.12
100001118821	6/1/12 - 6/30/12	$357.74
100001118822	11/1/13 - 11/30/13	$820.19
100001118823	5/1/13 - 5/31/13	$484.40
100001118824	8/1/13 - 8/31/13	$701.76
100001118826	7/1/16 - 7/31/16	$746.22
100001118827	1/1/11 - 1/31/11	$491.88
100001118828	9/1/11 - 9/30/11	$710.76
100001118829	2/1/11 - 2/28/11	$738.48
100001118831	5/1/11 - 5/31/11	$549.90
100001118832	4/1/11 - 4/30/11	$643.79
100001118833	3/1/11 - 3/31/11	$404.35
100001118834	5/1/12 - 5/31/12	$278.47
100001118835	1/1/12 - 1/31/12	$383.83
100001118836	7/1/12 - 7/31/12	$340.50
100001118837	8/1/12 - 8/31/12	$371.34
100001118838	2/1/12 - 2/29/12	$447.82

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100001118839	1/1/13 - 1/31/13	$579.88
100001118840	6/1/13- 6/30/13	$540.65
100001118841	3/1/13 - 3/31/13	$406.61
100001118842	2/1/13 - 2/28/13	$647.76
100001118843	7/1/13 - 7/31/13	$701.49
100001118844	4/1/13 - 4/30/13	$706.58
100001118845	12/1/13 - 12/31/13	$793.86
100001118846	9/1/13 - 9/30/13	$623.81
100001118847	10/1/13 - 10/31/13	$687.82
100001118848	10/1/16 - 10/31/16	$789.62
100001118849	8/1/16 - 8/31/16	$791.01
100001118850	9/1/16 - 9/30/16	$707.51
100001118851	6/1/16 - 6/30/16	$695.83
100001118852	4/1/17 - 4/30/17	$513.16
100001118853	3/1/17 - 3/31/17	$852.07
100001118854	2/1/17 - 2/28/17	$832.40
100001118855	1/1/17 - 1/31/17	$815.56
100001118857	5/1/16 - 5/31/16	$628.89
100001118869	1/1/14 - 1/31/14	$560.92
100001118871	5/1/15 - 5/31/15	$713.55
100001118876	10/1/10 - 10/31/10	$3,845.98
	Total	$30,737.27

These are responsible party assessments. Auntie's Antiques, LLC incurred sales tax liability resulting in multiple assessments. These assessments were never fully satisfied by Auntie's Antiques, LLC and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Auntie's Antiques, LLC., has been derivatively assessed against Don Hofstetter. 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 Tuesday, January 21, 2020.

Responsible Party

The petitioner objects to the assessments. During the hearing, the petitioner provided the name of another party who he states is the responsible party for the company. The petitioner argues that he is not responsible for the day-to-day operations and Manager, Nicholas Christlieb, agreed during the hearing and in an affidavit that he is the responsible party who oversees the day-to-day operations of the company. These contentions are not well taken.

MAR 19 2020

The evidence indicates that the petitioner was President of Auntie's Antiques, LLC and is identified as such on its county vendor's license application. A 2015 Geaugamapleleaf.com article references the petitioner as the owner of the business.[1] The petitioner's own petition for reassessment identifies himself as partial owner. The petition for reassessment was completed, dated, and signed by the petitioner on March 28, 2019. Moreover, the fact that one person may be responsible does not absolve another of liability. *Perry v. Tracy,* BTA No. 1998-M-8, 1998 WL 741927 (Oct. 16, 1998). R.C. 5739.33 requires personal liability to fall on any officer or employee having the requisite indices of responsibility. *Beck v. Tracy*, BTA No. 1996-K-156, 1997 WL 40124 (Jan. 17, 1997). The petitioner has not met his burden to demonstrate the assessments were in error. The objection is denied. Therefore, it is determined that the petitioner was a responsible party of Auntie's Antiques, LLC under R.C. 5739.33.

Underlying Assessment

The petitioner also submitted an objection related to the underlying corporate assessment. Since this is a responsible party assessment, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Therefore, this objection cannot be considered as it relates to the underlying assessments.

Accordingly, the assessments shall stand as issued.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

[1] Geauga County Maple Leaf, Parkman Industrial Park Takes Off After Years of Planning, (Oct. 29, 2015) https://www.geaugamapleleaf.com/news/parkman-industrial-park-takes-off-after-years-of-planning/ (accessed Jan. 22, 2020).

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

FINAL DETERMINATION

Date: MAR 19 2020

Theresa Jean Hofstetter
11090 Clay St.
Montville, OH 44064

Re: 45 Assessments
Tax Type: Sales (Responsible Party)
Auntie's Antiques, LLC
Vendor's License No.: 28-023270

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

Assessment No.	Filing Period	Total
100001118933	11/1/11 - 11/30/11	$694.87
100001118926	8/1/11 - 8/31/11	$742.85
100001118922	12/1/11 - 12/31/11	$466.50
100001118928	6/1/11 - 6/30/11	$505.92
100001118923	10/1/11 - 10/31/11	$667.19
100001118924	7/1/11 - 7/31/11	$793.24
100001118938	4/1/12 - 4/30/12	$309.19
100001118940	3/1/12 - 3/31/12	$651.12
100001118934	6/1/12 - 6/30/12	$357.74
100001118944	11/1/13 - 11/30/13	$820.19
100001118946	5/1/13 - 5/31/13	$484.40
100001118952	8/1/13 - 8/31/13	$701.76
100001118960	7/1/16 - 7/31/16	$746.22
100001118937	1/1/11 - 1/31/11	$491.88
100001118931	9/1/11 - 9/30/11	$710.76
100001118930	2/1/11 - 2/28/11	$738.48
100001118929	5/1/11 - 5/31/11	$549.90
100001118925	4/1/11 - 4/30/11	$643.79
100001118932	3/1/11 - 3/31/11	$404.35
100001118939	5/1/12 - 5/31/12	$278.47
100001118943	1/1/12 - 1/31/12	$383.83
100001118935	7/1/12 - 7/31/12	$340.50
100001118941	8/1/12 - 8/31/12	$371.34
100001118942	2/1/12 - 2/29/12	$447.82
100001118947	1/1/13 - 1/31/13	$579.88

MAR 19 2020

100001118951	6/1/13- 6/30/13	$540.65
100001118953	3/1/13 - 3/31/13	$406.61
100001118949	2/1/13 - 2/28/13	$647.76
100001118954	7/1/13 - 7/31/13	$701.49
100001118936	4/1/13 - 4/30/13	$706.58
100001118950	12/1/13 - 12/31/13	$793.86
100001118948	9/1/13 - 9/30/13	$623.81
100001118945	10/1/13 - 10/31/13	$687.82
100001118956	10/1/16 - 10/31/16	$789.62
100001118958	8/1/16 - 8/31/16	$791.01
100001118955	9/1/16 - 9/30/16	$707.51
100001118957	6/1/16 - 6/30/16	$695.83
100001118963	4/1/17 - 4/30/17	$513.16
100001118962	3/1/17 - 3/31/17	$852.07
100001118967	2/1/17 - 2/28/17	$832.40
100001118961	1/1/17 - 1/31/17	$815.56
100001118959	5/1/16 - 5/31/16	$628.89
100001118964	1/1/14 - 1/31/14	$560.92
100001118965	5/1/15 - 5/31/15	$713.55
100001118966	10/1/10 - 10/31/10	$3,845.98
	Total	$30,737.27

These are responsible party assessments. Auntie's Antiques, LLC incurred sales tax liability resulting in multiple assessments. These assessments were never fully satisfied by Auntie's Antiques, LLC and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Auntie's Antiques, LLC., has been derivatively assessed against Theresa Jean Hofstetter. 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 Tuesday, January 21, 2020.

Responsible Party

The petitioner objects to the assessments. During the hearing, the petitioner provided the name of another party who she states is the responsible party for the company. The petitioner provides that she is not responsible for the day-to-day operations and Manager, Mr. Nicholas Christlieb, agreed during the hearing and in an affidavit that he is the responsible party who oversees the day-to-day operations of the company. These contentions are not well taken.

The evidence indicates that the petitioner was the Secretary and Treasurer of Auntie's Antiques, LLC and is identified as such on its county vendor's license application. The petitioner displayed

an advertisement featured in the February 2018 edition of DestinationGeauga.com identifying herself as the owner of Auntie's Antique Mall since 2009.[1] Further, the petitioner's own petition for reassessment identifies herself as partial owner. The petition for reassessment was completed, dated, and signed by the petitioner on March 28, 2019. Moreover, the fact that one person may be responsible does not absolve another of liability. *Perry v. Tracy*, BTA No. 1998-M-8, 1998 WL 741927 (Oct. 16, 1998). R.C. 5739.33 requires personal liability to fall on any officer or employee having the requisite indices of responsibility. *Beck v. Tracy*, BTA No. 1996-K-156, 1997 WL 40124 (Jan. 17, 1997). The petitioner has not met her burden to demonstrate the assessments were in error. The petitioner's objection is denied. Therefore, it is determined that the petitioner was a responsible party of Auntie's Antiques, LLC under R.C. 5739.33.

Underlying Assessment

The petitioner also submitted an objection related to the underlying corporate assessment. Since this is a responsible party assessment, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Therefore, this objection cannot be considered as it relates to the underlying assessments.

Accordingly, the assessments shall stand as issued.

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

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

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] Destination Geauga, https://www.destinationgeauga.com/wp-content/uploads/2018/02/2018DGVisitorsGuide-1.pdf (accessed January 22, 2020).

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

FINAL DETERMINATION

Date: MAR 27 2020

Air Force One Inc.
5810 Shier Rings Rd.
Dublin, OH 43016

Re: Assessment No. 100001071605
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 corrected assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$975.00	$30.38	$146.25	$1,151.63

The petitioner purchased a motor vehicle as part of an asset purchase agreement without paying sales tax. Accordingly, this assessment was issued. The petitioner is requesting a remission of interest and penalty.

The request for remission of pre-assessment interest cannot be considered. The Tax Commissioner lacks jurisdiction to abate pre-assessment interest added to an assessment pursuant to R.C. 5739.133(B). Therefore, the request for interest remission is denied.

The facts and circumstances support full remission of the penalty.

Therefore, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$975.00	$30.38	$0.00	$1,005.38

Current records indicate that payments of $975.00 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 of State." Any payment made within sixty days of the date of this final determination should be forwarded to:

Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 27 2020

Ali Alogaidi
71 E. 1st Ave.
Columbus, OH 43201

Re: Assessment No. 100001451541
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
$397.86	$9.21	$59.68	$466.75

This assessment was issued based upon the conduct of a special audit of a motor vehicle title transfer. On May 20, 2019, Ali Alogaidi received title to a 2009 Nissan from J. Beth D. Anderson. At the time of the title transfer, the petitioner indicated that he paid $600.00 for the vehicle and paid tax on that amount. The Ohio Department of Taxation was unable to verify the purchase price. The Ohio Department of Taxation determined the average purchase price for this type of vehicle was $5,904.93. This assessment was issued for the tax on the difference between the reported purchase price and the average purchase price. A hearing was requested, but the petitioner failed to attend the hearing.

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

The petitioner disputes this assessment and contends that the price reported at the time of the titling was accurate due to the condition of the vehicle; therefore, no additional tax is due. The petitioner failed to provide any documentation to support his contention or verify the actual purchase price, such as a bill of sale or notarized statement from the seller, to support his contention. Therefore, the objection is denied.

Accordingly, the assessment is affirmed as issued.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:
MAR 18 2020

Apple Ohio LLC
6200 Oak Tree Blvd, Ste 250
Independence, OH 44131

Re: Refund Claim No. 20181290862

This is the final determination of the Tax Commissioner on an application for refund, in the total amount of $137,208.97 in use tax filed pursuant to R.C. 5739.07.

The claim was initially granted in the reduced amount of $77,619.80. The claimant disagreed with the reduction and requested a reconsideration of the refund claim. The claimant also submitted additional information for review. Although the claimant originally requested a hearing, the request was waived per an email sent from the claimant's representative on March 12, 2020.

The information supplied by the claimant indicates that another $44,017.05 of refund is warranted. The claimant agrees with this calculation.

Therefore, the claims are approved in the adjusted amount of $44,017.05, with appropriate interest.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAR 27 2020

Darrell D. Badgett
1386 Woodland Dr.
Uniontown, OH 44685

Re: Assessment No. 100001215388
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
$619.31	$22.84	$92.90	$735.05

This assessment was issued based upon the conduct of a special audit of a casual (non-dealer) motor vehicle title transfer. On May 21, 2018, Darrell D. Badgett received title to a 1982 Corvette from Donald T. Robinson. At the time of the title transfer, the petitioner indicated that he paid $100.00 for the vehicle and paid tax on that amount. The Ohio Department of Taxation was unable to verify the purchase price. The Ohio Department of Taxation determined the average purchase price for this type of vehicle was $9,275.00. This assessment was issued for the difference between the reported purchase price and the average purchase price. A hearing was requested, but the petitioner failed to attend the hearing on March 11, 2020.

The petitioner disputes this assessment and contends that the assessed tax is not appropriate given the condition of the purchased vehicle. The petitioner submitted a notarized affidavit from the seller. The evidence in file supports the petitioner's contention.

Accordingly, the assessment is cancelled

Current records indicate that no payments have been made toward 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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FINAL DETERMINATION

Date: MAR 27 2020

Benson, Pamela C
7132 Pleasant Colony Cir.
Blacklick, OH 43004

Re: Assessment 100001306565
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
$465.00	$10.81	$69.75	$545.56

The assessment is the result of an audit of the petitioner's purchase of a utility terrain vehicle ("UTV"). On December 14, 2018, the petitioner purchased a 2011 Polaris Ranger. No tax was paid at the time of purchase as the petitioner claimed it was exempt for "Direct Use – Farming." The exempt use of the UTV could not be verified and this assessment was issued. The petitioner objects to the assessment. A telephone hearing was held on March 18, 2020.

Background

The petitioner is an owner and managing member of Benson 6, LLC, which operates Benson Oaks Farm ("Benson Oaks") in Blacklick, Ohio. The petitioner states the UTV was purchased solely for exempt agricultural use within Benson Oaks's operations. Per Benson Oaks's Form SS-4 (Application for Employer Identification Number) and its website, its primary functions are horse boarding, clinics, horse training, lessons, and equine-assisted therapy.

Analysis

All sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are presumed subject to tax until the contrary is established. R.C. 5739.02(C) and R.C. 5741.02(G). Pursuant to 5739.02(B)(42)(n), sales where the purpose of the purchaser is to use or consume the thing transferred primarily in farming, agriculture, horticulture, or floriculture are exempted from taxation. "Farming" is defined in Ohio Adm. Code 5703-9-23 as the "occupation of tilling the soil for the production of crops as a business and shall include the raising of farm livestock, bees, or poultry, where the purpose is to sell such livestock, bees, or poultry, or the products thereof as a business." "Agriculture" is similarly defined by Ohio Adm. Code 5703-9-23 as "the cultivation of the soil for the purpose of producing vegetables and

fruits and includes gardening or horticulture together with the raising and feeding of cattle or stock for sale as a business" "Business" requires the "object of gain, benefit, or advantage." R.C. 5739.01(F). Making a casual sale is not engaging in business. R.C. 5739.01(G).

Therefore, in order for a vehicle to be eligible for the farming or agricultural exemption three prerequisites must be met. First, the vehicle must be used by a person who farms or provides agricultural services as a business enterprise, such as growing crops or raising livestock for sale as a business. Second, the person must be able to demonstrate that the vehicle is used in specific farming or agricultural activities and that the vehicle is used directly in those activities. Third, these farming or agricultural activities must account for the primary usage of the vehicle.

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. Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648, paragraph two of the syllabus (1952). This exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming or agriculture as defined in the Ohio Administrative Code. A UTV is not a traditional piece of farming equipment with a use limited to a farming function. Instead, a UTV can be used in ways that are both taxable and exempt. In most instances, UTVs are not primarily used as farming equipment.

Horse Boarding and Riding Operations

The petitioner contends that the vehicle is exempt under R.C. 5739.02(B)(42)(n) for use in agriculture. The Supreme Court of Ohio has held that items purchased for use by a taxpayer whose primary functions are "operating a riding school * * * and boarding and training horses owned by others" are not within the scope of the agriculture exemption. *Red Fox Stables, Inc. v. Porterfield*, 28 Ohio St.2d 239, 240, 277 N.E.2d 433, 434 (1972). The petitioner's submissions reflect that the UTV is being primarily used in functions related to operating a riding school and boarding and training horses owned by others. The petitioner has not produced any evidence or caselaw to rebut or distinguish this holding. Therefore, the petitioner's objection is denied.

Engaged in the Business

Assuming *arguendo* that *Red Fox Stables* is not controlling, the petitioner's objections still fail as a matter of law. The first requirement for exemption is that a taxpayer be engaged in the business of farming. In order to demonstrate that the farming activities at issue constitute a "business," typically a copy of the I.R.S Federal 1040 Schedule F (Profit or Loss from Farming) is necessary. This schedule is used to report farm income and expenses. The petitioner stated she did not have a Schedule F for any previous tax year as she had been renting Benson Oaks to others but decided in late 2019 to take the reins of the Benson Oaks operations.

The petitioner has been unable to present documentary evidence as to its sales and expenses. The petitioner noted that it will likely be filing a Schedule F going forward. The documentary evidence from the petitioner reflects that she did not even take over the Benson Oaks operations until the

fourth quarter of 2019 – the same time she bought the UTV. The evidence reflects at most an anticipation of future business. Purchases in anticipation of potential future business do not constitute an exempt purchase by someone engaged in the business of agriculture. *Grayson Family Farm v. Testa,* BTA Case No. 2017-1983, 2018 WL 2409821 (May 21, 2018). The petitioner has failed to demonstrate it is engaged in agriculture as a business.

Penalty

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

The petitioner failed to meet its burden to show error in the assessment. The petitioner has failed to provide sufficient evidence to show she is engaged in the business of farming or agriculture. The petitioner has further failed to provide sufficient evidence that the use of the UTV is exempt.

Accordingly, the assessment is modified in part.

Tax	Pre-Assessment Interest	Penalty	Total
$465.00	$10.81	$0.00	$475.81

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 27 2020

Claugus Family Farm LP
P.O. Box 565
Woodsfield, OH 43793

RE: Assessment No.: 100001147473
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$8,119.78	$123.83	$1,217.97	$9,461.58

This assessment is the result of an audit of the petitioner's purchase of a 2015 Mercedes-Benz utility vehicle on September 28, 2018 in the amount of $111,997.00. The petitioner did not pay any tax at the time of purchase. Instead, an exemption was claimed as "Direct Use-Farming." The exempt use of the vehicle could not be verified and, therefore, this assessment was issued. The petitioner filed a petition for reassessment and requested abatement of the penalty. A hearing was scheduled for Wednesday, March 4, 2020; however, the petitioner waived its hearing via email on Tuesday, March 3, 2020.

The petitioner contends that the Department of Taxation erred in issuing the notice of assessment because the vehicle is used on its farm and is tax exempt. The petitioner states that the use of the vehicle is for timber production. The petitioner's objections are addressed below.

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983). Unsupported testimonial evidence is insufficient to meet this burden. *R.L. Best Co. v. Testa*, 7th Dist. Mahoning No. 18 MA 0001, 2018-Ohio-5400, 2018 WL 6930501.

It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary

is established. R.C. 5739.02(C) and 5741.02(G). R.C. 5739.02(B)(42)(n) provides an exemption from tax for items where the purpose of the purchaser is to use or consume the thing transferred primarily in farming, agriculture, horticulture, or floriculture. "Farming" is defined as ". . . the occupation of tilling the soil for the production of crops as a business and shall include the raising of farm livestock, bees, or poultry, where the purpose is to sell such livestock, bees, or poultry, or the products thereof as a business." Ohio Adm.Code 5703-9-23. "Business" requires the "object of gain, benefit, or advantage." R.C. 5739.01(F).

Therefore, in order for a vehicle to be eligible for the farming exemption three prerequisites must be met. First, the vehicle must be used by a person that farms as a business enterprise, such as growing agricultural crops or raising livestock for sale as a business. Second, the person must be able to demonstrate that the vehicle is used primarily in specific farming activities that are part of growing crops or caring for livestock. Third, these farming activities must account for the primary usage of the vehicle.

Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). The farming exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming as defined in the Ohio Administrative Code.

Farming as a Business

The first requirement for exemption is that a taxpayer be engaged in the business of farming. In order to demonstrate that the farming activities constitute a "business," a copy of the I.R.S. Form 1040 Schedule F (Profit or Loss from Farming) or other proof that the petitioner is engaged in the business of farming is necessary. The petitioner submitted copies of its 1040 Schedule F's from 2005 through 2018 for consideration as proof that it is engaged in the business of farming. However, these forms demonstrate deductions that far outweigh income, with some years reporting no income. The petitioner also submitted copies of its 2010 through 2019 applications for Current Agricultural Use Valuation (CAUV) renewals processed by the Monroe County Auditor. The petitioner contends that the annual applications demonstrate that its real estate is being farmed as evidenced by the CAUV real estate tax reduction provided by the County for those engaged in farming. Therefore, the petitioner contends that it must be engaged in farming. The petitioner submitted additional information, such as two Forest Management Plans prepared in 2015 and 2019 by licensed foresters, and handwritten notes regarding the limited partnership's harvests from a registered forester who worked on the property from 2001 through 2008.

While the petitioner provided voluminous records of the limited partnership's previous harvests and future plans to harvest, the evidence is insufficient to demonstrate that the petitioner is currently engaged in the business of farming as enumerated in statute. The petitioner's own evidence provides that it has not sold timber since 2011. Further, the petitioner has not reported any sales since this time period to constitute income for a current business.

The petitioner contends that the vehicle in question was purchased in 2018 for farm use. The petitioner contends that the vehicle was specifically purchased because of its superior design and capabilities to efficiently conduct husbandry of timber in saving the farm time and money. However, the petitioner failed to elaborate on how the vehicle saved the petitioner time and money. In addition to the petitioner reporting no sales of any products or services on its Schedule F from 2011 through present, the petitioner has also reported a substantial loss of over $440,000 since purchasing the vehicle, less than all other tax year losses, except 2014. In *Grayson Family Farm v. Testa*, BTA No. 2017-1983, 2018 WL 2409821 (May 21, 2018), the Board relied heavily on the appellant's Schedule F, which reported no sales and significant expenses to affirm the assessment that the appellant did not appear to support the operation of an active farming business enterprise. The Board held that the combination of no reportable income i.e. sales and significant expenses undercut the claims that he was engaged in farming for sale as a legitimate business enterprise. *Id.* Here, as with *Grayson Family Farm*, the petitioner failed to provide evidence of income, and has reported substantial losses on its Schedule F every year since tax year 2011. Most notably, the petitioner's Schedule F provides that since tax year 2012, the petitioner placed an X in the box for Item E that it does not "materially participate" in the operation of this business. All Schedule F's completed by the petitioner after 2011 note this change and contain no reportable income.

In addition to the petitioner's Schedule F's, the petitioner submitted two Forest Management Plans and CAUV renewals to support its contention that it is engaged in the business of farming. The first Forest Management Plan was prepared in January of 2015 and does not provide evidence of the current use of the property for farming activities despite the Plan's expiration date of January 27, 2024. Further, the Plan states one of the landowner's objectives is to manage the forest in order to stay qualified for the CAUV Program. The Management Plan identified 5,500 red oaks that were 19 feet tall, and additional mature timber resources located on the property in 2015. Throughout the 2015 Plan, the forester recommends harvests in all three parts of the property and confirms that the property is stocked with a variety of marketable timber species now and in the future.

The second Forest Management Plan was prepared in December of 2019 and also provides that it was written to ensure the petitioner's qualification in the CAUV Program. In the 2019 Plan, the landowner's first objective is to maintain and improve productivity of the woodland for timber production. The last objective is to provide recreational opportunities that may improve the social benefits of the forest, such as hunting. This Plan also identifies marketable timber that could be clear-cut at the current time.

While the Tax Commissioner appreciates the petitioner's concerns regarding the many unique perils that the timber industry faces with infested timber and competition in production of large-scale farms, the petitioner has merely provided evidence of potential future use. Based on the Plans submitted by the petitioner, the petitioner has available timber; however, it has provided no evidence that it is currently engaged in the business of farming such timber. The petitioner failed to provide evidence that it is currently engaged in the sale of timber as a business enterprise. Rather, the petitioner has merely provided evidence of maintenance of its property, which contains a forest.

Further, the petitioner submitted an affidavit dated March 3, 2020, in which it mentions prior harvest revenue, and states in relevant part, "We expect similar, but larger-results for our next harvest *beginning soon*." (Emphasis Added). Bruce Claugus Affidavit, Paragraph 8. The petitioner's own admission provides that the petitioner is not currently engaged in business activity but contemplating future use. Further, the petitioner's Schedule F provides that the petitioner has not made any sales or reported any income since tax year 2011. The Tax Commissioner understands that the petitioner could be engaged in farming activities outside of timber; however, the petitioner failed to provide evidence of any other current business use of the property as the petitioner reported no sales since tax year 2011. Additionally, the petitioner provided that it is preparing to breed cattle and plant fruit orchards. As with timber, the petitioner's terminology indicates future use, rather than current business activity of the property.

The Tax Commissioner cannot conclude from the information provided that the petitioner is currently engaged in the business of farming. The fact is that since 2011, the petitioner's tax filings reflect significant losses and no income. While the Tax Commissioner is sensitive to the petitioner's remarks that this is a family farm he inherited, the petitioner's current activities do not constitute a farming or agricultural business under the statutory framework promulgated under the Ohio Revised Code and Ohio Administrative Code. The petitioner failed to indicate how it is "engaging in business" for the purposes of the statute. Therefore, this objection is denied.

Direct Use in Farming

Additionally, to be eligible for the farming exemption, the petitioner must demonstrate that the vehicle is used primarily in specific farming activities. The petitioner failed to provide sufficient information on how the vehicle was used in farming activities. The Department requested that the petitioner provide pictures or videos of the vehicle being used for farming activities, a completed Department of Taxation Farm Use Questionnaire, and vehicle information including the model and mileage. The vehicle, a Mercedes Benz purchased for $111,997.00, is not a traditional piece of farming equipment whose use is limited to a farming function. This is shown by the petitioner's statement that the vehicle is a specialty piece of equipment which was originally designed as a small army troop carrier used by the U.S. Army. Bruce Claugus Affidavit, Paragraph 5. The petitioner provides that annual sales of this vehicle have been limited to 578 and 4,200 units. *Id.*

The issue is whether the petitioner's Mercedes Benz was primarily used directly for exempt farming purposes. When analyzing if a piece of equipment is used for farming as defined by law, the primary use of the equipment is the key factor. *Lucinda Hart v. Limbach*, BTA No. 86-D-280, 1988 WL 162378 (July 22, 1988). If the equipment is used solely in transporting farm products to and from processing or storing, it is not eligible for a farm use exemption as it plays no part in sowing, cultivating, or harvesting the grain. *Medina Sod Farms v. Limbach*, BTA No. 2152, 1986 WL 7747 (July 9, 1986). The burden of demonstrating that this vehicle is used primarily in an exempt manner rests with the petitioner. *Forest Hills Supermarket, Inc., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999).

In the petition for reassessment, the petitioner contends that the Department erred in issuing the notice of assessment without first allowing the petitioner to submit a Farm Questionnaire. However, the petition for reassessment did not contain a Farm Use Questionnaire and lacked any explanation as to how the vehicle was used directly in farming. Prior to the hearing, the Department provided a blank copy of the Department of Taxation Farm Use Questionnaire for the petitioner to complete. The petitioner failed to submit a completed Department of Taxation Farm Use Questionnaire indicating the main uses of the vehicle. However, the petitioner provided an affidavit of its usage. Throughout the affidavit, the petitioner refers to the vehicle as the AG Processor. However, it does not identify the specific model, but provides general information regarding the background and sales of the vehicle. Most importantly, it does not identify how the Mercedes is used with a percentage of use.

The petitioner states that the principal features of the vehicle, such as ability to climb and traverse through difficult terrain, including water make it necessary to husband the petitioner's timber. The petitioner explains the modernization of the farm and the need for such equipment as farms have grown in acreage throughout recent generations. The petitioner contends that the specific topography of its land makes it difficult to productively farm without the vehicle, as the petitioner sought vehicles such as a jeep or conventional truck prior to this purchase, but it could not cope with the terrain.

The petitioner states the Mercedes Benz was purchased specifically to allow the petitioner to regularly and systematically coordinate and execute the monitoring, identification, treatment, and removal of invasive and undesirable species affecting its timber, salvage damaged timber, and harvest mature timber. The petitioner provides that timber "weeds" are distinguishable due to their size, and employees of the farm would use axes, chainsaws, herbicides, and heavy equipment to eradicate the weeds. The petitioner contends that the Mercedes Benz allows transportation of employees and equipment to the timber. While the petitioner could provide detailed maps of the topography of the area, it failed to provide pictures of the vehicle in question or any other documentary evidence to verify its use. The petitioner also fails to show how the vehicle is used to monitor, identify, treat, and remove the weeds affecting the timber.

Based on the information submitted, the petitioner has not demonstrated the use of the vehicle is for commercial timber production versus maintaining property which contains a forest. The use of the vehicle cannot be verified as exclusive to farm-use. Additionally, the petitioner has not provided sufficient evidence to demonstrate the vehicle is used for timber farming activities.

The petitioner states the vehicle is not used on public roads, but has not provided vehicle information as requested, including evidence of licensing restrictions to verify this contention. It is not clear from the information provided that the petitioner uses the vehicle for more than hauling people and items to and from different locations. Therefore, the petitioner has not provided evidence to demonstrate that the primary use of the vehicle is for farming. Since the petitioner has failed to supply evidence that the use of the vehicle satisfies the exemption, the objection is denied.

Definition of Agriculture

The petitioner contends that the Department erred in determining that Claugus Family Farm LP owes sales tax as it only applied the definition of agriculture included in Ohio Adm.Code 5703-9-23, and R.C. 5739.02(B)(42)(n) rather than the more broadly defined term included in R.C. 1.61. The petitioner contends that the Department erred in failing to interpret R.C. 5739.02(B)(42)(n) in conjunction with R.C. 1.61.

R.C. 5739.02(B)(42)(n) provides for exemption from sales and use taxation where the purpose of the purchaser is "[t]o use or consume the thing transferred primarily in producing tangible personal property *for sale* by farming, agriculture, horticulture, or floriculture." (Emphasis added.) However, Ohio Adm.Code 5703-9-23 makes clear that only use in agriculture "as a business" qualifies for the use tax exemption. *Lee v. Testa*, BTA No. 2017-2278, 2018 WL 2409832 (May 23, 2018).

While the petitioner's assertion is correct that R.C. 1.61 defines the term "agriculture" more broadly than 5739.02, the petitioner fails to elaborate how the Department misinterpreted the statute, as the petitioner failed to provide evidence of how the vehicle in question is used in agriculture as a business as defined by any of the aforementioned statutes. Further, R.C. 1.61 does not apply as the exemption in R.C. 5739.02(B)(42)(n) requires the petitioner not only be engaged in agriculture, but also be engaged in agriculture as a business. Therefore, this objection is denied.

Penalty

The petitioner requests abatement of the penalty and pre-assessment interest. The petitioner contends that the Department erred and abused its discretion in imposing a penalty as there is no factual or legal basis for holding that the Claugus Family Farm LP's conduct was a result of willfull neglect and not reasonable cause or that the petitioner owes any sales tax. The petitioner provides that the Department of Taxation erred and abused its discretion in claiming that it was required to impose a penalty upon the petitioner despite numerous factors favoring the taxpayer that do not warrant imposing a penalty. The petitioner provides that the Department also erred in issuing pre-assessment interest as there is no factual or legal basis for holding that the petitioner owes sales tax.

The request for remission of the pre-assessment interest cannot be considered. The Tax Commissioner lacks jurisdiction to abate assessment interest added to an assessment pursuant to R.C. 5739.133(B) and 5741.14.

R.C. 5739.133 provides that a penalty may be added to an assessment. The Supreme Court held that "[r]emission of the penalty is discretionary." *Jennings & Churella Constr. Co. v. Lindsey*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The Department, within its statutory authority, imposed a penalty for the petitioner's failure to remit tax. Based upon the facts and circumstances, a penalty abatement is not warranted. Accordingly, the request for a penalty abatement is denied.

Therefore, the assessment shall stand as issued.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAR 27 2020

Jason Eibling
12270 Township Hwy #10
Nevada, OH 44849

Re: Assessment No. 100001033471
Use Tax

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
$1,230.35	$19.00	$184.55	$1,433.90

This assessment is the result of an audit of the petitioner's purchase of a utility vehicle (UTV). On or about April 28, 2018, the petitioner purchased a 2018 Honda SXS. No tax was paid at the time of purchase. Instead, an exemption was claimed as "Direct Use-Farming." The exempt use of the vehicle could not be verified and, therefore, this assessment was issued. The petitioner objects to the assessment. A hearing was not requested.

Legal Standard

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. Unsupported testimonial evidence is insufficient to meet this burden. *R.L. Best Co. v. Testa*, 7th Dist. Mahoning No. 18 MA 0001, 2018-Ohio-5400, 2018 WL 6930501.

Sales where the purpose of the purchaser is to use or consume the thing transferred primarily in farming, agriculture, horticulture, or floriculture are exempted from taxation. R.C. 5739.02(B)(42)(n). "Farming" is defined as the "occupation of tilling the soil for the production of crops as a business and shall include the raising of farm livestock, bees, or poultry, where the purpose is to sell such livestock, bees, or poultry, or the products thereof as a business." Ohio Adm.Code 5703-9-23. "Business" requires the "object of gain, benefit, or advantage." R.C. 5739.01(F). Making a casual sale is not engaging in business. R.C. 5739.01(G).

Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl.*

Tube Co. v. Glander, 157 Ohio St. 407, 105 N.E.2d 648 (1952), paragraph two of the syllabus. The exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming or agriculture as defined in the Ohio Administrative Code. A UTV is not a traditional piece of farming equipment with a use limited to a farming or agricultural function. In most instances, UTVs are not primarily used as farming equipment, in comparison to tractors, combines, or spreaders.

Therefore, in order for the purchase of the UTV to be eligible for the farming exemption three prerequisites must be met. First, the UTV must be used by a person that farms as a business enterprise, such as growing agricultural crops for sale as a business. Second, the person must be able to demonstrate that the UTV is used in specific farming activities that are actually part of growing crops, and not for some other use such as transportation. Third, these farming activities must account for the primary usage of the UTV.

First, a taxpayer must be engaged in the business of farming to qualify for the farming exemption. In order to demonstrate that the farming activities at issue constitute a "business," typically a copy of the Internal Revenue Service (IRS) Form 1040 Schedule F (Profit or Loss from Farming) is necessary. This schedule is used to report farm income and expenses.

The petitioner provided a copy of their Schedule C indicating $610 in gross receipts. The petition for reassessment stated the property "does not demonstrate much revenue" but is under an Ohio CAUV Forestry Plan. The is insufficient to show the petitioner is engaged in the business of farming. As the Schedule C is not the appropriate place to report agricultural income, it is not sufficient evidence to show the petitioner was engaged in the business of farming. The low amount of reported gross receipts and unclear nature of reporting those sales on a Schedule C do not show the petitioner was engaged in the business of farming. The petitioner's submitted forestry plan is also insufficient to show the petitioner is engaged in the business of agricultural. A forestry plan may show the future intent to sell timber but does not show the petitioner is currently engaged in the business of selling timber.

Based on the evidence provided, the Tax Commissioner cannot conclude the petitioner is engaged in the business of farming. In *Grayson Family Farm v. Testa*, BTA No. 2017-1983, 2018 WL 2409821 (May 21, 2018), the Board of Tax Appeals considered a similar set of facts. The taxpayer submitted a Schedule F and Woodland Stewardship Management Plan with their appeal to the Board. The Board found that the petitioner was not engaged in business because the taxpayer reported no sales on their Schedule F. *Id.* The Board did not find the Woodland Stewardship Management Plan showed that the taxpayer was engaged in the business of farming. *Id.* The Board has also found a Schedule C with $4,928 of reported gross receipts insufficient to show a taxpayer was engaged in the business of farming. *Larry D. Lee v. Testa*, BTA No. 2017-2278, 2018 WL 2409832 (May 23, 2018). Therefore, based upon the evidence provided, the petitioner has failed to demonstrate he meets the business engagement prerequisite to qualify for the farm use exemption.

Even if the petitioner could show he engages directly in the business of farming, the UTV is not primarily used directly in exempt farming activities. It is not enough for the item to be necessary to the farming process, the item must be directly used in the sowing, cultivating, or harvesting.

Hedman et. al. v. Testa, BTA No. 2018-373, 2018 WL 5268924 (October 12, 2018). Transporting product around the property is not a direct use in farming. *See Medina Sod Farms v. Limbach*, B.T.A. No. 2152, 1986 WL 7747 (July 9, 1986).

The petitioner stated he uses the UTV in several different activities. The petitioner stated the UTV is used for personal transportation, spraying for vines, dragging fallen tree material, and hauling tools. The petitioner did not provide a breakdown of the percentage the UTV is used in each these activities. Spraying is a direct use in the cultivation of the timber. However, the rest of the petitioner's uses of the UTV are not direct uses in farming. Transporting the petitioner, dragging fallen tree material, and carrying tools are not direct uses in farming. The UTV does not directly act on the sowing, cultivating, or harvesting of timber as part of those activities. The UTV is merely carrying items and personnel around the property. The evidence does not show the primary usage of the UTV to be directly in exempt farming activities. The petitioner has not met his burden to show the primary use of the UTV is directly in farming. The objection is denied.

Therefore, the assessment is affirmed.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAR 19 2020

Steven H. Elston
18373 Rd. 126
Oakwood, OH 45873

Re: Assessment No. 100001146701
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
$725.00	$12.33	$108.75	$846.08

The petitioner objects to the use tax due on the purchase of a trailer. The petitioner purchased the trailer on or around September 12, 2018 without the payment of tax. The petitioner provided the seller with a certificate of exemption claiming the vehicle was used directly in farming. The Ohio Department of Taxation was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. No hearing was requested.

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of services provided, with it being the obligation of the user to file a return and remit tax on the purchase of such items when tax was not paid to a seller.

There is a farming exemption to the Ohio sales and use tax under R.C. 5739.02(B)(42)(n), if the purpose of the transaction is "to use or consume the thing transferred primarily in producing tangible personal property for sale by farming, agriculture, horticulture, or floriculture." However, not every agricultural activity is "farming." "Farming" is defined in Ohio Adm.Code 5703-9-23(A)(1) as the "occupation of *tilling the soil for the production of crops* as a *business* and shall include the raising of farm livestock, bees, or poultry, where the purpose is to sell such livestock, bees, or poultry, or the products thereof as a *business*." (Emphasis added.) "Business" requires the "object of gain, benefit, or advantage." R.C. 5739.01(F). Equipment that generally qualify for the exemption are tractors, combines, planters, balers, and similar equipment.

MAR 19 2020

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

Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). The farming exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming as defined in the Ohio Administrative Code.

In order to claim the exemption, the petitioner must first prove that he is engaged in farming as a business. Typically, to demonstrate that the farming activities constitute a "business," a copy of the I.R.S. Form 1040 Schedule F (Profit or Loss from Farming) is necessary. The schedule is used to report farm income and expenses. The petitioner provided a copy of his 2017 1040 Schedule F to verify that he is engaged in farming as a business.

The remaining questions are whether the trailer is used in farming and whether the farming use of the trailer is its primary purpose. According to the petitioner, the trailer is used to haul grain for livestock and to transport harvested crops within the boundaries of the farm. When analyzing if a piece of equipment is used for farming as defined by law, the primary use of the equipment is the key factor. *Hart v. Limbach*, BTA No. 86-D-280, 1988 WL 162378 (July 22, 1988). If the equipment is used solely in transporting farm products to and from processing or storing, it is not eligible for a farm use exemption. *See Medina Sod Farms v. Limbach*, BTA No. 2152, 1986 WL 7747 (July 9, 1986). The evidence shows the trailer is simply used to transport harvested crops. As such, it is not used directly in the production of those crops. *Id.* While the trailer in question is used exclusively for farm business and may be a necessary piece of that business, "the law does not provide *** that any item necessary for farming is exempt." *Bahan Farms, LLC v. McClain*, BTA No. 2017-2180, 2019 WL 1260533 (March 11, 2019).

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

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments in the amount of $846.08 have been applied in complete 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.

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MAR 19 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 19 2020

E-Tank Logistics Co.
3150 Millennium Blvd. S.E.
Massillon, OH 44646

Re: Refund Claim No. 20181295487
Filed on April 16, 2018
Use Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $47,272.07 in use tax filed pursuant to R.C. 5739.07 and R.C. 5741.10. The claim was initially denied. The claimant disagreed with the denial and submitted additional information for consideration. A hearing was held on December 4, 2019.

Every sale or use of tangible personal property is presumed taxable in Ohio and the burden is on the taxpayer to affirmatively establish the right to an exemption. *Standard Oil Co. v. Peck*, 163 Ohio St. 63, 125 N.E.2d 342 (1955). Vehicles purchased to be used primarily in transportation of other's tangible personal property for hire are exempt from sales tax. R.C. 5739.02(B)(32). The vehicle must be owned and operated by a holder of a permit to transport goods for consideration issued by Ohio or the United States of America. R.C. 5739.01(Z)(1). A United States Department of Transportation identification number is not a permit or certificate to transport tangible personal property belonging to others. *Rumpke Container Serv., Inc. v. Zaino*, 96 Ohio St.3d 304, 2002-Ohio-792, 762 N.E.2d 995.

Over the period of April 22, 2014 through January 5, 2018 the claimant purchased various motor vehicles and maintenance for said vehicles. The claimant contends the vehicles were to be used in transportation for hire therefore the payment of tax was erroneous. The claimant has a Department of Transportation identification number but did not obtain a motor carrier permit until October 2018. An identification number is merely for administrative purposes and is not a permit or certificate authorizing transportation of tangible personal property of others for hire. *Id.* As the claimant did not have a permit authorizing transportation of tangible personal property for hire at the time of purchase, they have failed to affirmatively establish their right to an exemption. The objection is denied.

Therefore, the claim for refund is denied.

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MAR 19 2020

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

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:

MAR 27 2020

Gilbane Building Company
7 Jackson Walkway
Providence, RI 02903

Re: Assessment No.: 100000786470
Use Tax
Account No. 97-211920
Audit Period: 01/01/2010 – 12/31/2013

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 and R.C. 5741.14.

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

Tax	Interest	Penalty	Total
$114,964.96	$23,174.83	$17,244.68	$155,384.47

Current records indicate that the petitioner is due a refund of $291,548.53 plus applicable interest.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Office of the Tax Commissioner
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FINAL DETERMINATION

Date: MAR 27 2020

Frances L. Marcum
5918 Centennial Rd.
Sylvania, OH 43560

Re: Assessment No. 100001146765
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
$1,885.00	$31.85	$282.75	$2,199.60

This assessment was issued based upon the conduct of a special audit of the purchase of a 2014 Utility trailer. The petitioner purchased the trailer without the payment of tax. It is the petitioner's contention that the purchase is exempt because the vehicle is used in transportation for hire. The Ohio Department of Taxation was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. A hearing was not requested in this matter.

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).

It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary is established. R.C. 5739.02(C) and 5741.02(G). However, the purchase of a motor vehicle that is primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire is exempt from taxation. R.C. 5739.02(B)(32).

In accordance with R.C. 5739.01(Z), "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

(1) The holder of a permit or certificate issued by this state or the United States authorizing

the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;

(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;

(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

In support of this contention, the petitioner only stated that the trailer was used for business purposes. No evidence was provided to substantiate that claim. The Department determined that the petitioner's business has an active permit number, which demonstrates that it is authorized by the U.S. Department of Transportation to operate as an interstate motor carrier for hire. However, no evidence such as invoices, logbooks, or other records were provided to demonstrate the use of the trailer in transportation for hire. The petitioner was mailed a request for more information but did not to respond to the request. Therefore, the petitioner did not meet their burden, and the objection is denied.

Accordingly, the assessment is affirmed as issued.

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

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 27 2020

Materion Corp.
6070 Parkland Blvd.
Mayfield Heights, OH 44124

RE: Assessment No. 100001253008
Use Tax
Account No. 98-002732

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

Tax	Pre-Assessment Interest	Penalty	Total
$57,727.64	$4,622.78	$5,772.73	$68,123.15

The petitioner operates as a parent company to a group of wholly owned subsidiaries that supply highly engineered advanced enabling materials to global markets. This assessment is the result of an audit of the petitioner's records from April 1, 2015 through March 31, 2018. A hearing was not requested.

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

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$57,727.64	$4,622.78	$2,886.38	$65,236.80

Current records indicate that payments of $62,350.42 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post-assessment interest will be added to the assessment as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAR - 5 2020

Micro Construction, LLC
8675 Lancaster Newark Rd. NE
Baltimore, OH 43105

Re: Assessment No. 100000712567
Use Tax
Ohio Tax Account #: 97-301950

The final determination of the Tax Commissioner issued on February 25, 2020 pertaining to this taxpayer is hereby vacated and is replaced by the following:

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	Penalty	Total
$147,936.36	$12,079.75	$22,189.82	$182,205.93

The petitioner, Micro Construction, LLC ("Micro"), is a multifaceted business with its headquarters in Baltimore, Ohio. It sells on-site demolition services, aggregate building materials, recycling services, portable toilet rentals, dumpster rentals, and roll-off containers. This assessment is the result of a field audit of the petitioner's purchases for the period of June 1, 2009 through August 31, 2016.

The petitioner objects to the assessment based mainly upon claims that certain purchases were either used in manufacturing, transportation for hire, or both. The petitioner also objects to two transactions as a "service of web site" or "service of real property." The petitioner argues that these transactions should be removed from the assessment. The petitioner further argues that the penalty should be removed. A hearing was held on February 26, 2019.

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. 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. 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,

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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).

Transportation for Hire

The first issue is whether the petitioner is entitled to the transportation for hire exemption. The petitioner purchased tangible personal property in the form of equipment, truck maintenance/repairs, dumpster containers, truck tires, and truck rentals free of tax. It contends these purchases fall under the transportation for hire exemption.

Vehicles and associated purchases that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire are exempt from sales tax. R.C. 5739.02(B)(32). In *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, ¶27, the Supreme Court of Ohio explained that "[t]he exemption in R.C. 5739.02(B)(32) is granted for the sale of motor vehicles and associated parts and services that are primarily used to transport tangible personal property of others for consideration. * * * To show that a motor vehicle is primarily used for the transportation of tangible personal property of others, there must be proof of that use." Mere testimonial evidence without further documentary evidence is insufficient to meet this burden. *Id.*[1]

The Petitioner Is Properly Licensed for Transport for Hire

One prerequisite for the exemption is if the petitioner has operating authority from the Public Utilities Commission of Ohio ("PUCO") or the United States Department of Transportation ("USDOT") to engage in transportation for hire. R.C. 5739.01(Z). The Commissioner does not dispute that the petitioner was properly licensed with the PUCO for the relevant time periods to this assessment. Therefore, the petitioner has met the licensure requirement for the exemption.

The Petitioner Transports Waste for Disposal, Not Personal Property Belonging to Others

The second prerequisite for the exemption is that the petitioner must transport tangible personal property belonging to others. The petitioner disputes several transactions related to the roll-off container portion of its business. According to the petitioner's trade name registration of Micro Roll-Off Containers (stylized on its website as "MICRO Rolloff"), the petitioner "rents roll-off containers/dumpsters and provides services related thereto[.]"[2] The petitioner's website advertises its roll-off containers as "clean, well maintained rolloff waste containers to suit your every need."[3] It also notes the waste containers are for "construction and demolition debris" and

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[1] *Accord R.L. Best Co. v. Testa,* 7th Dist. Mahoning No. 18 MA 0001, 2018-Ohio-5400, ¶ 34, *appeal not allowed,* 155 Ohio St.3d 1422, 2019-Ohio-1421, 120 N.E.3d 868, ¶ 34, *reconsideration denied,* 156 Ohio St.3d 1448, 2019-Ohio-2498, 125 N.E.3d 920, ¶ 34.

[2] Micro Rolloff Trade Name Registration.

[3] http://www.microrolloff.com/rolloff.php

that "[s]olid waste container weight limits apply."[4] It finally states "[w]hen you need your container, it will be there; when you're done, it will be gone."[5] There is no mention of general business terms, ownership of the debris, environmental regulations, hazardous waste, or a location to where the debris will be taken. In practice, the petitioner generally loads a Micro roll-off container onto the back of a truck, drives it to a location per the customer's request, drops it off, and then retrieves it upon completion. The debris is then generally transported still in the container to a public construction and demolition debris ("C&DD") landfill that neighbors the petitioner's office.[6]

The petitioner fails the transportation "for others" prong of the exemption. The petitioner is not in the business of transportation for hire. It is "rent[ing] roll-off containers/dumpsters and provid[ing] services related thereto[,]" i.e., waste disposal.[7] It is hauling waste, discarded by its customers, primarily in roll-off containers that the petitioner owns and rents out. This is not transportation of tangible personal property belonging to others. The nature of the materials hauled is significant, as the Supreme Court of Ohio and the Board of Tax Appeals (BTA) have both held that "waste" over which "[t]he generators of the waste have relinquished control" does not meet the definition of "tangible personal property belonging to others." *Arcaro v. Testa,* BTA No. 2014-432, 2014 WL 5605475 (October 22, 2014), citing *Rumpke Container Serv., Inc. v. Zaino*, 94 Ohio St. 3d 304, 310, 762 N.E.2d 995 (2002). Rumpke Container Service, Inc. (Rumpke), like the petitioner, was in the business of collecting and transporting waste, refuse, and trash from customers' commercial, construction, and industrial sites for disposal in its landfills. The Court found that "[w]hen Rumpke is transporting the waste to its landfill, it is transporting the waste in furtherance of its business of waste disposal, not as a person engaged in highway transportation of other's property for hire." *Id.* at 309. The BTA has routinely concluded that "the transportation of general waste to a landfill does not qualify as transportation of personal property belonging to others." *One Source Waste Solutions v. Testa*, BTA Nos. 2016-301, et seq., 2017 WL 1628609 (April 24, 2017), *2. The only conclusion that can possibly be reached from these facts is that the petitioner's customers are hiring the petitioner to perform the business of waste removal and disposal. Even if the petitioner in some situations did not own the roll-off container, the services purchased by the customer were transporting and disposal of waste, not transportation of a container.[8] As a result, the Commissioner cannot conclude that the petitioner has met its burden to show it is engaged in highway transportation of tangible personal property for others.

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[4] *Id.*

[5] *Id.*

[6] In its post-hearing supplemental evidence, specifically Exhibit K, the petitioner provides two other situations involving non-Micro containers and hazardous waste. The hazardous waste issue appears to have been unmentioned at hearing or on audit. The petitioner admitted that its trucks are not primarily used in transporting third-party rollaway containers. Audit Remarks, page 5 and Footnote 4. The petitioner further does not identify how either of these methods would meet the exemption under law, or any facts other than their existence. The Commissioner cannot conclude from the above that the petitioner was primarily engaged in transport for hire.

[7] Micro Roll-Off Trade Name Registration.

[8] Additionally, the auditor noted that petitioner's owner stated that "there are 3 customers who they haul for where they do not own the containers that the waste is stored in, so this would be considered transportation for hire. Auditors examined the sales journal for these 3 customers, but it was not greater than 50% of their business for the audit period. The taxpayer agreed with this." Audit Remarks, Page 5.

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The petitioner states that *Rumpke* is distinguishable because "Micro transports specific types of waste for which Micro has an Ohio PUCO certificate authorizing Micro to haul that type of waste."[9] This ignores the Supreme Court of Ohio's holding in *Rumpke* that "[e]ven if Rumpke were deemed to have 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 as required by R.C. 5739.01(Z). Rumpke is in the business of transporting various types of waste. * * * A review of the case law and regulations convinces us that the waste being transported by Rumpke is not 'personal property belonging to others' for the purposes of R.C. 5739.01(Z)." *Rumpke* at 308-309. The Court's extension of its holding past the licensure issue indicates this was an issue it wished to clearly address. Therefore, both long-settled law as well as the individual facts of this matter point to the taxability of the petitioner's purchases.

The petitioner counters that the property it transports belongs to others based upon mostly testimonial evidence of its customers' understanding of ownership and industry standards. It also justifies its position by a citation to a regulation promulgated by the Ohio Environmental Protection Agency and a case regarding hazardous materials at the BTA. Finally, it states that some transportation was performed on behalf of "Micro Materials, LLC," which it claims is a separate business entity. The Commissioner notes again that testimonial evidence, without further documentary evidence, generally does not meet the petitioner's burden to prove its entitlement to exemption. *R.K.E. Trucking* at ¶27.

The Commissioner will first address the petitioner's argument that customers held title based upon their understanding of ownership and industry standards. The petitioner states that the personal property belongs to others "because the customers direct the movement of the property and have a continuing interest in the property throughout the transportation process."[10] The petitioner points to an undated, unsigned document entitled "General Business Terms" (GBT) as evidence that its customers retained ownership of the property. This document goes at great lengths to stress the customers' ownership of the waste throughout the entire transportation process, in addition to unique clauses such as giving the petitioner the unilateral right to raise its price while performing its duties without any notice to its customers.[11] The petitioner does not dispute there is no evidence the GBT document was ever given to customers or even discussed with customers.[12] In fact, most of the petitioner's customers do not enter into any contract with the petitioner. In a memorandum that was provided by the petitioner at the administrative hearing, the petitioner stated, "virtually all (in excess of 95% of Micro's revenue) of Micro's customers' orders are received by Micro via telephone . . ." Further, there is no evidence that the document entitled GBT is enforceable.[13] The petitioner also provides Ohio Administrative Code

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[9] Petitioner's Exhibit D, Response to Audit Remarks, Page 15.

[10] Petitioner's Exhibit D, Response to Audit Remarks, Page 2.

[11] The petitioner states "Micro's General Business terms [sic] are Micro's unilateral terms of doing business with any and all customers." Petitioner's "Supplemental" Exhibit K, p.1.

[12] *Id.*

[13] *Id.* To the extent it may be implied these terms are enforceable, see *Williams v. Ormsby*, 131 Ohio St.3d 427, 2012-Ohio-690, ¶ 17 (holding consideration a prerequisite to an enforceable contract) ("* * * [I]t must be determined in a contract case whether any 'consideration' was really bargained for. If it was not bargained for, it could not support a contract.") (further citations omitted) and Official Comment to R.C. 1302.15 ("[A contract is unenforceable where], in the light of the general commercial background and the commercial needs of the particular

Section 3745-400-04 to support the proposition that its customers retain title, though there is no basis in the plain language of this regulation, or any law, that this creates an ownership relationship for customers after they have relinquished their waste. Ohio Adm.Code 3745-400-04 merely states that construction and demolition debris shall be disposed of within a licensed construction and demolition debris facility, or within a solid waste disposal facility, or by means of open burning. In total, the petitioner's uncorroborated statements are the only evidence that its customers held title to, ownership of, or intended to retain ownership of the waste they placed in rollaway containers for removal in direct contradiction of the well-settled law of *Rumpke*.

Generally, testimonial evidence is insufficient to establish exempt use. *R.L. Best* at *5, citing *R.K.E. Trucking, Inc.,* 98 Ohio St.3d 495. Further, testimonial evidence of customer beliefs that are unsupported by the record is insufficient to show exempt use. *Id.* at *6.[14] The BTA has held that industry standards are similarly unpersuasive. *Id.* The petitioner contends that more weight should be afforded to these "General Business Terms."[15] The Commissioner has given full consideration to the document. The Commissioner also recognizes that the petitioner has been on notice about the evidentiary weight of the "General Business Terms" since audit[16] and has been unable to provide law or further documentary evidence indicating that either: a.) the petitioner's customers retained ownership of their property; or b.) that a general customer or industry understanding of title or ownership is somehow relevant to whether or not the petitioner was transporting property that belonged to others in the transactions uncovered during audit. Without further supporting evidence, the Commissioner cannot conclude that the petitioner has met its burden.

The petitioner cites to *Metropolitan Environmental, Inc. v. Tracy*, BTA No. 97-K-1693, 1999 WL 146275 (March 5, 1999), as support for the statement "[t]hat [petitioner] transports property and is not a container renter company[.] * * * The decision allows the transportation exemption to a container company because the containers hold hazardous waste."[17] The petitioner states it primarily hauls construction and demolition debris. Construction and demolition debris "does not include materials identified or listed as solid wastes or hazardous waste pursuant to Chapter 3734 of the Revised Code and rules adopted under it[.]" R.C. 3714.01(C). Accordingly, the petitioner is more akin to the taxpayer in *Rumpke* than the taxpayer in *Metropolitan Environmental*. The Commissioner cannot conclude the petitioner has met its burden to prove exemption from this citation.

The petitioner also points to hauling performed by "Micro Materials, LLC" as an example of hauling "for others." It states that "Micro Materials, LLC" is a "separate business entity" and therefore any hauling related to that "entity" is exempt.[18] Upon investigation, "Micro Materials,

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trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.") *See also* discussion of "for consideration" portion of transportation for hire exemption.

[14] *Accord Pallet World v. Levin*, BTA No. 2007-M-116, 2010 WL 2548349 (June 22, 2010).

[15] Petitioner's Exhibit K, pp. 1-3.

[16] Audit Remarks, Page 9, noting that the petitioner's representative met with the auditor at the time, audit manager, and an assistant administrator met to discuss the issues with the GBT.

[17] Petitioner's Exhibit E, p.1.

[18] Petitioner's Exhibit D, Response to Audit Remarks, Page 5.

LLC" does not appear as a business entity on the Ohio Secretary of State's website. However, there is a trade name (not entity) of "Micro Materials" registered to the business of the petitioner, Micro Construction, LLC, at its address in Baltimore, Ohio.[19] The petitioner failed to provide evidence to demonstrate that "Micro Materials, LLC" is a separate business entity. Accordingly, any objection as to Micro Materials constituting exempt transportation for hire usage is denied.

The Petitioner Has Failed to Show Its Waste Removal Was Transportation "For Consideration"

The final pre-requisite for the exemption provided by R.C. 5739.02(B)(32) is that the taxpayer show that the transportation was provided for consideration. Motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire are exempt from sales tax. R.C. 5739.02(B)(32). To be engaged in highway transportation for hire, one must engage in the transportation of personal property belonging to others for consideration. R.C. 5739.01(Z)(1). Consideration is generally defined as "a bargained for exchange between parties." *Cuspide Properties, Ltd. v. Earl Mechanical Servs.*, 6th Dist. No. L-14-1253, 2015-Ohio-5019, 53 N.E.3d 818, ¶ 46 (further citations omitted). Importantly, "[i]t is the content of [a] promise or the actual anticipated performance which supplies consideration for the bargain." *Coca–Cola Bottling Corp. v. Kosydar*, 43 Ohio St.2d 186, 193, 72 O.O.2d 104, 108, 331 N.E.2d 440, 444 (1975). Thus, if the benefit of the bargain for its transactions are transportation services, then the petitioner is engaged in transportation for hire.

It is undisputed that the petitioner did not charge a separate fee or line-item for transportation services for hire.[20] Failure to delineate specific transportation fees in customer invoices is generally fatal to a claim of exempt use in transportation for hire. *R.L. Best Co. v. Testa*, 7th Dist. Mahoning No. 18 MA 0001, 2018-Ohio-5400, ¶49, *appeal not accepted*, 155 Ohio St.3d 1422, 2019-Ohio-1421, 120 N.E.3d 868, *reconsideration denied*, 156 Ohio St.3d 1448, 2019-Ohio-2498, 125 N.E.3d 920.[21] The petitioner's objections fail as a matter of law for this reason.

Even if it were not fatal, the record does not reflect consideration for transportation services. "Regardless of the nature of the consideration provided, the plain meaning of the phrase 'for consideration' in the exemption statute requires [taxpayer] to have held itself out to its customers as a transportation-for-hire business." *Id.* at ¶36. Here, "[t]urning to the argument that all of the customers knew they were paying for transportation, the Ohio Supreme Court has repeatedly recognized that the taxpayer has the burden of proof in exemption cases, and, further, that unsupported testimonial evidence is insufficient to established exempt use." *Id.* at ¶40. Regarding the documentary evidence in the record, the lack of any reference to a transportation service on its invoices indicates that the petitioner received consideration from its customers in exchange for the primary service that the petitioner, per its own trade name registration,

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[19] Micro Materials Trade Name Registration.

[20] Audit Remarks, Page 9.

[21] *Accord Kurtz Bros., Inc. v. Tracy,* BTA No. 1994-P-614, et seq., 1995 WL 752290 (December 15, 1995), *aff'd, Kurtz Bros. v. Tracy*, 8th Dist. Cuyahoga Nos. 70078, et seq., 1996 WL 417133, and *Pallet World v. Levin*, BTA No. 2007-M-116, 2010 WL 2548349 (June 22, 2010).

provides: waste disposal.[22] The petitioner's website also describes itself as waste disposal services. Further, petitioner readily admits that it cannot show that it ever provides to customers the one document it has that mentions transportation: its GBT.[23] Here, the consideration was for waste removal, not transportation services. Similar to *R.L. Best*, "[t]here is nothing in the record to establish that [petitioner]'s customers knew they were contracting transportation services from [petitioner]." *Id.* at ¶49. The petitioner's uncorroborated speculation as to the beliefs of its customers is insufficient to show that consideration was paid for transportation services.[24] The petitioner has failed to meet its burden to show how these transactions are exempt.

The petitioner also contends that it considers the pricing of the transportation within its waste disposal business. *Kurtz Bros., Inc. v. Tracy* is instructive as to this matter. Kurtz Bros. sold and delivered landscape materials and claimed the trucks used for delivery were non-taxable pursuant to the transportation-for-hire exemption. Although testimony at the hearing established the company "[took] transportation costs into account" in setting its pricing policy, no separate fee was charged for the deliveries. The BTA concluded that "[s]ince there was no separate consideration charged for the deliveries in question, [Kurtz Bros.] was not engaged in transportation for hire within the meaning of R.C. 5739.02(B)(33) [now (B)(32)] and R.C. 5739.01(Z)." *Kurtz Bros., Inc. v. Tracy,* BTA No. 1994-P-614, et seq., 1995 WL 752290 (December 15, 1995), *aff'd*, *Kurtz Bros. v. Tracy*, 8th Dist. Cuyahoga Nos. 70078, et seq., 1996 WL 417133, *12. Therefore, the petitioner has failed to show its purchases were exempt.

The Petitioner Has Failed to Show Its Purchases Were Primarily Used in Transportation for Hire

The petitioner has failed to show that any of its purchases were used primarily in transportation for hire. The petitioner listed its trucks as items to be "split" as "dual purpose / fungible use" based upon an omitted "average daily time analysis" of the use of these items.[25] It has not provided the basis for these calculations, such as the underlying data or any documentary evidence. The information provided is testimonial and conclusory. The petitioner has not met its burden as a result. In conclusion, the petitioner has failed to meet its burden to show that these purchases were exempt. Therefore, the petitioner's objections as to transportation for hire are denied.

Manufacturing

Before addressing its objections, a brief overview of the petitioner's manufacturing process is necessary. The petitioner brings debris to the public Walnut C&DD Facility (the "landfill"), which neighbors the petitioner's leased administrative offices. The debris is initially brought to a scale and weighed.[26] The petitioner then drives the debris up a hill and dumps it onto a flat space

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[22] Micro Rolloff Trade Name Registration.
[23] Petitioner's "Supplemental" Exhibit K, p. 1.
[24] See, generally, Petitioner's Exhibits.
[25] Petitioner's "Supplemental" Exhibit I, p.1.
[26] Audit Remarks, Page 11. Additionally, the petitioner stated at hearing that the petitioner pays a fee on the net weight between materials as they enter versus as they leave and the weighing is also a requirement by the Environmental Protection Agency regarding leeching.

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on the landfill.[27] At hearing, the petitioner stated it immediately examines the pile for valuable materials to its manufacturing operation, such as metal, wood, rebar, etc.[28] The petitioner further separates unnecessary material from the pile for disposal.[29] At hearing, the petitioner stated these sorted piles are then moved into their appropriate containers. Those sorted piles are then transported to secondary areas on the landfill according to the material.[30] As such, the materials are treated differently at each site – concrete is crushed and pulverized, dirt is put into a trommel to separate it from debris, material that can't be sold is disposed off-site, etc.[31] Once each material is in a resalable form, it is moved to finished good storage.[32]

The petitioner contends that its scrap manufacturing operation begins either when the debris is weighed or when the debris is sorted on the landfill. Ohio's use tax does not apply to the purchase of an item intended for use "primarily in a manufacturing operation to produce tangible personal property for sale." R.C. 5739.02(B)(42)(g); see also R.C. 5741.02(C)(2). R.C. 5739.01(S) defines "manufacturing operation" as "a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process." The operative language of this definition is its first clause, "a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed." The second clause, which lists activities "include[d]" within the primary definition, merely illustrates types of actions that constitute a manufacturing operation. *Trans Rail Am., Inc. v. Enyeart*, 123 Ohio St.3d 1, 2009-Ohio-3624, 913 N.E.2d 948, ¶28. To determine the point where a manufacturing process begins, as the Supreme Court explained in *LaFarge N. Am., Inc. v. Testa*, 153 Ohio St.3d 245, 2018-Ohio-2047 (*LaFarge*), we must answer two questions: (1) when is the scrap "changed, converted, or transformed into a different state or form from which [it] previously existed," and (2) when is the scrap committed to the manufacturing process? *LaFarge* at ¶17. Accordingly, if either the weigh station or landfill is where the scrap becomes a different state or form from which it previously existed and where the scrap is committed to the manufacturing process, then the items identified as the petitioner as used on the landfill would be exempt.

The Petitioner Has Failed to Show That the Manufacturing Process Begins at the Weigh Station

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[27] Petitioner's "Supplemental" Exhibit F, p.3.
[28] Petitioner also states "[a]ll material that Micro transports to Walnut landfill is immediately sent to the sorting area." Petitioner's Exhibit D, Response to Audit Remarks, Page 12.
[29] Petitioner's "Supplemental" Exhibit H and AR-11.
[30] Petitioner's "Supplemental" Exhibit F, p.6.
[31] *Id.*, pp. 6-10 and Audit Remarks, Page 11. The Commissioner notes that he requested information as to all of the petitioner's manufacturing processes, which petitioner stated it would provide in its e-mail dated March 28, 2019, but the only information in the petitioner's "Pictures of Business Operations with Descriptions" is related to the initial weighing, sorting, concrete "processing," and dirt processing and sorting. See, generally, *id.* The rest of the information upon which the petitioner's contentions are based comes from testimonial information prepared by the petitioner.
[32] Audit Remarks, Page 11.

The petitioner first argues that the manufacturing operation begins at the weigh station before being dumped at the landfill. It does not cite any law in support. It merely concludes that the weigh station is its "point of commitment" of the materials.[33] This is at odds with its pre-hearing exhibits, where the petitioner notes that the landfill, which the petitioner states is owned and operated by a separate entity, "weighs the material entering the facility and [petitioner] transports the property to an initial processing area."[34] The petitioner has not advanced what change occurs to the scrap here. It has not provided any analysis or evidence as to how the raw materials are committed to the manufacturing process at this point. Additionally, as the auditor noted, "this weighing at the scale as the scrap arrives cannot be considered a point of commitment for raw materials since what may happen next to these scrap/waste materials has yet to be determined after it is weighed."[35] Based upon the record, the Tax Commissioner cannot conclude that the petitioner has met its burden to show the manufacturing process begins at the weigh station.

The Petitioner Has Failed to Show Its Manufacturing Process Begins at Sorting

The petitioner next argues that the sifting on the landfill is the beginning of the manufacturing process. In a similar case, the Supreme Court of Ohio found that the scrap metal manufacturing process does not begin during initial sorting. *Sims Bros. v. Tracy*, 83 Ohio St.3d 162, 1998-Ohio-116, 699 N.E.2d 50 (1998).[36] That is because sorting "does not involve such a change, conversion, or transformation and constitutes uses prior to and subsequent to manufacturing." *Id.* at 166. The petitioner states that it is able to separate scrap into "wood materials", "metal materials", "concrete materials", and "hazardous material," at this point before being moved to a secondary location.[37] "* * * [I]n the scrap metal business, the manufacturing process includes processes such as actual compression, crushing, baling, and torching." *Id.* While the petitioner contends that it is crushing items in the landfill, and stated at hearing it occasionally shears down wood for transport to the wood processing area,[38] the evidence provided does not reflect that the primary purpose of the first landfill drop-off is anything but sorting. The petitioner even refers to this as the "sorting area."[39] Further, the auditor stated "[i]n Exhibit VI, the [petitioner's] primary contention is that these pieces of equipment are "processing" the waste/scrap material by crushing them and then further moving/separating the waste/scrap materials into piles. The petitioner failed to demonstrate that the primary use/purpose of these particular pieces of machinery is to crush these materials, as that is not what the design of these particular vehicles/pieces of machinery are intended nor designed for and that any crushing is merely incidental to the movement of raw materials to various piles."[40]

In *LaFarge*, the Supreme Court of Ohio held that the taxpayer's manufacturing process began at the point where bulldozers were used to crush and carry pieces of slag from a slag mountain. The court reasoned that the slag did not undergo any significant transformation in form once the

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[33] Petitioner's "Supplemental" Exhibit F, p. 1.
[34] Petitioner's Exhibit C, p. 1.
[35] Audit Remarks, Page 12 (emphasis removed).
[36] *Accord Kurtz Bros. v. Tracy*, 8th Dist. Cuyahoga No. 70078, 1996 WL 417133, *3.
[37] Petitioner's "Supplemental" Exhibit F pp.6-10 and Exhibit H.
[38] *See also* Petitioner's Exhibit D, Response to Audit Remarks, Page 12.
[39] *Id.*
[40] Audit Remarks, Page 12.

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bulldozers deposited the material at the taxpayer's screening plant; therefore, the change in form of the materials began at the slag mountain. *Lafarge*, 153 Ohio St.3d 245, 2018-Ohio-2047. In essence, the bulldozers created a marketable product when the pieces of slag were removed. That is not the case here. The petitioner's equipment might incidentally crush or break the material as it is sorted into different piles of wood, stone or metal, but each substance undergoes additional significant processing to become marketable material. For instance, the concrete material is deposited into a front-end loading screener machine to be screened and crushed.[41] The auditor recognized that the petitioner's screener and crusher were the beginning point of the manufacturing process and exempted purchases associated with this equipment.

The petitioner's contention that the separation of specific materials into piles is the beginning of the manufacturing process further directly contravenes the General Assembly's intent:

> The word "commit" in the statute reflects a legislative intent that materials be deemed part of the manufacturing process only at that point in time at which constituent materials are changed in such a manner that their original form is altered, such as when a liquid and solid are mixed to create a solution. At that point, the individual components are no longer distinct entities and, for purposes of the statutory exemption, have been "committed" to the process of becoming a new manufactured good.

Sims Bros. at 165. The petitioner, like the taxpayer in *Sims Bros.*, receives others' sortable debris, and later, manufactures it into resalable form. The petitioner has failed to show how *Sims Bros.* is distinguishable. The petitioner has not met its burden to show that the manufacturing process began at the sorting location on the landfill.

The Petitioner Has Failed to Show Which Purchases Are "Primarily" Used in Manufacturing

The assessment contains the purchase of equipment parts and repairs. The petitioner provided a list of items it contends are used in the manufacturing process.[42] They are: several excavators, two dozers, a single shredder, a trommel, and a loader.[43] It generally identifies these items as located at the manufacturing facility without further information.[44] As noted above, the auditors accounted for parts and services that could be directly attributable to manufacturing equipment. Despite the fact that excavators are described and pictured in its overview of its business operation, the petitioner does not identify which excavators, if any, are used in the various areas of the facility, such as the initial sorting, transportation from weighing, etc. It identifies a trommel which it states is used to "[p]ulverize dirt." Trommels are generally used to separate materials, i.e., sorting the dirt from other debris.[45] The petitioner also states a Hass 2000 Shredder and a Hyundai Loader should be exempt, but there is no transaction in the purchase schedule prepared by the auditor that references these purchases or the taxable amount, and there

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[41] Audit Remarks, Pages 12-13.
[42] Petitioner's "Supplemental" Exhibit G.
[43] *Id.*
[44] *Id.*
[45] Stessel, Richard Ian; Kranc, S. C. (1992). "Particle Motion in Rotary Screen", Journal of Engineering Mechanics, pp. 558-568.

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are no purchases identified by the petitioner that are specifically related to these items (including the trommel). Further, the auditor previously determined these items as taxable "as none of these scrap/waste items are work-in-process items yet and second, there is no change in state or form performed to any of these materials by any pieces of the aforementioned equipment."[46] The auditor also determined the two dozers were taxable as primarily moving either raw materials or finished goods.[47] The petitioner does not address this conclusion by the auditor in its objections to the audit remarks.[48] Based upon the record, even if the petitioner were correct in its conclusion that items used in sorting are exempt manufacturing equipment, it has failed to meet its burden to show these specific purchases of parts and services are connected to exempt equipment.

"Service of Web Site" and "Service of Real Property"

The petitioner objects to two further transactions. It states that a purchase from EIG*STARTLOGIC was exempt as "service of website." The auditor previously removed this transaction from the assessment.[49] The second transaction is a purchase from FMK Welding and Salvage for building a drainpipe. The petitioner states that this is "service of real property." Upon additional review, the auditor found this item was taxable. The petitioner failed to provide any further analysis or legal citation as to why this transaction is exempt. Accordingly, the Commissioner cannot conclude that the petitioner has met its burden to show error in the assessment.

Penalty

The petitioner also requests an abatement of the penalty. Penalty remission is within the discretion of the Tax Commissioner. See *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Based upon the surrounding facts and circumstances in this matter, the penalty is reduced to five percent.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$147,936.36	$12,079.75	$7,396.82	$167,412.93

[46] Audit Remarks, Page 12. See also auditor's February 24, 2017 e-mail to petitioner: "[a]fter reviewing all information provided up to this point we determined the manufacturing exemption to be narrowly construed to the operations occurring at Micro Construction. Any equipment used for handling materials prior to the materials reaching either the grinder, screener and/or shredder does not qualify for exemption from sales/use tax as the materials are not considered to be committed to the manufacturing process. Therefore, we have determined that the loaders and bulldozers are used primarily to move raw materials and finished goods. We believe any crushing which may occur during this handling is not a manufacturing process. As a result, any incidental crushing occurring during movement and handling of any materials around the facility does not meet the manufacturing exemption." Due to the above, the auditor removed a 1999 Extec Turbo 5000 Screener and a 1994 German Crusher and related purchases from the audit schedule. Audit Remarks, Page 13.

[47] Audit Remarks, Page 20.

[48] Petitioner's Exhibit D, Response to Audit Remarks, Page 20.

[49] Audit Remarks, Page 14.

Current records indicate that a payment of $1,062.89 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

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Office of the Tax Commissioner
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FINAL DETERMINATION

Date: MAR 27 2020

Nickels and Dimes Inc.
1844 N. Preston Rd.
Celina, TX 75009

RE: Assessment No.: 100001011811
Use Tax
Account No.: 97-134447

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

Tax	Pre-Assessment Interest	Penalty	Total
$31,460.20	$3,009.21	$4,718.94	$39,188.35

The petitioner operates as an entertainment complex providing attractions and arcade-like games. This assessment is the result of a field audit of the petitioner's purchases from January 1, 2013 through December 31, 2016. A hearing was not requested. The petitioner filed a petition for reassessment; however, the petition did not include any specific objections.

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

Audit Methodology

It was agreed that capital assets would be reviewed on a comprehensive basis. However, a projection method was agreed upon to review expense invoices. A sample period of January 1, 2015 through December 31, 2015 was used as a representation of the entire audit period purchases. Tax deficient expenses were projected over the entire audit period. The total tax deficient expense purchases for each account were divided by the total purchase activity in the same accounts for the sample period to determine the percentage of error on untaxed purchases. Each percentage of error was then applied to the corresponding account's total audit period purchases to determine untaxed taxable purchases for the audit period. The appropriate tax rate was then applied to the untaxed purchases for the audit period to determine the amount of tax due. Tax rate changes that occurred during the audit period were prorated by the number of months that each rate was in effect.

Additional Information

The petitioner did not provide any specific objections in response to the assessment. However, the petitioner provided invoices and purchases orders. The petitioner presented sufficient evidence to verify tax payments, collections, and remittances for twenty-eight transactions. The tax, interest, and penalty has been adjusted below.

The petitioner failed to provide evidence verifying sales tax paid or use tax remitted on the remaining transactions. Since the petitioner provided sufficient evidence to support payment of tax on select transactions, the petitioner is entitled to an adjustment of the amount assessed.

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$25,364.29	$2,400.35	$3,804.55	$31,569.19

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

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 27 2020

Ohio Utilities Protection Service
12467 Mahoning Ave.
North Jackson, OH 44451

Re: Assessment No. 100001449956
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
$1,280.18	$37.68	$192.03	$1,509.89

This assessment was issued based upon the conduct of a special audit of a casual (non-dealer) motor vehicle title transfer. On April 2, 2019, Ohio Utilities Protection Service received title to a 2014 Chevrolet Silverado from the Donlen Trust. At the time of the title transfer, the petitioner indicated that $126.00 was the purchase price of the vehicle. The Ohio Department of Taxation was unable to verify the purchase price. The Ohio Department of Taxation determined the average purchase price for this type of vehicle was $17,783.78. This assessment was issued for the difference between the reported purchase price and the average purchase price. A hearing was requested and held on March 12, 2020.

The petitioner disputes this assessment and contends that the price reported at the time of the titling was accurate. The evidence provided supports that contention.

Accordingly, the assessment is cancelled.

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

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

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

Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: MAR 27 2020

Margaret R. Osborne
1350 Crestwood Ave.
Columbus, OH 43227

Re: Assessment No. 100001224271
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
$242.39	$5.68	$36.36	$284.43

This assessment was issued based upon the conduct of a special audit of a casual (non-dealer) motor vehicle title transfer. On October 1, 2018, Margaret R. Osborne received title to a 2015 Kia Forte from Ali Altameemi. At the time of the title transfer, Ms. Osborne indicated that she paid $5,800.00 for the vehicle and paid tax on that amount. The Ohio Department of Taxation questioned this purchase amount and issued the current assessment based upon an average, similar vehicle value of $9,031.90. No hearing was requested.

The petitioner disputes this assessment and contends that the price reported at the time of the titling was accurate and no additional tax is due. In support of this contention, the petitioner has supplied a signed affidavit from the seller affirming the price paid for the vehicle. Therefore, the evidence in the file supports the petitioner's contention.

Accordingly, the assessment is cancelled.

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

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

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

Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:
MAR 1 8 2020

Precision Steel Services Inc.
31 E. Sylvania Ave.
Toledo, OH 43612

Re: Assessment No.: 100000737613
Use Tax
Account No. 97-305250
Reporting Period: 9/1/2010 – 8/31/2015

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:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$561,899.26	$76,369.74	$84,284.71	$722,553.71

The petitioner operates as a steel distributor. The petitioner was contacted by the auditor on March 4, 2016 to advise the petitioner that they were under audit. Audit Remarks, Page 4. An audit commencement letter was sent March 7, 2016. *Id.* The petitioner failed to provide all of the information requested by the auditor. Accordingly, an estimated assessment was issued. A hearing was held on November 16, 2018.

When filing its petition for reassessment, the petitioner provided the additional information originally requested by the auditor during the initial audit. This information reduced the petitioner's tax liability as shown below.

The petitioner requested penalty abatement. Based on the facts and circumstances of this case, a full abatement is warranted.

Therefore, the assessment is modified as follows:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$102,712.56	$13,117.93	$0.00	$115,830.49

Current records indicate that payment of $115,830.49 has been made in full satisfaction of the assessment.

MAR 1 8 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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FINAL DETERMINATION

DATE:

MAR - 5 2020

Reminger Co., LPA
101 W Prospect Avenue, Suite 1400
Cleveland, OH 44115-1093

Re: Assessment No. 100000119969
Consumer's Use Tax
Account No. 97-144255

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 consumer's use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$97,850.89	$9,213.70	$4,892.43	$111,957.02

This assessment is the result of an audit of the petitioner's, Reminger Co., LPA's ("Reminger's"), purchases. The petitioner is a law firm that represents clients in civil litigation. A hearing was held on this matter.

The petitioner provided a written summary of objections prior to the scheduled hearing and provided additional information following the hearing.

During the audit, the capital purchases were reviewed comprehensively. The expenses were reviewed using a block sample methodology. The auditor compiled a deficiency listing which included items that were deemed taxable but had no sales tax charged by the vendor. The block sample was used to establish a percentage of error which was applied to the entire audit period. The petitioner signed the purchase agreement that set forth the audit methodology as it relates to fixed assets and expenses.

Fixed Assets

The petitioner disputes two invoices from TH Martin, invoice No. 20955 and 18963. The petitioner contends that the purchase is an exempt construction contract. The petitioner provided copies of the invoices in support of its position. In further support of its position, the petitioner cites Ohio Adm.Code 5703-9-14(D)(1). The petitioner's reliance on Ohio Adm.Code 5703-9-14(D)(1) is misplaced. Ohio Adm.Code 5703-9-14(D)(1) states that a construction contractor is the consumer of materials it purchases for the incorporation into real property. The contractor's purchase is not at issue here. The petitioner's purchase is at issue. Nonetheless, the invoices establish that the petitioner's purchase involved the installation of tangible personal property into real property.

Pursuant to R.C. 5739.01(B)(5), the installation of tangible personal property into real property is exempt. Therefore, the petitioner's purchase is exempt. The objection is granted.

Medical Records

The audit includes medical records purchased by the petitioner. It is noted that the parties entered into a separate agreement regarding the methodology for medical records. According to the audit remarks, the petitioner stated that the invoice detail for the sample period was not readily available and was voluminous. (Audit Remarks, pg. 7). Accordingly, the Department and the petitioner entered into an agreement. The agreement set forth the procedure and method to be used to calculate the tax liability. The parties agreed to conduct a sample and derive an error percentage of untaxed purchases. The agreement was signed by the petitioner. The auditor determined an error rate of 46.914%. The petitioner contends that the error percentage rate as calculated by the auditor is incorrect and should be 18.439%.

To reach this calculation, the petitioner reviewed the invoices included in the sample period and made a determination of whether each invoice was taxable, nontaxable or partially taxable. The petitioner contends that several of the invoices are partially taxable. To support its position, the petitioner relies on Tax Commissioner Opinion No. 91-0017.

Tax Commissioner Opinion No. 91-0017 deals with the question of providing copies of medical records to third-party requestors. The Tax Commissioner Opinion concluded that when charges are separately stated on an invoice, the tax status of each category can be determined separately. It is acknowledged that the invoices provided by the petitioner includes items that are taxable and items that are nontaxable. Consequently, because the charges are separately stated, the tax status of each charge can be determined separately.

Pursuant to the Tax Commissioner Opinion, the service of searching records to be copied is not subject to tax. With these parameters in mind and after reviewing all the objections raised by the petitioner relating to medical records, it is determined that the error rate is 21.65%. The petitioner's individual objections are discussed below.

Akron General Medical Center- 12 invoices

The petitioner contends that the invoices contain nontaxable records search fees. The petitioner's contention is well taken. The petitioner provides sufficient evidence that each of the invoices at issue include a records search fee. This portion of the invoice is nontaxable. The objection is granted.

Cefaratti Group – 83 invoices

It is noted at the outset that the petitioner failed to provide a sufficient explanation as to why it believes these transactions should be removed from the assessment. Indeed, the petitioner merely listed "service" as the reason these invoices should be removed from the assessment. It is well established that under R.C. 5739.02 and R.C. 5741.02(G) all sales and purchases are presumed taxable unless proven otherwise, and that the taxpayer has the burden of proof. *CompuServe, Inc*

v. Limbach, 93 Ohio App.3d 777, 639 N.E.2d 1227 (1994). This places upon the petitioner an affirmative duty to show that its transactions are not subject to tax. The petitioner must provide sufficient evidence to prove its objection. Simply listing "service" does not sufficiently establish that the transactions at issue are exempt. However, under Ohio law, personal and professional services are not taxable.

In according with R.C. 5739.01(Y)(2), a personal and professional service includes but is not limited to:

> (a) Accounting and legal services such as advice on tax matters, asset management, budgetary matters, quality control, information security, and auditing and any other situation where the service provider receives data or information and studies, alters, analyzes, interprets, or adjusts such material;
>
> (b) Analyzing business policies and procedures;
>
> (c) Identifying management information needs;
>
> (d) Feasibility studies, including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;
>
> (e) Designing policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced, formatted, processed, controlled, and reported so that it will be meaningful to management;
>
> (f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;
>
> (g) Testing of business procedures;
>
> (h) Training personnel in business procedure applications;
>
> (i) Providing credit information to users of such information by a consumer reporting agency, as defined in the "Fair Credit Reporting Act," 84 Stat. 1114, 1129 (1970), 15 U.S.C. 1681a(f), or as hereafter amended, including but not limited to gathering, organizing, analyzing, recording, and furnishing such information by any oral, written, graphic, or electronic medium;
>
> (j) Providing debt collection services by any oral, written, graphic, or electronic means;
>
> (k) Providing digital advertising services

The evidence provided and independent research indicates that Cefaratti Group is a full-service litigation support company that provides services to legal professionals. A review of the invoices

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provided demonstrate that the purchases at issue are nontaxable services, such as advancing fees and reviewing records. The evidence indicates that the entire invoices are exempt. The objection is granted.

Cefaratti Record Retrieval – 111 invoices & Medical Concepts

Again, the petitioner merely listed "service" as the reason these invoices should be removed from the assessment. It is noted that simply listing "service" does not sufficiently establish that the transactions at issue are exempt. However, a review of the invoices and independent research demonstrate that the purchases at issue are nontaxable professional services. The evidence indicates that all of the invoices are exempt. The objection is granted.

Cleveland Clinic Department of Anatomic Pathology

The petitioner contends that this transaction should not be included in the assessment because the invoice was never paid and was voided. The petitioner provides the invoice in support of its position. However, the evidence provided by the petitioner does not support the petitioner's position. Instead, the word "paid" is stamped on the invoice. The date it was paid and the check number is also stamped on the invoice. Additionally, the petitioner includes a check register that purports to include voided and cancelled checks. It is noted that this register also does not substantiate the petitioner's claim. Even though the register includes a check with the same amount as the check at issue, the check number doesn't match the check number at issue. Additionally, the petitioner contends that the check at issue was voided September 27, 2012. There is no cancel request with that date on the check register. For these reasons, the petitioner's contention is not well taken. The objection is denied.

Mercy Health Partners- 14 invoices, Mount Carmel St. Ann's – 36 invoices, MRO Corporation - 72 invoices, Parma Community General Hospital – 14 invoices, Second Image - 27 invoices, St. Rita's Medical Center – 9 invoices, University Hospitals Case Medical Center – 21 invoices & University Hospitals Medical Group – 20 invoices

The petitioner contends that the invoices contain nontaxable records search fees. The petitioner's contention is well taken. The petitioner provides sufficient evidence that each of the invoices at issue include a records search fee. This portion of the invoice is nontaxable. The objection is granted.

Moscarino & Treu, LLP – 3 invoices

The petitioner simply lists "healthport" as a reason that these transactions are exempt from taxation. This is wholly insufficient. It is unclear what the petitioner is claiming. Moreover, the petitioner fails to provide sufficient evidence to demonstrate that these transactions are exempt. As stated above, the petitioner has the duty to provide a sufficient explanation and sufficient evidence to overcome the presumption of taxability. The petitioner has failed to do that. The objection is denied.

Protec Solutions – Health information services- 10 invoices

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The petitioner does not provide a specific reason as to why it considers these purchases exempt. As stated above, there is a presumption of taxability. It is the petitioner's burden to overcome this presumption. Consequently, the petitioner has an affirmative duty to show that its transactions are not subject to tax. Additionally, the petitioner must provide sufficient evidence to prove its objection. However, the petitioner failed to provide the invoices in question. Thus, the petitioner has not overcome the presumption of taxability. The objection is denied.

Records Deposition Service – 37 invoices

The petitioner maintains that these purchases should be removed from the assessment because they involve an exempt professional service. A review of the invoices provided demonstrate that the purchases at issue involve nontaxable services, such as subpoena fees and witness retrieval fees. The objection is granted.

Resurgens Orthopedics

The petitioner maintains that this purchase should be removed from the assessment because it involves an exempt professional service. The evidence provided by the petitioner indicates that the purchase involved an independent medical evaluation. This is not a taxable service. The objection is granted.

Summa Health System – 11 invoices

The petitioner contends that this transaction should not be included in the assessment because the invoice was never paid and was voided. The petitioner's contention is not well taken. First, it is unclear what the evidence provided by the petitioner purports to demonstrate. The petitioner provides a check register that purports to include voided and cancelled checks. The petitioner states that there are eleven invoices. However, the petitioner only seems to object to one transaction. The petitioner has not provided a sufficient explanation of its objection. Moreover, the petitioner fails to provide sufficient evidence to support its objection. Therefore, the petitioner has not overcome the presumption of taxability. The objection is denied.

The Ohio State University

The petitioner contends that this invoice includes nontaxable charges. It appears that the petitioner maintains that $789 of the invoice is not taxable. The petitioner fails to identify which specific charges on the invoice it contends is not taxable. After a review of the invoice, it is agreed that the following fees are not taxable as it relates to this purchase: archive fee, packing fee, and professional review fee. Therefore, $399 of the invoice is not taxable. The objection is granted in part.

Vestige, LTD

The petitioner contends that this purchase should be removed from the assessment because it

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involves a nontaxable professional service. The petitioner contends that the purchase was for expert witness testimony. The petitioner provides sufficient evidence in support of this contention. This is a nontaxable service. The objection is granted.

Employment Services

The petitioner maintains that a group of transactions are erroneously included in the assessment as employment services.

Pursuant to R.C. 5739.01(B)(3)(k), providing an employment service is taxable. R.C. 5739.01(JJ) defines employment service as:

> providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so provided or supplied receive their wages, salary, or other compensation from the provider or supplier of the employment service or from a third party that provided or supplied the personnel to the provider or supplier.

The evidence demonstrates that the petitioner did not provide taxable employment services. Rather, the petitioner hired summer interns. The petitioner provides evidence that it paid the interns with a Federal Form 1099-MISC. This supports the petitioner's contention that the transactions are not employment services. Indeed, the evidence demonstrates that the interns were not paid through an employment service or a third party. Rather, the petitioner paid the interns' wages. The petitioner's objection is granted. Transactions involving the five interns will be removed from the assessment.

Cefaratti Group

The petitioner contends that several transactions from Cefaratti Group were erroneously assessed as taxable employment services. It is the petitioner's contention that the transactions do not meet the definition of an employment service. In support of its position, the petitioner provides its contract with Cefaratti Group.

The petitioner maintains that Cefaratti provides litigation support to Reminger. In support of its position that the transactions at issue are not employment services, the petitioner maintains that it meets the exception found in both R.C. 5739.01(JJ)(3) and (JJ)(1).

Pursuant to R.C. 5739.01(JJ)(1), acting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser is not an employment service. Similarly, according to R.C. 5739.01(JJ)(3), supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis, is also not an employment service.

The petitioner contends that Cefaratti is not working under the control or supervision of Reminger and the petitioner maintains that the contract between the parties is at least one year and each

employee is assigned on a permanent basis.

The petitioner cites the following facts as supporting its contention:

- The support center is located at Reminger's Cleveland office;
- Cefaratti is responsible for maintaining the proper level of supply inventory at the facility;
- Cefaratti is responsible to complete the job requests of Reminger attorneys within the deadline;
- The contract requires Cefaratti to provide a site manager and one operator who are required to wear Cefaratti uniforms;
- The Cefaratti site manager is responsible for the oversight, management, and daily performance of Cefaratti personnel;
- Cefaratti is responsible for the supervision, daily direction, and control of its employees;
- The contract has a one-year term and has been extended for each of the past 10 years.
- The intent is to continue the contract indefinitely.

The evidence indicates that the transactions are not taxable employment services. The petitioner provides sufficient explanation and evidence to demonstrate that its purchases are not taxable employment services. Significantly, the evidence indicates that Cefaratti is not working under the direct control of Reminger. Moreover, the petitioner has demonstrated that the objective of the contract is to accomplish the timely completion of litigation support jobs by the deadline. Additionally, the evidence indicates that Cefaratti has been tasked with this assignment longer than one year, with the employee being assigned on a permanent basis. Therefore, the evidence demonstrates that the purchases are not taxable employment services.[1] The transactions that were included as employment services will be excluded.

Expenses

M & M Investigation

The evidence indicates that the petitioner purchased investigation services and other services from this vendor. Pursuant to R.C. 5739.01(B)(3)(h), private investigation services are taxable. The petitioner maintains that tax was charged on many of the invoices. However, the petitioner maintains that some of the transactions also involve nontaxable services, such as serving court documents.

There are ten transactions at issue. The petitioner's objection is granted for nine of the ten transactions, exclusive of invoice number 2012-381. Invoice number 2012-381 is for taxable investigation services. Further, that invoice does not demonstrate that tax was charged or paid on the subject transaction. However, the petitioner provided sufficient evidence that the remaining

[1] The petitioner contends that the entire Account 6410 should be removed on the basis that the purchases are not taxable employment services. It is noted that several transactions included in the assessment from Cefaratti Group list "copies" as the description of the purchase. Providing copies is a taxable service. The petitioner provides invoices in support of its position. The invoices with the description of "staffing" will be removed from the assessment. However, the petitioner fails to provide any explanation as to why the remaining invoices are not taxable. Thus, the petitioner has not overcome the presumption of taxability with regard these transactions.

nine transactions should be removed from the assessment. The objection is granted as to nine transactions.

Prospect Electric

The petitioner contends that its purchase from Prospect Electric should be removed from the assessment. The petitioner states that Prospect Electric is the contractor and end user and already paid tax on its return. The petitioner cites Ohio Adm.Code 5703-9-14(D)(1). Additionally, the petitioner provided an email from an unidentified employee at Prospect Electric stating that Prospect Electric pays sales tax on the material that it purchases. However, the petitioner's contention is without merit.

Ohio Adm.Code 5703-9-14(D)(1) states that a construction contractor is the consumer of materials he purchases for the incorporation into real property. All sales are presumed taxable and the petitioner has the burden to overcome the presumption of taxability. However, the petitioner has not provided any information or evidence regarding its purchase. The petitioner has not demonstrated that its purchase is exempt installation into real property. The petitioner did not provide an invoice or a contract. In order to overcome the presumption of taxability, the petitioner must provide sufficient explanation and sufficient evidence. The petitioner has failed to do that. The objection is denied.

Dot On

The petitioner maintains that it already paid tax on its purchases from Dot On. In support of its position, the petitioner provided three invoices. However, only one invoice provided by the petitioner appears to be included in the audit. This invoice does show tax was charged on the invoice. This invoice will be removed from the assessment. The objection is granted as to invoice number 2 for the amount $1,657.20.

Litigation Management Solutions

The petitioner contends that this purchase is a nontaxable transaction. The evidence demonstrates that this purchase involves the petitioner's membership to a legal forum. The petitioner provides sufficient evidence that its purchase is not taxable. The objection is granted.

Self-Accrued Tax

The petitioner contends that it accrued and paid use tax on several purchases. In support of its position, the petitioner provides copies of its tax returns, cancelled checks, account summaries, and self-accrual sheets. Each of the petitioner's purchases are discussed below.

Aims First Aid Supplies

The petitioner includes two transactions from this vendor, however, only one of the transactions

appears in the assessment.[2] The invoice totaling $13.71 will be removed from the assessment. The objection is granted, in part.

Speech Recognition Solutions

The petitioner includes six transactions from this vendor. However, none of these transactions are included in the assessment. Because there is nothing to remove, the objection is denied.

Digital River GmbH, Cleveland Corporate Services, Altrinsic Solutions

The petitioner fails to provide any evidence to support that it accrued tax on the transactions by these vendors. Additionally, there are no transactions from a vendor with the name Cleveland Corporate Services in the audit. The objection is denied.

Beyond Trust

There are seven transactions from Beyond Trust included in the audit. The petitioner provides sufficient evidence that it accrued and paid tax on all these transactions. The objection is granted.

Penalty

The petitioner requests a penalty abatement. The petitioner had a reasonably high compliance rate. Therefore, the circumstances warrant a penalty abatement. Accordingly, the penalty shall be abated in full.

Therefore, the assessment will be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$57,560.56	$5,582.69	$0.00	$63,143.25

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.

[2] Two are two transactions from AIMS in the assessment, however, only one invoice can be corroborated because the invoice amounts are the same. The other transaction does not match the invoice amount.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date:
MAR 19 2020

Riffle Family Farm
7400 Erisman Rd.
Greenville, OH 45331

Re: Assessment No.: 100001327262
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$1,740.00	$31.68	$261.00	$2,032.68

This assessment is the result of an audit of the petitioner's purchase of a 2010 Freightliner Cascadia truck. The petitioner claimed an exemption as "Direct Use-Farming." The exempt use of the vehicle could not be verified and, therefore, this assessment was issued. A hearing was held on March 11, 2020.

It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary is established. R.C. 5739.02(C) and 5741.02(G). Pursuant to 5739.02(B)(42)(n), sales where the purpose of the purchaser is to use or consume the thing transferred primarily in farming, agriculture, horticulture, or floriculture are exempted from taxation. "Farming" is defined in Ohio Adm.Code 5703-9-23 as the "occupation of tilling the soil for the production of crops as a business and shall include the raising of farm livestock, bees, or poultry, where the purpose is to sell such livestock, bees, or poultry, or the products thereof as a business." "Business" requires the "object of gain, benefit, or advantage." R.C. 5739.01(F).

Therefore, in order for a vehicle to be eligible for the farming exemption three prerequisites must be met. First, the vehicle must be used by a person that farms as a business enterprise, such as growing agricultural crops or raising livestock for sale as a business. Second, the person must be able to demonstrate that the vehicle is directly used in the production of crops or raising of livestock. Third, these activities must account for the primary usage of the vehicle.

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Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Nat'l Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E. 2d 648 (1952). The farming exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming as defined in the Ohio Administrative Code.

Farms as a Business Enterprise

First, a taxpayer must be engaged in the business of farming to qualify for the farming exemption. The petitioner submitted a copy of their 2018 Federal Schedule F form. The form details the profits and losses from farming and notes that the principal crop from the farm is grain. The evidence supports the petitioner's position that they are engaged in farming as a business.

Direct Use in Farming

The petitioner must also show that the vehicle is used directly in the production of crops or raising livestock. The vehicle in question is a semi-truck. The petitioner submitted a farm use questionnaire indicating that the truck is used to haul seed and grain and transport farm machinery and harvested crops within the boundaries of the farm. At the hearing, the petitioner further explained that the farm consists of roughly one thousand acres that are not all connected. The petitioner explained that a military flatbed trailer is attached to the truck in question. Tanks containing water, chemicals, and seed are placed on the trailer. The truck then takes the equipment to the fields. Once there, the truck is parked beside the road, and items from the tanks are put onto a tractor so that the fields can be farmed. Based on this description of how the truck is used, the truck is not directly used in the production of crops. The Board of Tax Appeals has previously held that a truck used to haul supplies on the public roads between the field and the farm is not used directly in the farming operation. *Hart v. Limbach*, BTA No. 86-D-280, 1988 WL 162378 (July 22, 1988). Here, as in *Hart*, the truck has no direct role in the farming operation. It merely transports equipment directly involved in the process to the fields. While the truck in question may be used exclusively for farm business and may be a necessary piece of that business, "The law does not provide… that any item necessary for farming is exempt." *Bahan Farms, LLC v. McClain*, BTA No. 2017-2180, 2019 WL 1260533 (March 11, 2019). The petitioner has not provided sufficient evidence that the truck in question qualifies for the farming exemption. Therefore, the objection is denied.

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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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: MAR 27 2020

RMI Titanium Company
1000 Warren Ave.
Niles, OH 44446

Re: Assessment No.: 100000553777
Use Tax
Account No. 98-002502
Audit Period: 01/01/2010 – 12/31/2012

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

Tax	Pre-Assessment Interest	Total
$189,957.23	$37,640.11	$227,597.34

This assessment is the result of an audit of the petitioner's purchases for the period shown above. The petitioner operates a manufacturing company headquartered in Niles, Ohio. A hearing was scheduled but the petitioner requested via email to submit written statements in lieu of the hearing. The petitioner then failed to provide the written statements.

Audit Methodology

The auditor and petitioner mutually agreed to review fixed assets, natural gas purchases, and leases on a comprehensive basis. Audit Remarks, Pages 8, 11, & 13. However, a partial statistical sample was agreed upon to review expenses. Audit Remarks, Page 6. The petitioner indicated that their purchases were not seasonal in nature and January 1, 2012 through December 31, 2012 was chosen as the sample period. It was agreed that 2012 was representative of the entire audit period and any purchasing patterns in that year would similarly be reflected in other audit years.

The petitioner contends that the audit methodology is flawed resulting in use tax being erroneously assessed. 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.

The petitioner does not specify in what way the audit methodology is flawed or provide any evidence to support this contention. Further, the petitioner signed the agreement in July of 2015 that specified the methodology of the audit. When entering into a valid, enforceable agreement, the petitioner

waives any objection it may have regarding the methodology expressly permitted by the agreement. *See 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 Inc. v. Lindley*, 25 Ohio St.3d 107, 495 N.E. 2d 417 (1986). The petitioner waived the hearing and requested to submit written statements. However, the petitioner did not submit any written statements and has not provided any other evidence to support this contention. The objection is denied.

Manufacturing Exemptions

The petitioner contends that use tax was erroneously assessed on machinery and equipment used in manufacturing. Sales where the purpose of the purchaser is to use the thing transferred primarily in a manufacturing operation to produce tangible personal property for sale are exempt from sales tax. R.C. 5739.02(B)(42)(g). While the audit remarks identify several issues contested by the taxpayer during the audit, the petition for reassessment does not make any specific objections. Therefore, it is not clear which items the petitioner believes are exempted by R.C. 5739.02(B)(42)(g) and the Department cannot speculate. The petitioner has not provided any additional information to support this contention. The objection is denied.

Personal and Professional Services

The petitioner contends that use tax was erroneously assessed on transactions that are nontaxable personal or professional services. The petitioner, citing R.C. 5739.01(B), states that personal and professional services are excluded from the definition of a sale. While personal and professional services are exempt, the petitioner does not identify any specific transactions that are personal or professional services in the petition for reassessment. The burden is on the petitioner to provide sufficient evidence to prove its objections. Sufficient 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). The petitioner has not provided any evidence to support the contention that exempt personal and professional services were included in the audit. The objection is denied.

Therefore, the assessment is affirmed as issued.

Current records indicate that a payment of $227,597.34 has been made in full satisfaction of the assessment.

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Jeffrey A. McClain

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: MAR 19 2020

The Mannik & Smith Group, Inc.
1800 Indian Wood Circle
Maumee, OH 43537

Re: Assessment No.: 100000717530
Use Tax
Account No. 97-132664
Audit Period: 07/01/2013 – 09/30/2016

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

Tax	Pre-Assessment Interest	Penalty	Total
$56,736.35	$3,455.89	$5,673.46	$65,865.70

The petitioner operates an engineering and environmental consulting firm. This assessment is the result of an audit of the petitioner's purchases for the period shown above. A hearing was held.

It was agreed that capital assets would be reviewed on a comprehensive basis. However, a projection method was agreed upon to review expense invoices. The petitioner indicated that their purchases were not seasonal in nature, so calendar year 2015 was chosen as the sample period. It was agreed that 2015 was representative of the petitioner's business activity. Tax deficient expenses were projected over the entire audit period based upon the test period findings. The total tax deficient expense purchases for each account were divided by the total purchase activity in the same accounts for the sample period to determine the percentage of error on untaxed purchases. Each percentage of error was then applied to the corresponding account's total audit period purchases to determine untaxed taxable purchases for the audit period. The appropriate tax rate was then applied to the untaxed purchases for the audit period to determine the amount of tax due. Tax rate changes that occurred during the audit period were prorated by the number of months that each rate was in effect.

Historical Information Gatherers

The petitioner contends that purchases from Historical Information Gatherers (HIG) are tax exempt because the tangible personal property they receive is incidental to the service of information gathering. The Ohio Supreme Court has previously addressed similar transactions in which the true object of the transaction must be determined. The Court has held that "in a professional, insurance or personal service transaction in which the charge for the services is not separated from the charge for the property, if the overriding purpose of the purchaser is to obtain tangible personal property produced by the service, the transfer of the property is a consequential element of the transaction and

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the entire transaction is taxable. If the purchaser's overriding purpose is to receive the service, the transfer of the personal property is an inconsequential element of the transaction, and the entire transaction is not taxable." *Emery Industries, Inc. v. Limbach*, 43 Ohio St.3d 134, 539 N.E.2d 608 (1989). In other words, the true object test looks to answer the question of whether the purpose of the transaction is to obtain a service or what the service produced. According to their website, HIG provides their clients with historical property use information by compiling research and customizing documents in a report ready-made for the client.[1] According to the petitioner, the information compiled by HIG is received electronically. The petitioner does not explain what the information is used for once it is gathered by HIG. Without further evidence from the petitioner on how the information is used once received from the vendor, it is not clear that the true object of the transaction is for the service and not the product. The objection is denied.

Training

The petitioner contends that trainings purchased for employees are not subject to tax because the true object of the transaction was the training, not electronic information services. The petitioner maintains that the trainings in question were either conducted live via a webinar or in person. "Electronic information services" are defined as providing access to computer equipment in order to examine or acquire data stored in or accessible to the computer equipment or place data into the computer equipment to be retrieved by designated recipients. R.C. 5739.01(Y)(1)(c).

The petitioner submitted sufficient evidence demonstrating that transactions from ACI Northeast Ohio, Transportation Research Board, and MacStat Consulting are exempt professional services. Therefore, these transactions have been removed from the audit. The petitioner also objected to training transactions from Swamp School LLC and RAND Worldwide Company. However, the evidence provided does not support the contention that the transactions are not electronic information services. While these transactions are for trainings, it is not clear if the trainings were presented by a live instructor or available for viewing on a database. Therefore, the objection pertaining to those two transactions is denied.

Central Consulting Group

The petitioner contends that purchase of an application software from Central Consulting Group is exempt because the software was customized. Prewritten software is s defined as software not designed or developed to the specifications of a specific purchaser. R.C. 5739.01(DDD). Prewritten computer software is included in the definition of tangible personal property; therefore, it is presumed taxable. R.C. 5739.01(YY). However, software that is customized is considered a professional service and thus exempt. R.C. 5739.01(Y)(2)(e).

The petitioner provided an email sent to a Central Consulting Group consultant requesting work on the software and invoices showing charges for the consultant's work. However, no proof has been submitted supporting the contention that the original software application was customized for the petitioner. Prewritten software that is modified to any degree for a specific purchaser is still considered prewritten software and remains taxable unless an invoice is provided separately stating charges for the software and modification. Further, even where an invoice separately stating these charges is provided, only the charges for the modification would be exempt. R.C. 5739.01(DDD).

[1] Historical Information Gatherers, *About Us*, http://www.historicalinfo.com/about-us/ (accessed February 24, 2020).

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Without a contract or invoice for the original software purchase and further details of the customization, it is not clear that the software was actually customized. The petitioner has provided no additional evidence to support this contention. The objection is denied.

Professional License Fee Renewal

The petitioner contends that a professional license fee renewal was purchased in conjunction with a training. However, no evidence has been provided supporting this contention. The petitioner has provided no evidence identifying the vendor from whom the training and license fee renewal were purchased. The objection is denied.

Penalty Abatement

The petitioner requests full abatement of the of the penalty. The Tax Commissioner may add a penalty of up to fifteen percent of the amount assessed where a taxpayer fails to remit tax as required. R.C. 5739.133(A)(3). 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 on the facts and circumstances, partial penalty abatement is warranted.

Therefore, the assessment is modified as follows:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$56,340.23	$3,450.60	$2,816.84	$62,607.67

Current records indicate that a payment of $48,999.11 has been made towards the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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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: MAR - 5 2020

The Men's Wearhouse, Inc.
6380 Rogerdale Rd.
Houston, TX 77072

Re: Assessment No.: 100000106362
Use Tax
Account No. 97-147189
Audit Period: 01/01/2011 – 12/3 1/2013

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

Tax	Pre-Assessment Interest	Penalty	Total
$45,042.29	$3,092.77	$2,251.80	$50,386.86

The petitioner operates retail stores. This assessment is the result of an audit of the petitioner's purchases for the period shown above. A hearing was held. The petitioner's objections are addressed below.

Fixed assets were reviewed on a comprehensive basis. Audit Remarks, Page 10. However, a block sample was agreed upon to review expense invoices. The petitioner indicated that their purchases were not seasonal in nature, so the months of February 2012 and August 2012 were chosen as the sample periods. It was agreed that those months were representative of the petitioner's business activity. Data for the sample periods was derived from the petitioner's report entitled GLTMW050 Transaction Report Feb 2012 and GLTMW050 Transaction Rpt August 2012. Tax deficient expenses were projected over the entire audit period based upon the test period findings. The total tax deficient expense purchases for each account were divided by the total purchase activity in the same accounts for the sample period to determine the percentage of error on untaxed purchases. Each percentage of error was then applied to the corresponding account's total audit period purchases to determine untaxed taxable purchases for the audit period. The appropriate tax rate was then applied to the untaxed purchases for the audit period to determine the amount of tax due. Tax rate changes that occurred during the audit period were prorated by the number of months that each rate was in effect.

The petitioner contends that the audit methodology includes purchases for which tax has already been paid either through a use tax accrual or sales tax paid to a vendor. The petitioner requests credit for tax paid. It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary is established. R.C. 5739.02(C) and 5741.02(G).

Expenses

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A block sample was utilized on the expense purchases. As previously stated, the petitioner contends that some of the expense transactions included tax paid to the appropriate entities, therefore a credit should be given for these transactions. The petitioner submitted five invoices for expense purchases from the following vendors: RR Donnelley, Pan Pacific Plastics Mfg, Ernest Packaging Solutions, Alliance Print Evolved, and Grainger. Of these invoices, only one is from one of the sample months used to determine the percentage of error on untaxed purchases. Invoices outside of the sample period cannot be accepted as they would not have been used to determine tax liability. The invoice from RR Donnelly is dated February 7, 2012, which is a sample month used to determine liability. However, the invoice shows that tax was paid to Texas not Ohio or an Ohio vendor. The petitioner has not submitted any additional information to show that they were required to submit tax to Texas on this specific transaction. Therefore, the objection is denied.

Fixed Assets

The petitioner contends that transactions used to determine tax liability for fixed assets included some transactions where sales tax has already been paid to either a vendor or the state. The petitioner submitted invoices from five vendors.

Advantage Equipment

Based on evidence submitted by the petitioner, taxes have been appropriately paid to Ohio on the service provided by Advantage Equipment. Therefore, credit was given for tax paid on this invoice. The tax, interest, and penalty have been adjusted below.

Dell Marketing

The petitioner also submitted an invoice from Dell Marketing for a computer/register for a new store location. The evidence indicates that the purchase was for store #4422. Based on the store code and the petitioner's website, store #4422 is located in Maumee, Ohio. The invoice shows that sales tax was paid to Texas. However, use tax would be due on this purchase absent evidence from the petitioner that Texas requires sales tax to be paid on all items even if they are purchased for use in another jurisdiction. The petitioner has provided no such evidence. Therefore, no credit can be given for this transaction.

Enpro Distributing & National Services

The petitioner also submitted invoices from Enpro Distributing and National Services for services provided to two Ohio based store locations. However, it is not clear from the invoices if taxes were remitted to Ohio. While Enpro Distributing has an Ohio location, their corporate office is located in Texas. The invoice does not make clear where the tax was remitted. Without additional information, no credit can be given for Enpro Distributing. Similarly, the invoice from National Services does not make clear where the vendor is based or where taxes charged on the transaction were remitted. Therefore, no credit can be given for the National Services invoice.

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Finally, the petitioner submitted a spreadsheet that purports to be from Shaw Industries that includes the sale of carpet for five different store locations, one of which was in Dublin, Ohio. While the spreadsheet shows that tax was charged on this purchase, it is not clear that tax was remitted to Ohio. The remittance address for this vendor is in Atlanta, Georgia. However, because the store is located in Ohio, use tax should have been remitted to Ohio. The petitioner has not provided sufficient evidence to show that appropriate use tax has been remitted, therefore, credit cannot be given for this transaction.

Therefore, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$44,942.66	$3,090.76	$2,246.82	$50,280.24

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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