



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 21 2020

Aerohive Networks, Inc.
1011 McCarthy Blvd
Milpitas, CA 95035-7920

Re: Assessment No. 100001060619
Commercial Activity Tax
Reporting Period: 01/01/2014 – 12/31/2017

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

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$18,535.00	\$6,350.00	\$2,442.94	\$3,732.75	\$31,060.69

The Ohio Department of Taxation assessed Aerohive Networks, Inc. (hereinafter referred to as “the petitioner”) after conducting an audit for the period in question. The petitioner designs and develops cloud networking and enterprise Wi-Fi solutions. The petitioner also sells a variety of hardware products and provides maintenance and support services to customers. The petitioner has its principal place of business outside the State of Ohio and does not maintain any locations in Ohio. During the audit, the Department’s audit staff identified that the petitioner was incorrectly registered as a single entity taxpayer for CAT. The audit staff identified that the petitioner is the common owner of several entities and thus, required to be registered as a combined taxpayer group pursuant to R.C. 5751.012(A). The petitioner is the only entity that meets substantial nexus through bright-line presence in Ohio as per R.C. 5751.01(H)(3) and (I)(3). Therefore, the petitioner is the only entity required to be registered for CAT as part of the combined taxpayer group.

During the audit, the Department identified that the petitioner’s gross sales reported on their OH Use Tax returns were significantly higher than the taxable gross receipts (“TGR”) reported on the CAT return for the audit period. The auditor identified that the Use Tax gross sales were gross receipts pursuant to R.C. 5751.01(F) and TGR pursuant to R.C. 5751.01 (G). The unreported sales were situated in accordance with R.C. 5751.033(E) and (I). The auditor made adjustments to add back the difference in TGR which resulted in an increase of the TGR and CAT due for the petitioner. The corresponding interest was assessed pursuant to R.C. 5751.06(G). Additionally, the petitioner was assessed a penalty pursuant to R.C. 5751.06(B)(1). In response to the assessment, the petitioner filed a timely petition for reassessment. The petitioner does not contest the CAT liability or Annual Minimum Tax as assessed and has paid the tax due amount but requests an abatement of the interest and penalty assessed. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

The petitioner seeks an abatement of the interest and penalty assessed. R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. Based upon the information available to the Tax Commissioner, including the petitioner’s payment of tax assessed and cooperation during the audit

process, support a partial reduction of the penalty. However, the interest cannot be abated, as the accrual of interest is mandatory pursuant to R.C. 5751.06(G).

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Accordingly, the assessment is adjusted as follows:

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$18,535.00	\$6,350.00	\$2,442.94	\$1,866.38	\$29,194.32

Current records indicate that the payment of \$24,885.00 reflected above has been made on this assessment, leaving an adjusted balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any 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 (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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


JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

CenturyLink, Inc.
ATTN: Michael Hebert, Tax Department
100 CenturyLink Drive
Monroe, LA 71203

Re: Assessment No. 17201511440121
Commercial Activity Tax – 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. 5751.09 concerning the following commercial activity tax (CAT) assessment:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$161,153.00	\$18,155.00	\$0.00	\$179,308.00

I. BACKGROUND

CenturyLink, Inc. (“CTL” or “petitioner”) began as a small Incumbent Local Exchange Carrier (ILEC) in rural Louisiana. ILECs are assigned local territories in which they must provide local telephone service. Since its inception, CTL acquired over 70 ILEC’s including Century Telephone of Ohio. In 1998, CTL formed a long-distance provider to offer long distance services to its local exchange customers. CTL formed some non-regulated companies to provide security alarm monitoring. It formed CenturyTel Broadband Services, LLC to provide internet service. In 2009, CTL acquired Embarq Group, which owned 24 ILEC’s. In 2011, CTL acquired Qwest Communications, which operates a long-distance fiber optic network and owns U.S. West Group, a “Baby Bell”, one of the seven regional telephone companies formed after the breakup of the Bell system in 1983 that is the primary ILEC in 14 states. CTL operates almost 75% of its total access lines in portions of Arizona, Colorado, Florida, Iowa, Minnesota, Missouri, New Mexico, Nevada, North Carolina, Oregon, Utah, and Washington.

CTL also provides local service in parts of Alabama, Arkansas, California, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Ohio, Michigan, Mississippi, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Wisconsin, and Wyoming. During the audit period, the company operated nearly 55 data centers throughout North America, Europe, and Asia.

CTL divides its business into four segments: regional markets (residential customers and small, midsized, and regional businesses), business markets (government and large enterprise), wholesale markets (other communications providers), and Savvis (hosting and network services to global

commercial customers). Wholesale and regional operations still account for most sales, making up nearly 65% of revenue in 2012. CTL categorizes its products and services into legacy services (traditional phone, approximately 45% of sales) and strategic services (data and network connection, approximately 45% of sales). Its strategic services include private line, broadband, hosting, video, internet telephony, multi-protocol line switching, and wireless services. The remaining 10% of sales is primarily from data integration services, such as network management, equipment installation and maintenance.

The Department discovered during a pre-audit analysis that the petitioner was underreporting taxable gross receipts on its CAT returns. On account of this, the Department's audit staff conducted a field audit of the petitioner's CAT account for the period in question. CTL was registered as and filed their Ohio CAT returns as a combined taxpayer group in accordance with R.C. 5751.012.

The Department assessed the petitioner after the audit confirmed that the petitioner underreported its taxable gross receipts for the period at issue. The tax amount assessed was calculated pursuant to R.C. 5751.09(A), and preassessment interest was assessed pursuant to R.C. 5751.06(G). The assessment reflects CAT payments already made by the petitioner for the periods in question.

The petitioner filed a timely petition for reassessment raising its objections. A personal appearance hearing was held on this matter in Columbus, Ohio. This matter is now decided based on the evidence currently available to the Tax Commissioner.

II. PETITIONER'S OBJECTIONS

First, the petitioner contends that the assessment includes as taxable gross receipts \$684,450.00 of dividend income for each of tax years 2010, 2011 and 2012 received by United Tel. Co. of Ohio. It argues that this dividend income is exempt from CAT under R.C. 5751.01(F)(2)(b).

Second, the petitioner contends that certain gross receipts related to Qwest Communications Company that the Department's audit staff found to be taxable were not taxable for the periods assessed due to "timing differences" and should not be subject to CAT. Similarly, the petitioner contends that certain gross receipts related to United Telephone of Ohio were not taxable due to similar timing differences.

Third, the petitioner contends that the assessment should exclude 50% of Embarq's Ohio taxable gross receipts, arguing that only 50% of all calls within Ohio started within Ohio.

Fourth, the petitioner claims that the Department situated too large a percentage of Qwest Corporation's gross receipts to Ohio.

III. AUTHORITY & ANALYSIS OF FACTS & CIRCUMSTANCES

A. EXCLUSION FOR DIVIDEND DISTRIBUTIONS

R.C. 5751.01(F)(2) provides some exclusions from the definition of "gross receipts." Relevant to this matter is the exclusion authorized by R.C. 5751.01(F)(2)(b) which provides:

(2) "Gross receipts" excludes the following amounts:

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(b) Dividends and distributions from corporations, and distributive or proportionate shares of receipts and income from a pass-through entity as defined under section 5733.04 of the Revised Code;

The petitioner contends that it received \$684,450.00 of dividends from a subsidiary for each of years 2010, 2011 and 2012, and that this dividend income was improperly included as taxable gross receipts in the assessment. This contention is well taken. This dividend income shall be removed from taxable gross receipts in the assessment.

B. TREATMENT OF TIMING DIFFERENCES

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

The petitioner contends that some of the taxable gross receipts the Department's audit staff situated to Ohio arose due to timing differences, and that such timing differences should prevent the gross receipts from being subject to CAT for the period at issue. The petitioner cites R.C. 5751.01(F) as support for making an adjustment to the assessment for timing differences, arguing that taxable gross receipts for CAT are different than gross receipts for federal income tax purposes. During the administrative hearing on this matter, the petitioner stated that deferred maintenance accounts and accounts receivable reserve accounts had been primary causes of the "timing differences" between its accounting records and its tax records. Also, the petitioner stated that Qwest Communications Corporation laid fiber optic cable and then sold "indefeasible rights of use" to this cable, causing another timing difference. Finally, the petitioner stated that a bad debt reserve caused a timing difference for the period at issue.

To support their contention regarding timing differences, the petitioner specifically cites R.C. 5751.01(F)(4) which provides a taxpayer's method of accounting for federal tax purposes shall be followed for determining gross receipts for purposes of Ohio's CAT, as follows:

A taxpayer's method of accounting for gross receipts for a tax period shall be the same as the taxpayer's method of accounting for federal income tax purposes for the taxpayer's federal taxable year that includes the tax period. If a taxpayer's method of accounting for federal income tax purposes changes, its method of accounting for gross receipts under this chapter shall be changed accordingly.

The petitioner contends that the adjustments made to taxable gross receipts by the Department's audit staff for purposes of the assessment should be reduced and offset to account for "timing differences". Although the petitioner cites R.C. 5751.01(F)(4) to support its contention regarding timing differences, the evidence currently available does not support the assertion that the purported timing differences arose due to the method of accounting that the petitioner used for federal tax purposes. Rather, records reflect that the Department's audit staff used the petitioner's own records and filings and factored in the petitioner's accounting methodology when calculating the adjustments that gave rise to the assessment.

It should be noted that the petitioner reported and remitted estimated taxes for the periods at issue. Division (C) of section 5751.05 of the Revised Code allows the tax commissioner to grant written

approval for a calendar quarter taxpayer to use an alternative reporting schedule or estimate the amount of tax due for the calendar quarter if the taxpayer demonstrates the need for such deviation. R.C. 5751.05(C) provided the Tax Commissioner the authority to adopt a rule regarding tax estimation. To that end, the Department promulgated Ohio Adm.Code 5703-29-09.

The Department's audit staff reviewed the reconciled state-by-state breakdown of gross receipts that the taxpayer provided and identified that adjustments were needed to be made with regard to the estimation of gross receipts. When the taxpayer originally filed its Ohio CAT returns on a quarterly basis it used an estimation, since financial information was not yet finalized. The audit staff reviewed that subsequently finalized financial information to make adjustments to reflect the correct amount that should have been reported. The adjustments that the audit staff made for each company was based upon the breakdown of gross receipts reconciled by the taxpayer on a yearly basis, in accordance with R.C. 5751.01(F), R.C. 5751.033(I), R.C. 5751.05(C), and Ohio Adm.Code 5703-29-09. The petitioner contends that its taxable gross receipts should be based upon its billings system data. However, the taxable gross receipts used by the audit staff are the gross receipts based upon actual finalized financial data, which is a more accurate measure of gross receipts than the billings system data that the petitioner seeks to use. The gross receipts based upon finalized financial data is the petitioner's data for income tax purposes, as required by R.C. 5751.01(F)(4).

Ultimately, the petitioner has not submitted evidence or arguments which refute the accuracy of the adjustments the Department's audit staff made regarding deferred maintenance accounts, accounts receivable reserve accounts, Qwest Communications Corporation's "indefeasible rights of use", and bad debt reserves. Furthermore, the petitioner has not identified how R.C. 5751.01(F)(4) or any authority would allow it to defer or otherwise delay reporting the taxable gross receipts at issue due to these "timing differences".

C. SITUSING GROSS RECEIPTS GENERATED THROUGH SERVICES PROVIDED BY EMBARQ COMMUNICATIONS, INC.

R. C. 5751.01(G) indicates that "taxable gross receipts" means gross receipts situated to this state under section 5751.033. R.C. 5751.033(I), which governs the situsing of taxable gross receipts from the sale of services, provides:

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

R.C. 5751.033(I) requires an inquiry focused on where the petitioner's purchasers ultimately receive the benefit of its services. *See, Def. Sec. Co., d/b/a Def. Direct, v. Testa*, 10th Dist. Franklin No. 18AP-238, 2019-Ohio-725, *appeal allowed sub nom. Def. Sec. Co. v. Testa*, 156 Ohio St.3d 1444, 2019-Ohio-2498, 125 N.E.3d 913, (2019).

Ohio Adm.Code 5703-29-17 amplifies R.C. 5751.033(I) and provides multiple examples regarding how certain services should be situated for CAT purposes. Ohio Adm.Code 5703-29-17(C) states that if services relate to various locations both within and without Ohio, the gross receipts may be situated to Ohio using any reasonable, consistent, and uniform method of apportionment that is supported by the service provider's business records as they existed at the time of the performance of the service or within a reasonable time thereafter.

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

Ohio Adm.Code 5703-29-17(C)(48) provides guidance for the siting of telecommunications services. In this matter, the petitioner objects to the Department's audit staff's siting of receipts related to interexchange carrier gross receipts. Interexchange carrier gross receipts are governed by Ohio Adm.Code 5703-29-17(C)(48)(g), which provides that:

Gross receipts from the sale of access fees, such as the carrier access charge paid by an interexchange carrier to connect to a local exchange network in Ohio, shall be situated to Ohio as follows:

- (i) Gross receipts from access fees attributable to intrastate telecommunications service that both originates and terminates in Ohio are situated one hundred per cent to Ohio.
- (ii) Gross receipts from access fees attributable to interstate telecommunications service are sourced fifty per cent to Ohio if the interstate call either originates or terminates in Ohio.
- (iii) Gross receipts from interstate end user access line charges, such as the surcharge approved by the federal communications commission and levied pursuant to the Code of Federal Regulations, Title 47, Part 69, shall also be sourced one hundred per cent to Ohio if the customer's service address is in Ohio.

CTL purchased Embarq Communications in 2009. Embarq Communications is an interexchange carrier and has interstate service revenues. The petitioner contends that the assessment should exclude 50% of Embarq's Ohio taxable gross receipts, arguing that only 50% of all calls within Ohio started within Ohio. The petitioner contends that "(t)he audit staff did not recognize the exclusion from Ohio gross receipts of 50% of receipts from interstate communication activity for tax year 2012. The audit report increased the Ohio gross receipts for this company by disallowing its reported interstate receipts exclusion and not accepting the omitted interstate receipts exclusion on the company's 3rd quarter return for 2012."

The Department's audit staff reviewed the evidence available to it regarding interstate telecommunications services, including records provided by the petitioner, and, while the evidence supports the assertion that approximately 50% of Embarq's calls originated and terminated in Ohio, the audit staff identified that the petitioner took a greater than fifty percent reduction in these interexchange carrier gross receipts when computing its Ohio taxable gross receipts. Therefore, in

accordance with Ohio Adm.Code 5703-29-1717(C)(48)(g)(ii), the audit staff identified all Ohio receipts from these interexchange accounts and totaled them, and then multiplied this total by fifty percent in order to determine the amount by which taxable gross receipts should be reduced. As the petitioner took more than a fifty percent reduction on its original return, the audit staff made an adjustment so that the petitioner only received a fifty percent reduction. Therefore, no further adjustment is necessary, as the audit staff has already allowed the fifty percent reduction that the petitioner is seeking in this contention.

D. SITUSING GROSS RECEIPTS GENERATED THROUGH SERVICES PROVIDED BY QWEST CORPORATION

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

On April 1, 2011, CTL acquired Qwest Communications International, Inc ("Qwest Corporation"). Qwest Corporation began as a construction company of conduit and fiber optic cable in railroad right of way. It also installed conduit and fiber for its own future use. Its business plan was to build out a national fiber optic communication network as well as selling fiber to other carriers. Most of this construction is in the western United States. Qwest Corporation then purchased LCI International, based in Dublin, Ohio, which owned a fiber optic network centered in the Midwest.

In June 2000, Qwest Corporation acquired US West Communications. US West was a combination of three ILECs and was the primary ILEC for 14 Western states. Its 14-state service area is comprised of Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming.

The Department's audit staff reviewed the reconciled state-by-state breakdown of gross receipts that the petitioner provided and concluded that adjustments needed to be made in regard to the estimation of gross receipts. When the petitioner originally filed its Ohio CAT returns on a quarterly basis it used an estimation provided for, since its financial information was not yet finalized. The audit staff made an adjustment to reflect the correct amount that should have been reported. The subsidiary companies used estimations that needed to be adjusted during the audit period. The adjustment for each company was based upon the breakdown of gross receipts reconciled by the taxpayer on a yearly basis in accordance with R.C. 5751.01(F)(4), R.C. 5751.033(I), and R.C. 5751.05(C).

The audit staff requested a state-by-state breakdown of Qwest Corporation's gross receipts. Based upon the breakdown provided by the petitioner, the audit staff determined that there were taxable gross receipts in Ohio. The auditor made an adjustment to include the receipts that were shown as Ohio receipts on the state-by-state breakdown. Thus, the audit staff sitused gross receipts to Ohio based upon the state-by-state breakdown provided by the petitioner. The petitioner's response to Qwest Corporation's gross receipts being included as taxable gross receipts was as follows:

Qwest Corporation is an integrated communications company engaged primarily in providing an array of communications services to residential, business, government, and wholesale customers serving a major portion of a 14-state area in the Western United States. It provides services including local, network access, private line, broadband,

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data, wireless, and video services. Ohio is not one of the states included in this region. Additionally, Qwest Corp provides intercompany activity in the form of employee services, such as IT, administrative, accounting, legal, and management services to other related members of Qwest and CTL in most of the 50 states. Pursuant to Ohio Code 5703-29-17, these services may be situated according to the purchaser's "principal place of business", which is Colorado. Accordingly, no amounts from these intercompany administrative activities have been included on the OH CAT returns.

Qwest Corporation's method of apportionment used for income tax return purposes cannot be applied to the Ohio CAT gross receipts returns. Qwest established a method for apportioning all revenue, including service income, rental income, and intercompany income for income tax return purposes. The method includes sourcing intercompany income based on a payroll allocation which results in intercompany receipts situated to all states with payroll. These receipts, however, are subsequently eliminated in states where combined or consolidated income tax returns are filed. This method is acceptable for income tax purposes and the remaining activity after eliminations is reflective of our customer base in the 14-state region. This methodology would not be acceptable for the CAT returns; hence, we do not incorporate for purposes of the CAT returns. Pursuant to 5703-29-17, "The physical location where the purchaser ultimately uses or received the benefit of what was purchased is paramount in determining the proportion of benefit received in Ohio." Parallel to this market source approach, we assert that this service income is clearly identifiable to customers in the 14-state region, and argue that our related party services do not benefit Ohio, are not received in Ohio, and the use is not in Ohio. The intercompany administrative services are situated to the domicile, Colorado, for purposes of the OH CAT returns.

As seen above, the petitioner contends that Qwest Corporation's services should be situated to Denver, Colorado and/or Monroe, Louisiana. The petitioner refers to Ohio Adm.Code 5703-29-17 in support of this contention. However, in addition to its services as an ILEC in its 14-state service territory in the western US, Qwest Corporation provides many intercompany services, such as information technology, accounting, legal, and management services to other related members of Qwest Corporation and CTL in most of the fifty states. The petitioner contends that the Qwest group of companies had 1,952 employees within Ohio during the audit period. Qwest Corporation provided administrative and support services to other affiliated companies. Also, Qwest operated its billing system in Dublin, Ohio as one of its consolidated services that it provides to related entities throughout the United States.

Based upon this information, it is clear that the petitioner had gross receipts situsable in Ohio. Qwest Corporation has numerous entities with operations in Ohio, and services are provided to those Ohio entities. The Department's audit staff situated gross receipts to Ohio using the petitioner's own state-by-state breakdown of gross receipts. In arguing to situs all Qwest Corporation's gross receipts to Colorado and/or Louisiana, the petitioner is arguing against its own state-by-state breakdown of gross receipts. The petitioner argues that Qwest's gross receipts from its services should be situated to Denver, Colorado or Monroe, Louisiana under Ohio Adm.Code 5703-29-17. Ohio Adm.Code 5703-29-17(C)(1)(c)(ii) provides that gross receipts may be situated to "the primary location of the management operations of the purchaser's business unit." However, Ohio Adm.Code 5703-29-17(C)(1)(c) requires that "In determining the "principal place of business" of a purchaser, the following measures, if known, shall be considered in *sequential order*". [Emphasis added.] Ohio Adm.Code 5703-29-17(C)(1)(c)(i), which comes before (ii) in sequential order, provides to situs "where the client

primarily receives the benefit of the accounting service". Thus, under this rule, the petitioner should situs "where the client primarily receives the benefit" before situsing based upon "the primary location of management operations of the purchaser's business unit."

R.C. 5751.033(I), in providing for the situsing of services, states that: "The physical location where the purchaser ultimately uses or receives the benefit of what was purchased shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere." This code section also requires that services be sitused based upon where the benefit is received. As CenturyLink has many operations in Ohio, such as local telephone service territories, data centers, fiber optic lines throughout the state, as well as 1,940 employees, \$125,042,000 of annual payroll, 285,000 access lines, and a network investment of greater than \$2 billion, all within Ohio after the audit period, it was unreasonable that the petitioner did not situs any of Qwest Corporation's legal, accounting and other administrative services that it provides to related entities to Ohio.

As explained above, Qwest Corporation has gross receipts generated in Ohio from its various operations within this State. Ohio Adm.Code 5703-29-17(C)(48) provides for the situsing of telecommunications services as follows:

[G]ross receipts from the sale of telecommunications service or mobile telecommunications service shall be sitused to Ohio if the customer's place of primary use of the service is in this state. In general, the customer's "place of primary use" means the street address representing where the customer's use of the telecommunications service primarily occurs, which must be the residential street address or the primary business street address of the customer.

Qwest Corporation has significant operations within Ohio and has many customers with a primary place for the use of telecommunications services within Ohio. Therefore, pursuant to Ohio Adm.Code 5703-29-17(C)(48), such telecommunications services should be sitused to Ohio.

The petitioner did not situs any Qwest Corporation gross receipts to Ohio on its CAT returns at issue, and now disputes the gross receipts sitused to Ohio by the audit staff. However, as explained above, the audit staff used the petitioner's own state-by-state breakdown of gross receipts to situs a portion of Qwest's gross receipts to Ohio. The petitioner is arguing against the use of its own records by contending that the gross receipts should not be sitused to Ohio based upon its state-by-state breakdown of gross receipts. R.C. 5751.033(I) and Ohio Adm.Code 5703-29-17(A) both provide that a taxpayer's method for situsing services must be supported by their business records as they existed at the time of the performance of the service or within a reasonable time thereafter. As the audit staff used the petitioner's state-by-state breakdown of gross receipts to situs Qwest's gross receipts to Ohio, the audit results are grounded in the petitioner's own business records.

Ohio Adm.Code 5703-29-17(C) provides that if services relate to various locations both within and without Ohio, the gross receipts may be sitused to Ohio using any reasonable, consistent, and uniform method of apportionment that is supported by the service provider's business records as they existed at the time of the performance of the service or within a reasonable time thereafter. The audit staff herein is sing a "reasonable, consistent, and uniform method of apportionment that is supported by the service provider's business records as they existed at the time of the performance of the service", as the petitioner's own state-by-state records were used to situs Qwest's gross receipts.

In the case at hand, the petitioner has not provided sufficient evidence to show that the gross receipts identified as occurring in Ohio in its state-by-state breakdown were either not gross receipts under R.C. 5751.01(F) or situsable outside the state in accordance with R.C. 5751.033(I) and Ohio Adm.Code 5703-29-17. As there is no information in the file supporting this contention, the contention must be denied.

IV. CONCLUSION

The Department has explained the nature of and reason for the assessment to the petitioner in correspondence. Other than for the dividend distributions exclusion contention raised, the petitioner has not submitted sufficient information to refute the accuracy of the tax and interest amounts assessed. Ultimately, the evidence available to the Tax Commissioner indicates that the CAT and preassessment amounts assessed have been prepared with the best available information and are accurate.

As explained above, the Department has determined that a reduction to the assessment is warranted for the petitioner’s contention regarding the dividend distributions received exclusion. The Department shall reduce the tax and preassessment interest assessed to reflect this.

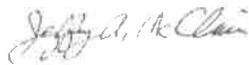
For the reasons stated above, the assessment is adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$155,816.00	\$17,561.00	\$0.00	\$173,377.00

Current records indicate that the petitioner has made a payment of \$96,537.00 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 payment to “Treasurer – State of Ohio.” Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

Chemical Services Inc.
4380 Hollansburg Tampico Rd.
Greenville, OH 45331

MAY 27 2020

Re: Refund Claim No. 201132064600
Commercial Activity Tax

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 refund amount sought is as follows:

<u>Period</u>	<u>Refund</u>
07/01/2016 – 09/30/2016	\$2,443.00

I. BACKGROUND & CLAIMANT'S CONTENTIONS

In February 2017, the claimant amended its CAT return for the period at issue reporting an overpayment of tax. Thereafter, the Department sent the claimant a letter requesting that it submit any documentation necessary to support the overpayment amount reported on its amended return for the period at issue. In response, the claimant contends that the original CAT return was an overstated estimate due to their Ohio taxable gross receipts not being available at the time of filing. The claimant also states that the refund was claimed as a nonrefundable credit on its first quarter 2017 CAT return. Upon initial review, the Department denied the refund claim because the claimant failed to provide any supporting documentation for the overpayment amount.

The claimant objects to the denial and requests an administrative review of the initial refund denial in accordance with R.C. 5703.70. The claimant did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim.

II. AUTHORITY

A. APPLICATIONS FOR CAT REFUNDS

R.C. 5751.08(A) governs CAT applications for refund and provides that:

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

MAY 27 2020

and documentation to support, the issuance of a refund.

(Emphasis added.)

B. A TAX MEASURED BY GROSS RECEIPTS

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

III. ANALYSIS

The Department has reviewed the documentation submitted by the claimant with its refund claim as well as the additional documentation that the claimant later submitted during the administrative review period. After reviewing the documents originally submitted by the claimant, the Department requested proof of the claimant's original and amended figures for the refund period and a detailed explanation of the reasons for the amended return. However, the claimant did not provide sufficient documentation to support the issuance of a refund. The claimant provided an income and loss statement without any detailed breakdown of gross receipts. Refunds are available for overpaid, illegal, or erroneously assessed taxes, but the applicant shall provide documentation to support the refund amount requested. R. C. 5751.08(A). In this case, the claimant has failed to provide sufficient evidence to prove that the originally filed CAT return was overstated. Accordingly, the Department has not been able to reconcile the taxable gross receipts reported on the amended return with the documentation submitted by the claimant and the evidence currently available to the Tax Commissioner.

IV. CONCLUSION

In the case at hand, the claimant has failed to meet its burden of proof of showing that the originally filed CAT return was overstated. Accordingly, the evidence currently available to the Tax Commissioner indicates that the taxable gross receipts and CAT liability which were initially remitted and reported were accurate. The information submitted by the claimant is too speculative to support the claimant's contention that the original CAT return was overstated without providing sufficient supporting documentation.

Accordingly, the refund claim is denied.

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

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


JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: MAY 21 2020

Comstar Enterprises, Inc.
PO Box 6698
Springdale, AR 72766-6698

Re: Ohio Tax Account #: 93141312
Tax Type: Commercial Activity Tax
Assessment No. 100001115861
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:

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalty</u>	<u>Payment</u>	<u>Total</u>
\$23,476.00	\$8,200.00	\$4,438.25	\$2,375.68	(\$31,826.00)	\$6,663.93

The Ohio Department of Taxation assessed the petitioner after conducting an audit of its CAT account for the period in question. Through that audit, the Department’s audit staff identified that the petitioner had substantial nexus with the State of Ohio through the bright-line presence in accordance with R.C. 5751.01(H)(3) and R.C. 5751.01(I). Further that it had receipts situsable to Ohio pursuant to R.C. 5751.033(G). Based on the 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 tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner does not contest the CAT liability assessed, but requests an abatement of the penalty and interest assessed. The petitioner did not request a hearing on the matter; therefore, this matter is decided based upon information available to the Tax Commissioner.

As to penalty abatement, R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. The evidence and circumstances, including the petitioner’s payment of tax amount assessed, partial payment of interest assessed, and its compliance with its CAT obligation following the assessment support a partial abatement of the penalty. However, the interest assessed cannot be abated, as the accrual of interest is mandatory pursuant to R.C. 5751.06(G).

Accordingly, the assessment is adjusted as follows:

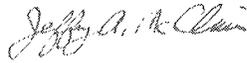
<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalty</u>	<u>Payment</u>	<u>Total</u>
\$23,476.00	\$8,200.00	\$4,288.25	\$593.92	(\$31,826.00)	\$4,732.17

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

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

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FINAL DETERMINATION

Date: **MAY 27 2020**

Cyberpower, Inc.
Attn: Stanly Ho - President
730 Baldwin Park Blvd
City of Industry, CA 91746

Re: Assessment No. 100001083573
Commercial Activity Tax
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.

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalties</u>	<u>Payment</u>	<u>Total</u>
\$39,945.00	\$10,650.00	\$3,825.40	\$7,589.25	(\$54,420.40)	\$7,589.25

The Ohio Department of Taxation assessed Cyperpower Inc. (hereinafter referred to as “the petitioner”) after conducting an audit for the period in question. The petitioner manufactures custom personal computers, primarily for gaming. The petitioner markets its products through its website to businesses, government agencies and schools, as well as to individual consumers. The petitioner has its principal place of business outside the State of Ohio and does not maintain any locations in Ohio. During the audit, the Department’s audit staff identified that the petitioner was not registered for the CAT even though it was determined that the petitioner had a substantial nexus through bright-line presence in Ohio as per R.C. 5751.01(H)(1-4) and (I)(3). Subsequently, the petitioner completed a Form CAT 1 Registration Form during the audit process and a CAT account was created for the petitioner.

During the audit, the Department also identified that the petitioner failed to report taxable gross receipts (“TGR”) from the sale of tangible personal property to Ohio customers during the period at issue. The unreported TGR was situated in accordance with R.C. 5751.033(E). The auditor made adjustments to add back the difference in TGR to the gross Ohio sales. The adjustment resulted in an increase of the TGR and CAT due for the petitioner. The corresponding interest was assessed pursuant to R.C. 5751.06(G). Additionally, the petitioner was assessed penalties pursuant to R.C. 5751.06(B)(1) and (D). In response to the assessment, the petitioner filed a timely petition for reassessment. The petitioner does not contest the CAT liability or Annual Minimum Tax (“AMT”) as assessed and has paid the tax due amount and interest but requests an abatement of the penalty assessed. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

The petitioner seeks an abatement of the penalty assessed. R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. Based upon the information available to the Tax Commissioner,

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including the petitioner's payment of tax and interest assessed and cooperation during the audit process, support a partial reduction of the penalty.

Accordingly, the assessment is adjusted as follows:

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalties</u>	<u>Payment</u>	<u>Total</u>
\$39,945.00	\$10,650.00	\$3,825.40	\$1,897.31	(\$54,420.40)	\$1,897.31

Current records indicate that a payment of \$54,420.40 has been made on this assessment, leaving an adjusted balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any 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 (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL DETERMINATION

Date: MAY 21 2020

Downing Displays, Inc.
550 Techne Center Dr.
Milford, OH 45150

Re: Refund Claim No. 95146840
Commercial Activity Tax

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 refund amount sought is as follows:

<u>Period</u>	<u>Refund</u>
07/01/2013 – 09/30/2013	\$9,122.00

I. BACKGROUND & CLAIMANT'S CONTENTIONS

On October 4, 2017, the claimant amended its CAT return for the period at issue reporting an overpayment of tax. Thereafter, on January 5, 2018, the claimant submitted an Application for Commercial Activity Refund form (CAT REF) along with supporting documentation for the period at issue. In its refund claims, the claimant maintains that it overreported and over-remitted its CAT for the above referenced period. Specifically, the claimant contends that the original CAT return included the combined receipts of all states and some foreign countries and, therefore, the CAT return was amended to report only its Ohio gross receipts. Thereafter, on initial review, the Department denied the refund claim because the payment was out-of-statute when the refund request was received.

The claimant objects to the denial and requests an administrative review of the initial refund denial in accordance with R.C. 5703.70. The claimant did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim.

II. AUTHORITY

R.C. 5751.08(A) provides the time parameters in which a CAT refund claim may be filed:

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

MAY 21 2020

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.*

(Emphasis added.)

The Ohio Board of Tax Appeals (“Board”) has previously reviewed a substantially similar corporate franchise tax refund statute, R.C. 5733.12, and found that although the taxpayer did not request its refund on form FT-REF, the request for refund included all the information requested by form FT-REF and, therefore, the core jurisdictional requirements had been fully satisfied. *Abitibi-Price Corp. & Subs. v. Tracy*, BTA No. 98-N-401, 2001 WL 224602 (Mar. 2, 2001). The Board determined that while the taxpayer’s request was not on the form prescribed by the tax commissioner, it was timely and provided all of the information requested on the tax commissioner’s form including a “full and complete reason for the claim.” *Id.* at 3.

III. ANALYSIS

The claimant contends that although its CAT REF and supporting documentation was not submitted until January 5, 2018, it states that its amended return was timely filed on October 4, 2017. The claimant filed its original return for the period at issue on November 11, 2013 and the claimant’s alleged erroneous payment of \$9,769 was received by the Department on November 12, 2013. As stated above, R.C. 5751.08(A) requires that CAT refund claims be filed within four years of the illegal or erroneous payment. Although the claimant filed its amended return within the four years of the illegal or erroneous payment, the claimant did not provide a full and complete reason for the claim or supporting documentation until January 5, 2018. R.C. 5751.08 provides that along with the refund amount request the taxpayer shall provide the “claimed reasons for, and documentation to support, the issuance of a refund.” Unlike the taxpayer in *Abitibi-Price Corp. & Subs*, the claimant did not timely provide a “full and complete reason for the claim” or supporting documentation with its amended return within four years of the illegal or erroneous payment. *Abitibi-Price Corp., supra*, at 3. Accordingly, the claimant filed this refund claim outside the four-year period as required per R.C. 5751.08(A).

IV. CONCLUSION

In the case at hand, the claimant has failed to meet its burden of proof of showing that its refund claim was timely filed. Furthermore, the evidence currently available to the Tax Commissioner indicates that the claimant filed this refund claim outside the four years of the illegal or erroneous payment. Although the claimant filed an amended return within four years of the illegal or erroneous payment, the claimant failed to supplement the return with a complete reason for the refund claim and supporting documentation. Due to the claimant failing to timely provide the supporting information, the tax commissioner was not on notice of the alleged erroneous payment, or the reasons for the erroneous payment within the four-year period required per R.C. 5751.08(A). Therefore, the Tax Commissioner has no jurisdiction to consider the claim since it was not filed within the time required by R.C. 5751.08(A).

Accordingly, the refund claim is dismissed.

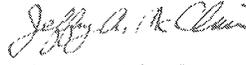
THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C.

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

MAY 21 2020

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: MAY 21 2020

Harlan D. Karp, Ltd.
1787 Radnor Rd.,
Cleveland Heights, OH 44118

Re: Ohio Tax Account #: 93072797
Tax Type: Commercial Activity Tax
Assessment No. 100000791615
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.

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$500.00	\$2,600.00	\$40.74	\$620.00	\$3,760.74

The Department of Taxation issued an assessment because the petitioner, Harlan D. Karp, 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). 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. The petitioner requested a hearing on the matter which was conducted via telephone, and this matter is now decided based on the evidence currently available to the Tax Commissioner.

Pursuant to R.C. 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 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.

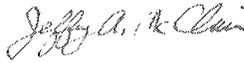
¹ Pursuant to Ohio Adm. Code 5703-29-05, each person required to file a commercial activity tax return shall file such return and remit payment of the tax liability by using the Ohio Business Gateway or the Ohio telefile system. The Department records indicate that the petitioner did not file the 2016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

Therefore, the assessment is affirmed.

Current records indicate that no payment has been made on this assessment, leaving the full balance due. ^{MAY 21 2020} 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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Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Hirschbach Motor Lines, Inc.
2460 Kerper Blvd
Dubuque, IA 52001-2224

Re: Assessment No. 100001118461
Commercial Activity Tax
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.

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalties</u>	<u>Payment</u>	<u>Total</u>
\$143,260.00	\$13,450.00	\$16,747.61	\$11,753.24	(\$173,457.61)	\$11,753.24

The Ohio Department of Taxation assessed Hirschbach Motor Lines, Inc. (hereinafter referred to as “the petitioner”) after conducting an audit for the period in question. The petitioner provides freight delivery as well as a wide range of services including warehousing, yard management services, and cold storage. The petitioner has its principal place of business outside the State of Ohio and does not maintain any locations in Ohio; however, as described below, records reflect that the petitioner conducted business activity in the State. During the audit, the Department’s audit staff identified that the petitioner was not registered for the CAT even though the evidence available indicated that petitioner had a substantial nexus through bright-line presence in Ohio as per R.C. 5751.01(H)(1-4) and (I)(3). Subsequently, the petitioner completed a Form CAT 1 Registration Form during the audit process. A CAT account was created for the petitioner and was registered as a single entity taxpayer.

During the audit, the Department also identified that the petitioner failed to fully report taxable gross receipts (“TGRs”) from the sale of transportation services by the proportion of miles traveled within Ohio versus total miles traveled everywhere else. The unreported TGRs were situated in accordance with R.C. 5751.033(G). The audit staff made adjustments to reflect TGRs related to transportation services in Ohio. The adjustment resulted in an increase of the TGRs and CAT liability due for the petitioner. The corresponding interest was assessed pursuant to R.C. 5751.06(G). Additionally, the petitioner was assessed penalties pursuant to R.C. 5751.06(B)(1) and (D). In response to the assessment, the petitioner filed a timely petition for reassessment. The petitioner does not contest the CAT liability or Annual Minimum Tax (“AMT”) as assessed and has paid the tax and interest assessed, but requests an abatement of the penalty assessed. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

The petitioner seeks an abatement of the penalty assessed. R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. Based upon the information available to the Tax Commissioner,

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including the petitioner's payment of tax and interest assessed and cooperation during the audit process, support a partial reduction of the penalty.

Accordingly, the assessment is adjusted as follows:

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalties</u>	<u>Payment</u>	<u>Total</u>
\$143,260.00	\$13,450.00	\$16,747.61	\$5,876.62	(\$173,457.61)	\$5,876.62

Current records indicate that, in addition to the \$173,457.61 payment reflected above, a \$3,092.97 motor fuel tax refund due the petitioner has been applied to this assessment pursuant to R.C. 5751.081, leaving an adjusted balance of \$2,783.65 due 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 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



Department of
Taxation

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

FINAL DETERMINATION

Date: MAY 21 2020

Johnson's Commercial Flooring of Ohio, Inc.
401 S. 32nd Street
Louisville, KY 40212-2205

Re: Ohio Tax Account #: 96221114
Tax Type: Commercial Activity Tax
Assessment No. 100001114900
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:

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$31,825.00	\$10,950.00	\$5,535.92	\$21,387.50	\$69,698.42

The Ohio Department of Taxation assessed the petitioner after conducting an audit of its CAT account for the period in question. Through that audit, the Department's audit staff identified that the petitioner had substantial nexus with the State of Ohio through the bright-line presence in accordance with R.C. 5751.01(H)(3) and R.C. 5751.01(I). Further, the audit staff concluded that the petitioner had receipts situsable to Ohio pursuant to both R.C. 5751.033(E). Based on the 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 tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner does not contest the CAT liability as assessed, but requests an abatement of the penalty assessed. The petitioner did not request a hearing on the matter; therefore, this matter is decided based upon information available to the Tax Commissioner.

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

Accordingly, the assessment is adjusted as follows:

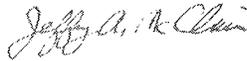
<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$31,825.00	\$10,950.00	\$5,535.92	\$5,346.87	\$53,657.79

MAY 21 2020

Current records indicate that a \$48,310.92 payment has been made on this assessment, leaving an adjusted balance due. However, due to processing and posting time lags, other payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to the "Ohio Treasurer". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Rose Transportation Inc.
618 Broadway
Pitcairn, PA 15140-1536

Re: Assessment No. 100001024490
Commercial Activity Tax
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.

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$58,398.00	\$12,450.00	\$8,616.63	\$35,424.00	\$114,888.63

The Ohio Department of Taxation assessed Rose Transportation Inc. (hereinafter referred to as “the petitioner”) after conducting an audit for the period in question. The petitioner is an intermodal transportation provider that also offers warehouse storage, trailer and container rentals, and logistics services. The petitioner has its principal place of business outside the State of Ohio but has two facilities located in Ohio. During the audit, the Department’s audit staff identified that the petitioner was not registered for the CAT even though it was determined that the petitioner had a substantial nexus through bright-line presence in Ohio as per R.C. 5751.01(H)(1-3) and (I)(5). Subsequently, the petitioner completed a Form CAT 1 Registration Form during the audit process and a CAT account was created for the petitioner.

During the audit, the Department also identified that the petitioner failed to report taxable gross receipts (“TGR”) from the sale of transportation services during the period at issue. The unreported sales were situated in accordance with R.C. 5751.033(G). The auditor made adjustments to add back the difference in TGR to the gross Ohio sales. The adjustment resulted in an increase of the TGR and CAT due for the petitioner. The corresponding interest was assessed pursuant to R.C. 5751.06(G). Additionally, the petitioner was assessed penalties pursuant to R.C. 5751.06(B)(1) and (D). In response to the assessment, the petitioner filed a timely petition for reassessment. The petitioner does not contest the CAT liability or Annual Minimum Tax (“AMT”) as assessed and has paid the tax due amount and interest but requests an abatement of the penalty assessed. The petitioner did not request a hearing on the matter. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

The petitioner seeks an abatement of the penalty. R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. Based upon the information available to the Tax Commissioner, including the petitioner’s payment of tax and interest assessed, support a partial reduction of the penalty.

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MAY 27 2020

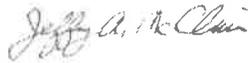
Accordingly, the assessment is adjusted as follows:

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$58,398.00	\$12,450.00	\$8,616.63	\$17,712.00	\$97,176.63

Current records indicate that the payment of \$79,464.63 has been made on this assessment, leaving an adjusted balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any 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 (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 29 2020

Sig Sauer Inc.
72 Pease Blvd.
Newington, NH 03801

Re: Seven Refund Claims
Commercial Activity Tax – Multiple Periods

This is the final determination of the Tax Commissioner with respect to applications for commercial activity tax (CAT) refunds filed pursuant to R.C. 5751.08. The refund amounts sought are as follows:

<u>Period</u>	<u>Refund Claim Number</u>	<u>Refund Requested</u>
01/01/2015 – 3/31/2015	093523064388	\$166.00
04/01/2015 – 6/30/2015	093523094536	\$143.00
07/01/2015 – 09/30/2015	093523039610	\$139.00
10/01/2015 – 12/31/2015	093523031466	\$296.00
01/01/2016 – 03/31/2016	093523038753	\$341.00
04/01/2016 – 06/30/2016	093523013788	\$276.00
07/01/2016 – 9/30/2016	093523050462	\$98.00

I. BACKGROUND & CLAIMANT'S CONTENTIONS

In October 2017, the claimant filed refund claims for the periods at issue. In its refund applications, the claimant contends that it erroneously double reported its web fulfillment orders. Upon initial review, the Department denied the refund claims because the claimant failed to provide any supporting documentation for the overpayment amounts.

The claimant objects to the denials and requests an administrative review of the initial refund denials in accordance with R.C. 5703.70. The claimant did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claims.

II. AUTHORITY

A. APPLICATIONS FOR CAT REFUNDS

R.C. 5751.08(A) governs CAT applications for refund and provides that:

An application for refund to the taxpayer of the amount of taxes imposed under this chapter that are overpaid, paid illegally or erroneously, or paid on any illegal or erroneous assessment shall be filed by the reporting

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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.*

(Emphasis added.)

B. A TAX MEASURED BY GROSS RECEIPTS

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

III. ANALYSIS

The Department has reviewed the information submitted by the claimant with its refund claims as well as the additional documentation that the claimant later submitted during the administrative review period. After reviewing the documents originally submitted by the claimant, the Department requested a breakdown quarter by quarter of how the claimant came to the original figures and the amended return figures of each return along with documentation to show the exact duplication of receipts that were initially included in error. However, the claimant did not provide sufficient documentation to support the issuance of refunds for the periods at issue. The claimant submitted an excel transaction list and a summary report for each quarter; however, the documentation is insufficient to demonstrate that the web sales the claimant claimed were reported twice were included in its original taxable gross receipts. Additionally, the documentation submitted by the claimant does not reflect all of the claimant’s taxable gross receipts and the transaction list included only the list of receipts that the claimant contended were reported twice.

As stated above, refunds are available for overpaid, illegal, or erroneously assessed taxes, but the applicant shall provide documentation to support the refund amount requested. R. C. 5751.08(A). In this case, the claimant has failed to provide sufficient evidence to prove that the originally filed CAT returns were overstated. Therefore, the Department has not been able to reconcile the taxable gross receipts reported on the amended returns with the documentation submitted by the claimant and the evidence currently available to the Tax Commissioner.

IV. CONCLUSION

In the case at hand, the claimant has failed to demonstrate that the originally filed CAT returns overstated its taxable gross receipts. Accordingly, the evidence currently available to the Tax Commissioner indicates that the taxable gross receipts and CAT liability which were initially remitted and reported were accurate. The information submitted by the claimant is too speculative to support the

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claimant's contention that the original CAT returns were overstated without providing sufficient supporting documentation.

Accordingly, the refund claims are denied.

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

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**FINAL
DETERMINATION**

Date: **MAY 27 2020**

Sunoco, Inc. (R&M)
3801 West Chester Pike
Newton Square, Pennsylvania 19073

Re: Ohio Tax Account No. 95236387
Tax Type: Commercial Activity
Assessment No. 17201602113796
Audit Period: 01/01/2011 – 12/31/2012

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

<u>Tax Due</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$459,476.00	\$61,241.00	\$0.00	\$520,717.00

I. BACKGROUND

The petitioner is one of the largest oil companies based in the United States. At some point in its history, the petitioner has engaged in nearly every aspect of the oil industry including drilling, refining, distributing, operating retail gas stations, and even shipbuilding. During the audit period at issue, the petitioner was primarily engaged in the refining, distribution, and retail sales of gasoline and related products. According to the petition for reassessment, the operative facts are as follows:

On March 1, 2011, Sunoco sold its refinery in Toledo, Ohio to Toledo Refining Company LLC. The sale included all fixed assets and inventory. The sale price included Sunoco’s finished product inventory that was on-hand at the refinery, as well as Sunoco’s finished product inventory that was contained within various pipelines located throughout the U.S. See, the Department’s CAT Audit Remarks at pages 2-3, attached hereto at Exhibit A.1.

PROCEDURAL HISTORY

The Department mailed an audit commencement notice to Sunoco on March 9, 2015. The Department conducted a field audit at Sunoco’s Philadelphia office on March 30 through April 2. The Department issued an information request dated October 20, 2015, regarding treatment of inventory associated with the refinery. Sunoco submitted a reply on November 20, 2015, which is attached as Exhibit B to the petition. In the reply, Sunoco provided documentation to show that its finished product inventory, which was not on-site at the refinery (i.e., the “offsite inventory”), should not be included as taxable gross receipts for purposes of the Ohio CAT. This offsite inventory included crude oil, refined product, and chemicals. The Department’s auditors used the response

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documentation provided in Exhibit B to situs the offsite inventory associated with the sale of the refinery. See, the Department's December 16, 2015, Preliminary Commercial Activity Tax (CAT) Audit Results, at Issue 2, included here as Exhibit A.2. (*"The auditors used the extensive documentation provided by the taxpayer in order to apply the proper situsing of the inventory associated with the sale of the Toledo Refinery and the Haverhill Chemical Plant location."*) See also, the Department's CAT Audit Remarks at pages 6-7 of Exhibit A.1.

In regards to the sale of the Toledo Refinery and Haverhill Chemicals Plant, the taxpayer was able to provide extensive details to the sale of these two entities. The taxpayer originally apportioned the sale of inventory to all of the states based on each state's individual apportionment factor. The taxpayer has indicated that they made an error in how they apportioned the inventory sale and have provided thorough detail to support their updated findings. The taxpayer removed their ratable apportionment of the original inventory sale of XXXXXX¹ and reapportioned the entire inventory sale of both the Toledo Refinery (XXXXXX) and Haverhill Chemicals Plant (XXXXXX) to Ohio.

The taxpayer then recalculated their taxable gross receipts based on this new apportionment and removed the appropriate deductions that are explained below in the "deductions" section of the audit remarks. *The inventory associated with the sale of the two entities in question were reduced by the amount of pipeline associated with the other state in which it travels through or the amount of chemical product that was sold outside Ohio. The taxpayer has provided extensive documentation to support this adjustment and the auditors have reviewed this documentation and agree with their reasoning.* The "E Detail" portion of the CAT workpapers have been updated with these new figures, specifically Sunoco Inc. R&M for 2011. Emphasis added.

II. THE PETITIONER'S CONTENTION

Initially, the petitioner objected to the assessment in its entirety based on twelve generic and unsupported boilerplate contentions. Subsequent documentation, correspondence, and the hearing itself narrowed the focus of petitioner's contentions to a single issue for which the petitioner seeks a reduction to the assessment of \$174,110.00. Accordingly, the Commissioner focuses this determination solely on the contention put forward to support the requested \$174,110.00 reduction to the assessment.

To that end, the petitioner contends that the Commissioner erred in situsing certain gross receipts from the sale of the petitioner's on-site inventory to Ohio.

III. ANALYSIS

¹ Actual figures replaced with "XXXXXX" to preserve potentially sensitive information.

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

Once a person determines the amount of gross receipts it realized, it must then "situate" those gross receipts to the appropriate location pursuant to section 5751.033 of the Revised Code. That statute provides, in pertinent part, siting requirements for gross receipts from the sale of tangible personal property. R.C. 5751.033(E). If a gross receipt is situated to Ohio pursuant to R.C. 5751.033, it is a "taxable gross receipt" ("TGR") that is subject to the CAT. R.C. 5751.01(G).

Here, the petitioner's sale of the two Ohio facilities generated gross receipts from the sale of on-hand inventory. This inventory was separated into two categories for purposes of determining the petitioner's TGRs. The two categories were: 1) product stored at the Ohio facilities ("on-site inventory"); and 2) product originating from the Ohio facilities that was in various stages of distribution ("off-site inventory"). The on-site inventory was the inventory that, on the day of the legal sale and transfer of the two facilities, was contained in or stored at the refinery and chemical plant. The off-site inventory was inventory that, on the day of the legal sale and transfer of the two facilities, was being transported in pipelines or trucks from the facilities. The petitioner does not contest that the sale of both kinds of on-hand inventory generated gross receipts for purposes of determining its CAT base. Instead, the petitioner contends that the Commissioner should situate the gross receipts from the sale of the on-site inventory in the same manner that the Department's audit staff allowed it to situate its gross receipts from the sale of the off-site inventory.

For the following reasons, the petitioner's contention is not well taken.

A. SITUS OF RECEIPTS FROM THE SALE OF OFF-SITE INVENTORY

Both the petitioner and the Commissioner agree with the method by which the amount of off-site inventory in Ohio was estimated. However, it is important to understand how and why the amount of off-site inventory was estimated in order to understand how and why it would be improper to apply the same concepts to the on-site inventory. Key to this understanding is recognizing that the off-site inventory was not situated differently than the on-site inventory. In fact, the same siting principle was applied to both: the gross receipts from the sale of all on-hand inventory were situated based on where the inventory was located on the date of the sale. The petitioner confuses the attempt to estimate the amount of off-site inventory located in Ohio with the manner in which such inventory should be situated.

Division (E) of R.C. 5751.033 governs the siting of taxable gross receipts from the sale of tangible personal property, which states:

Gross receipts from the sale of tangible personal property shall be situated to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property. For purposes of this section, the phrase "delivery of tangible personal property by common carrier or by

other means of transportation” includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

In the instant matter, both the on-site inventory and off-site inventory on hand at the time of the sale were received by the purchasers where the inventory stood. Because the purchasers of these facilities stepped into the place of the seller by taking title and possession of the facilities and inventory where they stood, none of the inventory was delivered to the purchasers by “common carrier or by other means of transportation.” Accordingly, only the first sentence of R.C. 5751.033(E) applies to these facts. That sentence requires gross receipts from the sale of tangible personal property to be situated to Ohio if such property is received by the purchaser in Ohio.

Prior to the audit, the petitioner had apportioned all of the gross receipts from the sale of its inventory, on-site and off-site, among all states in which it did business as though the inventory had been fully distributed and sold to its ultimate purchasers pursuant to the petitioner’s historic, normal trade channels. In other words, the petitioner allocated the sale of the on-hand inventory as though the product had already made its way to the end of its distribution channels for sale to ultimate customers. Upon audit, the petitioner realized this approach was incorrect and voluntarily “reapportioned the entire inventory sale of both the Toledo Refinery * * * and Haverhill Chemicals Plant * * * to Ohio.” CAT Audit Remarks Page 6. The Audit Remarks go on to say that “[t]he inventory associated with the sale of the two entities in question were reduced by the amount of pipeline associated with the other states in which it travels through or the amount of chemical product that was sold outside Ohio.” This proportion was used as a reasonable estimate of the amount of off-site inventory that was located in a pipeline or a truck in Ohio on the day of the sale compared to off-site inventory that was located in a pipeline or a truck outside Ohio on the day of the sale. This method was proposed by the petitioner, and accepted by the Department’s audit staff, as an estimate of the amount of off-site inventory that was located in Ohio on the date of the sale. Therefore, the Ohio proportion of off-site inventory was considered to have been in Ohio on the date of the sale. Conversely, the non-Ohio proportion of the off-site inventory was considered to have been outside of Ohio on the date of the sale. It is important to note that actual knowledge of the inventory’s location would dispense with the need to estimate the quantity of Ohio off-site inventory.

The gross receipts from the sale of the off-site inventory were situated to Ohio if the purchaser received the property in Ohio. In the instant case, the purchaser received the off-site inventory where it stood. Therefore, off-site inventory that was estimated to be in Ohio on the date of the sale was received by the purchaser in Ohio for purposes of situsing gross receipts for the CAT. Likewise, off-site inventory that was estimated to be outside Ohio on the date of the sale was not received in Ohio for purposes of situsing gross receipts for the CAT.

This estimation method was appropriate and warranted because, on the day of the sale, the exact location of the off-site inventory could not be determined. The petitioner and the Department’s audit staff agreed that the estimate was a reasonable reflection of the quantity of off-site inventory physically located in Ohio on the date of the sale. The petitioner does not contest the portion of the assessment related to taxable gross receipts from the sale of the off-site inventory.

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B. SITUS OF RECEIPTS FROM THE SALE OF ON-SITE INVENTORY

As explained above, the Department's audit staff agreed with the petitioner that some of the off-site inventory was not located in Ohio at the time of the sale. The petitioner and the Department's audit staff agreed on a reasonable method to estimate the quantity of off-site inventory that was reasonably located and received in Ohio for purposes of the CAT. The location of the on-site inventory, however, was never in doubt. That property was located in Ohio. It was received by the purchaser in Ohio. Therefore, the gross receipts from the sale of that inventory were correctly situs to Ohio pursuant to R.C. 5751.033(E).

Now, the petitioner seeks to apply an estimation method to the on-site inventory. The petitioner's proposed method is based on historical "commercial channels" that it sold its products through to third-party purchasers. This estimate is not being proposed to determine the location of the on-site inventory, which was known to be Ohio. Rather, petitioner hopes to situs or apportion those gross receipts outside Ohio based on where the inventory *might have eventually been sold to subsequent purchasers* – ignoring the intervening sale of inventory to the purchasers of the facilities – *had the petitioner continued to operate the facilities*. The petitioner's position is a bridge too far.

R.C. 5751.033(E) states, in relevant part, that "[g]ross receipts from the sale of tangible personal property shall be situs to this state if the property is received in this state by the purchaser." Here, the "tangible personal property" is the on-site inventory. "The purchaser" is the respective purchasers of the Toledo Refinery and the Haverhill Chemicals Plant. As purchasers of the facilities, assets, and inventory, those purchasers received the inventory *in situ*, or where it stood (i.e., there was no transportation of the tangible personal property to those purchasers pursuant to the sale). The exact location of the off-site inventory could not be determined, so an estimate was used to approximate how much of that inventory was in Ohio. However, the on-site inventory was unquestionably located in Ohio on the date of the sale. The Commissioner, like the statute, looks no further than the location where the purchaser received the property.

The flaw in the petitioner's contention lies in the fact that the purpose of estimating the quantity of off-site inventory located in Ohio was never to determine where the inventory *was eventually going*. The purpose was to attempt to determine where the inventory *was* on the date of its sale. As previously noted, the purchasers of the inventory received the inventory at the location where it stood. Pursuant to R.C. 5751.033(E), that location is the situs for the gross receipts for purposes of determining the petitioner's CAT liability. It belies logic to apply such an estimate to the on-site inventory because the location of that inventory was known.

Accordingly, the Commissioner finds that the amounts at issue were properly included in the petitioner's taxable gross receipts during the period under audit and no adjustment to the assessment is warranted.

IV. CONCLUSION

The petitioner's contention fails to support the requested reduction to the assessment. Upon examination, the petitioner's main assertions appear to result from a series of logical missteps and mistakes. For example, the petitioner uses the term "purchaser" to refer interchangeably to both the purchasers of the inventory at issue and the petitioner's past customers whose historical sales data was used to estimate

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the quantity of off-site inventory in Ohio. It makes this error when pointing out that R.C. 5751.033(E) requires the Commissioner to situs gross receipts from the sale of tangible personal property where the "purchaser" receives the property. This results in the petitioner advancing the untenable position that the purchasers of the on-site inventory received that inventory at the locations where the petitioner's past customers received their past purchases. Unsurprisingly, the inconsistent use of the term "purchaser" by the petitioner yielded a logically and legally incorrect conclusion.

Additionally, the petitioner falsely equates the method for estimating the quantity of Ohio off-site inventory to the situsing rule that applies. As explained above, these concepts are distinct from one another. However, the petitioner treats them as though they are one and the same throughout the petition and related documents. The petitioner erroneously conflates these concepts to conclude that the data points used to estimate off-site inventory location *is* the situsing rule for the gross receipts. It is not. To compound the confusion, the petitioner argues that because an estimate is permissible to determine the quantity of off-site inventory in Ohio, the same estimate must also be applied to the on-site inventory. The petitioner argues that they are the same kind of property and should be afforded the same treatment vis-à-vis how much of the on-site inventory may eventually travel outside Ohio. This argument ignores the reason for making the estimate in the first place: to determine the amount of the inventory contained within pipelines and trucks that was reasonably considered to be in Ohio on the date of the sale. Where there is no question as to the inventory's location, as is the case with the on-site inventory, there is no need to employ such an estimate.

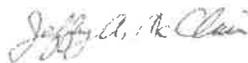
Finally, the petitioner contends that the Commissioner should treat the receipts of both types of inventory the same for purposes of situsing. The petitioner's suggestion that the Commissioner sitused the on-site inventory and the off-site inventory differently spotlights the error in its conclusion that the estimate *is* the situsing rule. That is because the Commissioner did situs the gross receipts from both types of inventory pursuant to the same statutory rule: "[g]ross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser * * *." R.C. 5751.033(E). The Commissioner consistently applied the situsing statute with respect to the gross receipts from the sale of all of the petitioner's inventory.

Accordingly, the assessment is affirmed.

Current records indicate that a payment of \$520,717.00 has been made in full satisfaction of this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: MAY 21 2020

Western Oilfields Supply Co.
Rain For Rent
PO Box 2248
Bakersfield, CA 93303-2248

Re: Ohio Tax Account #: 95212252
Tax Type: Commercial Activity Tax
Assessment No. 100001083795
Reporting Period: 01/01/2015 – 12/31/2017

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

<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$8,232.00	\$1,000.00	\$967.61	\$1,384.78	\$11,584.39

The Ohio Department of Taxation assessed the petitioner after conducting an audit of its CAT account for the period in question. Through that audit, the Department’s audit staff identified that there were discrepancies in the petitioner’s CAT quarterly payments as to taxable gross receipts. R.C. 5751.01(F). The petitioner also notified the audit staff that the business had implemented a new accounting system that calculated its sales tax amount into its OH CAT Invoice listing, which inadvertently included a doubled sales tax. 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 tax penalty pursuant to R.C. 5751.06(B)(1). The corresponding interest was assessed pursuant to R.C. 5751.06(G). In response to the assessment, the petitioner filed a petition for reassessment. The petitioner does not contest the CAT liability as assessed, but requests an abatement of the penalty assessed. The petitioner did not request a hearing on the matter; therefore, this matter is decided based upon information available to the Tax Commissioner.

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

Accordingly, the assessment shall be adjusted as follows:

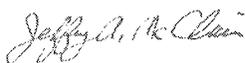
<u>Tax</u>	<u>AMT</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$8,232.00	\$1,000.00	\$967.61	\$0.00	\$10,199.61

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Current records indicate that a payment of \$10,199.61 has been made on this assessment, leaving no balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

H&R Block Eastern Enterprises, Inc.
Attn: Kristopher Amos, Manager – State & Local Tax
One H&R Block Way
Kansas City, MO 64105

MAY 06 2020

Re: Application for Refund No. 1503993
Corporation Franchise Tax: Multiple Periods

This is the final determination of the Tax Commissioner with regard to the following corporation franchise tax application for refund filed pursuant to R.C. 5733.12:

<u>Report Year</u>	<u>Amount Claimed</u>
2007	\$141,341.00
2008	\$150,532.00

I. BACKGROUND

During the report years in question, the claimant, H&R Block Eastern Enterprises, Inc., provided taxation services, including return filings, e-filings, and tax consulting to clients across the world. For Ohio Corporation Franchise Tax (“CFT”) purposes, the claimant was included as a member of a combined franchise tax group pursuant to R.C. 5733.052 and former Ohio Adm.Code 5703-5-06, applicable for the periods at issue. The claimant timely filed Ohio CFT reports and remitted tax for the report years in question.

For federal income tax purposes, the claimant was a member of an affiliated group of corporations (“affiliated group”) that filed a consolidated federal income tax return. The parent of that affiliated group was H&R Block and Subsidiaries (hereinafter “parent company”). Records reflect that the claimant’s parent corporation was subject to an audit by the Internal Revenue Services (“IRS”) for periods from 1999 through 2007. Documents provided by the claimant indicate that the IRS made a final determination on the audit of the claimant’s parent company which resulted in certain changes to the federal income tax returns of the affiliated group. Following the IRS’ final determination, the claimant filed amended Ohio CFT reports requesting the refund amounts currently considered. Upon initial review, the Department’s audit staff denied the application for refund. The claimant objected to the initial denial and requested an administrative review of the denial in accordance with R.C. 5703.70. In addition, the claimant requested a hearing on this matter, which was conducted via telephone. This matter is now decided based on the evidence available to the Tax Commissioner.

II. CLAIMANT'S CONTENTIONS

In correspondence submitted with their amended returns, the claimant identified that its parent company was subject to an IRS audit and, as the result of that audit, "the Ohio Franchise Tax, income portion, for H&R Block Easter Enterprises, Inc., Inc. [sic], a member of that federal filing group, has changed for 2000-2006." The claimant then filed amended returns purporting to report changes which it claims resulted from the IRS audit of its parent company. Specifically, the claimant asserts that it "timely filed the Amended Ohio Corporation Franchise Tax reports reflecting (i) increases and decreases to the federal taxable income originally reported, and (ii) increases and decreases to the amount of net operating losses ("NOLs") generated and utilized during each period." With respect to the NOLs, the claimant contends that:

(b)ecause of the increases and decreases to federal taxable income during the RAR years, it was necessary to adjust on the amended Ohio Franchise Tax reports the NOLs to properly reflect the losses truly generated, capable of utilization, and utilized. The statute [R.C. 5733.031(C)] explicitly provides that items 'either directly or indirectly' related to RAR adjustments are not barred by the general statute of limitations. At the very least, changes to our NOL are *indirectly* related to the RAR changes to taxable income. (emphasis in original).

The claimant is represented in these matters by members of its in-house tax department. Those individuals participated in the telephone hearing but did not present new evidence or arguments or raise any new objections during the administrative hearing on these matters. In addition, it should be noted that the Department's hearing officer provided the claimant's representatives with sixty days from the date of hearing to submit additional or clarifying facts or arguments, however, as of the date of this Final Determination, no such facts or arguments have been submitted.

III. AUTHORITY & ANALYSIS

A. REQUIREMENT TO REPORT CHANGES TO FEDERAL INCOME TAX – R.C. 5733.031(C)

As a threshold matter and prior to undertaking a review of the claimant's substantive arguments, the Tax Commissioner must determine that the application for refund in question was timely filed. There are two relevant statutes at play in making that jurisdictional determination in this case. The first is R.C. 5733.12, which is the general refund provision for Ohio's CFT, and states, in pertinent part, that:

* * * an application to refund to the corporation the amount of taxes imposed under section 5733.06 of the Revised Code that are overpaid, paid illegally or erroneously, or paid on any illegal, erroneous, or excessive assessment, with interest thereon as provided by section 5733.26 of the Revised Code, shall be filed with the tax commissioner, on the form prescribed by the commissioner, within three years from the date of the illegal, erroneous, or excessive payment of the tax, or within any additional period allowed by division (C)(2) of section 5733.031, division (D)(2) of section 5733.067, or division (A) of section 5733.11 of the Revised Code.

In this matter, the applications for refund were filed well-beyond the three-year statute of limitations R.C. 5733.12 generally provided for CFT purposes. Nevertheless, and of particular importance here, is R.C. 5733.031(C)(2), which R.C. 5733.12 identifies as a section that provides an “additional period” for CFT applications for refund. R.C. 5733.031(C)(2) states that:

In the case of an overpayment, an application for refund may be filed under this division within the one-year period prescribed for filing the amended report even if it is filed beyond the period prescribed in division (B) of section 5733.12 of the Revised Code if it otherwise conforms to the requirements of such section. An application filed under this division shall claim refund of overpayments resulting from alterations to only those facts, figures, computations, or attachments required in the corporation's annual report that are affected, either directly or indirectly, by the adjustment to the corporation's federal income tax return unless it is also filed within the time prescribed in division (B) of section 5733.12 of the Revised Code. It shall not reopen those facts, figures, computations, or attachments that are not affected, either directly or indirectly, by the adjustment to the corporation's federal income tax return.

Records reflect that the claimant filed the amended returns and requested the refunds within one year after the adjustment to the parent company's federal income tax return had been agreed to or determined for federal income tax purposes and, therefore, the application was timely filed within the additional refund period provided for by R.C. 5733.031(C).

B. R.C. 5733.031(C) ONLY PERMITS CORRECTIONS THAT RESULT FROM AN IRS ADJUSTMENT

Having established that the applications for refund were timely filed in response to adjustments made by the IRS, the Tax Commissioner must next determine whether the claimant's application for refund resulted from alterations to figures, computations, or attachments required in the claimant's Ohio CFT reports that were affected, either directly or indirectly, by the adjustment to its federal income tax return. The last sentence of R.C. 5733.031(C)(2) states that, while the provision creates an additional period for taxpayers to file applications for refund beyond the general three year statute of limitations, “(i)t shall not reopen those facts, figures, computations, or attachments that are not affected, either directly or indirectly, by the adjustment to the corporation's federal income tax return.”

The notion that the additional period provided for by R.C. 5733.031(C) only reopens the otherwise closed report period for federal adjustments which affect a taxpayer's Ohio CFT reports is critical, and has been examined by multiple Ohio tribunals. Those tribunals have repeatedly found that a taxpayer's ability to amend Ohio CFT reports to claim a refund and the Tax Commissioner's ability to assess based on federal changes are only available in limited and specific circumstances. For instance, the Ohio Supreme Court held that, after a federal audit resulted in increased federally adjusted income, a corporation was required to file an amended report incorporating only federal adjustments, but was not entitled to file a complete amended state franchise tax return. *General Motors Corp. v. Limbach*, 67 Ohio St.3d 90, 616 N.E.2d 204 (1993). The appellant in *General Motors* filed amended returns in which it reported the increased federal adjusted income but also sought to exclude interest income it received from federal obligations. The exclusion of the interest income GM sought was not related to and did not arise from federal adjustments. The Court summarized its holding on this issue by stating that “ R.C. 5733.031(C) does not

direct [GM] to file a complete amended report; it requires GM to file a report incorporating the federal adjustments.”

In *McLean Trucking Co. v. Lindley*, 70 Ohio St.2d 106, 435 N.E.2d 414 (1982), the Ohio Supreme Court examined the interplay between R.C. 5733.11 and R.C. 5733.031(C). It must be noted that R.C. 5733.11 is the statute which authorized the Tax Commissioner to assess taxpayers who failed to file a report or fully remit CFT. Like the general refund provision for CFT (R.C. 5733.12), R.C. 5733.11 contains a general statute of limitation, but it also includes an exception to that limitation by way of the additional period created under R.C. 5733.031(C). Again, the exception to the general statute of limitations in R.C. 5733.11 centers on the requirement that a taxpayer file amended CFT reports to incorporate federal adjustments that directly or indirectly impact the taxpayer's CFT. In *McLean Trucking*, the Court ruled that R.C. 5733.11 barred reopening of the returns except for the limited purpose of assessing the federal corrections that would have been reflected if the taxpayer had timely filed amended reports. The Court took issue with the Tax Commissioner's assessment based on corrections unrelated to the federal audit in stating that “(t)he wholesale re-opening of a taxpayer's reports on such an unrestricted basis would impede the attainment of the goals of certainty and finality in tax planning and tax collection-for both the taxpayer and the Tax Commissioner.” *Id.* at 112. Ultimately, the Court concluded that “R.C. 5733.11 is an absolute bar insofar as the instant assessment pertains to increases in [McLean's] franchise tax obligation unrelated to the corrections made as a result of the IRS audit”. *Id.* at 111.

The Ohio Board of Tax Appeals (“BTA”) examined R.C. 5733.031(C) and the Ohio Supreme Court's decisions from *General Motors, supra.*, and *McLean Trucking, supra.*, in *First Federal Savings Bank v. Tracy*, BTA No. 94-T-1353, 1996 WL 765710 (August 23, 1996). Following an IRS audit, First Federal filed an amended report under R.C. 5733.031(C), incorporating the federal adjustments. In the amended returns, First Federal tried for the first time to deduct goodwill on its CFT reports. The BTA found that this new attempt to deduct goodwill was inconsistent with R.C. 5733.031(C) observing that:

* * * the IRS audit did not examine or modify the amount of First Federal's goodwill. The federal adjustments were limited to disallowing the deduction of certain expenses claimed in connection with the Willoughby merger. It was only after the audit was completed that First Federal made a decision to capitalize the expenses and attempt to deduct them as goodwill. The Tax Commissioner eventually accepted the \$44,650 in disallowed expenses as goodwill. However, he properly determined that the remaining amount claimed to be recorded goodwill was not affected in any way by the federal audit. This amount was on First Federal's books prior to the federal audit and could have been deducted on First Federal's initial tax returns. Thus, the amount of goodwill subsequently claimed by First Federal arises from an alleged taxpayer error, not from any IRS adjustment.

In *First Federal*, the BTA ultimately held that the authority of both taxpayers to file amended returns following federal changes and the Tax Commissioner to assess following federal changes is limited to corrections related to the IRS audit.

Ohio's individual income tax also includes a provision which require taxpayers to file amended returns following federal adjustments. *See* R.C. 5747.10. Like corporate taxpayers under R.C. 5733.031(C)(2), Ohio's individual income taxpayers have an obligation to file amended returns when those facts, figures, computations, or attachments required in the taxpayer's Ohio return are affected, either directly or indirectly, by the adjustment to the taxpayer's federal income tax return. Ohio's Court of Appeals for the

At the outset, it must be noted that the claimant has not provided evidence or narrative precisely identifying the organizational changes that occurred to it and its parent company preceding and during the report years in question that gave rise to the NOL in question. However, based on the evidence available, it appears as though the claimant merged with an entity named H&R Block Eastern Tax Services, Inc. on or around December 31, 2004. Prior to the merger, H&R Block Eastern Tax Services, Inc. was the lead corporation for a combined group of entities for Ohio CFT purposes. In correspondence submitted to the Department's audit staff during the initial refund review period, the claimant contends that "H&R Block Eastern Tax Services, Inc. net operating losses were transferred to H&R Block Eastern Enterprises on the merger date." The claimant further included a breakdown of the NOL for itself and H&R Block Eastern Tax Services, Inc. showing NOL carryforwards in the aggregate amount of \$11,999,255 that it asserts "were available and transferred in the merger and that reflect the RAR returns". Subsequently, the claimant then filed amended Ohio CFT reports deducting the NOLs from net income for the first time and requesting the refunds in question.

In examining these circumstances, two critical facts become clear. The first critical fact is that the \$11,999,255 NOL existed and was available for the claimant to begin deducting immediately after the 2004 merger. In fact, the concept of NOLs surviving a merger and being available for use by a successor corporation has been examined on multiple occasions by Ohio courts. *See Gulf Oil, supra., Litton Industrial Products, Inc. v. Limbach*, 58 Ohio St.3d 169, 569 N.E.2d 481 (1991), *MTD Prods, Inc v Limbach*, BTA No. 84-C-120, unreported (June 11, 1986). However, the claimant has not identified and the Tax Commissioner is not aware of any direct precedent or authority, outside of R.C. 5733.031(C), which would allow taxpayers to extend the reporting period for NOLs beyond the period provided for in R.C. 5733.04(I)(1). Similarly, to the extent that the available NOL created in an illegal, erroneous, or excessive overpayment of CFT, the claimant had three years from the date of the underlying payment to file amended returns or applications for refund pursuant to R.C. 5733.12 claiming a refund of the overpayment. The claimant does not contend and the record does not reflect that it filed amended reports claiming NOL deductions in the years immediately following the merger.

Rather, the claimant first reported the NOLs in 2014 on what it refers to as its "RAR returns", and asserts that it was "necessary to adjust on the amended Ohio Franchise Tax reports the NOLs" which were "*indirectly* related to the RAR changes to taxable income." (emphasis in original). Both the Department's audit staff and the hearing officer have reviewed the documents submitted relating to the IRS audit, including the Form 870-AD Federal Audit Final Determination, Form 906 RAR Adjustments, and Form 5278 Appeals Division Supporting Documents. However, that review has not revealed any changes made by the IRS to the claimant's parent company's federal returns directly or indirectly affected the NOLs in question.

Moreover, aside from claimant's general contentions regarding the indirect relation of the IRS audit of its parent company and the NOLs that have been identified in this Determination, the claimant has not expanded or expounded its contentions. For instance, the claimant has not explained how the federal changes "*indirectly* related to the RAR changes to taxable income." More broadly, the claimant also has failed to demonstrate how, whether, or to what extent the results of the audit of its parent company either directly or indirectly changed the NOL relating to the 2004 merger or otherwise triggered the requirement to report the NOLs under R.C. 5733.031(C). For example, the claimant has not pointed to any provision or calculation in the IRS audit documents that show that the 2004 NOLs it reported on its

amended Ohio CFT reports were altered or adjusted by the changes the IRS audit made to its parent company's federal income tax return.

It is worth reiterating that R.C. 5733.031(C) only permits taxpayers to adjust those facts, figures, computations, or attachments required in the corporation's annual report that are affected, either directly or indirectly, by the adjustment to the corporation's federal income tax return. It is clear from the current record that the IRS audit of the claimant's parent did not directly affect the NOLs in question. Based on the evidence presented, the NOLs in question would have related to the 2004 merger and, as such, any available deductions could have been reported on a CFT report filed immediately after merger pursuant to R.C. 5733.04(I)(1) on an amended report. Similarly, the fact that NOLs predated the IRS audit of the parent company also removes them from the realm of facts, figures, computations, or attachments required in the corporation's annual report that were indirectly affected by the IRS audit. Therefore, the claimant's out-of-statute CFT periods for the purposes of R.C. 5733.12 cannot be reopened under R.C. 5733.031(C) to allow it to claim the novel NOL deduction. In the end, the claimant may well have had deductible NOLs in the periods immediately after the merger, and, if so, was permitted to file amended reports or applications for refund reporting the deductions within the three year period provided under R.C. 5733.12. Nevertheless, as the precedent on this issue points out, an IRS audit does not reopen the door for taxpayers to a file an amended report or claim refunds based on facts, figures, and calculations unrelated to the IRS audit.

IV. CONCLUSION

Absent a demonstration that the results of the IRS audit of the claimant's parent company affected the NOLs reported on the claimant's amended returns, the application for refund must be denied. Here, the claimant has failed to show whether, how, and to what extent the NOL that forms the basis of this refund claim was impacted by the IRS audit of its parent company. The contention that reporting the NOL deductions was necessary or indirectly affected by the IRS audit of the claimant's parent are not supported by the evidence and are too tenuous to be well-taken. Ultimately, the claimant has not shown that any payments made for the periods in question were illegal, erroneous, or excessive.

Accordingly, the application for refund is denied.

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 21 2020**

Jeffrey A. Nesselrotte
5961 Ford Rd.
De Graff, OH 43318

Re: Assessment No. 100000697897
Employer Withholding Tax – 01/01/2014 – 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:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$25,118.43	\$1,852.68	\$8,791.56	\$35,762.56

The Ohio Department of Taxation assessed the petitioner after conducting an audit of the petitioner's Ohio employer withholding tax account for the periods from January 1, 2009 through December 31, 2014. During the audit, the Department's audit staff discovered inconsistencies between the petitioner's withholding tax filings and its employees' personal income tax withholding records. Throughout the course of the audit, the petitioner did not provide documentation that the audit staff requested regarding its employer withholding taxes sufficient to resolve or override the inconsistencies between its original filings, its employees' filings, and the Department's records. The petitioner provided neither its own internal withholding tabulations nor withholding filings for the 2014 tax year; as such, the Department assessed the petitioner in amounts based on the evidence available to it at the time pursuant to R.C. 5747.13(A).

It should be noted that the petitioner was separately assessed (No. 100000387362) for failing to file and remit employer withholding tax for the same period as that at issue in this matter. The petitioner did not file a timely petition for reassessment in response to Assessment No. 100000387362, and a tax amount of \$3,000.00, plus applicable interest and penalty, was certified to the Ohio Attorney General's Office for collections pursuant to R.C. 131.02.

During the administrative appeal period, the petitioner provided the Department with its employees' Forms W-2, its Ohio Form IT 3, and its Ohio Form IT 941 for 2014. The Department has reviewed the new documentation against the withholding amounts as reported by the petitioner's employees. From these records collectively, the Department determined that the petitioner failed to fully remit the amounts that it withheld from its employees in 2014. Based on this information and in light of the separately assessed and certified tax amount, the Department has determined that the petitioner has an additional employer withholding tax amount of \$112.67 due. As such, the assessment will be adjusted accordingly.

Therefore, the assessment is adjusted as follows:

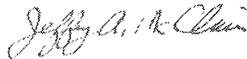
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<u>Tax Due</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$112.67	\$22.69	\$39.43	\$174.79

Current records indicate that the petitioner has made no payments on the above-referenced assessment. Due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Post-assessment interest will be added to the 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.

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

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


JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 21 2020

W. Michael & Catherine Brady
1994 Marble Cliff Ct.
Columbus, OH 43204

Re: Refund Claim No. 1800650
Individual Income Tax - 2016

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

<u>Tax Year</u>	<u>Refund Claimed</u>
2016	\$3,868.00

I. BACKGROUND

The claimants filed an amended individual income tax return for tax year 2016 claiming the Ohio Business Income Deduction (“BID”) for capital gains Mr. Brady received from the sale of his ownership interest in Scioto Wealth Advisors, LLC and Scioto Wealth/Wells Fargo Advisor (“Scioto Wealth”). Upon initial review, the Department disallowed the BID for the capital gains and denied the claimants’ refund requested on their 2016 amended return.¹ The claimants contend that the Department incorrectly identified the capital gains as nonbusiness income and denied the corresponding BID. Accordingly, the claimants object to the denial of their refund claim and request a refund of income tax paid to Ohio for tax year 2016. The claimants contend that the Department incorrectly identified the capital gains from the sale of Scioto Wealth as nonbusiness income, and thus incorrectly denied the corresponding BID.

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

II. CLAIMANTS’ CONTENTIONS

The claimants assert that their 2016 amended individual income tax return was correct as filed. The claimants contend that goodwill resulting from the sale of Mr. Brady’s in Scioto Wealth, is business income and thus eligible for the BID. The claimants state that Mr. Brady’s sold his regular ongoing Federal Schedule C sole proprietorship including business goodwill, a consulting agreement, and noncompete agreement to Eric Friedman. The claimants further state that they elected to record the capital gains from the sale as an installment sale. Mr. Brady also contends that he had a separate and unrelated ownership interest in the partnership Scioto Wealth Advisors, LLC but claims that it was not

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.”

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sold. Mr. Brady alleges that he was removed from the partnership because his ownership interest had no value. Accordingly, the claimants contend that the sale of Mr. Brady's entire interest and resulting goodwill in Scioto Wealth should be considered a liquidation of a business.

III. RELEVANT AUTHORITY

A. THE OHIO BUSINESS INCOME DEDUCTION

For tax year 2016, R.C. 5747.01(A)(31) allows individuals jointly filing the Ohio IT 1040 to deduct up to \$250,000 of business income, to the extent such income is included in federal adjusted gross income. Any remaining business income is taxed at a flat 3% rate.

B. BUSINESS & NONBUSINESS INCOME

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

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

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

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

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

Nonbusiness income is allocated to the state depending on the type of income. *See* R.C. 5747.20(B) (allocating, for example, compensation to the place where it is earned, rents to the location of the property, and capital gains from the sale of intangible property to the taxpayer's state of domicile). The definition of nonbusiness income necessarily excludes business income, and only "may include" the listed items. As such, the statute provides potential examples of nonbusiness income, and the examples serve as only a non-exhaustive list of types of nonbusiness income. The determination of whether income is business or nonbusiness income rests on tests derived from case law in addition to whether the income was from the liquidation of a business.

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In *Corrigan v. Testa*, the Supreme Court of Ohio reviewed the applicability of R.C. 5747.212 to nonresident taxpayers and ultimately found that “the ordinary treatment of capital gains derived from intangible property” (e.g. an ownership interest in an entity), is nonbusiness income. *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶3 (2016). Additionally, while the Court has found that income generated by a pass-through entity is business income to the entity’s investors, it has declined to extend such treatment to income from an investor’s sale of the pass-through entity. *Id.* ¶36-37; see also *Agley v. Tracy*, 87 Ohio St.3d 265, 719 N.E.2d 951 (1999). Furthermore, the Court has declined to rely on “form-over-substance” arguments when determining the proper classification of income derived from the sale of an interest in a business, instead relying on the actual facts of the transaction giving rise to income. *Corrigan* at ¶62-67.

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

Part I: ‘Business income’ means income arising from transactions, activities, and sources in the regular course of a trade or business, and

Part II: includes income from tangible and intangible personal property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation.

Kemppel at 422 (internal citations omitted).

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

C. GOODWILL IS INTANGIBLE PROPERTY

“Goodwill” is defined as a business's reputation, patronage, and other intangible assets that are considered when appraising the business, esp. for purchase, or the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets. Black's Law Dictionary (11th ed. 2019). The Ohio Supreme Court has presented a comprehensive definition of “goodwill” indicating that it is “the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.” *Spayd v. Turner, Granzow & Hollenkamp*, 19 Ohio St.3d 55, 59–60, 482 N.E.2d 1232, 1236 (1985), citing Story, Commentaries on the Law of Partnership (6 Ed.1868) 170, Section 99; *Metro. Natl. Bank v. St. Louis Dispatch Co.* (1893), 149 U.S. 436, 13 S.Ct. 944, 37 L.Ed. 799; 38 American Jurisprudence 2d (1968)

912, Good Will, Section 1. Importantly, in *Kemppel*, the Ohio Supreme Court repeatedly acknowledged that goodwill was not a business asset, but was rather a gain which resulted from the sale of intangible personal property. *Kemppel, supra.*, at 421.

The notion of goodwill being intangible personal property is clearly echoed in federal tax law. Specifically, 12 CFR Sec. 1.197-2(b)(1) defines goodwill as "the value of a trade or business attributable to the expectancy of continued customer patronage," and that "[t]his expectancy may be due to the name or reputation of a trade or business or any other factor." The Internal Revenue Service ("IRS") has described goodwill as:

In the final analysis, goodwill is based upon earning capacity. The presence of goodwill and its value, therefore, rests upon the excess of net earnings over and above a fair return on the net tangible assets. While the element of goodwill may be based primarily on earnings, such factors as the prestige and renown of the business, the ownership of a trade or brand name, and a record of successful operation over a prolonged period in a particular locality, also may furnish support for the inclusion of intangible value. IRS Rev. Rul. 59-60

Thus, like Ohio, the IRS sees goodwill as an intangible value. Similarly, the Tax Court of the United States has stated that goodwill is an intangible asset consisting of the excess earning power of a business. *Staab v. C.I.R.*, 20 T.C. 834, 840 (T.C.1953)

D. INCOME FROM THE LIQUIDATION OF A BUSINESS

Subsequent to the *Kemppel* decision, the Ohio General Assembly passed Senate Bill 261, which amended Ohio's definition of business income found in R.C. 5747.01(B) to include income from the partial or complete liquidation of a business.² See, Am. Sub. Senate Bill 261 (Effective Date, June 5, 2002). This is critical, as the legislative history shows the General Assembly relied on the facts in *Kemppel* when enacting this amendment to R.C. 5747.01(B).³ The Legislative Service Commission's ("LSC") "Final Analysis" for Senate Bill 261, which is an explanation of permanent law, directly references the *Kemppel* case when explaining the change to R.C. 5747.01(B).⁴

In *Kemppel*, the corporation sold all its assets and ceased doing business. *Kemppel* at 420. The link between liquidation and cessation of operations was reiterated several times throughout the *Kemppel* decision. The Court cited many out-of-state cases that differentiate between the sale of assets as part of the cessation of the business (a "true liquidation") versus the sale of assets to another who continues the business. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Com., Bd. of Fin. & Revenue*, 537 Pa. 205, 209, 642 A.2d 472, 474-75 (1994) and *Polaroid Corp. v. Offerman*, 349 N.C. 290, 307, 507 S.E.2d 284, 296 (1998). Taken together, this is a clear indication that the cessation of business operations is a material fact in determining what can be considered liquidation under R.C. 5747.01(B). The converse implication is that the sale of an ownership interest in an entity that continues to operate after the sale is not a liquidation under Ohio law, but rather is simply the sale of an intangible asset.

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

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

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

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

IV. ANALYSIS

Mr. Brady can only deduct his gain from his sale of Scioto Wealth if such gain is business income. The Department acknowledges that Mr. Brady was a sole proprietor of Scioto Wealth/Wells Fargo Advisor and had a 33% partnership interest in Scioto Wealth Advisors, LLC. Although the claimant contends that Scioto Wealth Advisors LLC was purely an office cost-sharing arrangement with other investment advisors including Eric Friedman, the purchaser, the Scioto Wealth Advisor’s website states that it is “an independent wealth management practice with products and services provided through Wells Fargo Advisors Financial Network.”⁵ The U.S. Return of Partnership Agreement for Scioto Wealth Advisors, LLC also states that the principal service is investment management. Additionally, the documents submitted by the claimant indicate that Eric Friedman acquired Mr. Brady’s ownership interest in the partnership after the sale. Further, the Purchase Agreement indicates that Scioto Wealth Advisors, LLC was sold, not the sole proprietorship. Additionally, Mr. Brady filed a Federal Schedule C to report the 1099-Misc nonemployee compensation that he received from Wells Fargo for the financial services he performed while a partner of Scioto Wealth Advisors. Regardless, Department records indicate that Mr. Brady sold his ownership interest in Scioto Wealth which produced a capital gain consisting of goodwill. Accordingly, for the claimants to demonstrate that the capital gains received from the sale are business income, they must show that the income (1) meets the transactional test, (2) meets the functional test, or (3) is related to a “partial or complete liquidation of a business.” R.C. 5747.01(B).

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

Income is business income under the “functional test” only “if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer’s regular trade or business operations.” R.C. 5747.01(B) and *Kemppel* at 423. Additionally, gains satisfying the functional test generally arise from the sale of an asset which produces business income while it was owned by the taxpayer. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Commonwealth, Bd. Of Fin. & Revenue*, 537 Pa. 205, 210 (1994). Here, the claimants have not argued or demonstrated that acquiring or disposing of its intangible interests in companies constituted an integral part of their regular trade or business. Rather, it appears that Mr. Brady was an investment advisor for Scioto Wealth which was in the business of providing financial services. In short, Mr. Brady’s intangible property (i.e. his ownership interest in

⁵ Scioto Wealth Advisors, *Welcome to the Scioto Wealth Advisor Website*, <https://fa.wellsfargoadvisors.com/scioto-wealth-advisors/> (accessed on May 1, 2020)

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Scioto Wealth) is not “integral” to the “regular course of a trade or business operation” conducted by either Mr. Brady or Scioto Wealth. Accordingly, the resulting gains from the sale of said intangible property does not meet the functional test.

Income is also business income if it is generated from the “partial or complete liquidation of a business * * *.” R.C. 5747.01(B). Based on prior case law and the legislative intent which led to the amendment of R.C. 5747.01(B), a “partial or complete liquidation of a business” requires a complete asset sale followed by the actual cessation of all business operations (a complete liquidation), or the sale of certain assets followed by the actual cessation of the line of business relating to those assets (a partial liquidation). In contrast, the sale of an intangible asset such as an ownership interest in an entity, is not a liquidation. Instead, it is merely a transactional sale which results in a capital gain to the investor. In this case, Mr. Brady sold his entire intangible ownership interest in Scioto Wealth, he did not sell as business asset held by the company. The intangible interest was held by Mr. Brady personally, not Scioto Wealth, and was not used exclusively or primarily for Scioto Wealth’s business purposes as a business asset would be. Additionally, the sale of intangible interests or intangible personal property does not produce business income under Ohio law unless meets the transactional or functional tests or results from a partial or complete liquidation of a business. In this case, the business was not liquidated and dissolved; rather, it continued to operate as a wealth management firm but under different ownership. Therefore, Mr. Brady’s gain from the sale of Scioto Wealth was not a partial or complete liquidation of a business.

V. CONCLUSION

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

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

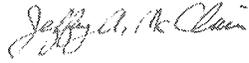
Accordingly, the refund claim is denied in full.

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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.

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 21 2020**

Charles D. & Leona Cammock
6842 Twin Oaks Ct
Canfield, OH 44406

Re: Assessment No. 02201900863565
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:

<u>Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$39,367.14	\$7,481.84	\$20,868.75	\$67,717.73

I. BACKGROUND

The Department assessed Charles D. and Leona Cammock (hereinafter referred to as “the petitioners”) based on the un rebutted presumption that the petitioners were Ohio residents who failed to fully remit an Ohio income tax for the 2012 tax year. Records reflect that the petitioners were 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 petitioners filed a petition for reassessment and state that they were not residents of Ohio for the 2012 tax year and had no Ohio-sourced income; therefore, they contend that they were not required to file an Ohio income tax return. Specifically, the petitioners argue that for the tax year at issue, they were residents of South Dakota and did not move to Ohio until 2013. The petitioners requested a hearing on the matter. The hearing was conducted via telephone with the petitioners’ authorized representative on March 30, 2020.

II. RELEVANT AUTHORITY

A. OHIO RESIDENTS ARE ALWAYS SUBJECT TO INDIVIDUAL INCOME TAX

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.¹ R.C.

¹ 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.

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5747.01(I) defines a “resident” as an individual who is domiciled in this state subject to R.C.5747.24. A “nonresident” is an individual who is not a resident. R.C. 5747.01(J).

The tests set forth in divisions (B), (C) and (D) of R.C. 5747.24 examine the number of Ohio contact periods to arrive at a presumption of whether the individual is an Ohio resident for that taxable year. R.C. 5747.24(A)(1) 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 two consecutive days in Ohio. R.C. 5747.24(E) indicates that an individual is presumed to have a contact period for any period the individual does not prove by a preponderance of the evidence that they had no such contact period.

Former R.C. 5747.24(B)(1), 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 case at hand, the petitioners did not timely file an Affidavit of Non-Ohio Residency/Domicile for the tax year in question and, therefore, they are not entitled to an irrebuttable presumption of non-domicile under R.C. 5747.24(B).

Under Divisions (C) and (D) of R.C. 5747.24, the burden then 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, stated that an individual who has less than 183 contact periods with Ohio and does not qualify for the irrebuttable presumption under division (B) of this section 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 the 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, 249 N.E.2d 808 (1969). The petitioners have presented evidence which indicates that Mr. Cammock worked in South Dakota and further that both petitioners had fewer than 183 contact periods with Ohio during 2012. Therefore, the petitioners must rebut the presumption of domicile with a preponderance of the evidence to the contrary, R.C. 5747.24(C).

B. 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. In addition, R.C. 5747.24(B) “distinguishes verification of domicile from verification of contact periods and abode; it does not conflate them.” *Id.* ¶ 25. While the

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

The Ohio Supreme Court has held that the “domicile of a person [is] where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent he has the intention of returning.” *Sturgeon v. Korte*, 34 Ohio St. 525, 535 (1978), citing Story, Conflict of Laws, Section 41. The Court in *Cunningham* reiterated that domicile is “the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined.” *Cunningham*, 2015-Ohio-2744, ¶ 12, citing *Schill v. Cincinnati Ins. Co.*, 141 Ohio St.3d 382, 2014-Ohio-4527, 24 N.E.3d 1138, ¶ 24, quoting *Williamson v. Osenton*, 232 U.S. 619, 625, 34 S.Ct. 442, 58 L.Ed. 758 (1914). Generally, domicile is defined as “a legal relationship between a person and a particular place which contemplates two factors: first, residence, at least for some period of time and, second, the intent to reside in that place permanently or at least indefinitely.” *Id.*, quoting *Schill*, ¶ 24. Therefore, Ohio Courts have held that “a person can have multiple residences, but can have only one domicile.” *Schill*, ¶ 25, citing *Grant v. Jones*, 39 Ohio St. 506, 515 (1883).

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

Once domicile is established, it continues until the individual abandons it with intent to abandon it. Accordingly, “abandonment of one’s domicile is effected only when a person chooses a new domicile, establishes actual residence in the place chosen and shows a clear intent to establish a new principal and permanent residence.” *E. Cleveland v. Landingham*, 97 Ohio App.3d 385, 391, 646 N.E.2d 897 (1994). For a change in domicile to be established, “the person must have a physical presence in the new residence and intend to stay there.” *Schill*, ¶ 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 (1914).

III. FACTS & CIRCUMSTANCES:

The petitioners contend that they were not residing in Ohio during the year at issue. The petitioners did not timely submit an Affidavit of Non-Ohio Residency/Domicile for the tax year at issue; therefore, the petitioners must rebut the presumption of domicile with a preponderance of the evidence to the contrary, R.C. 5747.24(C). The petitioners contend that they were domiciled in South Dakota during tax year 2012 and support their claim by providing several documents evidencing their South Dakota residency.

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The petitioners provided the Department with a 2012 Billing Summary for property taxes for the petitioners' 2408 Burleigh Street, Yankton, South Dakota abode, copies of utility bills, copies of their W-2s from Mr. Cammock's employer addressed to their South Dakota's abode, and a copy of their 2012 IRS Application for Automatic Extension of Time To File U.S. Individual Income Tax Return using their South Dakota abode's address. The state of South Dakota does not require residents to file a state income tax return, therefore, the petitioners are unable to provide state tax returns as evidence of South Dakota residence. However, the primary tie to the state of Ohio is the petitioners' filing of their 2012 IRS income tax return in which they used an Ohio address. Records show that the petitioners purchased a home in Ohio in March of 2013 when they moved out of South Dakota and into Ohio and used that address when they filed their 2012 IRS income tax return.

IV. CONCLUSION

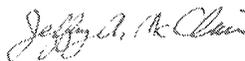
The petitioners have provided evidence sufficient to rebut the presumption of Ohio domicile and have demonstrated by a preponderance of the evidence that they were South Dakota residents in 2012.

Accordingly, the assessment is cancelled.

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

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 21 2020

Terry & Sally Grear
5659 Hickory Place Dr.
Cincinnati, OH 45247

Re: Two Applications for Refund
Individual Income Tax – Multiple Periods

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

<u>Refund Claim No.</u>	<u>Tax Year</u>	<u>Amount Claimed</u>
1900087	2014	\$9,415.00
1900305	2017	\$9,573.00

I. BACKGROUND

The claimants filed amended individual income tax return for tax year 2014 and 2017 claiming the Ohio Small Business Investor Deduction (“SBD”) and the Ohio Business Income Deduction (“BID”) for capital gains that Mr. Grear received from the sale of his ownership interest in Grear & Company CPAs, LLC (“Grear & Company”). Upon initial review, the Department disallowed the SBD and BID for the capital gains and denied the claimants’ refund requested on their amended returns for tax year 2014 and 2017.¹ The claimants contend that the Department incorrectly identified the capital gains from the sale of Grear & Company as nonbusiness income and denied the corresponding SBD and BID. Accordingly, the claimants object to the denial of their refund claim and request a refund of income tax paid to Ohio for tax year 2014 and 2017.

The claimants object to the denial of their refund claims reported on their amended returns for tax year 2014 and 2017. The claimants requested an administrative review of their refund claim denials in accordance with R.C. 5703.70 but did not request a hearing. Therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claims.

II. CLAIMANTS’ CONTENTIONS

The claimants assert that their 2014 and 2017 amended individual income tax returns were correct as filed. The claimants contend that the gain from the sale of Mr. Grear’s ownership interest in Grear & Company, is business income and thus eligible for the SBD and BID. The claimants state that effective January 1, 2014, Mr. Grear sold his company, Grear & Company, which included his customers and company name to Clayton L. Scroggins Associates, Inc. who later changed the company name to

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.”

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ScrogginsGear Inc. to capitalize on Mr. Gear's good name. The claimants further state that they elected to record the capital gains from the sale as an installment sale based on when they received the income. Accordingly, the claimants argue that the sale of Mr. Gear's entire ownership interest and goodwill in Gear & Company to Clayton L. Scroggins Associates, Inc. is considered a liquidation of a business.

III. RELEVANT AUTHORITY

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

The SBD was effective for tax years 2013 and 2014 and was applied to a taxpayer's apportioned Ohio business net income. Former R.C. 5747.01(A)(31), provided that a taxpayer's SBD income means "the portion of the taxpayer's adjusted gross income that is business income reduced by deductions from business income and apportioned or allocated to" Ohio "to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year." For tax year 2013, the SBD amounted to 50% of up to \$250,000 of the taxpayer's Ohio-sourced business income. However, for tax year 2014, the SBD was increased to 75% of the first \$250,000 of apportioned business income (up to \$187,500).

For tax year 2015, 75% of the first \$250,000 of business income earned by taxpayers who filed single or married filing jointly, and was included in federal adjusted gross income, was deductible under the BID. For tax years 2016 and thereafter, R.C. 5747.01(A)(31) allows individuals jointly filing the Ohio IT 1040 to deduct up to \$250,000 of business income, to the extent such income is included in federal adjusted gross income. Any remaining business income is taxed at a flat 3% rate.

B. BUSINESS & NONBUSINESS INCOME

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

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

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

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

[A]ll income other than business income and may include, but is not limited to, compensation, rents and royalties from real or tangible personal property, capital gains,

interest, dividends and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards.

Nonbusiness income is allocated to the state depending on the type of income. *See* R.C. 5747.20(B) (allocating, for example, compensation to the place where it is earned, rents to the location of the property, and capital gains from the sale of intangible property to the taxpayer's state of domicile). The definition of nonbusiness income necessarily excludes business income, and only "may include" the listed items. As such, the statute provides potential examples of nonbusiness income, and the examples serve as only a non-exhaustive list of types of nonbusiness income. The determination of whether income is business or nonbusiness income rests on tests derived from case law in addition to whether the income was from the liquidation of a business.

In *Corrigan v. Testa*, the Supreme Court of Ohio reviewed the applicability of R.C. 5747.212 to nonresident taxpayers and ultimately found that "the ordinary treatment of capital gains derived from intangible property" (e.g. an ownership interest in an entity), is nonbusiness income. *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶3 (2016). Additionally, while the Court has found that income generated by a pass-through entity is business income to the entity's investors, it has declined to extend such treatment to income from an investor's sale of the pass-through entity. *Id.* ¶36-37; *see also* *Agley v. Tracy*, 87 Ohio St.3d 265, 719 N.E.2d 951 (1999). Furthermore, the Court has declined to rely on "form-over-substance" arguments when determining the proper classification of income derived from the sale of an interest in a business, instead relying on the actual facts of the transaction giving rise to income. *Corrigan* at ¶62-67.

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

Part I: 'Business income' means income arising from transactions, activities, and sources in the regular course of a trade or business, and

Part II: includes income from tangible and intangible personal property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation.

Kemppel at 422 (internal citations omitted).

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

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C. INCOME FROM THE LIQUIDATION OF A BUSINESS

Subsequent to the *Kemppel* decision, the Ohio General Assembly passed Senate Bill 261, which amended Ohio's definition of business income found in R.C. 5747.01(B) to include income from the partial or complete liquidation of a business.² See, Am. Sub. Senate Bill 261 (Effective Date, June 5, 2002). This is critical, as the legislative history shows the General Assembly relied on the facts in *Kemppel* when enacting this amendment to R.C. 5747.01(B).³ The Legislative Service Commission's ("LSC") "Final Analysis" for Senate Bill 261, which is an explanation of permanent law, directly references the *Kemppel* case when explaining the change to R.C. 5747.01(B).⁴

In *Kemppel*, the corporation sold all its assets and ceased doing business. *Kemppel* at 420. The link between liquidation and cessation of operations was reiterated several times throughout the *Kemppel* decision. The Court cited many out-of-state cases that differentiate between the sale of assets as part of the cessation of the business (a "true liquidation") versus the sale of assets to another who continues the business. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Com., Bd. of Fin. & Revenue*, 537 Pa. 205, 209, 642 A.2d 472, 474-75 (1994) and *Polaroid Corp. v. Offerman*, 349 N.C. 290, 307, 507 S.E.2d 284, 296 (1998). Taken together, this is a clear indication that the cessation of business operations is a material fact in determining what can be considered liquidation under R.C. 5747.01(B). The converse implication is that the sale of an ownership interest in an entity that continues to operate after the sale is not a liquidation under Ohio law, but rather is simply the sale of an intangible asset.

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

IV. ANALYSIS

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

Income is business income under the "transactional test" only if it is derived from a transaction in which the taxpayer regularly engages. *Kemppel* at 422. The claimants have presented no evidence that either Mr. Gear or Gear & Company regularly disposed of intangible interests in entities. On the contrary, the record reflects that the sale of Mr. Gear's intangible ownership interest in the business was a one-time occurrence and, therefore, did not arise from transactions or activities in the normal course of his,

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

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

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

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or even Grear & Company's trade or business. As such, the gains from this extraordinary and unusual event do not meet the transactional test.

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

Income is also business income if it is generated from the "partial or complete liquidation of a business * * *." R.C. 5747.01(B). Based on prior case law and the legislative intent which led to the amendment of R.C. 5747.01(B), a "partial or complete liquidation of a business" requires a complete asset sale followed by the actual cessation of all business operations (a complete liquidation), or the sale of certain assets followed by the actual cessation of the line of business relating to those assets (a partial liquidation). In contrast, the sale of an intangible asset such as an ownership interest in an entity, is not a liquidation. Instead, it is merely a transactional sale which results in a capital gain to the investor. In this case, Mr. Grear sold his entire intangible ownership interest and his goodwill associated with his ownership interest in Grear & Company. The intangible interest was held by Mr. Grear personally, not Grear & Company, and was not used exclusively or primarily for Grear & Company's business purposes as a business asset would be. Additionally, the sale of goodwill alone is not business income under Ohio law unless it results from a partial or complete liquidation of a business. In this case, the business was not liquidated and dissolved; rather, it continues to operate as a public accounting firm but under different ownership and a different name. Therefore, Mr. Grear's gain from the sale of Grear & Company was not a partial or complete liquidation of a business.

V. CONCLUSION

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

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

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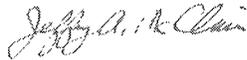
the business income tax rate.

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Accordingly, the refund claims are denied in full.

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Donald E. Griffith
4200 Bauman Hill Rd. SE
Lancaster, OH 43130

Re: Assessment No. 02201705927076
Individual Income Tax – 01/01/2013 – 12/31/2013

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$3,437.81	\$304.88	\$609.76	\$4,352.45

The Department assessed the petitioner, Donald E. (Joe D.) Griffith (hereinafter “Griffith”) after making adjustments to the individual income tax return that he filed for the tax period in question. The petitioner filed a timely petition for reassessment requesting a cancellation of the assessment. The petitioner also requested a hearing on the matter which was conducted via telephone. Based on the evidence currently available to the Tax Commissioner, the petitioner’s request is well taken.

Accordingly, the assessment is cancelled.

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

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

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

JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL DETERMINATION

Date: **MAY 27 2020**

Randy L. & Marcy J. Happeney
146 Hickory Lane
Lancaster, OH 43130

Re: Three Assessments
Individual Income Tax – Multiple Periods

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

Assessment No.	Tax Year	Tax Amount	Interest	Penalty	Total
02201701814609	2013	\$5,958.22	\$500.32	\$1,000.64	\$7,459.18
02201701814610	2014	\$6,777.53	\$365.80	\$731.60	\$7,874.93
02201701814611	2015	\$2,362.60	\$55.92	\$111.84	\$2,530.36

The Department assessed the petitioners after making adjustments to the individual income tax returns that they filed for the tax periods in question. The petitioners filed timely petitions for reassessment requesting that the assessments be cancelled. The petitioners also requested a hearing on the matters which was conducted via telephone. Based on the evidence currently available to the Tax Commissioner, the petitioners' request is well taken.

Accordingly, the assessments are cancelled.

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

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

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE
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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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FINAL DETERMINATION

Date: **MAY 29 2020**

Tiffany Harris
1678 Ridgewick Dr
Wickliffe, OH 44092

Re: Assessment No. 02201819278392
Individual Income Tax – 2016

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$826.00	\$40.46	\$80.92	\$947.38

The Department assessed Tiffany Harris (hereinafter referred to as “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 20, 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



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

FINAL DETERMINATION

Date:

MAY 27 2020

Daren M. Keeter
11180 Alpharetta Hwy.
Roswell, GA 30076

Re: Assessment No. 02201827845931
Individual Income Tax – 2000

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$2,311,291.55	\$1,973,080.26	\$3,946,160.52	\$8,230,532.33

I. BACKGROUND

The Department assessed the petitioner for failing to timely file an amended individual income tax return to reflect a change in the petitioner’s federal adjusted gross income under R.C. 5747.10. This information was reported to the Department by the Internal Revenue Service (“IRS”) under authorization of Section 6103(d) of the Internal Revenue Code.

Specifically, the Department received information from the IRS that the petitioner’s 2000 federal adjusted gross income (“FAGI”) was increased as a result of an IRS audit. The Department issued the assessment currently considered based upon the adjustments made pursuant to the IRS audit. The petitioner filed a timely petition for reassessment but did not pay the amounts assessed or file an amended Ohio income tax return for the tax year in question.

II. RELEVANT AUTHORITY

Ohio’s income tax is levied on individuals, trusts, and estates residing in Ohio or earning or receiving income in Ohio, or otherwise having nexus with or in Ohio. R.C. 5747.01, R.C. 5747.02. For Ohio income tax purposes, the starting point is FAGI which is then adjusted pursuant to R.C. 5747.01 et seq. to reach Ohio Adjusted Gross Income. Every taxpayer who is liable for income earned or received in Ohio is required to file an annual income tax return. R.C. 5747.08.

Former R.C. 5747.10, in effect for the period in question, mandated that “if any of the facts, figures, computations, or attachments required in a taxpayer’s annual return * * * must be altered as the result of an adjustment to the taxpayer’s federal income tax return, * * * the taxpayer shall file an amended return with the Tax Commissioner.” Further, the amended return shall be filed not later than sixty days after the adjustment has been agreed to or finally determined for federal income purposes. Former R.C. 5747.10.

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Pursuant to former R.C. 5747.13, in effect for the period in question, a taxpayer's ability to challenge an income tax assessment is, in certain circumstances, specifically dependent upon the payment of the amounts assessed. Under former R.C. 5747.13(B), a taxpayer must file a petition for reassessment within sixty days after the service of the notice of assessment. Important to this matter is former R.C. 5747.13(E) provided, in pertinent part, that:

The portion of an assessment that must be paid upon the filing of a petition for reassessment shall be as follows: * * *

“(2) *If the taxpayer or qualifying entity that is assessed failed to file, prior to the date of issuance of the assessment, the annual return or report required by section 5747.08 or 5747.42 of the Revised Code, any amended return or amended report required by section 5747.10 or 5747.45 of the Revised Code for the taxable year at issue, or any report required by division (B) of section 5747.05 of the Revised Code to indicate a reduction in the amount of the credit provided under that division, payment of the assessment, including interest but not penalty is required, except as otherwise provided under division (E)(6) or (7) of this section * * *.*” (Emphasis added).

Ohio's Court of Appeals for the Eleventh District examined former R.C. 5747.10 and found that IRS adjustments to taxpayers' federal adjusted gross income which directly affected their Ohio income tax liability, which in turn, triggered the requirement to file an amended return pursuant to R.C. 5747.10. *Gibson v. Limbach*, 11th Dist. Trumbull, 74 Ohio App.3d 498, 501, 599 N.E.2d 715, 717 (1991).

III. ANALYSIS OF THE FACTS & CIRCUMSTANCES

In the present case, the petitioner timely filed an original Ohio income tax return. The petitioner reported that he was a nonresident with Ohio sourced income and he remitted Ohio income tax accordingly. In 2016, the IRS adjusted and increased petitioner's FAGI based on an audit which was finally determined on or around July 11, 2016. Pursuant to former R.C. 5747.10, the petitioner had sixty days from July 11, 2016, the date the adjusted FAGI was finalized, to file an amended Ohio return. The petitioner asserts that he was a nonresident and that “(t)he adjustment made by the Internal Revenue Service was not subject to tax in Ohio.” The petitioner's nonresidency is not in dispute. The petitioner's original nonresident return indicates that he had nexus with Ohio and Ohio-sourced income during the tax year in question. Moreover, despite the petitioner's contention, FAGI is the starting point for Ohio's income tax calculation, so an adjustment to the adjustment to the petitioner's FAGI by the IRS directly affects the petitioner's Ohio income tax liability and therefore triggers the requirement to file an amended return pursuant to R.C. 5747.10. *See Gibson, supra.*

As previously mentioned, the petitioner was required to file the amended return “after the adjustment has been agreed or finally determined for federal income tax purposes * * *.” Former R.C. 5747.10. This requirement to file an amended return after the IRS modifies a taxpayer's FAGI was further delineated by the Supreme Court of Ohio in *Wagenknecht v. Levin*. *Wagenknecht v. Levin*, 121 Ohio St. 3d 13, 2008-Ohio-6812, 901 N.E.2d 772, ¶ 15. Nonetheless, Department records indicate that, as of the date of this Final Determination, the petitioner has not filed an amended Ohio return, as required by former R.C. 5747.10. Department records also show that the petitioner did not make any payment under this

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assessment. Therefore, pursuant to R.C. 5747.13, the Tax Commissioner lacks jurisdiction to consider the objections raised in petitioner's petition for reassessment.

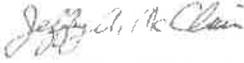
Nevertheless, R.C. 5703.05(H) provides the Tax Commissioner with the authority to review assessments on his own motion. Here, that review will be limited to the penalty amount assessed. In accordance with R.C. 5703.05(H), the Tax Commissioner shall partially abate penalty as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$2,311,291.55	\$1,973,080.26	\$346,693.73	\$4,631,065.54

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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Department of Taxation

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

FINAL DETERMINATION

Date: **MAY 29 2020**

Andrew & Nancy Kepley
755 Sandlewood Drive
Canal Fulton, OH 44614

Re: Assessment No. 02201828947747
Individual Income Tax - 2017

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$5,200.00	\$102.00	\$204.00	\$5,506.00

I. BACKGROUND

The Ohio Department of Taxation assessed Andrew and Nancy Kepley (“the petitioners”) after making corrections to their Ohio individual income tax return for tax year 2017. Specifically, the Department disallowed a Business Income Deduction (“BID”) which resulted in the assessment currently considered. Records reflect that that Nancy Kepley (“Ms. Kepley”) and her partner sold their interests in “Our Friends and Family LLC” (“the company”) to a third party, JADD Corporation. As a result of the sale, Ms. Kepley realized a capital gain from the disposition of her interest in the company. The petitioners contend that they can deduct the capital gain Ms. Kepley realized as a BID for the tax period in question. The petitioners did not request a hearing; therefore, this matter is decided upon information available to the Tax Commissioner and the evidence supplied with the application.

II. THE PETITIONERS’ CONTENTIONS

The petitioners contend that the capital gain Ms. Kepley realized from the sale of her 50% ownership interest in the company should be deductible as BID. The company’s purpose is to provide and sell nonmedical, in-home companion care services under the trade name “Home Helpers” and “Direct Link.”¹

¹ The Ohio Secretary of State, *Organization/Registration of Limited Liability Company*, <https://bizimage.ohiosos.gov/api/image/pdf/200707101898>, (accessed May 27, 2020).

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III. AUTHORITY

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

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

B. BUSINESS INCOME – FUNCTIONAL & TRANSACTIONAL TESTS

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

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

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

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

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

Nonbusiness income is allocated to the state depending on the type of income. *See* R.C. 5747.20(B) (allocating, for example, compensation to the place where it is earned, rents to the location of the property, and capital gains from the sale of intangible property to the taxpayer's state of domicile). The definition of nonbusiness income necessarily excludes business income, and only “may include” the listed items. As such, the statute provides potential examples of nonbusiness income, but does not provide definitive types of nonbusiness income. The determination of whether income is business or nonbusiness income rests on tests derived from case law in addition to whether the income was from the liquidation of a business.

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

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

In *Kemppel v. Zaino*, the Ohio Supreme Court reviewed the two tests used to classify business income. *Kemppel v. Zaino*, 91 Ohio St.3d 420, 746 N.E.2d 1073 (2001). The tests analyze only the first sentence of the business income definition under R.C. 5747.01(B) and separate it into two parts:

"Part I: "Business income" means income arising from transactions, activities, and sources in the regular course of a trade or business," and

"Part II: 'includes income from tangible and intangible personal property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation.'"

Kemppel at 422. (internal citations omitted).

The Court described the transactional test, which "considers the statute as a whole and emphasizes Part I of the definition." *Id.* The Court determined that income is classified as business income under the transactional test if "it arises from a transaction or activity that occurs in the regular course of the business in which the taxpayer engages." *Id.* The Court then described the functional test finding that income is classified as business income if "use of the property constituted an integral part of the regular course of a trade or business operation." *Id.* at 423. Under the functional test, the extraordinary nature or infrequency of the transaction is irrelevant." *Id.* The Court found that a liquidation followed by a dissolution fit neither test nor was it nonbusiness income. *Id.*

C. INCOME FROM THE LIQUIDATION OF A BUSINESS

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

In *Kemppel*, corporation sold all its assets and ceased the business. *Kemppel* at 420. The link between liquidation and cessation of operations was reiterated several times throughout the *Kemppel* decision. The Court cited out-of-state cases that differentiate between the sale of assets as part of the cessation of the business (a "true liquidation") versus the sale of assets to another who continue the business. *Kemppel*

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

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

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

at 423, citing *Laurel Pipe Line Co. v. Com., Bd. Of Fin. & Revenue*, 537 Pa, 205, 209, 642 A.2d 472, 474-75 (1994) and *Polaroid Corp. v. Offerman*, 349 N.C. 290, 307, 507 S.E.2d 284, 296 (1998). Taken together, this is a clear indication that the cessation of business operation is a material fact in determining what can be considered liquidation under R.C. 5747.01(B). The converse implication is that the sale of an ownership interest in an entity that continues to operate after the sale is not a liquidation under Ohio law, but rather is simply the sale of an intangible asset.

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

IV. ANALYSIS

In the present case, Ms. Kepley can only deduct her capital gains from the sale of the company if such gains are business income. Ms. Kepley’s participation and ownership interest in the company are not individually or collectively determinative for the purposes of addressing whether the gain resulting from her sale of her interest in the business is business income. Instead, for the petitioners to prevail, they must show that the income (1) meets the transactional test, (2) meets the functional test or (3) is related to a “partial or complete liquidation of a business.” R.C. 5747.01(B).

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

Income is business income under the “functional test” only “if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer’s regular trade or business operations.” R.C. 5747.01(B) and *Kemppel* at 423. Additionally, gains satisfying the functional test generally arise from the sale of an asset which produces business income while it was owned by the taxpayer. *Kemppel* at 423, citing *Laurel Pipe Line Co. v. Commonwealth, Bd. Of Fin. & Revenue*, 537 Pa. 205, 210 (1994). Here, the petitioners have not argued or demonstrated that acquiring or disposing of its intangible interests in companies constituted an integral part of their regular trade or business. It appears that Ms. Kepley provided in-home care services for the company. As described above, the company was in the business of offering, performing, and selling nonmedical, in-home companion care service under the trade name “Home Helpers” and “Direct Link.”⁵ In short, Ms. Kepley’s intangible property (i.e. her ownership interest in the company) is not “integral” to the “regular course of a trade or business operation” conducted by either Ms. Kepley or the company. Accordingly, the resulting gains from the sale of said intangible property does not meet the functional test.

⁵ The Ohio Secretary of State, *Organization/Registration of Limited Liability Company*, <https://bizimage.ohiosos.gov/api/image/pdf/200707101898>, (accessed May 27, 2020).

Income is also business income if it is generated from the “partial or complete liquidation of a business * * *,” R.C. 5747.01(B). Based on prior case law and the legislative intent which led to the amendment of R.C. 5747.01(B), a “partial or complete liquidation of a business” requires a complete asset sale followed by the actual cessation of all business operations (a complete liquidation), or the sale of certain assets followed by the actual cessation of the line of business relating to those assets (a partial liquidation). In contrast, the sale of an intangible asset such as an ownership interest in an entity, is not a liquidation. Instead, it is merely a transactional sale which results in a capital gain to the investor. In this case, Ms. Kepley sold her entire intangible ownership interest in the company. Ms. Kepley did not sell a business asset held by the company. In addition, the intangible interest was held by Ms. Kepley personally, not the company, and was not used exclusively or primarily for the company’s business purposes as a business asset would be. The business was not liquidated and dissolved; rather, it continues to operate as in-home companion care service, but under different ownership. Therefore, Ms. Kepley’s gain from the sale of the company was not a partial or complete liquidation of a business.

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

V. CONCLUSION

Therefore, the capital gains that Ms. Kepley realized from the sale of her ownership interest in the company are not business income under either the transactional or functional tests under R.C. 5747.01(B). Furthermore, the income is not from “a partial or complete liquidation,” as that phrase is used in R.C. 5747.01(B). The legislative history shows that “partial or complete liquidation” contemplates the cessation of the business, as opposed to an investor selling an ownership interest to another party who continues to operate the business. Records show that the business continued to operate under different ownership. There was not an actual sale of business assets followed by a cessation of the business. As such, the Ms. Kepley’s capital gains are nonbusiness income and does not qualify for Ohio’s BID or business income tax rate.

VI. PENALTY ABATEMENT

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 support a full abatement of the penalty.

For the reasons discussed above, the assessment is adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$5,200.00	\$102.00	\$0.00	\$5,302.00

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

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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 APPROPRAITELY CLOSED.

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of Taxation

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

FINAL DETERMINATION

Date: **MAY 29 2020**

Sharon Kilbane
13055 Chase Moor
Strongsville, OH 44136

Re: Refund Claim No. 2019110901
Individual Income Tax – 2018

This is the final determination of the Tax Commissioner with regard to the above-referenced request for refund filed pursuant to 5747.11:

<u>Tax Year</u>	<u>Refund Claimed</u>	<u>Refund Previously Granted</u>
2018	\$51,344	\$408

I. BACKGROUND

The claimant electronically filed her 2018 Ohio IT 1040, Ohio Individual Income Tax Return, showing “Total Ohio tax payments” (line 18) of \$51,749 and an “Overpayment” (line 24) of \$51,344.¹ After review, the Department reduced the claimant’s “Total Ohio tax payments” amount from \$51,749 to \$813, and also reduced the claimant’s deduction for Ohio 529 contributions from \$50,000 to \$0. The claimant has since provided evidence to support her \$50,000 deduction.² However, the Department was unable to verify the additional \$50,936 in payments and thus could not further adjust the return.

The claimant requested a hearing on the matter in accordance with R.C. 5703.70(C)(1), which was conducted via telephone on December 17, 2019. This matter is now decided based upon the evidence currently available to the Tax Commissioner.

II. CLAIMANT’S CONTENTIONS

At both the hearing and in correspondence to the Department, the claimant contends that the additional \$50,936 is an overpayment carryforward from her 2016 IT 1040 filing. Ms. Kilbane contends that she entered into a settlement agreement with the Department relating to tax year 2016, and as part of the settlement agreement, she and the Department agreed to allow her to preserve the \$50,936 overpayment carryforward as claimed on her originally filed 2016 IT 1040 and apply it to her 2018 Ohio IT 1040 filing.

¹ Of the total overpayment, the petitioner requested the Department credit \$1,344 toward her 2019 taxes and refund the remaining \$50,000. 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 This evidence led to the cancellation of Assessment No. 02201923229732 via a corrected assessment on November 6, 2019, and a partial refund to the taxpayer of \$408.

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III. THE SETTLEMENT AND DISPOSITION OF TAX YEAR 2016

The Department does not dispute that claimant's originally filed 2016 individual income tax return requested an overpayment carryforward of \$50,936. However, the Department adjusted Ms. Kilbane's 2016 return, which reduced her overpayment from \$50,936 to \$0 and led to an assessment³ for additional tax, plus applicable interest and penalty.

The Department also does not dispute that claimant and the Tax Commissioner entered into a settlement agreement (the "Agreement") with regard to Ms. Kilbane's 2016 individual income tax filing.⁴ The Agreement required Ms. Kilbane to pay a portion of the assessed tax and interest, and expressly finalized her Ohio income tax liability for tax year 2016. It did not contain any language preserving Ms. Kilbane's originally claimed overpayment carryforward.

Pursuant to the terms of the Agreement, upon its execution the Commissioner issued a final determination on the assessment. The body of the final determination reads in its entirety:

Re: Assessment No. 02201724373216
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 above individual income tax assessment.

In resolution of this matter, the Tax Commissioner and the petitioner have reached an agreement to a modification of the assessment.

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

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

As with the Agreement, the final determination resolves the matter and does not contain language that preserves Ms. Kilbane's originally claimed overpayment carryforward from tax year 2016.

IV. LAW & DISCUSSION

The Commissioner, with the consent of the taxpayer, may credit the taxpayer's income tax refund from one tax year to the following tax year. R.C. 5747.12. A refund exists when the taxpayer has an overpayment- that is, when the taxpayer has paid an amount in excess of "the figure determined to be the correct amount of the tax." *See* R.C. 5747.11 and 5747.01(R). Thus, if the taxpayer is not entitled to a refund for the tax year, the Commissioner cannot allow the taxpayer to claim an overpayment carryforward.

³ Assessment No. 02201724373216.

⁴ While the Agreement is "confidential and may not be disclosed to any third party, except as required by law", the claimant has provided a copy of the Agreement as part of her refund claim. Furthermore, both parties agree that the Agreement is material to the disposition of Ms. Kilbane's refund request.

In this matter, the claimant's requested overpayment carryforward stems from her 2016 Ohio IT 1040. This tax year was finalized as part of a settlement between the Commissioner and Ms. Kilbane. As such, whether the claimant is entitled to a \$50,936 overpayment carryforward is dependent solely on the parties' Agreement for tax year 2016, and thus this is less an issue of Ohio's income tax law and more an issue of contract interpretation.

When examining a contract, here the Agreement, the court "examines the contract as a whole and presumes that the intent of the parties is reflected in the language used in the agreement. Where the parties following negotiation make mutual promises which thereafter are integrated into an unambiguous contract duly executed by them, courts will not give the contract a construction other than that which the plain language of the contract provides. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. Evidence cannot be introduced to show an agreement between the parties that is materially different from that expressed by the clear and unambiguous language of the instrument. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St.3d 485, 2011-Ohio-4189 at ¶22 (internal quotation marks and citations omitted).

The facts are not in dispute; the Commissioner and Ms. Kilbane executed a binding Agreement for tax year 2016. The Agreement called for Ms. Kilbane to make a payment in order to resolve a balance due assessment for the tax year. The Agreement did not expressly or implicitly preserve a refund of any kind that Ms. Kilbane could now apply to another tax year.⁵ Instead, by its terms the Agreement "finalized [Ms. Kilbane's] Ohio individual income tax liability for tax year 2016."

In short, each side made "mutual promises" to one another and integrated said promises into "an unambiguous contract duly executed by them...."⁶ *Id.* The Agreement's language is clear, and thus its review is not subject to extrinsic evidence or speculation as to intent; to do so would be to "show an agreement between the parties that is materially different from that expressed by the clear and unambiguous language" of the Agreement. *Id.* Furthermore, the final determination issued subsequent to the Agreement, and as required by the Agreement, also does not expressly or implicitly preserve the claimant's overpayment carryforward from 2016 to 2018. To the contrary, the final determination mentions the assessment being "paid in full", which further evinces that the disposition of tax year 2016 was not a refund, but instead a tax due.

Based on this analysis, the claimant was not entitled to a refund for tax year 2016. The Agreement does not expressly or implicitly allow the claimant an overpayment carryforward on her 2016 return. Thus, said amount is not available on her 2018 return, and claimant's contention is not well taken.

V. CONCLUSION

In sum, the claimant is attempting to utilize a \$50,936 overpayment carryforward from a tax year in which she did not have an overpayment and thus was not due a refund. Claimant's argument hinges on a unilateral belief that she would be able to preserve her overpayment carryforward from tax year 2016

⁵ In fact, the Agreement states that no "refund claim shall be made or filed for tax year 2016, except to the extent necessary... to incorporate the effects of changes to Taxpayer's federal income tax returns."

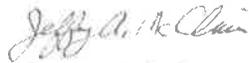
⁶ The Agreement spelled out all the material terms- the applicable tax year, the parties, the actions of the parties, the dates by which said actions would occur, and that completion of those actions and execution of the Agreement would finalize Ms. Kilbane's 2016 tax year.

to tax year 2018. However, the Agreement's language is clear and can be given definite legal meaning. The Agreement not only does not convey an overpayment carryforward to the claimant, it actually *required her to pay tax and interest* on an assessment to finalize her 2016 Ohio income tax liability. Nothing in the Agreement or the subsequent final determination creates a refund or an amount that could be credited from 2016 to another tax year. Based upon its terms, it is impossible to give the Agreement "a construction other than that which the plain language of the contract provides." *Id.*

As such, the additional refund amount 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 FILED APPROPRIATELY CLOSED.

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 21 2020

Ruben N. Patterson
2798 E 126th Street Buckeye
Cleveland, OH 44120

Re: Assessment No. 02201817268225
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:

<u>Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Total</u>
\$561.72	\$134.03	\$276.47	\$972.22

I. BACKGROUND

The Department assessed Ruben N. Patterson (hereinafter referred to as “the petitioner”) based on the un rebutted presumption that he was an Ohio resident who failed 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 filed a petition for reassessment and contends that “the [petitioner] relied on his Agent/Manager to handle any and all financial matters and had no knowledge taxes were due.” The petitioner also contends that he did not live in Ohio during the year at issue and requested a hearing on the matter. The hearing was conducted via telephone with the petitioner and his authorized representative on April 20, 2020.

II. RELEVANT AUTHORITY

A. OHIO RESIDENTS ARE ALWAYS SUBJECT TO INDIVIDUAL INCOME TAX

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.¹ R.C. 5747.01(I) defines a “resident” as an individual who is domiciled in this state subject to R.C.5747.24. A “nonresident” is an individual who is not a resident. R.C. 5747.01(J).

¹ 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.

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The tests set forth in divisions (B), (C) and (D) of R.C. 5747.24 examine the number of Ohio contact periods to arrive at a presumption of whether the individual is an Ohio resident for that taxable year. R.C. 5747.24(A)(1) 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 two consecutive days in Ohio. R.C. 5747.24(E) indicates that an individual is presumed to have a contact period for any period the individual does not prove by a preponderance of the evidence that they had no such contact period.

Former R.C. 5747.24(B)(1), 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 case at hand, the petitioner did not timely file an Affidavit of Non-Ohio Residency/Domicile for the tax year in question and, therefore, he is not entitled to an irrebuttable presumption of non-domicile under R.C. 5747.24(B).

Under Divisions (C) and (D) of R.C. 5747.24, the burden then 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, stated that an individual who has less than 183 contact periods with Ohio and does not qualify for the irrebuttable presumption under division (B) of this section 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 the 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, 249 N.E.2d 808 (1969).

B. 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. In addition, R.C. 5747.24(B) “distinguishes verification of domicile from verification of contact periods and abode; it does not conflate them.” *Id.* ¶ 25. While the Ohio Revised Code does not define “domicile,” the definition of domicile has been set forth in previous Ohio court decisions.

The Ohio Supreme Court has held that the “domicile of a person [is] where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent he has the intention of returning.” *Sturgeon v. Korte*, 34 Ohio St. 525, 535 (1978), citing Story, Conflict of Laws, Section

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

At common law, “the issue of domicile is one of intent determined by the facts of the individual case,” including “the acts and declarations of the person” and the totality of “accompanying circumstances.” *Davis v. Limbach*, BTA No. 89-C-267, 1992 WL 275694, *4 (Sept. 25, 1992), citing *State ex rel. Kaplan v. Kuhn*, 8 Ohio N.P. 197, 202, 11 Ohio Dec. 321 (1901). The Ohio Supreme Court has also held that “the law ascribes a domicile to every person, and no person can be without one.” *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 (1914).

C. THE FAILURE TO MAKE A TIMELY FILING OF A TAX RETURN IS NOT EXCUSED BY THE TAXPAYER’S RELIANCE ON AN AGENT

In *United States v. Boyle*, the United States Supreme Court addressed the issue, under federal tax requirements, of a taxpayer’s failure to make a timely filing of a tax return because he relied on his agent and held that:

The failure to make a timely filing of a tax return is not excused by the taxpayer’s reliance of an agent, and such reliance is not ‘reasonable cause’ for a late filing * * *. To say that it was ‘reasonable’ for respondent to assume that the attorney would meet the statutory deadline may resolve the matter as between them, but not with respect to the respondent’s obligation under that statute. It requires no special training or effort on the taxpayer’s part to ascertain a deadline and ensure that it is met. That the attorney, as respondent’s agent, was expected to attend to the matter does not relieve the principal of his duty to meet the deadline. *United States v. Boyle*, 469 U.S. 241, at 253 (1985).

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Similarly, in *Aryana Meghnot D.B.A. Arya Oriental Rugs v. Limbach*, the Ohio Board of Tax Appeals stated that “[r]eliance upon an accountant is not uncommon, but that reliance cannot function to excuse a taxpayer from the consequences of his failure to comply with the settled principle that tax returns have fixed filing dates and returns must be filed (and taxes paid) when due or serious problems will surely result.” *Aryana Meghnot D.B.A. Arya Oriental Rugs, Appellant v. Joanne Limbach, Tax Commissioner of Ohio, Appellee*, 1991 WL 235424, at *4. The Board further stated that “[f]ailure to comply with a basic statutory obligation is not excused simply by the assignment or delegation of portion of the responsibility therefor.” *Id.*

III. FACTS & CIRCUMSTANCES:

The petitioner initially contended that he was not residing or domiciled in Ohio during the year at issue. The petitioner did not submit an Affidavit of Non-Ohio Residency/Domicile for the tax year at issue; therefore, the petitioner must rebut the presumption of domicile with a preponderance of the evidence to the contrary, R.C. 5747.24(C). Department records reflect that the petitioner maintained an abode in Ohio for the tax year at issue. Moreover, in support of his claim of not being domiciled in Ohio, the only evidence provided by the petitioner was a written objection in his petition for reassessment. No other evidence was provided to substantiate his objection. The petitioner, thus, has failed to provide the Department with sufficient documentation to demonstrate that he was domiciled in other State other than Ohio. Furthermore, during the hearing, the petitioner admitted he was a resident of Ohio during the tax year in question and recalled receiving income during the tax year in question. The petitioner subsequently withdrew his domicile objection to the assessment by providing the Tax Commissioner with a written statement.

The petitioner also contends that he was not aware that any taxes were due or that he was required to file an Ohio tax return because he relied on his business manager to handle any and all of his financial matters. In support of his claim, the petitioner submitted a document detailing all his encounters with his financial manager and in which the petitioner alleges he was defrauded by him. However, as was discussed by the United States Supreme Court in *Boyle* and by the Ohio Board of Tax Appeals in *Arya Oriental Rugs*, the petitioner’s reliance on his agent to file and pay taxes and the evidence of failure of his agent to do so may resolve the matter as between them but not with respect to the petitioner’s obligation under the statute. The petitioner conceded to having been a resident of Ohio during the year at issue and was aware of the income received during the year at issue, therefore, the petitioner was on notice of the settled principle that tax returns have fixed filing dates and this obligation is not excused by the simple delegation of duty to an agent.

During the hearing proceeding, the petitioner conceded to be a resident of Ohio during the tax year at issue. Subsequently, the petitioner withdrew his objection of not being domiciled in Ohio by providing the Tax Commissioner with a written statement. R.C. 5747.13(E) requires the total assessed amount to be paid with a petition for reassessment if the taxpayer fails to file a tax return, and the basis for this failure is not an assertion of lack of nexus with Ohio or a contention that the correctly calculated tax liability minus credits is less than one dollar. In this case, the petitioner failed to file an individual income tax return for the tax year at issue and did not pay the tax, interest, and penalty amounts assessed. Additionally, the petitioner withdrew his objection that he lacked nexus with the State of Ohio and records reflect that the petitioner was audited by the IRS and had federal adjusted gross

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income in an amount which would have resulted in an Ohio income tax liability exceeding one dollar and one cent.

IV. CONCLUSION

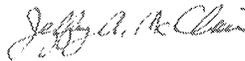
For the forgoing reasons, the petitioner's reliance on his agent to file and pay taxes does not release him from the obligation under the statute. Furthermore, the petitioner conceded to having been a resident of Ohio and that he received income during the tax year at issue. Therefore, the petitioner was required to file an Ohio tax return for the 2012 tax year. Consequently, R.C. 5747.13(E) requires the total assessed amount to be paid with the petition for reassessment if the petitioner fails to file a tax return, and the basis for this failure is not an assertion of lack of nexus with Ohio or a contention that the correctly calculated tax liability minus credits is less than one dollar. As a result, and in accordance with the relevant authority described above, unless the petitioner makes the required payment, the Tax Commissioner must dismiss the petition.

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

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

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of
Taxation

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

FINAL DETERMINATION

Date: MAY 27 2020

Jeff J. & Allison G. Spangler
7659 Richland Rd. NE
Rushville, OH 43150

Re: Three Assessments
Individual Income Tax – Multiple Periods

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

Assessment No.	Tax Year	Tax Amount	Interest	Penalty	Total
02201704526803	2013	\$3,479.53	\$300.95	\$605.90	\$4,386.38
02201704526804	2014	\$3,507.56	\$200.17	\$400.34	\$4,108.07
02201704626814	2015	\$4,984.03	\$135.16	\$270.32	\$5,389.51

The Department assessed the petitioners after making adjustments to the individual income tax returns that they filed for the tax periods in question. The petitioners filed timely petitions for reassessment requesting that the assessments be cancelled. The petitioners also requested a hearing on the matters which was conducted via telephone. Based on the evidence currently available to the Tax Commissioner, the petitioners' request is well taken.

Accordingly, the assessments are cancelled.

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

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

0000000335



Department of Taxation

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

FINAL DETERMINATION

Date:

MAY 06 2020

Aaron & Corinne King
9 Quail Ridge Dr.
Oxford, OH 45056

Re: Assessment No. 04201805941796
School District Individual Income Tax – 2015

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

<u>Tax</u>	<u>Interest</u>	<u>Late Payment Penalty</u>	<u>Total</u>
\$1,502.00	\$102.87	\$525.70	\$1,604.87

The Ohio Department of Taxation assessed the petitioners for failing to file a school district income tax return for the Preble Shawnee Local School District (0908) for the 2015 tax year. Subsequent to the assessment, the petitioners submitted documentation to show that they resided at 605 S Ada-Doty Street, Gratis, OH 45330 for tax year 2015 which in the Preble Shawnee School District. Accordingly, the petitioners do not contest the tax and interest amounts owed but request an abatement of the penalty assessed. The petitioners did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

The Tax Commissioner may abate penalties when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). Subsequent to the assessment, the petitioners remitted the tax and interest amounts owed for tax year 2015. The petitioners have also continued to file their school district income tax return for subsequent tax periods and remit the tax amounts owed. In this case, the petitioners claim that their failure to comply was due to reasonable cause and the evidence and circumstances support a full abatement of the penalty. However, the interest cannot be abated, as the payment of interest is mandatory pursuant to R.C. 5747.08(G).

Accordingly, the assessment is adjusted as follows:

<u>Tax</u>	<u>Interest</u>	<u>Late Payment Penalty</u>	<u>Total</u>
\$1,502.00	\$102.87	\$0.00	\$1,604.87

Current records indicate that \$1,604.87 has been made on this assessment, leaving the adjusted 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.

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

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FINAL DETERMINATION

Date: **MAY 27 2020**

1-800-Wineshop.com, Inc.
525 Airpark Road
Napa, CA 94558-7514

Re: Refund Claim No. 272512196492
Account No. 99-052420
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of \$29,128.00 of sales tax filed pursuant to R.C. 5739.07 and 5741.10.

The claimant filed its application for refund requesting a refund of tax in the amount of \$29,128.00. Upon initial review, the claim was denied. A hearing was held.

On May 13, 2020, the claimant withdrew its request for refund. Therefore, the request for refund is dismissed.

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

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

JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

1040 E. Whittier Inc.
Raafat Yousif
562 Mawyer Dr.
Columbus, OH 43085

RE: Assessment No.: 100000255798
Sales Tax
Account No.: 25-314548

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

<u>Tax</u>	<u>Pre-Assessment</u> <u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$27,816.34	\$1,501.31	\$13,908.08	\$43,225.73

The petitioner operates a convenience store. This assessment is the result of a markup audit of the petitioner's sales from May 22, 2012 through June 30, 2015. The petitioner filed a petition for reassessment. A hearing was held.

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

Audit Methodology

The petitioner failed to keep complete and accurate records as required by R.C. 5739.11. Therefore, a mark-up analysis was conducted using the 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, soft drinks, energy drinks, and other taxable merchandise. Each category was assigned a mark-up percentage based on industry standards and state minimum requirements.

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A sample period of January 1, 2013 through December 31, 2013 was used to calculate taxable sales using a mark-up analysis. It is agreed that the taxpayer's activity for the sample period is representative of the business activity for the entire audit period. Inventory purchase invoices maintained by the petitioner were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period.

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 records, summaries, or other information obtained directly from the distributors. In instances when the confirmation of the amount of taxable inventory purchases could not be obtained from either the taxpayer or distributors, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor.

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 total taxable sales for the sample period were divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales of 107.7446 percent. The resulting taxable percentage of adjusted gross sales was multiplied by the reported adjusted gross sales for each month of the entire audit period to determine the calculated monthly taxable sales for the entire audit period.

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

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

Inaccurate Assessment

The petitioner contends that the assessment is based upon inaccurate estimates, which fail to consider actual sales. The petitioner contends that it was not given an opportunity to participate or provide essential information pertinent to the assessment. The petitioner states that the Department did not follow general accounting principles, and, as a result arrived at erroneous numbers. It claims the Department's findings are not supported by reliable, probative, and substantial evidence. These contentions are not well taken.

The Department issued multiple correspondences to the petitioner. The Department issued an audit commencement packet to notify the petitioner of the audit and provide it with all the

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relevant information about how to proceed and supply the necessary records. Later, the petitioner signed for and accepted correspondence containing the proposed audit results. The petitioner did not contact the Department or attempt to submit any records during both the audit period and the thirty-day window after the proposed audit results were issued. The Department followed procedures, based off reliable distributor data, which have been ratified by the Board of Tax Appeals, as noted above, to conduct the audit. The petitioner still has not submitted documentation that shows that the Department's assessment was in error. Therefore, these contentions are denied.

Sample Period

The petitioner contends that the sample period is not representative of the audit period. The petitioner stated that it is not representative because, among other things, the store was closed in December 2014. The petitioner provided no evidence to substantiate its claim. Department records show that the petitioner reported an adjusted gross income of \$10,001.82 for December 2014. Therefore, this contention is denied.

Liability after March 2015

The petitioner contends that the assessment incorrectly accounts for sales after February 2015. The petitioner states that it ceased operations in March 2015. The petitioner believes that it should have no liability after that point. The Sales Tax Liability Report, included with the audit, shows that the audit listed adjusted gross incomes for the petitioner in the amount of \$0.00 for the months of March, April, May, and June 2015. The workpapers show that the assessment did not account for any sales after February 2015. Therefore, this contention is denied.

Theft of Inventory, Breakage, and Other Loss

The petitioner contends that the assessment failed to account for general theft of inventory in the store. The petitioner contends that the assessment also failed to account for breakage and other forms of loss at the store. Providing 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. dba Starr Carryout 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.

The petitioner submitted several police reports to support this contention. However, only one police report actually detailed the price of the taxable items, two cartons of cigarettes, that were stolen. However, the incident occurred outside of the sample period, and therefore, cannot be used to reduce the assessment. The petitioner was not able to produce any evidence detailing the amount of taxable inventory lost during the sample period. As a result, this contention is denied.

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Inventory

The petitioner contends that the assessment failed to consider the amount of the taxpayer's inventory. The audit methodology used to calculate the liability does not rely upon beginning and ending inventory balances. The purpose of a mark-up calculation is to derive a reasonable percentage of taxable and exempt sales in relation to total sales in the usual course of business for the petitioner. The specific beginning and ending inventory balances for the sample period are irrelevant to the percentage calculation. The unsold items remaining on the shelf should contain the same percentage of taxable to exempt items. Unless the petitioner can demonstrate that for some reason, more taxable items remained in inventory than the calculated percentage, the build-up of inventory does not alter the methodology used to determine the liability. See *Markho, Inc., d/b/a One Stop Carry Out and One Stop Mini Mart v. Tracy*, BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999). The petitioner provided no further proof or elaboration regarding that claim. Therefore, this contention is denied.

Food Stamp Sales

The petitioner contends it did not receive credit for food stamp sales. The auditor noted that the petitioner is not an authorized food stamp retailer. Audit Remarks, Page 6. The petitioner did not provide any supporting records to illustrate otherwise. The burden is on the petitioner to provide sufficient evidence to warrant adjusting a finalized audit. *Forest Hills, supra* at *4. Therefore, this contention is denied.

Penalty

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

Accordingly, the assessment is amended as follows:

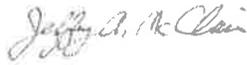
	<u>Pre-Assessment</u>		
<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$27,816.34	\$1,501.31	\$4,172.27	\$33,489.92

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

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

17229 Corporation
17229 Euclid Ave.
Cleveland OH 44112

Re: Assessment No.: 100000464020
Sales Tax
Account No.: 18-506528

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$46,578.51	\$3,117.82	\$23,289.16	\$72,985.49

The petitioner owns and operates a carryout in Cuyahoga County. This assessment is the result of a field audit of the petitioner's sales for the period of October 1, 2012 to January 31, 2016. A hearing was held.

It should be noted that the assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing, *Federated Department Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983); *Automotive Warehouse, Inc. v. Limbach*, BTA No. 87-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 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, p. 7. Therefore, a mark-up analysis was conducted using supplier purchase summaries and the petitioner's purchase invoices. Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. See, *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

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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 sample period of January 1, 2014 through December 31, 2014 was used as a representation of the entire audit period to calculate taxable sales. The petitioner's inventory purchase summaries and distributor invoices were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. The auditor calculated the taxable beer, wine, cigarettes, other tobacco, pop & soft drinks, energy drinks, taxable merchandise, and low/mixed alcohol products. Each category was assigned a mark-up percentage based on historical evidence gathered by the Department, industry standards, or state minimum requirements. Audit Remarks, p. 5. The petitioner is an authorized food stamp retailer, so the portion of taxable merchandise categorized as soft drinks and energy drinks was reduced by 25%.

The calculated taxable sales of all inventory categories from the sample period were totaled and divided by the sum of the gross sales on the petitioner's sales tax returns filed for the same period, resulting in a taxable percentage of reported gross sales (38.8485%). This was then multiplied by the reported monthly gross sales for the entire audit period to determine the calculated taxable sales. Monthly calculated taxable sales were then multiplied by the applicable tax rate in effect throughout the audit period to determine gross sales tax liability by month. Credits representing tax reported and paid monthly via the petitioner's sales tax returns were subtracted from the monthly gross sales tax liability to determine unreported sales tax liability by month. Finally, these monthly tax liability figures were combined to determine total tax liability.

The petitioner contends that the sales figures should be much lower. Per Ohio statute adequate records showing sales tax collected and remitted are a requirement, and in the event of a lack of records the Tax Commissioner is empowered to conduct an audit using any information available, including mark-up analysis. R.C. 5739.13. The petitioner failed to maintain records for any period. Audit Remarks, p. 7. Lacking adequate records, the use of the mark-up audit methodology as applied was appropriate and supported by statute. The objection is denied.

Accounting Company Failure to Make Proper Accounting

The petitioner contends that he had hired an accounting company to manage the books and file proper tax returns, and that the company failed to do so. As noted above, 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. It is the responsibility of the petitioner to ensure that records are maintained and the proper tax is remitted. The petitioner failed to demonstrate error in the assessment. The objection is denied.

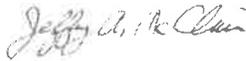
Accordingly, the assessment is affirmed as issued.

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

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

A&P Takhar LLC
5430 Brandt Pike
Huber Heights, OH 45424

Re: Assessment No.: 100000337027
Sales Tax
Account No.: 57-189570

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$36,100.01	\$2,223.44	\$5,414.86	\$43,738.31

The assessment is the result of an audit of the petitioner's sales from May 1, 2012 through April 30, 2015. A hearing was held.

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, p. 4. Therefore, a mark-up analysis was conducted using inventory purchase invoices supplied by the taxpayer and their suppliers. The Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. R.C. 5739.13. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

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

Audit Methodology

As noted above, a mark-up analysis was used to calculate taxable sales. A mark-up analysis was used to calculate taxable sales based upon a block sample period of January 1, 2014 through December 31, 2014. Inventory purchase invoices maintained by the petitioner were the primary

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documents utilized to determine the total taxable inventory purchased for sale during the sample period. Where complete inventory purchase records were not available, information obtained directly from the distributor was used.

The auditor calculated the taxable sales of beer, wine, cigarettes, other tobacco, pop & soft drinks, energy drinks & other beverages, and taxable merchandise. The purchases allocated to each category were totaled and multiplied by the applicable mark-up percentage to calculate taxable sales for each inventory category. The remaining calculated taxable sales were then totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the petitioner for the entire sample period. The resulting taxable percentage of reported gross sales (78.1247%) was then applied to gross sales for each period of the audit to arrive at a calculated taxable sales figure for each reporting period. The appropriate tax rate was then applied to arrive at the sales tax liability. Since the taxpayer was registered to accept food stamps, the pop & soft drink and energy drink categories were reduced by 25 percent. The petitioner was given credit for sales tax paid with its sales tax returns. The unpaid tax liability was assessed.

It is noted at the outset that the petitioner signed a memorandum of agreement that specified the methodology of the audit. The agreement specified that the audit would be conducted using a block sample methodology. The audit agreement is binding and enforceable. When entering into a valid, enforceable agreement, the petitioner waives any objection it may have regarding the method used to determine sales. *Markho, Inc. dba One Stop Carry Out and One Stop Mini Mart v. Tracy*, BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999), citing *Akron Home Medical Services v. Lindley*, 25 Ohio St.3d 107, 495 N.E.2d 417 (1986). See, also, *Shaheen, Inc. dba Abe's Quick Shoppe v. Tracy*, BTA No. 96-M-1231, 1998 WL 127061 (Mar. 20, 1998), citing *Akron Home Medical Services v. Lindley*, 25 Ohio St.3d 107, 495 N.E.2d 417 (1986).

Cigarette Rebates

The petitioner contends additional cigarette rebates should be taken into consideration. The petitioner submitted records of payments during the sample period. These payments do not appear to be for cigarette rebates. The documentation states the payments are reimbursements for coupons. Sales tax is computed based on the price of the sale. R.C. 5739.025(A). The definition of price includes consideration received by the vendor from a third party. R.C. 5739.01(H)(1)(b). The evidence shows the petitioner was reimbursed for the discounted sales associated with these coupons. The petitioner is not entitled to calculate sales tax based on a reduced price for these sales because the petitioner received consideration from a third party for the sale. The objection is denied.

Cigarette Pricing

The petitioner contends the mark-up percentage employed for cigarettes was incorrect. The presumptive mark-up percentage on cigarettes is eight percent unless a retailer can prove a different cost of doing business. R.C. 1333.11(B). The petitioner submitted invoices from various cigarette suppliers suggesting various mark-up percentages less than eight percent. This is insufficient evidence to show the petitioner's cost of doing business. The submitted evidence is merely a suggested price, not proof of the petitioner's costs. The documentation shows what the

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prices would be with the suggested mark-up percentage. It does not show any of the petitioner's various costs of doing business associated with the sales of cigarettes. A retailer can only vary from the eight percent mark-up if it can prove a higher or lesser cost of doing business. *Id.* The burden is on the petitioner to submit evidence sufficient to show error in the assessment. The petitioner has not met their burden. The objection is denied.

Additionally, the petitioner contends it sold cigarettes at lower price to match competition. Retailers may sell cigarettes at a lower price in good faith to match a competitor selling the same article. R.C. 1333.15. The petitioner submitted a photograph of advertised cigarette prices. There is no evidence along with the photograph to show the date or location of the advertised prices. This is insufficient evidence to warrant an adjustment to the assessment. As the photograph cannot be tied to the sample period, it is insufficient evidence to show the petitioner was justified in selling cigarettes at a reduced price to match competition during the sample period. The burden is on the petitioner to submit evidence sufficient to show error in the assessment. The petitioner has not met their burden. The objection is denied.

Inventory Build Up

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

Expired Inventory

The petitioner contends some inventory was expired or damaged and not sold. The burden is on the petitioner to provide evidence sufficient to show error in the assessment. The petitioner merely provides estimated figures for their proposed change to the assessment. The petitioner did not provide evidence to support their estimated figures. The petitioner has not met their burden to provide evidence showing error in the assessment. The objection is denied.

Heidelberg Invoices

The petitioner contends the purchase amounts associated with Heidelberg invoice 351407 is incorrect. The petitioner supplied an alternative figure for the invoice but did not provide evidence to support this figure or a reason for the change. The burden is on the petitioner to provide evidence sufficient to show error in the assessment. The objection is denied.

Additionally, the petitioner highlights two other Heidelberg transactions that the petitioner states it does not recognize. The transactions were obtained through distributor records showing the petitioner made purchases in the listed amounts from Heidelberg. The petitioner did not elaborate

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on a reason to alter these transactions or provide evidence related to this contention. The burden is on the petitioner to provide evidence sufficient to show error in the transactions. The objection is denied.

Theft

The petitioner contends the audit failed to take into consideration theft of inventory. The burden is on the petitioner to provide sufficient evidence to demonstrate a basis for adjusting the audit. The petitioner must do more than merely state a conclusion. The petitioner provided an estimate of theft but did not provide evidence from the sample period to support this figure. The petitioner provided a police report to show theft, however, the police reported shows the theft in question occurred in 2017. This is not sufficient evidence to warrant an adjustment to the sample period sales from 2014. In order to sufficiently demonstrate that the audit produced inaccurate results, the petitioner must present evidence that relates to the reliability of the sample period. *See Shaheen, Inc., dba Abe's Quick Shoppe v. Tracy*, BTA No. 96-M-1231, 1998 WL 127061 (Mar. 20, 1998). The petitioner has not met their burden. The objection is denied.

Interest

The petitioner also requested a reduction of interest. The Tax Commissioner is without jurisdiction to reduce the statutory interest promulgated by the General Assembly under R.C. 5739.132. The objection is denied.

Penalty Abatement

The petitioner requests abatement of the penalty. The petitioner was assessed a reduced penalty during the audit. Considering the surrounding facts and circumstances, further abatement of the penalty is not warranted. The request is denied.

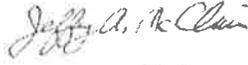
Therefore, the assessment is affirmed.

Current records indicate that payments of \$44,874.88 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.

MAY 27 2020 00000087

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

0000000301



Department of Taxation

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

FINAL DETERMINATION

Date:

MAY 06 2020

Advantage Property Preservation, LLC
8701 Hartman Rd.
Wadsworth, OH 44281

RE: Assessment No.: 100001325615
Tax Type: Sales
Account No.: 92-200121

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$14,296.53	\$1,888.16	\$2,144.16	\$18,328.85

The petitioner operates as a landscaping service. This assessment is the result of an audit of the petitioner's sales for the period September 1, 2014 through August 31, 2018. The petitioner filed a petition for reassessment and requested a hearing. A hearing was held in this matter on Thursday, April 9, 2020.

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

The petitioner did not provide any specific objections in response to the underlying corporate assessment. However, the petitioner stated that she is not a responsible party of the corporation and is not liable for the assessment. The petitioner contends that she is not involved with the company. Since this is not a responsible party assessment, the issue of whether the petitioner is a responsible party under R.C. 5739.33 cannot be considered. The petitioner failed to prove error in the assessment. Therefore, this objection is denied.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payments have been made toward the assessment. 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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Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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ENTRY RECORDED IN THE TAX COMMISSIONER'S JOURNAL



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: MAY 21 2020

American First Finance, Inc.
3515 N. Ridge Rd.
Wichita, KS 62705

Re: Refund Claim No. 20191692652
Refund Amount Requested: \$4,447.84
Refund Period: April 2019
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of \$4,447.84 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was not requested.

The claimant contends that sales tax was erroneously remitted to Ohio on the same account twice. The petition for reassessment states that the claimant realized they filed an incorrect amount for the account at issue. After realizing the mistake, the claimant contends that they then filed an amended return and made a new payment. The claimant maintains that both payments were accepted. Therefore, they are requesting a refund for the payment associated with the incorrect first filing.

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

In addition to the petition, the claimant submitted three supporting documents intended to support their contention. The claimant provided a copy of the receipt for the original filing which shows that a payment of \$4,447.84 was made for the April 2019 filing period. The claimant also submitted a copy of an Ohio Business Gateway receipt for a payment of \$25,131.69. Finally, the claimant provided an excel spreadsheet. The claimant stated that the spreadsheet shows all Ohio sales for the month of April. However, the claimant has not provided sufficient information to explain how these documents support their contention. It is not clear from the Ohio Business Gateway receipt that a refund is due. Further, other than evidence that seems to indicate that the second payment was made on May 17, 2019, there is no information to support the claim that the payment is for the April 2019 filing period. Additionally, the excel spreadsheet provided shows a tax due amount that is significantly higher than either receipt indicates. The claimant has not provided sufficient evidence to support their contention.

Accordingly, the refund claim is denied.

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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



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 29 2020

Basilios, LLC
6094 Parkcenter Cir.
Dublin, OH 43017

Re: Assessment No.: 100001537266
Sales Tax
Account No.: 28-801869
Reporting Period: 01/01/2013 – 07/31/2019

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$170,086.81	\$23,906.57	\$85,043.04	\$279,036.42

This assessment is the result of an audit of the petitioner's records for the period shown above. The petitioner operates a restaurant in Dublin, Ohio. A hearing was not requested.

The petitioner requests full abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax 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).

In support of this position, the petitioner states that they filed returns and paid tax during each month of the audit period. Additionally, the petitioner states that the issue regarding tax remittances was a result of relying on employees to file and remit tax while the petitioner was out of the country. The petitioner further states that since the audit, employees have been trained on how to correctly report and remit. However, during a comprehensive review of the petitioner's primary records, the auditor found substantial evidence that the petitioner collected more tax than they remitted. Audit Remarks, Page 4. Based on the facts and circumstances, penalty abatement is not warranted. The objection is denied.

Therefore, the assessment is affirmed as issued.

Current records indicate that payments totaling \$11,215.29 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.

MAY 29 2020

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

Office of the Tax Commissioner

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

FINAL DETERMINATION

Date: **MAY 21 2020**

Ahaduab Begashaw
167 San Diego Dr., Apt. C
Columbus, OH 43213

Re: 23 Assessments
Sales Tax (Responsible Party)
Dream Motors LLC
Vendor's License No. 31394935

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:

<u>Assessment No.</u>	<u>Time Period</u>	<u>Total</u>
100001426230	11/01/16-11/30/16	\$3,012.28
100001426231	12/01/16-12/31/16	\$6,224.93
100001426234	01/01/17-01/31/17	\$9,386.36
100001426236	03/01/17-03/31/17	\$15,478.41
100001426239	02/01/17-02/28/17	\$11,333.09
100001426240	06/01/17-06/30/17	\$24,122.53
100001426241	07/01/17-07/31/17	\$28,018.73
100001426242	08/01/17-08/31/17	\$31,198.07
100001426244	06/01/18-06/30/18	\$31,465.27
100001426245	07/01/18-07/31/18	\$31,449.95
100001426246	08/01/18-08/31/18	\$31,570.22
100001426247	04/01/17-04/30/17	\$18,056.91
100001426248	05/01/17-05/31/17	\$21,830.51
100001426249	09/01/17-09/30/17	\$31,207.15
100001426250	10/01/17-10/31/17	\$31,204.88
100001426251	11/01/17-11/30/17	\$31,198.07
100001426252	12/01/17-12/31/17	\$31,227.57
100001426253	01/01/18-01/31/18	\$31,306.99
100001426254	02/01/18-02/28/18	\$31,516.32
100001426255	03/01/18-03/31/18	\$31,309.26
100001426256	04/01/18-04/30/18	\$31,414.78
100001426257	05/01/18-05/31/18	\$31,376.77
100001426258	09/01/18-09/30/18	\$31,345.57
	Total:	\$576,254.62

MAY 21 2020

These are responsible party assessments. Dream Motors, LLC. incurred sales tax liability resulting in assessments for periods shown above. These assessments were never satisfied by Dream Motors 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 Dream Motors, LLC. has been derivatively assessed against Ahaduab Begashaw. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods shown above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was held on May 4, 2020.

The petitioner claims in two signed affidavits and through his representative at hearing that his brother stole his identity, that the petitioner had no knowledge of the business or tax obligation at issue in the assessments, and because these corporations were organized and incurred tax liability without his knowledge, the responsible assessments should be cancelled. The petitioner contends that his brother used his stolen identity to open two businesses, Omega Auto Sales and D28 Auto Sales. Dream Motors, LLC, the subject corporation for the at-issue assessments, was not addressed in either affidavit.

The petitioner provides no support for his claim beyond the signed affidavits. Hearing officer research shows the petitioner is listed as the incorporator of D28 Auto Sales in Cincinnati but revealed no connection with Omega Auto Sales. Dream Motors, LLC, was incorporated on October 15, 2016, with Ahaduab Begashaw as the statutory agent on the Articles of Incorporation, and a business address of 7821 Reading Road, Cincinnati. Hearing officer research shows that the addresses in Cincinnati were associated with the petitioner at the time of the incorporation and assessment periods. Research also shows that the petitioner was the contact for the business and the responsible party on the County Vendor's License Application.

Further, although the petitioner claims he had no knowledge of either the corporation in question or the tax liability incurred, hearing officer research revealed multiple civil judgements against the petitioner in relation to debts incurred by Dream Motors and D28 Auto Sales. The petitioner has taken no civil action and filed no criminal complaint for identity theft relating to these judgements or any other corporation obligations.

The petitioner provided no independent verification of his contentions. The petitioner is the incorporating agent and the responsible party on the Dream Motors, LLC vendors license application.

Therefore, the assessments are affirmed as issued.

Any reduction or credit made to the underlying corporate assessments on appeal or in collection will be applied to the corresponding responsible party assessments. Proper credit for any payments will be given at the collection stage. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above referenced total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of

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MAY 21 2020

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

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of
Taxation

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

FINAL DETERMINATION

Date: MAY 21 2020

CarMax Auto Superstores, Inc.
12105 Omniplex Ct.
Cincinnati, OH 45240

RE: Refund Claim No.: 202002599
Refund Claim Amount: \$1,088.57
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of \$1,088.57, in sales tax, filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. No hearing was 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). A refund of sales tax for returned merchandise is granted when the vendor refunds the full purchase price and sales tax to the customer or credits the customer's account. Ohio Adm.Code 5703-9-11(A). If the full price is not refunded to the customer, no partial refund is granted to the vendor; no deduction can be made for wear, damage, or use. Ohio Adm.Code 5703-9-11(B); *Buick Youngstown Co. v. Tracy*, BTA No. 93-R-1130, 1994 WL 193898 (May 13, 1994).

The claimant is a motor vehicle dealer. On or about July 24, 2019, the claimant collected sales tax on the sale of a 2017 Chevrolet Cruze. The claimant contends that a refund of the entire purchase price was returned to the customer when the deal was cancelled. The claimant filed the application for refund on behalf of the customer seeking a refund of the sales tax paid on the returned vehicle.

The claimant provided documentation in the form of an Ohio Certificate of Title, which reported the sales tax amount as \$1,091.81. That is more than the requested refund amount of \$1,088.57. The claimant is requesting a refund of the sales tax based off a selling price that is less than the amount stated on the title. The claimant failed to include the optional GAP waiver agreement as part of its calculation of the taxable selling price. The optional GAP waiver agreement was listed on the itemized retail installment contract. As a result, it is part of the taxable base, pursuant to R.C. 5739.01(B)(10), which includes guaranteed auto protections in the definition of a "sale."

Additionally, the claimant provided the return agreement for the returned vehicle. It showed that there was a difference between the refunded total and the purchase total. The claimant failed to explain why it provided a refund amount that was less than the purchase amount. The Ohio

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MAY 21 2020

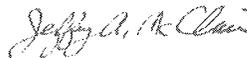
Administrative code requires the vendor to return the full purchase price and sales tax amount before a refund request can be granted.

Therefore, the evidence submitted is insufficient to warrant a refund of the sales tax as the claimant failed to demonstrate that the customer received a refund or credit for the full purchase price and sales tax for the vehicle.

Accordingly, the claim for a refund is denied.

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 27 2020

Joshua Chandler
608 Aukerman St.
Eaton, OH 45320

RE: Refund Claim No: 202000206
Refund Amount Requested: \$477.52
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of \$477.52, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). A refund of sales tax for returned merchandise is granted when the vendor refunds the full purchase price and sales tax to the customer or credits the customer's account. Ohio Adm.Code 5703-9-11(A). If the full price is not refunded to the customer, no partial refund is granted to the vendor; no deduction can be made for wear, damage, or use. Ohio Adm.Code 5703-9-11(B); *Buick Youngstown Co. v. Tracy*, BTA No. 93-R-1130, 1994 WL 193898 (May 13, 1994).

The vehicle title indicates that the claimant purchased a 2013 Ford Focus from Beechwood Motors for \$6,877.52 on June 14, 2019. The claimant states in his refund application that he purchased a vehicle that was a "lemon." The purchase order lists the price of the vehicle at \$6,400.00 and then lists \$500.00 for "tax, title, and fees" for a total of purchase price of \$6,900.00. The title lists sales tax paid in the amount of \$464.00. Regardless, the claimant admits that when the car was returned "the bank was refunded the money minus the sales tax and GAP insurance." The claimant submitted as evidence a refund check in the amount of \$6,400.00 from Beechwood Motors. The claimant also submitted a check from Off The Top Salon, a third-party LLC, who provided repayment to the bank for the portions of car loan covering the sales tax and GAP insurance. This further establishes that the dealer did not refund the full purchase price and sales tax to the claimant as required by Ohio Adm.Code 5703-9-11. Therefore, the evidence submitted is insufficient to warrant a refund of the sales tax.

Accordingly, the claim for a refund is denied.

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MAY 27 2020

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 21 2020**

Michael Collins
1641 Old 35
Xenia, OH 45385

Re: Assessment No. 100001538841
Sales Tax (Responsible Party)
Stan's Bar & Grill, Inc.
Vendor's License No. 29-019646
Period: 01/01/09 – 12/31/12

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

<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$616,423.13	\$60,685.32	\$308,211.22	\$985,319.67

This is a responsible party assessment. Stan's Bar & Grill, Inc. incurred sales tax liability resulting in the above-mentioned assessment. This assessment was never satisfied and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Stan's Bar & Grill, Inc. has been derivatively assessed against Michael Collins. A hearing was not requested.

The petitioner did not challenge his status as a responsible party but indicated in the petition for reassessment that the tax assessed should be much lower. It is important to note that the evidence indicates that the petitioner is the owner of the company. Records from the Department of Liquor Control show that on the 2007 ownership disclosure information form, the petitioner owned 100 percent of the company shares. Additionally, this same form indicates that the petitioner was the secretary and treasurer for the company.

As previously stated, the petitioner objects to the amount of sales tax assessed stating that the actual amount is less than half of what the assessment states. Pursuant to R.C. 5739.33, the only issue that can be considered is whether the petitioner is an appropriate responsible party. The underlying substantive objection to the tax assessment cannot be considered. The objection is denied.

Accordingly, the assessment is affirmed as issued.

Any reduction or credit made to the underlying corporate assessment will be applied to the corresponding responsible party assessment. Proper credit for any payments will be given at the

collection stage. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above referenced total.** Payments shall be made payable to “Treasurer – State of Ohio.” Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 21 2020

Paul B. Davis III
714 Peachtree Battle Ave. NW
Atlanta, GA 30327

RE: Refund Claim No.: 202000254
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of \$2,673.68, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was not requested.

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

The claimant purchased a 2017 Dodge Chrysler Grand Caravan from Key Chrysler Jeep & Dodge Inc. for \$39,610 on April 30, 2019. The claimant filed the application for refund on July 30, 2019 seeking a refund of the tax paid in the amount of \$2,673.68 plus applicable interest.

R.C. 5739.02 levies “an excise tax” on any retail sale made in this state. R.C. 5739.029(B)(1)(a) exempts the sale of motor vehicles to a nonresident consumer who intends to immediately remove the motor vehicle from this state for use outside this state. The Department informed the claimant during the initial denial that the Department required additional evidence including the buyers’ agreement for the transaction and a copy of the non-resident affidavit (form STEC-NR) that was provided to the dealer at the time of purchase. The claimant provided copies of the buyer’s order, a copy of an Ohio Bureau of Motor Vehicles temporary tag registration application issued May 3, 2019, a copy of the nonresident affidavit (form STEC-NR) dated September 17, 2019, an online payment to the State of Georgia for tag renewal dated July 22, 2019, a Huntington Bank title transfer request dated June 24, 2019, and an Ohio Certificate of Title issued May 21, 2019.

The claimant contends that it purchased the vehicle in Ohio and was charged Ohio and Georgia sales tax. The claimant further contends that the State of Georgia required the claimant to pay fees for tags and the bank delayed in sending the title to Georgia from Ohio. However, the claimant failed to provide evidence of Georgia residency at the time of purchase.

Sales of motor vehicles to nonresidents of Ohio are exempt from Ohio tax provided the proper affidavit for nonresident sales is completed by the consumer and provided to the dealer. R.C. 5739.029(C). The claimant submitted a nonresident affidavit (form STEC-NR) dated September 17, 2019; however, this form was completed nearly five months after the purchase. Therefore, the affidavit was not executed

MAY 21 2020

and provided to the dealer at the time of purchase. Form STEC-NR notes the requirement that the original must be retained by the vendor (dealer) with two copies to the Clerk of Courts. Additionally, the address the claimant provided on this form is contrary to other evidence the claimant submitted, such as the Ohio Certificate of Title, the buyer's order, and the Ohio Bureau of Motor Vehicles temporary tag registration application which list the claimant's address as Xenia, Ohio. This information identifies the claimant as an Ohio resident at the time of purchase. Pursuant to Information Release ST 2007-04, Ohio sales tax must be paid based upon the purchaser's county of residence. The purchaser's subsequent removal of the vehicle from Ohio does not affect the Ohio tax liability.

In addition, the claimant failed to provide evidence that it immediately removed the vehicle from Ohio to Georgia. This is furthered by the claimant's evidence which provides a State of Georgia tag renewal date of July 22, 2019. Based on the information provided, the earliest date of removal was June 24, 2019 according to the Huntington Bank Title Transfer Request.

The claimant did not provide documentation to support its contention. Further, the information provided by the claimant does not show the vehicle was immediately removed outside of Ohio in accordance with R.C. 5739.029(B)(1)(a). The claimant has not satisfied its burden that the claimant is entitled to a refund as required by R.C. 5739.07. The evidence submitted is insufficient to warrant a refund of the sales tax paid by the claimant.

Therefore, the claim for a refund is denied.

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

3096010305

FINAL DETERMINATION

Date: **MAY 27 2020**

Dayton Freight Lines, Inc
6450 Poe Ave., Ste. 311
Dayton, OH 45414

Re: Refund Claim No. 201800015
Refund Amount Requested: \$195,704.08
Refund Period: May 1, 2013 – February 28, 2017
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of \$195,704.08 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was held.

Transportation for Hire

The claimant contends that they erroneously paid sales tax amounting to \$46,384.51 on purchases that are exempt under R.C. 5739.02(B)(32). Under this section of the Ohio Revised Code, sales tax does not apply to the sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire. The Ohio Administrative Code provides examples of items that are considered “attached to or incorporated in” such as padlocks, auto tie downs, and decking boards. Ohio Adm.Code 5703-9-24(A)(1). The devices installed on the truck to enable satellite communication services the claimant contends should also be exempt are not similar to these items delineated in the Ohio Administrative Code. Property explicitly delineated as exempt under the rule are items that help physically facilitate movement of the property. While the satellite service may play an important role in the claimant’s business, it is not similar to the items explicitly exempted. The Board of Tax Appeals has ruled that items necessary for an exempt activity are not exempt if they are not used directly in the exempt activity. *See Bahan Farms, LLC v. McClain*, BTA No. 2017-2180, 2019 WL 1260533 (March 11, 2019). All items useful to providing transportation for hire services are not automatically exempt. The satellite service is used by the claimant to compute routes and give information to the claimant’s headquarters in Ohio. The claimant must provide proof that an exemption applies. The claimant has not provided sufficient information to support the contention that the satellite services qualify for the exemption simply because the computers are attached to the trucks. The objection is denied.

Satellite Purchases for Trucks Outside of Ohio

The claimant contends that they erroneously paid sales tax amounting to \$149,319.57 for satellite and terrestrial communication services used on trucks located outside of Ohio. The claimant operates a

trucking company with 59 service centers in 14 states.¹ Nine of those service centers are located in Ohio. The claimant maintains that several trucks are based at service centers outside of Ohio and are never used within the state. Therefore, satellite charges for those trucks should not be subject to Ohio sales tax.

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 sourcing location for sales tax for an enumerated service is the jurisdiction where the service is received. R.C. 5739.033(C). A service is considered received when it is first used. R.C. 5739.033(C)(6). When a service is not received at a vendor's place of business it shall be sourced to a location known to the vendor where the consumer will receive the service. R.C. 5739.033(C)(2). When a location is not specified, the vendor may source the sale to a location for the consumer maintained in the vendor's records in the ordinary course of business. R.C. 5739.033(C)(3).

The claimant contends this was erroneous because the first use of this service was not in Ohio. Based on the claimant's description of the service, it is received at the claimant's headquarters in Ohio. The claimant's description of the service indicates it is primarily for managerial and logistical purpose by dispatchers, which would be completed at the claimant's headquarters to manage their vehicle fleet. The claimant provided insufficient evidence to support their contention. The objection is denied.

Accordingly, the refund claim is denied.

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

¹ Dayton Freights, *Service Centers*, <https://www.daytonfreight.com/service-centers/> (accessed Mar. 18, 2020).

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Department of Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Delores C. Duncan, dba Sam's Corner Store
7011 New Haven Rd.
Harrison, OH 45030

Re: Assessment No.: 100001326810
Sales Tax
Account No.: 31-272354

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$67,174.79	\$6,640.29	\$23,510.97	\$97,326.05

The petitioner operates a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales for the period from March 1, 2015 through May 31, 2018. The petitioner filed a petition for reassessment. A hearing was held on April 6, 2020. The petitioner's objections are addressed below.

Audit Methodology

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

The petitioner failed to maintain complete and accurate records of net taxable sales and tax collected as required by R.C. 5739.11. As a result, a mark-up analysis was conducted using records provided by the petitioner's distributors. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco products, pop & soft drinks, energy drinks, mixed drinks & other beverages, and other taxable merchandise. Each category was assigned a mark-up percentage derived from either the product checklist completed with the petitioner's assistance, industry averages, or state minimum requirements.

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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 did not sign the memorandum of agreement, but she also did not provide an alternative methodology.

A sample period of January 1, 2017 through December 31, 2017 was used to calculate taxable sales using a mark-up analysis. It was agreed that the petitioner's activity for the sample period is representative of the business activity for the entire audit period. Audit Remarks, Page 4. The record summaries maintained by the distributors were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period. The invoice dates were used to determine which inventory purchase transactions occurred within the sample period. In the instances when confirmation of the amount of the taxable inventory purchases could not be obtained from either the taxpayer or the distributors, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor.

All taxable inventory purchases were listed by category. The purchases allocated to each category were marked up and then totaled to calculate the taxable sales for the audit period. The remaining calculated taxable sales from all categories were totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the petitioner for the entire sample period. The resulting taxable percentage of reported adjusted gross sales was multiplied by the reported adjusted gross sales for each non-sampled month of the audit period to determine the calculated monthly taxable sales for the audit period. Tax liability for sampled periods was calculated on the actual calculated monthly taxable sales for that sample period.

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

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

Mark-Up Percentages

The petitioner objects to the marked-up sale prices. She believes the auditor insisted that she had a 50% mark-up on cigarette sales instead of the 8% mark-up that is actually in place. The evidence in the file shows that the auditor used an 8% mark-up for cigarettes. The petitioner did not provide any evidence to the contrary. Therefore, this objection is denied.

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Time to Gather Records

The petitioner contends that she did not have adequate time to gather her records. She contends that the auditor told her she would have ample time to procure the necessary information before a formal assessment was issued. The petitioner was notified of the audit in July 2018. During the audit, the petitioner provided only minimal 2017 records from Pepsi to the auditor. The petitioner met with the auditor to receive the letter of confirmation, marking the end of the audit, in December 2018. The petitioner provided the auditor with cigarette rebates during the thirty-day post-audit period. These rebates reduced the amount of the inventory purchases, thereby reducing the calculated amount of tax owed. Since then, the petitioner has provided no more documentation to support her contention that the audit results are inflated. The petitioner had six months during the audit, and has had more than an additional year since, to find and submit records, yet has failed to do so. Therefore, this contention is denied.

Spillage, Breakage, Theft, and Returns

The petitioner contends that spillage, breakage, theft, and returns were not properly accounted for during the audit. The petitioner provided no numbers or records to substantiate this claim. A generalized description of losses incurred from theft and spoilage does not meet the appellant's burden to prove error in an assessment. *24 Hours, Inc. v. Tracy*, BTA No. 97-M-1389, 1999 WL 349220 (May 21, 1999). The loss must be quantifiable from the evidence presented by the petitioner. *R & K Entertainment, Inc. v. Zaino*, BTA No. 2003-B-103, 2004 WL 1631689 (July 16, 2004) at *5. The petitioner provided only a generalized description of loss. Therefore, the contention is denied.

Rebates/Subsidies

The petitioner contends that rebates and subsidies were not accounted for. As addressed above, the audit results were adjusted after cigarette rebates were submitted. The petitioner has provided no additional evidence of other applicable rebates or subsidies. Therefore, this contention is denied.

Penalty

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

Accordingly, the assessment is amended as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$67,174.79	\$6,640.29	\$16,793.51	\$90,608.59

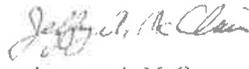
Current records indicate that no payments have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not

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

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Delores C. Duncan, dba Danny B's Lounge
6987 New Haven Rd.
Harrison, OH 45030

Re: Assessment No.: 100001344542
Sales Tax
Account No.: 31-392441

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$26,388.69	\$2,845.45	\$13,194.24	\$42,428.38

The petitioner operates a bar and restaurant. This assessment is the result of a mark-up audit of the petitioner's sales for the period from March 1, 2015 through May 31, 2018. The petitioner filed a petition for reassessment. A hearing was held on April 6, 2020. The petitioner's objections are addressed below.

Audit Methodology

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

A mark-up analysis was conducted using records provided by the petitioner and her distributors. Utilizing these records, the auditor calculated the taxable beer (bottle and can), beer (draft), liquor, and wine. All purchases of liquor, beer, and other alcoholic beverage products during the audit sample periods were listed by those categories. Each category was assigned a mark-up percentage as described below.

The petitioner failed to maintain primary records as required by R.C. 5739.11. Audit Remarks, Page 10. Accordingly, the Department sent a memorandum of agreement to the petitioner that

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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 neither signed the memorandum of agreement nor submitted an alternative methodology. The petitioner did submit inventory purchase invoices for the three-month periods of May 1, 2016 through July 31, 2016 and October 1, 2017 through December 31, 2017.

The audit was divided into two periods, each with its own sample period. The first audit period was from March 1, 2015 through December 31, 2016, with a sample period of January 1, 2016 through December 31, 2016. The second period was from January 1, 2017 through May 31, 2018, with a sample period of January 1, 2017 through December 31, 2017. It was agreed that each sample period is representative of the business activity for that respective audit period. Audit Remarks, Page 7. The sample periods were then used to calculate taxable sales using a mark-up analysis. The inventory purchase invoices maintained by the petitioner and the inventory purchase summaries obtained from the distributors were the primary documents utilized to determine the total taxable inventory purchased for sale during the audit period. The invoice dates were used to determine which inventory purchase transactions occurred within the audit period. In the instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon the records, summaries, or other information obtained directly from the distributors. In the instances where confirmation of the amount of the taxable inventory purchases could not be obtained from either the taxpayer or the distributors, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a comparable distributor.

The mark-up percentages for all inventory categories were calculated as weighted averages of a representative sample of the most popular premium, standard, and economy products for each inventory category. The mark-up percentages for each product were determined by calculating a weighted average of the product sales prices, subtracting the product cost per serving, and dividing the difference by the product cost per serving. The petitioner's sales prices were derived from the business' drink price list. The weighted average sales prices accounted for different pricing structures such as Happy Hour and "Other Price." Weights for the Happy Hour sales prices were determined based upon the total Happy Hours per week (35) divided by the total hours of operation per week (74). Weights for the "Other Price" (buckets) were determined based on total beer bottle sales, from the three-month periods, divided by total beers sold as buckets. Resulting individual product mark-up percentages were weighted based upon the product sales volume, which was determined from an analysis of the total dollar cost of product inventory purchased, derived from the inventory vendor purchase invoices, that the petitioner submitted, for the periods of May 1, 2016 through July 31, 2016 and October 1, 2017 through December 31, 2017. When adequate records or information were not available to calculate customized weighted mark-up percentages, the mark-up percentages were derived from a prior audit of a comparable business. The calculated taxable sales for each sample period were reduced, for the categories of beer (draft), liquor (blended rate), and wine, to account for losses of inventory due to spillage and over-pours. The taxable food sales made during the audit sample periods were accepted as filed and added to the calculated taxable sales for the audit sample periods. Audit Remarks, Page 7.

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The calculated taxable sales for each sample period, from all categories, were totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the petitioner during each sample period. The resulting taxable percentage of reported gross sales was multiplied by the reported monthly gross sales for each audit period to determine the calculated taxable sales by month for that respective audit period.

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

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

To-Go Orders

The petitioner contends that to-go orders were not correctly accounted for during the audit period. The petitioner also contends that the numbers reflected in the assessment are far too high for a bar of this size. She states that the bar would need to maintain wall-to-wall capacity to ever hit those projections. These contentions are not well taken. The auditor noted in the letter of agreement that the petitioner maintained detailed records supporting its taxable food sales. Therefore, taxable food sales made during the audit sample periods were accepted as filed and were added to the calculated taxable sales for the audit sample periods. To-go orders are not taxable since they consist of food that is sold for consumption off premises. This means that the petitioner is contending that its own records were incorrect, since they were accepted as filed. The petitioner has provided no evidence that any to-go orders were incorrectly treated as taxable. The petitioner failed to submit evidence that demonstrates error in the assessment. Therefore, this contention is denied.

Oaxaca Sports Café to Danny B's Lounge

The petitioner contends that the audit erroneously includes data that states that they were open during August and September 2015, when they were in fact closed for remodeling. She states that there should have been no records of distributor purchases for those two months, yet they were assessed \$36,376.23 for both months. This contention is not well taken. The petitioner submitted a table with a corresponding graph that purports to demonstrate what her records show sales were versus what the Department assessed them for. However, the petitioner has not provided the primary records used to compile this data. The sales tax liability shows that the audit accounted for a \$0.00 AGI and tax liability for August and September 2015. The audit

remarks note that the petitioner was closed for renovations during those months. Audit Remarks, Page 10.

The petitioner also states that the audit incorrectly failed to differentiate for the periods when the bar was Oaxaca Sports Café and when it became Danny B's Lounge. She states that a management agreement was entered into and different people were responsible for Danny B's Lounge. However, the petitioner remains listed as the owner on the vendor's and liquor licenses. As a result, the management agreement has no effect on the Tax Commissioner's determination of the underlying assessment. Therefore, these contentions are denied.

Happy Hour Discount Not Applied Appropriately

The petitioner contends that the audit did not correctly account for happy hour pricing. First, the petitioner states that the audit found the petitioner's ratio of happy hour to regular hours was 45% happy hour pricing and 55% regular pricing; however, she contends that the true percentages are closer to 57% happy hour pricing and 43% regular pricing. In support of this contention she provided a chart with daily listings for October through December 2017. The chart depicts the purported ratio of happy hour to regular hour pricing. The petitioner did not submit the primary records that were used to compile the chart. Therefore, the petitioner failed to meet her burden, and her contention is denied.

Next, the petitioner contends that the methodology used to account for happy hour drink prices was incorrect. In an email, petitioner stated that "our bucket price for beer was never factored in at all. In fact, I had asked him to include it on several occasions. Typically, our beer prices are \$4.00 on regular hours and \$3.00 on Happy Hours. However, if you purchase a bucket it is \$14.00, and you receive 5. That is a unit price of \$2.80. This is never reflected in any assessment, nor is a Happy Hour price for regular liquor or specialty drinks." Petitioner's Reply, dated May 4, 2020. In direct contrast to these contentions, the audit remarks state "the percentage of Other Price (Beer Buckets) was calculated by dividing total beers sold in buckets during the three-month purchase period, by the total beers eligible for buckets, to determine the other price percentage." Audit Remarks, Page 8. The remarks further elaborate on how the percentage was determined for and applied to each sample period. On that same page, the auditor noted, under spirituous liquor, that the auditor recorded the price for each different spirituous liquor. *Id.* It also states that the auditor then recorded all happy hour prices which are \$1.00 less than the standard price. *Id.* The evidence demonstrates that the auditor did take such pricing into consideration. Therefore, the petitioner's contention is denied.

Inventory Purchase and Sale Estimates

The petitioner contends that she went back and checked the actual amount of product ordered, and there was a definite decline in purchases between 2016 and 2017, yet the months were assessed almost identically and didn't reflect the decline in purchases. The petitioner also contends that there were three months in both 2015 and 2018 where the product purchases were extremely similar based on her records, but there were disparities in sales assessments of sometimes up to \$25,000. The petitioner states that these contentions are all based on her and her

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distributors' hard data and receipts. She submitted two charts in support of these contentions, which depict lower numbers for 2017 than 2016. The first chart attempted to demonstrate the number of units sold each year from the distributors Heidelberg and Stagnaro. However, the petitioner never defined what a unit is, nor did she provide the primary records used to create the chart. The petitioner also submitted a chart that attempts to demonstrate the amounts of product ordered each year from Backs, Stagnaro, and Heidelberg. The charts show that there is a vast difference between the number of units sold and the number of products ordered. The petitioner yet again failed to define what a product is, failed to provide the primary records used to create the chart, and failed to explain why the amount of product ordered is so much greater than the amount of units sold during those periods. Further, the petitioner failed to specify which months, nor quantity which amounts, in 2015 and 2018 that she was referencing.

Each vendor is required to keep complete and accurate records of sales. R.C. 5739.11. The petitioner did not keep the primary records of her sales as required by law, so, pursuant to R.C. 5739.13, the Tax Commissioner utilized all the information at his disposal to estimate the petitioner's sales. The petitioner has an affirmative duty to provide sufficient evidence to prove her objections. Therefore, the petitioner has failed to meet her burden, and her contentions are denied.

Theft

The petitioner contends it did not receive proper credit for stolen inventory. The petitioner submitted no additional evidence in support of this contention and did not quantify any amounts of loss. A generalized description of losses incurred from theft and spoilage does not meet the appellant's burden to prove error in an assessment. *24 Hours, Inc. v. Tracy*, BTA No. 97-M-1389, 1999 WL 349220 (May 21, 1999). The loss must be quantifiable from the evidence presented by the petitioner. *R & K Entertainment, Inc. v. Zaino*, BTA No. 2003-B-103, 2004 WL 1631689 (July 16, 2004) at *5. Therefore, this objection is denied.

Penalty

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

Accordingly, the assessment is amended as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$26,388.69	\$2,845.45	\$6,597.01	\$35,831.15

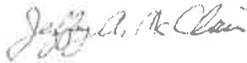
Current records indicate that no payments have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in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

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

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 21 2020**

Devo Corp
North Dixie Food Mart
689 Hafton Ct.
Maineville, OH 45039

Re: Assessment No.: 100001477791
Sales Tax
Account No.: 57-200474
Audit Period: 12/1/2015 – 11/30/2018

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$46,051.28	\$3,925.44	\$23,025.53	\$73,002.25

The petitioner operates as a carryout in Maineville, Ohio. This assessment is the result of an audit of the petitioner's sales for the period shown above. The petitioner does not object to the tax but asks for a remission of the penalty. No hearing was requested.

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

Therefore, the assessment shall be modified as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$46,051.28	\$3,925.44	\$16,117.80	\$66,094.52

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

MAY 21 2020

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 21 2020

Germain Infinity of Easton
3833 Morse Rd.
Columbus, OH 43219

Re: Refund Claim No. 202000247
Filed on July 31, 2019

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of \$731.25 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

This refund claim pertains to sales tax paid on the purchase of an automobile at the claimant's dealership on June 1, 2019, that was later returned. A hearing was not requested.

In its initial refund request the claimant provided a buyer's order, a Clerk of Courts receipt for tax paid, the title, and copies of the front of two checks issued to the customer by the claimant. Upon review, the refund claim was denied. The reviewing agent requested additional documentation, specifically evidence that the customer had been given a full refund of the purchase price. The claimant responded with a signed and notarized affidavit from the customer stating that they would be willing to wait on a sales tax refund until the claimant was refunded.

Ohio Adm.Code 5703-9-11(A) requires that, in order to receive a refund of sales tax when merchandise is returned, the vendor must refund the full purchase price of the merchandise. *Destiny's Auto Sales, LLC v. Levin*, BTA Case No. 2008-M-1773, 2011 WL 489362 (February 8, 2011). Purchase price includes "the total amount of consideration *** for which tangible personal property or services are sold." R.C. 5739.01(H)(1)(a)(iii). The total purchase price consists not only of the cost of the vehicle, but also the services necessary to complete the sale. *Tallen v. Testa*, BTA Case No. 2017-1616, 2018 WL 6493035 (December 4, 2018).

The reviewing agent requested specific documentation to show a full refund had been provided to the customer. The claimant failed to produce the requested documentation. The Department has insufficient evidence to show that the customer was given a refund of the purchase price.

Accordingly, the refund claim is denied.

0000000388

MAY 21 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

0000000297



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 06 2020

Isabella's Market LLC
1283 Salt Springs Rd.
Youngstown, OH 44509

Re: Assessment No.: 100001252027
Sales Tax
Account No. 50-300739
Audit Period: 06/03/2015 – 04/30/2018

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

<u>Tax</u>	<u>Pre-Assessment</u> <u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$54,666.32	\$5,225.14	\$27,332.98	\$87,224.44

This assessment is the result of an audit of the petitioner's purchases for the reporting period shown above. The petitioner operates a carryout in Youngstown, Ohio. A hearing was held on November 21, 2019.

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.

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. A twenty-five percent reduction was applied to the pop/soft drink and energy drink taxable sales as an adjustment for food stamp usage. 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 (282.2294%). 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 petitioner contends that the audit methodology is unreasonable and unlawful. Pursuant to R.C. 5739.11 and Ohio Adm.Code 5703-9-02, vendors must maintain complete and accurate records. 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. See, *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

The auditor requested records from the petitioner including sales records, however because none were provided, the auditor conducted a mark-up analysis. Audit Remarks, Page 8. The petitioner was also provided a letter of agreement that explained how the audit would be conducted and how any tax liability would be calculated. The petitioner declined to sign the letter of agreement. The auditor then mailed the petitioner a ten-day letter dated January 24, 2019 that gave the petitioner the opportunity to provide an alternative methodology to calculate tax liability. The petitioner did not sign that letter or provide an alternative methodology. After the hearing, the petitioner submitted additional information that purports to show a reduction in tax liability. However, the petitioner has not explained how they arrived at a different tax liability or adequately explained the additional records they submitted. It is the petitioner's burden to demonstrate that there was 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). The data submitted by the petitioner does not meet the burden of proving error in the assessment or the audit methodology. The objection is denied.

Figures used to Calculate Liability

The petitioner contends that several figures used by the auditor to calculate liability are inaccurate. For example, the petitioner maintains that the amounts used by the auditor for cigarettes and other tobacco are inaccurate. The petitioner submitted documents after the hearing but the petitioner does not explain how the new documents support this contention. It is not clear from the additional documentation that there is an error in the figures used by the auditor. The objection is denied.

Sample Year

The petitioner contends that sales were higher in the sample year than the other years of the audit period. As previously stated, the petitioner was given a letter of agreement explaining the audit methodology, which stated that 2017 would be used as the sample year to calculate tax liability. Further, the auditor discussed using 2017 as the sample year during the course of the audit with the petitioner. Audit Remarks, Page 7. No objections were made by the petitioner at that time and the petitioner did not object to the sample year when he received the letter of agreement. No further evidence has been provided to support the contention that sales were higher in the sample year than the other years in the audit period. The objection is denied.

Mark-up Percentages

The petitioner contends that the audit report does not support the mark-up percentages for wine, pop & soft drinks, other tobacco, energy drinks, taxable merchandise, and other alcohol. The petitioner maintains that the auditor should have conducted a shelf test to determine the mark-up percentages. According to the petitioner, a shelf test involves calculating mark-up percentages for each category and comparing those percentages to local competitors. Mark-up percentages used by the auditor for the contested categories were either state minimums or comparable to the percentages provided by the petitioner on the Carryout Product Checklist. Audit Remarks, Page 12. For example, the mark-up percentage used for wine was the minimum prescribed by Ohio Adm.Code 4301:1-1-03(C)(2)(c). The Liquor Control Commission of Ohio has determined mandatory minimum price mark-ups for wine. R.C. 4301.13, Ohio Adm.Code 4301:1-1-03. Selling wine at prices below the state minimum is a violation of Ohio liquor law. The Tax Commissioner will not allow an adjustment of the mark-up percentages for wine below state minimum.

Further, while the petitioner expressed disagreement with the mark-up percentages for the other categories during the audit, no proof was ever presented to support changes to the mark-up percentages. Additionally, it should be noted that the auditor did in fact compare mark-up percentages for each category to industry averages for similar size businesses. Audit Remarks, Page 12. The petitioner has provided no further evidence to support the contention that mark-up percentages used were inadequate or that the auditor was required to conduct a shelf test. The objection is denied.

Cigarette Returns

The petitioner contends that more credit should be given for cigarettes returned to the manufacturer. The petitioner has already been given credit for cigarette rebates. Audit Remarks, Page 12. The petitioner did not provide evidence to show that additional credit should be given for returned cigarettes. The petitioner failed to provide sufficient evidence to support their contention. The objection is denied.

Audit Report

The petitioner objects to pages of the audit report that appear to show discrepancies in the tax, interest, and penalty assessed. Page four of the audit report shows the projected tax liability for the entire audit period based on the markup analysis. In accordance with the agreement letter, the petitioner received credit for tax already remitted to the state during the audit period. The petitioner had already remitted \$29,998.64 for the audit period. Audit Remarks, Page 14. Therefore, the projected liability was reduced by this amount, hence the actual tax liability shown on pages 1-3 of the audit report. A reduction in the tax liability also resulted in a reduction of the penalty and interest. The objection is denied.

Penalty Abatement

The petitioner also requests abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax 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). Based on the facts and circumstances, partial penalty abatement is warranted.

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Therefore, the assessment is modified as follows:

<u>Tax</u>	<u>Pre-Assessment</u> <u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$54,666.32	\$5,225.14	\$21,866.37	\$81,757.83

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

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 06 2020

Douglas P. Jarrold
8088 Eagle Creek Rd.
Cincinnati, OH 45247

RE: Refund Claim Number: 201902036
Refund Amount Requested: \$182.63
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of \$182.63, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). A refund of sales tax for returned merchandise is granted when the vendor refunds the full purchase price and sales tax to the customer or credits the customer's account. Ohio Adm.Code 5703-9-11. If the full price is not refunded to the customer, no partial refund is granted to the vendor; no deduction can be made for wear, damage, or use. Ohio Adm.Code 5703-9-11(B); *Buick Youngstown Co. v. Tracy*, BTA No. 93-R-1130, 1994 WL 193898 (May 13, 1994).

The claimant purchased a 2018 Honda Accord from Jeff Wyler Colerain Inc. for \$40,917.15 on February 12, 2018. The claimant's purchase order included a fee for an extended service contract for \$2,609. The claimant returned the vehicle by cancelling the service contract on April 9, 2018 and received a refund from the lender in the amount of \$2,534. The claimant filed the application for refund on January 30, 2019 seeking a refund of the tax paid on the service contract for the returned vehicle.

The Department informed the claimant during the initial denial that the Department requires additional evidence including proof that the full purchase price was refunded to the claimant. The claimant provided copies of the buyer's order evidencing a fee of \$2,609 for the service contract, the product cancellation request form from the dealer, excerpts from the extended service contract, and a statement from Honda Financial Services issued May 7, 2018, which contained a reported warranty refund of \$2,534 applied to the claimant's principal. The claimant contends that the company deducts an administrative fee of \$75 for the cancellation of the extended warrant contract. The claimant has not demonstrated that he received a full refund of sales tax as required by Ohio Adm.Code 5703-9-11.

Therefore, the claim for a refund is denied.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Department of
TaxationOffice of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215**FINAL
DETERMINATION**Date: **MAY 29 2020**Jayco, Inc.
903 S. Main St.
Middlebury, IN 46540RE: Refund Claim No: 202001784
Refund Amount Requested: \$3,893.51
Sales Tax

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

Background

The claimant is a second-stage assembler of recreational vehicles based in Indiana. On September 17, 2016, Summit RV, a Jayco-authorized dealer in Ashland, Kentucky, sold a 2016 Jayco Redhawk 31XL RV (the "first RV") to Ronald and Brenda Caskey. Mr. and Mrs. Caskey were residents of Lawrence County, Ohio at the time of purchase. Sales tax of \$3,893.51 was remitted to the Lawrence County Clerk upon titling the first RV.

Per the claimant, in settlement of warranty-related litigation in Kentucky, it agreed to replace the first RV with a 2020 Redhawk 31FS (the "second RV"). The claimant states that the second RV was provided at no cost to Mr. and Mrs. Caskey and was substituted as collateral on the loan for the first RV. The second RV resulted in a tax burden of \$4,885.78. The claimant paid that amount to the Lawrence County Clerk upon titling the second RV to Mr. and Mrs. Caskey.

Analysis

The burden is on the claimant requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that it is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). The claimant states that a refund is due pursuant to R.C. 5739.07. It did not provide a specific provision of the statute. It provided no analysis why R.C. 5739.07 allows the claimant to recoup the taxes paid by Mr. and Mrs. Caskey on the sale of the first RV.

The claimant was not a party to the remission of tax to Ohio on the first RV. The claimant provided the second RV to Mr. and Mrs. Caskey, apparently for consideration in the form of resolution of Mr. and Mrs. Caskey's warranty claims. Both the sale of the first RV and the transfer of the second RV were taxable events. 5739.01(B). As a result, tax was due on each transaction. The petitioner failed to identify how the payment of tax on the purchase of the first

MAY 29 2020

RV was illegal or erroneous. *See, e.g.,* R.C. 5739.07(A), R.C. 5739.07(B), 5739.07(C), R.C. 5739.07(D). The claimant has not identified how it is entitled to a refund under any provision of R.C. 5739.07. As a result, the Commissioner cannot conclude it has met its burden to show that the claimant is entitled to a refund. The objection is denied.

However, in light of the evidence the claimant has provided, the Commissioner will address its presumable arguments *arguendo*. The claimant included a page from the settlement indicating that Mr. and Mrs. Caskey had assigned over all rights to any sales and use tax refund. The Tax Commissioner can only presume the claimant is arguing it is entitled to a refund in this manner. Even if the claimant had identified how Mr. and Mrs. Caskey's purchase of the first RV included payment of taxes that are illegal and erroneous, it has not identified any law that would make the Tax Commissioner beholden to an unrelated settlement agreement. The refund provisions under the sales and use tax statutes require the Tax Commissioner to refund taxes erroneously paid to the consumer when the consumer has paid directly to the treasurer of the state or to a vendor when the vendor collected and paid over the taxes. R.C. 5739.07 and *Meijer Inc. v. Tracy*, BTA No. 97-M-1618, 2001 WL 128070 (Feb. 8, 2001). Here, the claimant was not the vendor of the first RV. "Vendor" means the person that effects the transfer of tangible personal property. R.C. 5739.01(C). "Consumer" means the person to whom the transfer was effected. R.C. 5739.01(D)(1). The claimant is seeking a refund of the taxes paid on the sale of the first RV. The vendor of the first RV was Summit RV. Thus, the claimant is not entitled to a refund under R.C. 5739.07(B). The claimant provided no evidence Mr. and Mrs. Caskey, the consumers, were given a full refund of the purchase price of the first RV. Instead, the claimant's own statements reflect the second RV was provided as a "substitute." This is not a full refund to a consumer. Thus, the claimant has not shown it is entitled to a refund under R.C. 5739.07(B) or R.C. 5739.07(C). The claimant has not shown how the payments by Mr. and Mrs. Caskey for the first RV were illegal or erroneous as required under R.C. 5739.07 generally. Instead, the claimant has attempted to bypass any statutory requirements with an agreement that has no force of law. Accordingly, the claimant's evidence indicates that no refund is due.

Accordingly, the claim for a refund is denied.

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

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JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 21 2020

Jeff Schmitt Beaver Creek, Inc.
635 Orchard Ln
Beaver Creek, OH 45434

Re: Refund Claim No. 201903563
Refund Amount Requested: \$759.75
Refund Period: February 25, 2019
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The claimant sold a 2012 Chevy Equinox to a customer on February 25, 2019. The customer made a down payment of \$2,000 and the remaining balance was financed by a lender for a total purchase price of \$10,923.25. The customer returned the car to the dealership because of mechanical issues after the sales tax had been remitted to the state. The customer then purchased a 2011 Buick Enclave from the claimant for which the buyer's order also shows a \$2,000 down payment. The claimant remitted sales tax on the purchase of the second car. The claimant requests a refund in the amount of \$759.75 for the amount of sales tax paid on the Chevy Equinox.

Pursuant to Ohio Adm.Code 5703-9-07(A)(3), an application for refund filed by a vendor must show that the tax was remitted to the state and provide applicable supporting documentation. Further, if a vendor fails to refund or credit the customer's account with the full purchase price and applicable tax, the transaction cannot be treated as a return of merchandise for purposes of reporting sales or use tax. Ohio Adm.Code 5703-9-11.

The claimant provided copies of buyer's orders for the original vehicle and the second vehicle. The claimant also submitted copies of checks and receipts from the Montgomery County Clerk of Courts office to prove that tax was remitted on both vehicles. However, it is not clear from the evidence submitted if the initial \$2,000 down payment was returned or transferred to the purchase of the second vehicle or if the customer made another \$2,000 down payment. The claimant submitted copies of statements that show that \$6,974.22 from the first vehicle was transferred to the purchase of the second vehicle. The amount transferred from the purchase of the first vehicle is more than the down payment, but less than the overall purchase price of the first vehicle, so it is not clear what the transferred amount is intended to cover. Because the claimant has not provided adequate evidence to prove that the customer was fully refunded, the Department cannot grant the refund claim pursuant Ohio Adm.Code 5703-9-07(A)(3).

Therefore, the claim for refund is denied.

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MAY 21 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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Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Mercy Health Care Systems
P.O. Box 5203
Cincinnati, OH 45801

Re: Refund Claim No. 201804210
Refund Amount Requested: \$82,728.22
Refund Period: September 2015 – September 2017
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund filed pursuant to R.C. 5739.07.

The claimant submitted a request for refund contending that sales tax was erroneously paid on services provided by a vendor. The claimant contends that they are a tax-exempt organization, and thus should not have paid taxes on the services. Subsequently, the claimant submitted information from the Internal Revenue Service (IRS) identifying the organization as a 501(c)(3) and thus tax-exempt for state purposes pursuant to R.C. 5739.02(B)(12). The claimant's refund request was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was held on February 11, 2020.

Findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St. 3d 121, 537 N.E.2d 1302 (1989). Therefore, the burden is on the taxpayer challenging the determination to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar*, 38 Ohio St.2d 135, 311 N.E.2d 1 (1974). In order for the claimant to receive a refund of sales tax paid, they must establish that sales tax was paid to the vendor or directly to the state. Ohio Adm.Code 5703-9-07(A)(4). Proof of sales tax remitted to the state or vendor must be supported by copies of original invoices or similar documents. Ohio Adm.Code 5703-9-07(A)(4).

The claimant provided copies of original invoices from the vendor. However, these invoices do not separate the tax from the total charge. Therefore, it is impossible to state whether tax was charged based on the invoices. In support of these invoices, the claimant submitted a letter from the vendor acknowledging that they did indeed charge tax and spreadsheets that show the amount of taxes charged on each invoice. No evidence was presented to show tax from these transactions was submitted to the state. Pursuant to R.C. 5739.01(H)(1)(a), the price includes the total amount of consideration for which services are sold. However, the price does not include taxes that are legally imposed and separately stated on the invoice. R.C. 5739.01(H)(1)(c)(iii). Here, the invoices do not separately state the tax. Therefore, the entire amount is considered the "price" and is subject to sales tax. Without a separation of sales tax and price, it appears that no sales tax was charged, because it was all part of the price. The claimant has not provided sufficient evidence to support a refund.

Therefore, the refund request is denied.

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MAY 27 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



Department of
Taxation

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

FINAL DETERMINATION

MAY 27 2020

Date:

Nasrin Gas Inc.
14196 Granger Rd.
Maple Heights, OH 44137

RE: Assessment No. 100001455824
Sales Tax
Account No. 18-804413

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$123,270.44	\$11,144.47	\$61,635.06	\$196,049.97

The petitioner operates as a gas station and convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from April 29, 2016 through December 31, 2018. A hearing was held on March 26, 2020.

The petitioner requested penalty abatement. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. See *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Given the totality of the circumstances, a partial penalty abatement is warranted.

Accordingly, the assessment shall be adjusted as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$123,270.44	\$11,144.47	\$30,817.47	\$165,232.38

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

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

MAY 27 2020

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Netsmart Technologies, Inc.
4950 College Blvd.
Overland Park, KS 66211

RE: Refund Claim No.: 20191591293
Refund Claim Amount: \$9,485.70
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of \$9,485.70, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

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

The claimant contends that they are due a refund on transactions where sales tax was charged prior to customers providing an exemption certificate. The Ohio Revised Code requires tax to be reported and paid with the return for the period in which the sale is made. The tax imposed * * * shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer * * * the full and exact amount of the tax payable on each taxable sale, in the manner and at the times provided as follows: "The vendor or the vendor's agent shall, at or prior to the provision of the service * * * charge the tax imposed * * * to the account of the consumer, which amount shall be collected by the vendor from the consumer in addition to the price. Such sale shall be reported on and the amount of the tax applicable thereto shall be remitted with the return for the period in which the sale is made." R.C. 5739.03(A)(2). The evidence submitted with the refund request shows that credits are being rolled forward to be used on future periods, rather than amending the corresponding return. The additional information submitted by the claimant failed to indicate the counties and periods where the taxes were originally remitted to the state. As such, it is unclear if the credits had been previously taken into account for the transactions included in the refund claim.

Further, the amount requested includes a portion for November 2018 for Summit County. The claimant's return for Summit County shows a negative amount. The Department cannot issue a refund for a county where a negative amount was filed, because the refund is meant to make a

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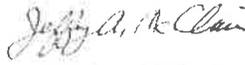
taxpayer whole for taxes illegally or erroneously paid. A negative filing amount does not evidence that a taxpayer over-paid sales tax for that period.

The claimant also failed to demonstrate that the claimant refunded the full amount of the sales tax to their customers as required by R.C. 5739.07(A). Therefore, the evidence submitted is insufficient to warrant a refund of the sales tax as the claimant failed to demonstrate that the claimant erroneously over-paid sales tax to the state and that the claimant refunded the consumer for the full amount of sales tax paid.

Accordingly, the claim for a refund is denied.

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Om Karthikeya LLC
2237 Canterbury Ln.
Wooster, OH 44691

Re: Assessment No.: 100001400147
Sales Tax
Account No.: 76-152385

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$31,520.16	\$3,165.09	\$15,759.98	\$50,445.23

The petitioner operated a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales for the period from August 1, 2015 through October 31, 2018. The petitioner filed a petition for reassessment. A hearing was held on April 9, 2020. The petitioner's objections are addressed below.

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

Audit Methodology

The petitioner failed to maintain primary records as required by R.C. 5739.11. Accordingly, the Department sent a memorandum of agreement to the petitioner that specified the methodology of the audit. The petitioner signed the memorandum of agreement agreeing to the audit methodology.

The inventory purchase invoices maintained by the petitioner were the primary documents utilized to determine the total taxable inventory purchased for sale during the audit period. The invoice dates were used to determine which inventory purchase transactions occurred within the

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audit period. In instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon the records, summaries, or other information obtained directly from the distributors. In the instances when confirmation of the amount of the taxable inventory purchases could not be obtained from either the taxpayer or the distributors, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor. Taxable inventory purchase amounts derived from distributor summaries or estimates will be divided by the number of months in the calendar year period and recorded as monthly purchase amounts for the audit period.

Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco products, pop & soft drinks, energy drinks, other alcohol products, and other taxable merchandise. Each category was assigned a mark-up percentage derived from the product checklist completed with the petitioner's assistance, industry averages, or state minimum requirements. The purchases allocated to each category were marked up and then totaled to calculate the taxable sales for the audit period. The calculated taxable sales from all categories were totaled by month and then multiplied by the applicable tax rate in effect throughout the audit period to determine the sales tax liability by month for the entire audit period. Credits representing the tax reported and paid through the taxpayer's monthly sales tax returns was subtracted from the gross sales tax liability to determine any unreported sales tax liability by month for the entire audit period.

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

Calculation of Taxable Sales and Mark-Ups

The petitioner generally objects to the taxable sales and the mark-up percentages used to calculate those sales. The mark-up percentages that the petitioner provided on the Carryout Product Checklist were noted by the auditor to be very low. The auditor also noted that the cost prices seemed high. The auditor stated "on the product checklist, taxpayer indicated that the mark-up percentage for beer was 5-6% and wine was 6-8%. State minimum for Beer is 25% and Wine is 50%." Audit Remarks, Page 15. There were additional questions as to how the petitioner was calculating the mark-up percentages on the checklist. "For example, the taxpayer indicated cost was \$4 and the retail price was \$4.50. The mark-up percentage for these costs and retail price would be $(\$4.50 - 4.00) / \$4.00 = 12.5\%$. The taxpayer indicated the markup percentage was 5-6%." *Id.* Therefore, the product checklist was deemed unreliable and industry averages were used. *Id.* The petitioner did not provide any further evidence to show that his proposed mark-up percentages were actually correct, while meeting all necessary legal requirements. The petitioner also did not submit any evidence that shows that the calculation of the taxable sales was incorrect. Therefore, the objection is denied.

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Limited Sampling Period

In his petition for reassessment, the petitioner objects "to the limited sampling period used to calculate taxable sales over a period of 39 months." No sampling period was used during the audit because the petitioner wanted the audit done comprehensively. Audit Remarks, Page 15. The petitioner has provided no evidence that a sampling period was in fact used or that the assessment is incorrect. Therefore, this objection is denied.

Inventory Purchase Estimates

The petitioner objects to the estimation of inventory purchases used during the audit period. The petitioner states that the estimates need to be adjusted downward because sales in 2017 were significantly lower than in 2016, which is part of the reason he sold his business in September 2017. Each vendor is required to keep complete and accurate records of sales, together with a record of the tax collected on the sales, * * * and shall keep all invoices, bills of lading, and other such pertinent documents. R.C. 5739.11. The petitioner did not keep any records of his sales as required by law, so, pursuant to R.C. 5739.13, the Tax Commissioner utilized all the information at his disposal to estimate the petitioner's sales. Certain distributor records were not provided or made available during the audit, and in such instances comparable industry averages were used to estimate the petitioner's purchases. The auditor explained this methodology to the petitioner prior to commencing the audit. The petitioner signed the memorandum of agreement agreeing to that audit methodology without providing any alternative methods. The petitioner did not provide any evidence to prove error in the assessment. Therefore, this objection is denied.

Sale of Business During the Audit Period

The petitioner contends that he sold his business in the middle of the audit period, on September 15, 2017, and was no longer associated with the business in any manner after that date. The petitioner contends that a term of the purchase agreement stated that the buyer would be responsible for any fines, penalty, or tax-related obligations. The petitioner contends that the buyer utilized his vendor's and liquor licenses without his permission after the sale closed. These contentions are not well taken.

The sale of business agreement that the petitioner entered into was submitted with the petition for reassessment. There is, indeed, a clause that states the buyer is responsible for all tax obligations. In that same paragraph the seller also gives explicit permission to use his liquor license. "The Seller will allow the Purchaser to continue functioning in the normal purchase and selling of liquor as per the Seller's Liquor License eligibility from the Closing Date and up until the Purchaser obtains his own Liquor License." Exhibit B, Page 3. This term clearly contradicts the petitioner's contention that the buyer utilized the petitioner's liquor license without his permission for the remainder of the audit period. "As a consequence, any side agreement that a taxpayer might enter into with another entity concerning responsibility for payment of sales tax, like the Management Agreement to which appellant refers, is not binding on the Tax Commissioner." *Painter v. Testa*, 2017-Ohio-267, 81 N.E.3d 860 (5th Dist.2017) citing *Farhan, d.b.a. Hiland Foods v. Tracy*, 10th Dist. No. 97APH10-1410, 1998 WL 48987 (July 21, 1998).

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In *Painter*, the appellant entered into an agreement to sell the business assets to another entity. *Painter*, at ¶ 2. It allowed that entity to operate under its liquor license until the license was successfully transferred. *Id.* The court found that the taxpayer could not avoid tax liability simply by entering into an agreement that stated he was delegating the duty to collect and remit taxes to another person operating under the taxpayer’s licenses. *Id.*; *SQS Foodstores, Inc. v. Tracy*, 7th Dist. Mahoning No. 00-CA-124, 2002-Ohio-5015, 2002 WL 31116698. The 3rd-party agreement that the petitioner entered into is not binding on the Tax Commissioner. Therefore, the petitioner has failed to provide sufficient evidence that proves he should not be liable for the taxes incurred during the entire audit period, and these contentions are denied.

Theft, Expired, and Damaged Inventory

The petitioner contends it did not receive proper credit for stolen, expired, and damaged inventory. The petitioner further contends that there were two major break-ins during the audit period, which involved significant inventory loss and damage. No police reports were submitted to substantiate such claims. The petitioner submitted a “Waste Spoilage” spreadsheet to demonstrate in what months theft or waste occurred for different categories of goods. However, instead of providing quantities or dollar amounts related to such losses, a simple “yes” had been used to mark in what month theft or waste occurred. The petitioner submitted no additional evidence in support of this contention and did not quantify any amounts of loss. A generalized description of losses incurred from theft and spoilage does not meet the appellant’s burden to prove error in an assessment. *24 Hours, Inc. v. Tracy*, BTA No. 97-M-1389, 1999 WL 349220 (May 21, 1999). The loss must be quantifiable from the evidence presented by the petitioner. *R & K Entertainment, Inc. v. Zaino*, BTA No. 2003-B-103, 2004 WL 1631689 (July 16, 2004) at *5. Therefore, these contentions are denied.

Inventory After Sale

The petitioner contends that, at the time of the sale of his business, there was approximately \$20,000.00 in inventory, which became the property of the new owners. Therefore, he should not be assessed for the sales taxes related to the sale of that \$20,000 worth of inventory by the new owners. Those sales were made through the petitioner’s liquor and vendor’s licenses. As addressed above, the agreement that the petitioner had with the buyers is not binding on the Tax Commissioner.

In addition, the audit methodology used to calculate the liability does not rely upon beginning and ending inventory balances. The purpose of a mark-up calculation is to derive a reasonable percentage of taxable and exempt sales in relation to total sales in the usual course of business for the petitioner. The specific beginning and ending inventory balances for the sample period are irrelevant to the percentage calculation. The unsold items remaining on the shelf should contain the same percentage of taxable to exempt items. Unless the petitioner can demonstrate that for some reason, more taxable items remained in inventory than the calculated percentage, the build-up of inventory does not alter the methodology used to determine the liability. 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 (Jul. 16, 1999). Therefore, this

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contention is denied.

Interest

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

Penalty

The petitioner objects to and seeks abatement of the penalty. Pursuant to R.C. 5739.133, a penalty may be added to every amount assessed under R.C. 5739.13 or 5739.15 as follows: "in the case of an assessment against a person who fails to collect and remit the tax required by this chapter * * * up to fifty per cent of the amount assessed." R.C. 5739.133(A)(1). Therefore, the addition of a penalty is proper. The surrounding facts and circumstances warrant a partial abatement of the penalty.

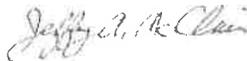
Accordingly, the assessment is amended as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$31,520.16	\$3,165.09	\$7,879.93	\$42,565.18

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

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

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


JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 27 2020

Naina P. Thaker
6187 Downs Ridge Ct.
Elkridge, MD 21075

Re: Assessment No.: 100001117077
Tax Type: Sales (Responsible Party)
SAI Empire Enterprises, LLC
Vendor's License No.: 31-389287
Reporting Period: 07/01/2014 – 06/30/2017

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$54,649.37	\$5,025.36	\$27,324.57	\$86,999.30

This is a responsible party assessment. SAI Empire Enterprises, LLC incurred sales tax liability resulting in the sales tax assessment for the above period. This assessment was never fully satisfied by SAI Empire Enterprises, LLC and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees, who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities, personally liable for the unpaid amount. Accordingly, the outstanding liability of SAI Empire Enterprises, LLC has been derivatively assessed against Naina Thaker. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the period listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was held on May 14, 2020.

The petitioner objects to the assessment. The petitioner contends that SAI Empire Enterprises, LLC was sold, on April 30, 2014 to Aleshia Mahmoud, d.b.a. Cincinnati ESR, Ltd. The petitioner contends that the bill of sale clearly stated that Cincinnati ESR, Ltd. would make no purchases and sales on the seller's account. She states that Cincinnati ESR, Ltd. continued to make sales under her vendor's license without her permission. She states that she had no relation to the gas station after April 2014, and therefore, she is not a responsible party for this tax liability. These contentions are not well taken.

The evidence submitted indicates that the petitioner entered into a management agreement with Aleshia Mahmoud. The petitioner submitted a bill of sale, signed only by herself, in support of her contention that she sold the business. Instead, the evidence provided indicates that the petitioner did not truly sell the business. The bill of sale contained conflicting clauses regarding the usage of

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the petitioner's licenses, while also giving the petitioner a revisionary interest in the event of a default by the buyer.

In an attempt to limit the petitioner's future liability, the fifth clause of the bill of sale states that the buyer would be responsible for the payment of all taxes, and the eighth clause states that SAI Empire Enterprises, LLC is not to be held responsible for any tax liability incurred after the sale. However, any side agreement that a taxpayer might enter into with another entity concerning responsibility for payment of sales tax is not binding on the Tax Commission. *Farhan, d.b.a. Hiland Foods v. Tracy*, 10th Dist. Franklin No. 97APH10-1410, 1998 WL 418987 (July 21, 1998). Therefore, the petitioner is not able to delegate her tax collection and remittance duties to Cincinnati ESR, Ltd. via the bill of sale.

Furthermore, SAI Empire Enterprises, LLC was listed on the liquor license for the entire audit period. A responsible party questionnaire was submitted that states that the petitioner is a responsible party for SAI Empire Enterprises, LLC. The petitioner, as president, is the sole signatory on the vendor's license application for SAI Empire Enterprises, LLC. The petitioner was also the sole signatory on the Articles of Organization for SAI Empire Enterprises, LLC.

The petitioner contends that Aseshia Mahmoud, the buyer, 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 totality of the circumstances demonstrates that the petitioner retained the requisite indices of responsibility during the audit period.

The petitioner failed to demonstrate that she sold her business and that Aseshia Mahmoud utilized her licenses without permission. The petitioner also failed to demonstrate that the assessment was in error. Therefore, it is determined that the petitioner is a responsible party of SAI Empire Enterprises, LLC, under R.C. 5739.33.

Accordingly, the assessment is affirmed as issued.

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

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

The Cheesecake Factory Restaurants, Inc.
26901 Malibu Hills Rd.
Calabasas Hills, CA 91301

Re: Refund Claim No. 20191591300
Filed on March 22, 2019
Sales Tax
Account No. 95-502377

This is the final determination of the Tax Commissioner on an application for refund in the amount of \$166,521.66 in sales tax filed pursuant to R.C. 5739.07. The claim was initially granted in part and denied in part. The claimant disagreed with the denial and provided additional information concerning \$67,725.64 of the denied transactions. A hearing was not requested.

In order for a consumer to receive a refund, they must first show sales tax was paid. Ohio Adm.Code 5703-9-07(A)(4). Additionally, a consumer must submit invoices or similar documents. Ohio Adm.Code 5703-9-07(A)(4)(a). One of the invoices submitted by the claimant, invoice 8916 from Valley Refrigeration, does not show that sales tax was charged. The claimant did not submit invoices for the one hundred and ninety-seven transactions labeled as "Fire Protection System Inspection/Maintenance." The claimant must submit invoices and proof of tax paid in order to justify a refund. The claimant has failed to do so for these transactions. Therefore, the refund claim on these transactions is denied.

A claim for refund of tax illegally or erroneously remitted must be made within four years of the payment of the tax. R.C. 5739.07(D). The commissioner cannot waive this jurisdictional filing requirement. *Verifone, Inc. v. Limbach*, 69 Ohio St.3d 699, 635 N.E.2d 377 (1994). The claimant filed the application for refund on March 22, 2019, therefore tax must be paid to Ohio after March 22, 2015 in order to be considered for a refund. The evidence submitted by the claimant shows payment on thirty-eight transactions was remitted before March 22, 2015. The Commissioner is unable to consider a refund on these transactions.

The Department reviewed the additional information on the remaining transactions and the evidence supports a refund in the reduced amount of \$64,147.12.

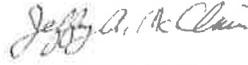
Accordingly, a partial refund of \$64, 147.12, plus appropriate interest, is hereby authorized.

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

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

The MCS Group
1601 Market St., Ste. 800
Philadelphia, PA 19103

Re: Assessment No. 100000735321
Sales Tax
Account No. 18-904181

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$10,776.47	\$1,232.00	\$5,388.21	\$17,396.68

The petitioner provides outsourcing services for records retrieval, litigation support, reprographic, and discovery services. This assessment is the result of an audit of the petitioner's transactions from July 1, 2008 through June 30, 2015. A hearing was not requested.

Taxability of Transactions

The objections in the petition for reassessment were not clear. The Commissioner believes the petitioner contends each invoice constitutes a bundled transaction, the objects of which are the exempt services themselves, rather than the documents produced, and therefore the entirety of the transactions are exempt from taxation.

The services subject to taxation in the audit were scanning, uploading, copying, printing, document conversion, custodial fees, shipping, and other services relating to litigation document management. The transactions were itemized on monthly invoices provided to the petitioner's customers.

Pursuant to R.C. 5739.012(A), a bundled transaction is "... the retail sale of two or more products ... where the products are otherwise distinct and identifiable products and are sold for one non-itemized price." Further, "one non-itemized price" is defined in R.C. 5739.012(B)(1) as "... not includ[ing] a price that is separately identified by product on binding sales or other supporting sales-related documents ... , including, but not limited to, an invoice ... "

As demonstrated by the samples provided by the petitioner during the audit, its customers receive itemized invoices that vary based on services provided. "If a retail sale of two or more products is not made for one non-itemized price, then the retail sale is not a bundled transaction ... A retail sale shall not be considered made for one non-itemized price if the purchaser has the option of declining to purchase any of the products being sold and, as a result of the purchaser's selection of products, the

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sales price varies or a different price is negotiated." ST 2010-02 - Sales and Use Tax: Bundled Transactions – Issued September 2010, §A.2.

By varying charges based on the number of services provided, the invoices demonstrate the transactions at issue are not bundled transactions as defined by the Code. Therefore, each itemized transaction can be analyzed for taxability.

Electronic Document Management

In the alternative, if treated as individual bundled transactions, each itemized service on the invoice is taxable as well. The petitioner is contracted to access and provide information to its clients via electronic document management through such services as scanning and uploading documents. The petitioner contends that these services are not taxable, as the “true object” of the transactions were the personal services provided and not the information itself. This objection is not well met.

Under the Supreme Court’s decision in *Emery Industries v. Limbach*, 43 Ohio St.3d 134, 138, 539 N.E.2d 608 (1989), a “... personal service is taxable if it is part of a transaction involving a transfer of tangible personal property as a consequential element and the person performing the service does not make a separate charge for the property.” To determine the consequentiality of the tangible personal property in a transaction, the Court declared the “true object” test, or the determination of the essential reason the buyer enters the transaction, to control. *Id.* at 138-139. This is a fact specific determination.

The petitioner was contracted to provide copies of the documents pertaining to active litigation. The overriding purpose of the transactions were the documents themselves, and the transaction would not have been entered into but for the documents. The transaction had no purpose beyond document access; therefore, the documents were the consequential element and true object of the subject transactions.

Additionally, the services were not itemized on the invoices. There was no breakdown between service charges and fees for the tangible personal property produced. If the invoices do not separate charges for the property and services when the true object is found to be taxable tangible personal property, the entire transaction is taxable. *Id.* at 138.

Further, the services provided were taxable. Pursuant to R.C. 5739.01(B)(3)(e), a “sale” includes all transactions by which:

“ ... electronic information services are or are to be provided for use in business when the true object of the transaction is the receipt by the consumer of ... electronic information services rather than the receipt of personal or professional services to which ... electronic information services are incidental or supplemental.”

In 5739.01(Y)(1), the Code defines “electronic information services” as “placing data into computer equipment to be retrieved by designated recipients with access to the computer equipment.” Through scanning and uploading documents for access via customer systems, the petitioner was providing electronic information services.

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As both the services and the tangible personal property in the subject transactions were taxable, the objection is denied.

Penalty Remission

The petitioner asks for a remission of the penalty assessed. The petitioner's reporting and remitting compliance was minimal. From 2008 until 2013, when it applied for a vendor's license, the petitioner had multiple and repeated transactions in the state of Ohio for which the petitioner failed to collect and remit sales tax. The petitioner contends that it believed it had no nexus with the state of Ohio necessary to maintain a vendor's license and remit sales tax.

Pursuant to R.C. 5739.033(C) " ... all sales shall be sourced as follows: (2) When the tangible personal property or service is not received at a vendor's place of business, the sale shall be sourced to the location known to the vendor where the consumer ... receives the tangible personal property or service, including the location indicated by instructions for delivery to the consumer ..."

The petitioner provided legal support services to clients in Ohio while maintaining an office in Pittsburgh, Pennsylvania. The services were not received at the vendor's place of business. Therefore, the transactions were sourced at the location where the consumer received the tangible personal property and services, their offices in Ohio.

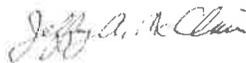
As the transactions were sourced to Ohio and the petitioner failed to maintain an Ohio vendor's license, thereby failing to collect and remit the proper sales tax, the penalty stands as issued.

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments in the amount of \$12,032.11 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



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 21 2020

Tiffin Theater, Inc.
30 S. Washington St.
Tiffin, OH 44883

Re: Claim No. 20191533911
Filed on January 1, 2019

This is the final determination of the Tax Commissioner on an application for refund of sales tax in the amount of \$2,891.47 filed pursuant to R.C. 5739.07. The claimant contends that the tax was illegally or erroneously paid to the Treasurer of State.

This refund claim pertains to the tax paid on the purchases related to the claimant's non-profit corporation between December 1, 2014 and December 31, 2018. A hearing was not requested.

Upon initial review, a partial refund was granted in the amount of \$2,528.19 plus applicable interest. The reviewing agent requested additional documentation showing proof of tax paid, which the claimant provided for a portion of the transactions. The additional documentation supports an additional partial refund.

Accordingly, a refund in the amount of \$357.16 with appropriate interest is hereby authorized.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

MAY 27 2020

Date:

Tuhin Inc.
5110 Clark Ave.
Cleveland, OH 44102

RE: Assessment No. 100001118574
Sales Tax
Account No. 18-802122

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$51,978.30	\$3,518.25	\$25,989.05	\$81,485.60

The petitioner operates as a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from November 3, 2015 through June 30, 2018. A hearing was held on March 25, 2020.

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

Audit Methodology

The petitioner failed to maintain the primary sales records required by R.C. 5739.11. Therefore, the Department sent a memorandum of agreement to the petitioner that specified the methodology of the audit. The agreement was provided to the petitioner with a ten-day correspondence requesting that if the petitioner disagreed with the audit methodology, an alternative methodology must be submitted in written form within ten days. The petitioner did not submit an alternative methodology.

A sample period of January 1, 2017 through December 31, 2017 was used as a representation of the entire audit period to calculate taxable sales. It is agreed upon that the taxpayer's activity for

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the sample period is representative of the business activity for the entire audit period. The inventory purchase invoices maintained by the petitioner were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. In the instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon records, summaries, or other information obtained directly from the distributor. In the instances when confirmation of the amount of the taxable inventory purchases could not be obtained from either the taxpayer or the distributor, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco products, pop & soft drinks, energy drinks & other beverages, other alcohol products, and other taxable merchandise. Each category was assigned a mark-up percentage derived from auditor observations, industry averages, and state minimum requirements. Taxable inventory purchases amounts derived from distributor summaries or estimates were divided by the number of months in the sample period and recorded as monthly purchase amounts. The petitioner accepted SNAP throughout the entire audit period. Therefore, a twenty-five percent discount was applied to the pop and energy drinks categories.

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 108.9435 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. Credit representing the tax reported and paid through the taxpayer's monthly sales tax returns were subtracted from the gross sales tax liability to determine any unreported sales tax liability by month for the entire audit period.

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

Theft

The petitioner contends that the assessment did not correctly account for theft that occurred during the audit period. The petitioner states there were numerous thefts, with "quite a large quantity of cartons of cigarette stolen." The petitioner elaborated that even though the police did not itemize any of the products that were stolen, the thefts accounted for a majority of the

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discrepancy in sales tax owed. The petitioner never provided proof to substantiate the claims nor quantified an exact loss. A generalized description of losses incurred from theft and spoilage does not meet the appellant's burden to prove error in an assessment. *24 Hours, Inc. v. Tracy*, BTA No. 97-M-1389, 1999 WL 349220 (May 21, 1999). The loss must be quantifiable from the evidence presented by the petitioner. *R & K Entertainment, Inc. v. Zaino*, BTA No. 2003-B-103, 2004 WL 1631689 (July 16, 2004) at *5. Therefore, the petitioner's contention is denied.

Penalty

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

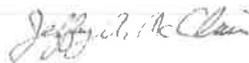
Accordingly, the assessment shall be adjusted as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$51,978.30	\$3,518.25	\$12,994.45	\$68,491.00

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

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 21 2020

Daniel A. & Wanda J. Wilson
34 1/2 W. Main St.
New Lebanon, OH 45345

Re: Assessment No. 100001345598
Sales Tax
Account No. 57-173780

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$30,743.45	\$2,668.82	\$3,074.13	\$36,486.40

The petitioner requests penalty abatement. The facts and circumstances support abatement of the penalty.

Therefore, the assessment is adjusted as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$30,743.45	\$2,668.82	\$0.00	\$33,412.27

Current records indicate payments of \$33,412.27 have been applied to this assessment, in full satisfaction of the assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date:

MAY 27 2020

Amtrust North America, Inc.
800 Superior Ave. E., 21st Fl.
Cleveland, OH 44114

RE: Assessment No.: 100001057119
Use Tax
Account No.: 97-301944

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$235,921.65	\$37,962.68	\$35,387.78	\$309,272.11

The petitioner operates as an insurance company. This assessment is the result of a field audit of the petitioner's purchases and expenses from January 1, 2010 through December 31, 2015. The petitioner filed a petition for reassessment. A hearing was not requested.

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., 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. The petitioner indicated that their purchases were not seasonal in nature, so a sample period of January 1, 2015 through December 31, 2015 was chosen as the sample period. It was agreed that the sample period 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 test 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

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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.

Tax Paid

The petitioner objects to the inclusion of transactions in a specific account for IT-copiers. The petitioner contends that it paid sales tax directly to the vendor for the invoices listed in Account No. 6210437. The petitioner provided invoices, purchases orders, and a list of disputed items listed in the account. The petitioner also provided a letter from the vendor that verified sales tax was paid upfront on the leases in the account and that the tax was remitted. The petitioner presented sufficient evidence to verify tax payments, collections, and remittances for the transactions. Since the petitioner provided sufficient evidence to support payment of tax on the contested transactions, the petitioner is entitled to an adjustment of the amount assessed.

Accordingly, the assessment is adjusted as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$225,501.02	\$36,271.10	\$33,824.70	\$295,596.82

Current records indicate that \$309,272.11 has been paid, resulting in a refund due of \$11,792.25 plus applicable interest.

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

G&G Berry, LLC
Gene Berry
5099 Vista Chico Loop
Las Cruces, NM 88012

Re: Assessment No.: 100000955386
Consumer's Use Tax
Account No.: 97-305460
Reporting Period: 01/01/11 – 11/30/16

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$7,530.02	\$1,479.91	\$1,129.49	\$10,139.42

This assessment is the result of an audit of the petitioner's purchases of six vehicles. The facts indicate that Gene Berry formed G&G Berry, LLC, a Montana limited liability company, on April 11, 2011.¹ Using the Montana LLC, the petitioner purchased a 2004 Tiffin Phaeton motorhome in May 2011, a 2011 GMC Sierra pickup truck in November 2011, a 2002 Harley-Davidson XL 1200C motorcycle in December 2013, a 1999 Harley-Davidson FXD motorcycle in July 2015, a 2002 Harley-Davidson FLHT motorcycle in July 2016, and a 2005 Ford Econoline E450 in November 2016. These vehicles were purchased by G&G Berry, LLC and registered in the state of Montana. The evidence in the file demonstrates that Gene Berry was a fulltime resident of Ohio at the time of these purchases. The evidence in the file further demonstrates that the petitioner failed to pay tax to any jurisdiction on these purchases. As a result, this assessment was issued. Although G&G Berry, LLC and Mr. Berry were both assessed, it is not the intent of the Tax Commissioner to collect tax more than once for the purchase of these four vehicles. The Supreme Court of Ohio held that where ownership is unclear, multiple parties may be assessed for the full amount of the same use tax. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954. A hearing was not requested on this matter. 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

¹ Per the Secretary of State's website, the LLC was *involuntarily* dissolved on 12/1/2019. Montana Secretary of State, https://www.mtsosfilings.gov/mtsos-corporations/viewInstance/view.html?id=8383adccf3cbf69372998a953a3446188dc5bd05a9b8cf477c5894769a3f4c83&_timestamp=16982443626030974 (accessed Apr. 30, 2020).

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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).

Background

Montana does not have a sales or use tax. Some practitioners advertise that people can form Montana LLCs and avoid paying tax on the purchase of vehicles. The typical scenario involves a resident of another state who wants to purchase a motorhome or vehicle without paying sales tax on the purchase. The person forms an LLC, usually with the help of a Montana tax or law practitioner. The title of the vehicle is put in the name of the Montana LLC and the LLC obtains a Montana license plate for the vehicle.

In this case, LLC Agency Services LLC is listed as the registered agent for G&G Berry, LLC. Tax Free RV or Montana RV Consulting would send an annual renewal invoice to the petitioner as a bill for renewing the LLC's filings in Montana.² Tax Free RV, LLC lists Montana RV Consulting as an alternate business name on the Better Business Bureau's website.³ LLC Agency Services LLC, Tax Free RV, LLC, and Montana RV Consulting, Inc. appear to be the same company or, at the very least, affiliated with one another.

Tax Free RV's website provides a detailed description of the services it provides its clients. Tax Free manages the legal relationships needed to form and maintain the LLC in Montana.

Tax Free RV's services include:⁴

- Establishing the Montana statutory address for the LLC.⁵
- Acting as the Montana Statutory Agent that handles the legal affairs, including filing the Articles of Organization, and all other legal paperwork.
- Registering the RV in the name of the Montana LLC and purchasing the license plates. The license plates will be shipped directly to any address designated.
- Produce a company book for Limited Liability Company documentation and state registration forms.
- Package the Limited Liability Company Kit.⁶

² Berry's Response, dated June 24, 2017, Pages 138-139.

³ Better Business Bureau, <http://www.bbb.org/eastern-washington/business-reviews/campers-dealers/tax-free-rv-llc-in-red-lodge-mt-64006791> (accessed Apr. 30, 2020).

⁴ Even though Tax Free RV, specifically has RV in its title, its services are not limited to RVs. It will also help purchasers title other vehicles, including passenger cars in the name of the Montana LLC. Tax Free RV, *Add Other Vehicles*, <http://www.taxfreerv.com/add-other-vehicles/> (accessed Apr. 30, 2020).

⁵ The website advertises, in bold, "[s]ince it's an official company, you do not need to personally reside in Montana." Tax Free RV, *Form Montana LLC*, <http://www.taxfreerv.com/form-montana-llc/> (accessed Apr. 30, 2020).

⁶ The Company Kit includes: Professional Binder with the Limited Liability Company name, Articles of Organization, Operating Agreement, Company Resolution to purchase your RVs, Company Resolution authorizing Operation of your RVs, Certificate of Membership Interest, Attractive glove box envelope for your important papers. *Id.* (accessed Apr. 30, 2020).

- Tax Free sends a notice to the LLC owner each December for renewal of the Montana LLC to keep the registration and tax status in good standing.

Therefore, it is clear that Tax Free RV and similar practitioners perform all the duties and handle all the paperwork associated with forming and managing the LLCs, including registering the RV and purchasing the license plates. It is also clear that these LLCs are not formed for the purpose of engaging in business. The LLC's address is often the address of the practitioner that set up the LLC.⁷ The evidence establishes that the LLCs are formed for no other purpose but to avoid sales tax and other associated costs related to owning the RVs and other vehicles. The petitioner has even repeatedly stated that G&G Berry, LLC is a "non-revenue generating entity serving as a holding company for the purpose of limiting exposure to personal liability."

Sham Transaction

In accordance with R.C. 5741.02, use tax is due on the storage, use or other consumption of tangible personal property in this state, that has not been subject to sales tax in another jurisdiction. The Department of Taxation contacted the petitioner regarding the purchases and informed the petitioner of the obligation to pay use tax on the purchases of vehicles used or stored in the State of Ohio, even if the vehicle was purchased in another state, pursuant to R.C. 5741.02. The letter asked the petitioner to respond and either demonstrate that that had been already paid, or if tax had not been paid, to remit use tax to Ohio. The letter also explained that if the petitioner felt that use tax was not due, then an explanation as to why should be provided.⁸

The petitioner responded in an email, dated May 25, 2017, but did not provide the requested information. Instead, the petitioner merely stated that his Ohio residence terminated when he departed the state in early 2011. He went on to state that the LLC and its initial holdings were established after he terminated his Ohio residence. Finally, he admitted that two of the audited vehicles, the 2002 Harley-Davidson FLHT and the 2005 Ford Econoline E450, were moved to Ohio in 2016. In an email, dated May 26, 2017, the Department informed the petitioner that his response was insufficient and informed him again to provide the documentation requested in the April 27th communication regarding the vehicle. Additionally, the Department requested information to substantiate the petitioner's contention that he was no longer an Ohio resident during the audit period.

On June 24, 2017, the petitioner responded to the Department's request and provided some of the requested documentation by mail. The petitioner supplied a schedule that detailed his locations and time spent at each spot during the audit period, paperwork showing where and when certain vehicles were serviced, and the filings associated with his Montana LLC. The petitioner reiterated the fact that he believes he was no longer an Ohio resident, even though he admits to filing Ohio income tax returns through 2015. He also reiterated the fact that, in April 2011, he established a non-revenue holding company with the purpose of purchasing, insuring, and operating vehicles to reduce the risk of personal liability. The petitioner supplied a copy of an Affidavit of Inactivity

⁷ G&G Berry, LLC's street and mailing addresses are identical to LLC Agency Services LLC's, Tax Free RV, LLC's, and Montana RV Consulting, Inc.'s street and mailing addresses. *See* Montana SoS G&G Berry and Montana SoS LLC Agency.

⁸ MT MV Initial Letter, dated April 27, 2017.

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that he filed with the state of Montana on behalf of G&G Berry, LLC. This affidavit states that the entity had no income or business activities of any nature in the state of Montana.⁹ He admitted that the company purchased and insured its first vehicle in May 2011.

On July 2, 2017, the petitioner responded to a request from the Department for information about the sale, simply stating that there was no bill of sale because the motorcycle was acquired for \$2,000.00, in cash. On July 13, 2017, the Department issued a letter to the petitioner alerting him to the amount of use tax the Department determined that he owes and requesting a response by August 3, 2017, or an assessment would be issued. On August 2, 2017, the petitioner responded to the Department via email. He asked for all future correspondence to be remitted to his New Mexico address and again stated that he was not an Ohio resident pursuant to R.C. 5747.24. The petitioner contended that he had significantly less than the required contact periods for Ohio residency in 2013-2015,¹⁰ which is in contradiction to the evidence previously submitted. On February 2, 2018, the Department asked the petitioner, via email, for the FEIN for G&G Berry, LLC and alerted the petitioner that it was working to finalize the assessment, so that the petitioner could formally appeal the result. The petitioner responded, in his petition for reassessment, that G&G Berry, LLC does not have a FEIN.

As determined above, the facts in this case demonstrate that the petitioner formed the LLC for the purposes of avoiding tax and personal liability. As evidenced by his admissions and the Affidavit of Inactivity, it is not the petitioner's contention that he formed the Montana LLC to actually perform business. Therefore, for the purposes of determining tax liability, Gene Berry and G&G Berry, LLC are indistinguishable as the owners of the vehicles. Due to the conflicting ownership and registration information, the Tax Commissioner issued an assessment against both Gene Berry and G&G Berry, LLC, which was proper under *Satullo v. Wilkens*, 111 Ohio St3.d 399, 2006-Ohio-5856, 856 N.E.2d 954. These assessments were not issued with the intention of collecting the tax twice, but rather to ensure the proper party paid the outstanding tax liability. *Id.*

Vehicle Locations

The petitioner maintains that some of the vehicles were never stored in Ohio, and, therefore, he does not owe use tax on the purchases. However, the weight of the evidence indicates that the petitioner did store, and use, all of the vehicles, at issue, in Ohio.

First, it is undisputed, by the petitioner's own admission, that the 2002 Harley-Davidson HD FLHT and 2005 Ford Econoline E450 were stored and used in Ohio.¹¹ Per the Greene County Auditor's website, the Econoline E450 even appears to be parked in the driveway of the petitioner's residence in Beavercreek, Ohio.¹² The evidence provided shows that the 2004 Tiffin Phaeton motorhome was used in Ohio on multiple occasions during the audit period. The petitioner admits that the

⁹ Berry's Response, dated June 24, 2017, Page 128.

¹⁰ Petitioner contends that he had one contact period in 2013, four contact periods in 2014, and two contact periods in 2015. Berry's Response, dated August 2, 2017.

¹¹ Berry's Response, dated May 25, 2017.

¹² The photo of the property on the auditor's website shows a white, bus-like vehicle parked in the petitioner's driveway that fits the description of a 2005 Ford Econoline E450. Greene County Auditor, Greene County URECA – Property Search, <http://apps.co.greene.oh.us/auditor/ureca/data.aspx?parcelid=B42000200160002400&taxyear=2019&taxformyear=2019&search=Address&searchp=1150%2cfirewood%2cDR> (accessed Apr. 29, 2020).

motorhome was in Ohio during October 2013, June 2014, August 2014, and June 2015. Service records state that the vehicle was serviced in Ohio on May 22, 2015, September 20-22, 2014, June 16-26, 2014, and July 15, 2014. Notarized records show that the petitioner was in Ohio during September 2011, September 2013, and July 2015. The 2011 GMC Sierra was purchased in the state of Ohio on or about November 29, 2011. The petitioner used his Ohio driver's license during the purchase of the 2011 GMC Sierra.

The petitioner submitted company resolutions to purchase and operate the 1999 Harley-Davidson FXD motorcycle that were dated June 4, 2015. However, the forms appear to have actually been signed and notarized in Warren, Ohio on July 14, 2015. The petitioner stated in his June 24, 2017 response that the motorcycle was purchased in June 2015. That coincides with a time period that the petitioner admits that he was in Ohio. This suggests that the 1999 FXD was in Ohio during that time. The petitioner stated that all of the motorcycles were transported with the movements of the motorhome, which places the 2002 XL 1200C in Ohio when the motorhome was in Ohio, during the periods listed above, after its purchase in December 2013.

The overwhelming weight of the evidences shows that all six vehicles have been stored, used, or otherwise consumed in Ohio, by the petitioner, and that they have not been subject to sales tax in another jurisdiction.¹³ Therefore, the petitioner has not met his burden of proof that the assessment was in error, and his contentions regarding each vehicle are denied.

Residency

The petitioner contends that he was not an Ohio resident during the audit period. He states that he abandoned his Ohio domicile in 2011, turned over all financial responsibility in his house, at that time, to his son, and did not satisfy the minimum number of contact periods required to determine Ohio residency pursuant to R.C. 5747.24. He contends that he took up "100% residence in the motorhome with a physical mailing address of 9 South Broadway, Ste F, Red Lodge, Montana."¹⁴ The petitioner stated that, in May 2011, Michael Berry assumed physical and financial responsibility for the property at 1150 Firewood Drive, Beavercreek, Ohio 45430. He states that Michael Gene Berry was added to the property deed, mortgage note, and insurance documents. These contentions are not well taken.

First, the petitioner incorrectly tried to apply R.C. 5747.24 to this assessment. R.C. 5747.24 states that this section is to be applied solely for the purposes of R.C. 5747 and 5748. This assessment was issued pursuant to R.C. 5741.02. As a result, R.C. 5747.24 does not apply in the case at hand, and the minimum contacts argument is denied.

The weight of the evidence suggests the petitioner was an Ohio resident for the majority of the audit period. It is undisputed that the petitioner originally resided at 1150 Firewood Drive, Beavercreek, Ohio 45430. According to the Greene County Auditor's website, the petitioner

¹³ For example, the purchase order submitted for the 2005 Ford Econoline E450 shows no Virginia sales tax was collected on the transaction. Berry's Response, dated June 24, 2017, Page 122.

¹⁴ Petition for Reassessment.

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retained title to that property throughout the audit period.¹⁵ There were no sales recorded with the Greene County Auditor between August 29, 1994 and March 16, 2017.¹⁶ The petitioner provided no records to substantiate his contention that he transferred his property to his son during the audit period. Furthermore, the petitioner has not shown that he had a permanent domicile outside of Ohio until February, 29 2016, when he bought a house in Las Cruces, New Mexico.¹⁷ The petitioner simply stated that he “HAD SEVERAL abodes, places where I lived or domiciled at, outside of Ohio for the ENTIRE TIME from May 2011 through November 30, 2016.”¹⁸ In contrast, the law remains that a person retains his old domicile until a new one is shown to be acquired by the concurrence of fact and intent; no one acquires a new domicile, or loses the old one, by the mere fact that he intends to move elsewhere and prepares to do so, or that he is physically in a new location without any intent to remain there. *City of East Cleveland v. Landingham*, 97 Ohio App.3d 385, 646 N.E.2d 897, (8th Dist.1994), citing *In re Estate of Huston*, 165 Ohio St. 115, 133 N.E.2d 347 (1956). Therefore, the petitioner is deemed to have been domiciled in Ohio until, at least, he proved that he had moved to New Mexico and intended to remain there. However, there is conflicting evidence that suggests the petitioner might still own the Beaver creek, Ohio property, and therefore, he may not have relinquished his Ohio domicile even when he moved to New Mexico.¹⁹ Regardless, only the two vehicles that the petitioner stated were moved to Ohio in 2016 were acquired by the petitioner after he moved to New Mexico.

According to the operating agreement, the company books for G&G Berry LLC are kept and maintained in Beaver creek, Ohio.²⁰ The Montana Annual Report Power of Attorney, a form authorizing agents to act in Montana on behalf of the LLC, was signed by the petitioner and notarized in Ohio. Voting records show that the petitioner voted in Ohio through, at least, 2013. The Beaver creek address remained listed as the petitioner’s address on his Ohio voter registration.²¹ The petitioner filed income tax returns with the state of Ohio through 2015. The petitioner held a valid Ohio driver’s license during the audit period, with an expiration date of January 5, 2015. The overwhelming weight of the evidence suggests that the petitioner was an Ohio resident for, at least, the majority of the audit period. Therefore, the petitioner has failed to satisfy his burden of proof that the assessment was in error. As such, the petitioner’s contention is denied.

ODT Nexus Questionnaire

The petitioner states that at no time did G&G Berry, LLC conduct activities or provide services for profit in Ohio, or any other state. He contends that G&G Berry, LLC does not have an economic

¹⁵ Greene County Auditor, Greene County URECA – Property Search, <http://apps.co.greene.oh.us/auditor/ureca/data.aspx?parcelid=B42000200160002400&taxyear=2019&taxformyear=2019&search=Address&searchp=1150%2cfirewood%2cDR> (accessed Apr. 29, 2020).

¹⁶ *Id.*

¹⁷ New Mexico Property Purchase, dated February 29, 2016.

¹⁸ Petition for Reassessment.

¹⁹ The Greene County Auditor’s website states that on March 16, 2017, a Land & Building Sale occurred for \$0.00, and the owner of the property is now listed as “Berry, Gene et al.” Greene County Auditor, Greene County URECA – Property Search,

<http://apps.co.greene.oh.us/auditor/ureca/data.aspx?parcelid=B42000200160002400&taxyear=2019&taxformyear=2019&search=Address&searchp=1150%2cfirewood%2cDR> (accessed May 1, 2020).

²⁰ Berry’s Response, dated June 24, 2017, Page 132.

²¹ Lexis Report for Gene Berry.

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nexus with the state of Ohio, and therefore, the cited tax codes do not apply. In support of this contention he supplied the Ohio Department of Taxation's Corporate Franchise Tax and Pass-Through Entity Tax Nexus Questionnaire. This questionnaire is meant to help determine if an entity owes corporation franchise tax or pass-through entity tax to Ohio, not use tax. It is a form that is no longer utilized by the Department. Furthermore, R.C. 5741.02 does not require a person or entity to conduct economic activities or provide services to be subject to Ohio's use tax. It simply requires a person to store, use, or consume tangible personal property in Ohio that has not been subject to sales tax in another jurisdiction. Therefore, the petitioner's contention is denied.

Penalty

The petitioner seeks abatement of the penalty. The totality of the circumstances indicates that the penalty abatement is warranted. Therefore, the petitioner's request is granted.

Accordingly, the assessment is adjusted as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$7,530.02	\$1,479.91	\$0.00	\$9,009.93

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

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 21 2020**

Glenn T Grayson
5304 Canyon Ridge Dr.
Liberty Twp., OH 45011-0630

Re: Assessment No.: 100000355931
Use Tax

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$327.30	\$5.52	\$49.10	\$381.92

The assessment is the result of an audit of the petitioner's purchase of a 2007 Polaris All-Terrain Vehicle ("ATV"). 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 ATV could not be verified and this assessment was issued. The petitioner objects to the assessment. A hearing was not requested.

Analysis

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 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, for an ATV to be eligible for the farming or agricultural exemption, three prerequisites must be met. First, the ATV must be used by a person that 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 primarily 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. An ATV is not a traditional piece of farming equipment with a use limited to a farming function. Instead, an ATV can be used in ways that are both taxable and exempt. In most instances, ATVs are not primarily used as farming equipment. They are most often used for the taxable purposes of convenient transportation around the owner's property or for recreation.

Engaged in the Business of Farming

In this case, the petitioner has failed to sufficiently demonstrate that he is farming as a business enterprise. The petitioner claims to produce timber for sale. While the petitioner supplied a copy of his Federal Form 1040 Schedule F (Profit or Loss from Farming) for 2015, the information reported on this document does not support the operation of an active farming business enterprise since the petitioner made no sales. However, despite having no sales, the petitioner listed total expenses of \$33,904.00, resulting in a net loss of \$33,904.00. The combination of this information undercuts the petitioner's claim that he is engaged in farming for sale as a legitimate business enterprise.¹ It is also unclear why the ATV was titled in the individual petitioner's name instead of his business if it is used in the business' farming activities. The Tax Commissioner cannot conclude based upon the evidence shown that the petitioner is engaged in the business of farming.

Use of the Vehicle

Next, the petitioner has failed to demonstrate exempt usage of the ATV. The petitioner submitted a questionnaire in support of the exempt usage of the ATV. While the removal of invasive plants (15%) may be considered an exempt usage in connection with timber production, the ATV's usage in cutting wood/hauling brush (50%), delivering meals (5%), recreational activities (5%) are not. The petitioner also wrote in under the other portion of the questionnaire the ATV is used for "planting trees" (10%). It is unclear how an ATV could be directly used in "planting trees" – what the petitioner seems to be referring to is using the ATV as convenient transport around its timber farm so the petitioner can plant seeds in the ground. Based upon the evidence provided, the Tax Commissioner cannot conclude the use of the ATV was exempt.

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

¹ See *Grayson Family Farm v. Testa*, BTA No. 2017-1983, 2018 WL 2409821 (May 21, 2018), *2.

Accordingly, the assessment is affirmed.

MAY 21 2020

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
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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



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

FINAL DETERMINATION

Date: **MAY 21 2020**

Glenn T Grayson
5304 Canyon Ridge Dr.
Liberty Twp., OH 45011-0630

Re: Assessment No. 100000356110
Use Tax

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$862.98	\$13.97	\$129.45	\$1,006.40

The assessment is the result of an audit of the petitioner's purchase of a 2015 Yamaha All-Terrain Vehicle ("ATV"). 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 ATV could not be verified and this assessment was issued. The petitioner objects to the assessment. A hearing was not requested.

Analysis

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 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, for an ATV to be eligible for the farming or agricultural exemption, three prerequisites must be met. First, the ATV must be used by a person that 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 primarily 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. MAY 21 2020

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. An ATV is not a traditional piece of farming equipment with a use limited to a farming function. Instead, an ATV can be used in ways that are both taxable and exempt. In most instances, ATVs are not primarily used as farming equipment. They are most often used for the taxable purposes of convenient transportation around the owner's property or for recreation.

Engaged in the Business of Farming

In this case, the petitioner has failed to sufficiently demonstrate that he is farming as a business enterprise. The petitioner claims to produce timber for sale. While the petitioner supplied a copy of his Federal Form 1040 Schedule F (Profit or Loss from Farming) for 2015, the information reported on this document does not appear to support the operation of an active farming business enterprise since the petitioner made no sales. However, despite having no sales, the petitioner listed total expenses of \$33,904.00, resulting in a net loss of \$33,904.00. The combination of this information undercuts the petitioner's claim that he is engaged in farming for sale as a legitimate business enterprise.¹ It is also unclear why the ATV was titled in the individual petitioner's name instead of his business if it is used in the business' farming activities. The Tax Commissioner cannot conclude based upon the evidence shown that the petitioner is engaged in the business of farming. The petitioner has failed to show error in the assessment.

Use of the Vehicle

Next, the petitioner has failed to demonstrate exempt usage of the ATV. The petitioner submitted an unsigned questionnaire in support of the exempt usage of the ATV. While the removal of invasive plants (18%) and spraying for insects, weeds, and rodents (10%) may be considered an exempt usage in connection with timber production, the ATV's usage in cutting wood/hauling brush (43%), delivering meals (5%), and recreational activities (2%) are not. The petitioner also wrote in under the other portion of the questionnaire that the ATV is used for "planting trees" (25%). It is unclear how an ATV could be directly used in "planting trees" or sowing seeds (5%) – what the petitioner seems to be referring to is using the ATV as convenient transport around its timber farm so the petitioner can plant seeds in the ground. It is further unclear how an ATV could be directly used in other methods with the preceding in mind. Based upon the evidence provided, the Tax Commissioner cannot conclude the use of the ATV was exempt.

¹ See *Grayson Family Farm v. Testa*, BTA No. 2017-1983, 2018 WL 2409821 (May 21, 2018), *2.

MAY 21 2020

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

Accordingly, the assessment is affirmed.

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



Department of
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Office of the Tax Commissioner
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00-3900018

FINAL DETERMINATION

Date: **MAY 27 2020**

Lester Haverty
4682 S. Onyx Dr.
Chandler, AZ 85249

Re: 3 Assessments
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 assessments:

<u>Assessment No.</u>	<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
100000722837	\$6,910.80	\$1,015.29	\$1,036.62	\$8,962.71
100000722838	\$6,910.80	\$1,011.32	\$1,036.62	\$8,958.74
100000722839	\$5,915.00	\$846.65	\$887.25	\$7,648.90
			Total:	<u>\$25,570.35</u>

These assessments are the result of an audit of the petitioner’s purchase of three vehicles during the period of September 20, 2012 through November 5, 2012. The petitioner objects to the assessments. A hearing was held on October 25, 2018.

Background

On August 6, 2012, the petitioner, along with David Kim, incorporated D&L Group LLC (D&L) in Montana through Bennett Law Office. On or about September 20, 2012, the petitioner purchased a 2013 Nissan GTR through D&L. On or about September 27, 2012, petitioner purchased a 2013 Nissan GTR through D&L. On or about November 5, 2012, petitioner purchased a 2009 Nissan GTR through D&L. Each vehicle was purchased outside of Ohio and taken to Switzer Performance Group in Oberlin, Ohio for modifications. All three vehicles were later sold. Lester Haverty signed on behalf of D&L on each transfer of title. The petitioner at no point possessed a motor vehicle dealer license.

Montana does not have a sales tax or a use tax. Some practitioners advertise that people can form Montana LLCs and avoid paying sales tax on the purchase of vehicles. For instance, the Bennett Law Office website states¹,

Forming a Montana business entity (usually a Limited Liability Company) may help you eliminate all sales taxes and minimize license fees upon the purchase and

¹ Bennett Law Office, P.C., *Vehicle Registration*, <http://www.bennettlawofficepc.com/registration-services.html>. (accessed May 8, 2020).

registration of a recreational vehicle or any other vehicles.

A Montana business entity can take ownership of a new vehicle, or a vehicle you currently own, and register the motor vehicle in Montana, which has no sales tax and low registration fees.

The typical scenario involves a resident of another state, such as Ohio, who wants to purchase a motorhome, recreational vehicle, boat, automobile, etc. and avoid paying tax on the purchase. The person forms an LLC, usually with the help of a Montana tax or law practitioner. The title of the vehicle is put in the name of the Montana LLC and the LLC obtains a Montana license plate for the vehicle.

The petitioner, an Ohio resident during the audit period, purchased three vehicles. They did not pay sales or use tax to Montana because Montana imposes no sales tax on the purchase of vehicles by its residents. As previously stated, the petitioners contend the vehicles were being purchased by D&L.

The Bennett Law Office website provides a detailed description of the services it provides to its clients. Bennett Law Office manages the legal relationships needed to form and maintain the LLC in Montana. The Bennett Law Office website explains they draft and file all forms in order to establish a business entity, and can later handle winding up the entity. The site also strongly reminds clients not to use their own name or address on title paperwork.² Daniel Bennett signed the application for Title on behalf of D&L.

It is clear that Bennett Law Office and similar practitioners perform all the duties and paperwork associated with forming and managing the LLCs, including registering vehicles and purchasing the license plates. The petitioner contends they were testing a business model with these purchases. At hearing it was stated the entity was formed in Montana so “we could test this out tax free.” When asked for records to support the claimed nature of this business, the petitioner stated there were no records.³ In addition, the petitioner did not provide any advertisements for the sale of these vehicles and stated that they had no ties to Montana.⁴ The evidence establishes the LLC was formed for no other purpose but to avoid sales tax and other associated costs related to owning vehicles. A transaction without economic substance because there is no business purpose other than obtaining tax benefits is a sham transaction and may be disregarded by the Tax Commissioner for the purposes of determining tax liability. R.C. 5703.56(B).

Resale

In accordance with R.C. 5741.02, use tax is due on the storage, use or other consumption of tangible personal property in the state, that has not been subject to sales tax in another jurisdiction. By bringing the vehicles into Ohio to be stored and modified, the petitioner exercised ownership and control over the vehicles subjecting them to use tax in Ohio. The petitioner contends the vehicles were purchased for resale and excepted from use tax pursuant to R.C. 5739.01(E) and

² *Id.*

³ Response to letter from Hearing Officer Sabol dated October 29, 2018.

⁴ *Id.*

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5741.02(C)(2). The resale exception to sales and use tax levied on a motor vehicle is not available to a taxpayer who does not possess a motor vehicles dealer’s license. *Dotzauer v. Testa*, BTA Nos. 2014-2030, 2014-2076, 2015 WL 1048568 (Feb. 27, 2015).

The petitioner contends they were exempt from the requirement to obtain a motor vehicle dealer license as they sold fewer than five vehicles pursuant to R.C. 4517.02(A). The petitioner misinterprets R.C. 4517.02(A). The statute states “Except as otherwise provided in this section no person shall do any of the following* * *.” This is the start of a list of conditions which could require an individual to secure a license to deal motor vehicles. The use of the word “any” makes it clear that a person is required to obtain a license to deal motor vehicles if any one of the listed requirements is met. Making more than five sales of motor vehicles in a twelve-month period is merely one of the potential circumstances which could require a person to maintain a motor vehicle dealer’s license. The statute does not state anything about making fewer than five sales exempting a person from the other listed requirements.

The petitioner is still required to obtain a motor vehicle dealer license if they assume to engage in the business of selling new or used motor vehicles. R.C. 4517.02(A)(1) and 4517.02(A)(2). Business is defined as “any activities engaged in by any person for the object of gain, benefit, or advantage either direct or indirect.” R.C. 4517.01(E). The petitioner stated they were “engaging in the purchase, modification and resale of motor vehicles.”⁵ The petitioner obtained the benefit of testing their business model, and any profit they may have made on the sales. As the petitioner was engaging in business and required to maintain a motor vehicle dealer’s license, use tax was properly assessed in accordance with the Board of Tax Appeals’ decision in *Dotzauer*. The objection is denied.

Penalty Abatement

The petitioner requests abatement of the penalty. Abatement of the penalty is at the discretion of the Tax Commissioner. *King Entertainment Co. v. Limbach*, 63 Ohio St.3d 369, 588 N.E.2d 777 (1992). The surrounding facts and circumstances do not support abatement of the penalty. The request for penalty abatement 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 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.

⁵ Written Argument in Favor of Petition for Reassessment, page 1.

MAY 27 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



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 21 2020**

J. Irwin Company, Ltd.
P.O. Box W
Bastrop, TX 78602

RE: Assessment No. 100001515527
Use Tax
Account No. 97-301242

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$56,648.50	\$9,763.53	\$4,247.78	\$70,659.81

The petitioner operates as a construction contractor. This assessment is the result of an audit of the petitioner's records from March 1, 2013 through December 31, 2016. A hearing was held on April 16, 2020. The petitioner requested abatement of the interest and penalty.

Interest Abatement

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

Penalty

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

Accordingly, the assessment shall be adjusted as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$56,648.50	\$9,763.53	\$0.00	\$66,412.03

Current records indicate that payments of \$66,412.03 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

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MAY 21 2020

be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

2019037322

FINAL DETERMINATION

Date: **MAY 27 2020**

David Kim
23200 Chagrin Blvd., Unit 473
Beachwood, OH 44122

Re: 3 Assessments
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 assessments:

<u>Assessment No.</u>	<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
100000643006	\$8,135.17	\$1,005.40	\$1,220.28	\$10,360.85
100000643018	\$12,417.05	\$1,469.31	\$1,862.56	\$15,748.92
100000643019	\$15,672.05	\$1,814.57	\$2,350.81	\$19,837.43
			Total:	\$45,947.20

These assessments are the result of an audit of the petitioner's purchase of three vehicles during the period of March 11, 2013 through June 14, 2013. The petitioner objects to the assessments. A hearing was held on October 25, 2018.

Background

On August 12, 2012, the petitioner incorporated Kim Consulting LLC (KC) in Montana through Bennett Law Office. On or about March 11, 2013, the petitioner purchased a 2013 BMW M5 through KC. On or about May 14, 2013, petitioner purchased a 2013 Nissan GTR through KC. On or about June 14, 2013, petitioner purchased a 2014 Nissan GTR through KC. Each vehicle was purchased outside of Ohio and taken to Switzer Performance Group in Oberlin, Ohio for modifications. All three vehicles were later sold. David Kim signed on behalf of KC on each transfer of title. The petitioner at no point possessed a motor vehicle dealer license.

Montana does not have a sales tax or a use tax. Some practitioners advertise that people can form Montana LLCs and avoid paying sales tax on the purchase of vehicles. For instance, the Bennett Law Office website states¹,

Forming a Montana business entity (usually a Limited Liability Company) may help you eliminate all sales taxes and minimize license fees upon the purchase and registration of a recreational vehicle or any other vehicles.

¹ Bennett Law Office, P.C., *Vehicle Registration*, <http://www.bennettlawofficepc.com/registration-services.html>. (accessed May 8, 2020).

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A Montana business entity can take ownership of a new vehicle, or a vehicle you currently own, and register the motor vehicle in Montana, which has no sales tax and low registration fees.

The typical scenario involves a resident of another state, such as Ohio, who wants to purchase a motorhome, recreational vehicle, boat, automobile, etc. and avoid paying tax on the purchase. The person forms an LLC, usually with the help of a Montana tax or law practitioner. The title of the vehicle is put in the name of the Montana LLC and the LLC obtains a Montana license plate for the vehicle.

The petitioner, an Ohio resident, purchased three vehicles. They did not pay sales or use tax to Montana because Montana imposes no sales tax on the purchase of vehicles by its residents. As previously stated, the petitioners contend the vehicles were being purchased by KC.

The Bennett Law Office website provides a detailed description of the services it provides to its clients. Bennett Law Office manages the legal relationships needed to form and maintain the LLC in Montana. The Bennett Law Office website explains they draft and file all forms in order to establish a business entity, and can later handle winding up the entity. The site also strongly reminds clients not to use their own name or address on title paperwork.² Daniel Bennett signed the application for Title on behalf of KC. In addition, petitioner stated the address for Bennett Law Office as KC's principal place of business.³

It is clear that Bennett Law Office and similar practitioners perform all the duties and paperwork associated with forming and managing the LLCs, including registering vehicles and purchasing the license plates. The petitioner contends they were testing a business model with these purchases. At hearing it was stated the entity was formed in Montana so "we could test this out tax free." When asked for records to support the claimed nature of this business, the petitioner stated there were no records, no day to day operations of the business, and he had no ties to Montana.⁴ In addition, the petitioner did not provide any advertisements for the sale of these vehicles. The evidence establishes the LLC was formed for no other purpose but to avoid sales tax and other associated costs related to owning vehicles. A transaction without economic substance because there is no business purpose other than obtaining tax benefits is a sham transaction and may be disregarded by the Tax Commissioner for the purposes of determining tax liability. R.C. 5703.56(B).

Resale

In accordance with R.C. 5741.02, use tax is due on the storage, use or other consumption of tangible personal property in the state, that has not been subject to sales tax in another jurisdiction. By bringing the vehicles into Ohio to be stored and modified, the petitioner exercised ownership and control over the vehicles subjecting them to use tax in Ohio. The petitioner contends the vehicles were purchased for resale and excepted from use tax pursuant to R.C. 5739.01(E) and

² *Id.*

³ Affidavit of David Kim, ¶ 6.

⁴ Response to letter from Hearing Officer Sabol dated October 29, 2018.

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5741.02(C)(2). The resale exception to sales and use tax levied on a motor vehicle is not available to a taxpayer who does not possess a motor vehicle dealer’s license. *Dotzauer v. Testa*, BTA Nos. 2014-2030, 2014-2076, 2015 WL 1048568 (Feb. 27, 2015).

The petitioner contends they were exempt from the requirement to obtain a motor vehicle dealer license as they sold fewer than five vehicles pursuant to R.C. 4517.02(A). The petitioner misinterprets R.C. 4517.02(A). The statute states “Except as otherwise provided in this section no person shall do any of the following* * *.” This is the start of a list of conditions which could require an individual to secure a license to deal motor vehicles. The use of the word “any” makes it clear that a person is required to obtain a license to deal motor vehicles if any one of the listed requirements is met. Making more than five sales of motor vehicles in a twelve-month period is merely one of the potential circumstances which could require a person to maintain a license to deal motor vehicles. The statute does not state anything about making fewer than five sales exempting a person from the other listed requirements.

The petitioner is still required to obtain a motor vehicle dealer license if they intend to engage in the business of selling new or used motor vehicles. R.C. 4517.02(A)(1) and 4517.02(A)(2). Business is defined as “any activities engaged in by any person for the object of gain, benefit, or advantage either direct or indirect.” R.C. 4517.01(E). The petitioner stated they were “engaging in the purchase, modification and resale of motor vehicles.”⁵ The petitioner obtained the benefit of testing their business model, and any profit they may have made on the sales. As the petitioner was engaging in business and required to maintain a motor vehicle dealer’s license, use tax was properly assessed in accordance with the Board of Tax Appeal’s decision in *Dotzauer*. The objection is denied.

Penalty Abatement

The petitioner requests abatement of the penalty. Abatement of the penalty is at the discretion of the Tax Commissioner. *King Entertainment Co. v. Limbach*, 63 Ohio St.3d 369, 588 N.E.2d 777 (1992). The surrounding facts and circumstances do not support abatement of the penalty. The request for penalty abatement 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 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.

⁵ Written Argument in Favor of Petition for Reassessment, page 1.

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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.

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Kuka Toledo Production Operations LLC
6600 Center Dr.
Sterling Heights, MI 48312

Re: Assessment No. 100000780124
Use Tax
Account No. 97-163033

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:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$267,269.79	\$20,419.10	\$40,090.43	\$327,779.32

This assessment is the result of a field audit of the petitioner’s purchases for the period of July 1, 2013 through September 30, 2016. The petitioner objected to portions of the assessment. Telephone hearings were held on January 9, 2019 and March 4, 2019.

Background

KUKA Toledo Production Operations, LLC (“KTPO”) is a wholly owned subsidiary of KUKA Systems North America LLC. During the audit period, the petitioner was a manufacturer of Jeep Wrangler vehicle bodies. KTPO conducted its operations at KTPO’s manufacturing facility in Toledo, Ohio. The KTPO facility is integrated with a larger manufacturing facility operated during the audit period by DaimlerChrysler Corporation and later Fiat Chrysler Automobiles (collectively, “Chrysler”).

KTPO’s production of body-in-whites is a multi-step process. Assembling the vehicle body involves welding the underbody, windshield, and closures together. This work is done in 60 different operator stations. Once the vehicle bodies are complete, they are moved through to Chrysler’s facility, on a just-in-time basis, where they are shipped directly into Chrysler’s paint shop. Per the petitioner, KTPO was contractually obligated during the audit period to produce 43 vehicle bodies per hour. These operations were performed six days a week, 24 hours a day. Failure to meet these requirements could result in KTPO’s displacement from its manufacturing facility and its operations being assumed by Chrysler.¹

In order to meet these demands, it was critical that KTPO had all the necessary operator stations filled at all the necessary times. KTPO maintained its own union workforce at the facility

¹ Petitioner’s Memorandum in Support of Petition for Reassessment (“Memo in Support”), p. 1.

pursuant to a collective bargaining agreement. However, KTPO states that it had to deal with absenteeism among its union employees. The absenteeism was significant enough that KTPO had to engage staffing companies so that it could guarantee “a sufficient number of people were present” so that output was not affected.² At hearing, the petitioner stated that it was searching for dedicated personnel to “backfill” positions. Dissatisfied with the quality of workers provided by its initial staffing company, KTPO decided to engage the company now named Imperial Inc. d/b/a Supplemental Staffing (“Supplemental”)³ to provide the necessary workers so that KTPO would have enough people on hand to ensure consistent output. While KTPO requested that the same workers not be reassigned to other Supplemental Staffing clients, there was no obligation for Supplemental Staffing to do so.⁴

KTPO signed a “Staffing Agreement” (the “contract” or “agreement”) with Supplemental Staffing on June 1, 2010 that contains several exhibits. The agreement notes it is “for one year ending May 31, 2011” but will “continue until terminated by either party pursuant to the terms of this Agreement.” The body of the contract states that “[i]f during the term of any agreement, which is one year or longer, [KTPO] decides to hire [a Supplemental] employee, [KTPO] will assume full responsibility for fulfilling the Ohio Sales Tax Exemption by specifying that the employee is acquired on a permanent basis.” Exhibit A contains a list of assigned employees.⁵ Exhibit B to the agreement notes that “the employee placement list on **exhibit A** does not specify an ending date.” (Bolding in original.) It goes on to state that “[t]he employee is being placed on an assignment with [KTPO] which does not have an end date (or “on a permanent basis” as that term is defined in Ohio Rev. Code §5739.01 et seq.)” Finally, the exhibit states that “[t]he employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonal, short term or specific project workloads. At this time, the placed employee is intended to be a permanent outsourcing of labor and will remain assigned until or unless circumstances not known at this time change.” A further attached document is a fee schedule from 2008 which describes the position as “Production Temp Workers.” KTPO kept track of these expenses in its ledger under Account 62000, which it labelled as “Temporary Labor – General.” Per KTPO, this contract is still currently in use, but has not been re-executed since 2010.

Per KTPO, Supplemental Staffing interviewed and administered a dexterity test before hiring workers. Once hired, Supplemental personnel went through a 4-hour “administrative orientation.” After this initial orientation, Supplemental personnel would learn how to work each of the various operator stations by shadowing KTPO employees for a six-week period.⁶ KTPO

² *Id.*

³ The true entity the petitioner contracted with is unclear. The agreement KTPO executed was with “Imperial Staffing,” which is a registered trade name of “Imperial Industrial Temporaries, Ltd.,” an Ohio corporation that was still active as of 2019. Additionally, one of the signees to the agreement identified herself as being from “Imperial Industrials,” another trade name registered to Imperial Industrial Temporaries, Ltd. However, invoices from the audit period are from “Supplemental Staffing,” with the bill-to address as “Imperial, Inc.,” which is a separate Ohio corporation that may be a successor to the original Imperial entities. The CEO of Imperial, Inc., Malcolm Richards, also appears to have signed the original agreement. As the transactions at issue are with Supplemental Staffing, the Tax Commissioner will use that name to refer to the employment services provider.

⁴ Memo in Support, p. 2 and Staffing Agreement Exhibit B.

⁵ KTPO did not present any evidence of any of these listed employees working during the audit period.

⁶ KTPO states this six-week period is when most turnover would occur.

notes that the work provided by Supplemental employees was not particularly taxing.⁷ At hearing, KTPO stated that Supplemental workers would have “first dibs” on KTPO positions, but turnover with KTPO was rare. Supplemental workers’ employment was at-will and there was no contractual obligation that KTPO offer a Supplemental worker full-time employment if a position became open.

Per KTPO, after training, it assigned Supplemental workers to operator stations as needed to ensure production requirements were met. Generally, KTPO assigned ten Supplemental employees per shift to vacant operator stations depending on production needs. The need for Supplemental workers arose from employee leave. “For example, if a KTPO person [were] scheduled to be on vacation, or out sick, [a Supplemental] person would cover that production station for the period of the absence.”⁸ Additionally, Chrysler began scheduling Saturday and Sunday production, resulting in increased absences by KTPO’s union employees. Accordingly, KTPO began offering an “early out” program, which would offer KTPO employees early leave or weekend leave in order of seniority. KTPO notes that “[i]f no KTPO employees availed themselves of an ‘early out’, [a Supplemental] person might be sent home for the remainder of the day and report back for work the next day.”⁹ Per KTPO, its intent was that Supplemental employees would be available daily with their work hours being adjusted based upon the needs of the facility, i.e., whether or not employees were on vacation, out sick, or using early leave.¹⁰ The “Early Out” agreements shift from referring to sending “temporary employees” home in 2014 to sending “Supplemental employees” home in 2016.¹¹ KTPO states it generally had 10 employees per shift that were assigned to cover vacant operator stations.

The petitioner agreed to calendar year 2015 as the representative period for the audit. At audit, the petitioner provided invoices for 43 weeks of the year and the final 2 weeks of 2014. Post-hearing, the petitioner provided invoices with employee names through December 13, 2015. It also provided a summary pivot table of statistics regarding employee names and hours from the invoices. No work orders, purchase orders, exemption certificates, or individual worker contracts were provided.

During the audit period, Supplemental Staffing supplied a total of 82 employees. The number of Supplemental employees provided per week was between 18 and 33. No Supplemental employee worked the full 52 weeks. 70% of Supplemental employees over the period worked for more than six weeks, which KTPO indicated was the length of its training program. Only five Supplemental employees took a break and returned to KTPO, and each break lasted one week. The invoice amounts varied from \$1,528.57 to \$31,445.48.

Employment Services

Pursuant to R.C. 5739.02, “an excise tax is * * * levied on each retail sale made in this state,” with R.C. 5739.01(B)(3)(k) defining the term “sale” to include “[a]ll transactions by which * *

⁷ Memo in Support, p. 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Petitioner’s Exhibit 2.

* [an e]mployment service is or is to be provided.” R.C. 5741.02(A)(1) levies a complementary “excise tax * * * on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided.” 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 supplied receive their wages, salary, or other compensation from the provider of the service.”

The petitioner contends its purchase of employment services was exempt from taxation under R.C. 5739.01(JJ)(3). It states that “[e]mployment service does not include * * * [s]upplying 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.” The Supreme Court of Ohio recently addressed the “permanent assignment” aspect of R.C. 5739.01(JJ)(3) in *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.2d 345. Citing its prior decision in *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, 800 N.E.2d 740, the *Accel* court explained that “the [*H.R. Options*] test for permanent assignment has two elements: (1) the employee must be assigned for an indefinite period, i.e., the contract stating the employee's assignment does not specify an ending date, and (2) the employee must not be provided as a substitute for a current employee who is on leave or to meet seasonal or short-term-workload needs.” *Accel* at ¶ 40. Both the contract and the facts and circumstances surrounding the assignment are factors that must be reviewed. *Id.*

As an exception or exemption from taxation, R.C. 5739.01(JJ)(3) is strictly construed against the taxpayer's claim for relief. *Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, 978 N.E.2d 882 ¶18 (further citations omitted). Additionally, the petitioner has the burden to prove that these employees were assigned to the petitioner on a permanent basis. *Id.* at ¶ 15. Even when the contract meets the criteria set forth in the statute on its face, the Tax Commissioner will review evidence to determine whether the parties' performance under the contract is consistent with permanent assignment. *H.R. Options* at ¶ 22.

Permanent Assignment

The Supreme Court of Ohio has consistently rejected the idea of “magic words” in a contract to satisfy the exemption. *Bay Mechanical* at ¶ 19. However, the first element of permanent assignment requires “the employee must be assigned for an indefinite period, i.e., the contract stating the employee's assignment does not specify an ending date * * * [.]” *Accel* at ¶ 40. While, generally, the specific individual employee contracts are needed to prove permanent assignment, none were provided. *H.R. Options* at ¶ 23. Therefore, the Commissioner will review the employment services contract to determine whether the employees were assigned for a definite or an indefinite term.

The agreement is inconsistent with permanent assignment. It is uncontroverted that the employment services contract both states an end date and states it exists in perpetuity. The Court in *H.R. Options* expressly found that contracts that state an end date do not meet the exemption. *Id.* at ¶¶ 23-24. Based on the employment services contract alone, the Tax Commissioner cannot conclude it does not specify an ending date as required by the first element of the *H.R. Options* test.

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Additionally, the record does not have a clear line of succession from the original entity that signed the agreement and KTPO.¹² KTPO states that both it and Supplemental have abided by the terms of the agreement, but they have not re-executed it since 2010. A contract that is not reduced to writing is not inherently fatal to a claim of employment services. *Excel Temporaries, Inc. v. Tracy*, BTA No. 97-T-257, 1998 WL 775284 (October 30, 1998), *8. However, the agreement clearly notes that “[n]o course of dealing, course of performance or parole [sic] evidence, of any nature, shall be used to supplement or modify these terms.”¹³ When determining whether an exception or exemption to taxation applies, it is not just the form of a contract that is important; the “crucial inquiry” becomes a determination of what the seller is providing and of what the purchaser is paying for in their agreement. *Bay Mechanical* at ¶ 23 (further citations omitted). Due to the uncertainty surrounding the agreement, the Tax Commissioner cannot conclude KTPO has satisfied the first prong of the *H.R. Options* test.

Finally, the Court in *H.R. Options* looked to how the contracts themselves referred to the position. *H.R. Options* at ¶ 25. Here, the 2008 fee schedule notes that KTPO was hiring “Production Temp Workers.” Some of the “Early Out” documentation also refers to “temporary employees.” KTPO kept track of its employment services expenses in Account 62000: “Temporary Labor – General.” The Court found that internally referring to workers as “seasonal” was fatal to a claim of permanent assignment. *Id.* KTPO referred to these workers as temporary employees. Therefore, the Commissioner cannot conclude the petitioner has met its burden to show permanent assignment.

At audit, KTPO noted it took great pains to ensure that its contract met the necessary requirements to constitute exemptible transactions.¹⁴ It is unclear whether the intent of the agreement was to satisfy the “magic words” rejected by *Accel* or to memorialize permanent assignment. It is further unclear, based upon the agreement and its exhibits, whether the contract specifies an end date consistent with the Supreme Court’s requirement that the employee be assigned for an indefinite period. The petitioner has presented no further documentary evidence in support. *See R.K.E. Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638, ¶ 27. Therefore, the Commissioner cannot conclude that the petitioner has met its burden under the first element of the *H.R. Options* test.

Substitute for Employees on Leave

The petitioner claims the Tax Commissioner erred in his assessment of taxes upon employment services purchased by KTPO as the facts and circumstances surrounding this arrangement were consistent with permanent assignment. The petitioner cites R.C. 5739.01(JJ)(3); *Accel, Inc. v. Testa*, 152 Ohio St. 3d 262, 2017-Ohio-8798, 95 N.E.2d 345; and *A.M. Castle & Co. v. Testa*, BTA No. 2013-5851, 2015 WL 1304477 (March 9, 2015) for this proposition. Assuming, *arguendo*, that the first prong of the *H.R. Options* test has been satisfied, the Tax Commissioner will discuss below.

¹² See fn. 3.

¹³ Petitioner’s Exhibit 1, Staffing Agreement, Section 4C.

¹⁴ E-mail from KTPO to auditor (Aug. 11, 2017).

The second element of the *H.R. Options* test requires that “the employee must not be provided as a substitute for a current employee who is on leave or to meet seasonal or short-term-workload needs.” (Emphasis added.) *Accel* at ¶ 41 (further citations omitted). “[A]ssigning an employee on a permanent basis means assigning an employee to a position for an indefinite period * * * [.]” *H.R. Options* at ¶ 21. Importantly, most case law on this element is limited to the determination of whether an employment services arrangement constitutes seasonal or short-term assignment, not a substitute, and is therefore distinguishable.¹⁵

Here, Supplemental employees worked as substitutes for KTPO employees who were on leave.¹⁶ At hearing, the petitioner stated multiple times that this arrangement was to make sure KTPO was covered for vacations because output was the key concern for the company. KTPO’s intent of these workers as substitutes is further shown through their training of each worker in all operator stations; this way, Supplemental employees could cover for any KTPO workers on leave. This is more consistent with KTPO’s own ledger entries of Supplemental employees as “Temporary Labor – General”. It appears this arrangement for KTPO was purely substitutional, not “permanent assignment.” As substitutes for workers on leave, the Supplemental employees do not meet the second prong of the *H.R. Options* test for exempt employment services.

The facts and circumstances further reflect KTPO’s substitutional arrangement fails the *H.R. Options* test. The petitioner states that the specific need for Supplemental workers was “maintain[ing] the continuity of the workforce required to meet KTPO’s production requirements.”¹⁷ The petitioner identified two situations where this continuity became an issue: where KTPO employees were “on vacation, or out sick” and where KTPO employees availed themselves of the Early Out program.¹⁸ The intent was to have Supplemental reserves to cover for KTPO employees on leave, i.e., substitutes. If an employee were on leave, a Supplemental worker would cover that station. If an employee took an early out, a Supplemental worker would cover that station. This is not “assigning an employee to a position for an indefinite period” as the *H.R. Options* test requires; it is instead substituting a Supplemental employee to an operator station for a KTPO employee on leave. KTPO points to the fact that the Supplemental employee would come back the next day if sent home as evidence of “permanent” assignment. When the Supplemental employee would return the next day, KTPO would determine if that Supplemental worker was needed based upon who was on leave.¹⁹ Supplemental workers were available to KTPO each day as substitutes for KTPO employees who were on leave. This does not satisfy the second prong of the *H.R. Options* test. Therefore, the Tax Commissioner cannot conclude that KTPO has met its burden to show its arrangement met the permanent assignment exemption.

Accel is distinguishable. KTPO’s staffing needs arose from employees who were on leave. *Accel* specifically dealt with fluctuations of a company’s outside labor force and whether the staffing arrangement constituted “temporary or seasonal labor.” *Accel, Inc. v. Testa*, BTA No. 2012-

¹⁵ See, e.g., *Accel, supra*; *H.R. Options, supra*; *A.M. Castle, supra*; *Bay Mechanical, supra*; *Career Staffing, LLC, v. Testa*, BTA No. 2016-2617, 2018 WL 3859629 (August 2, 2018); *Excel Temporaries, supra*, 1998 WL 775284.

¹⁶ Memo in Support, p.2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

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2840, 2015 WL 4410600 (July 15, 2015), *5; *see also Accel* at ¶¶ 45 and 48.²⁰ For *Accel*, the issue was whether *Accel*'s external workforce was permanently placed in a situation where external and internal workers contemporaneously assembled gift sets during the workday and the amount of the workers fluctuated throughout the audit period. *Id.* The Board of Tax Appeals ("BTA"), in finding placement was not due to seasonal needs, noted from the testimony of representatives of both the hiring company and employment services provider that "the intent was to have permanent employees to avoid the need for constant training of new employees and to provide needed continuity." *Id.* at *5. In contrast, KTPO stated that Supplemental Staffing's workers would have their hours adjusted based upon the needs of the facility, i.e., whether or not individuals were on leave.²¹ The *Accel* decision also noted the staffing company's "unique business model" involved permanent assignment of employees to *Accel*.²² *Id.* Most importantly, the Supreme Court of Ohio noted that 358 of the 647 employees provided to *Accel* worked more than one year for the company. *Accel*, 2017-Ohio-8798, at ¶ 46. In contrast, KTPO has not provided evidence that a single Supplemental employee of the 82 who worked with KTPO in 2015 worked there for more than one year. For these reasons, KTPO's attempt to analogize its substitute employees to the workers in *Accel* is not well-taken.

A.M. Castle & Co. is also distinguishable and further indicates KTPO's arrangement does not constitute permanent assignment. In that case, the BTA examined the hiring of truck drivers between A.M. Castle and an employment services provider and whether they were seasonal or short-term. Based upon the agreement and testimony of multiple witnesses presented by A.M. Castle, the BTA held the intent of the parties was for the provision of permanent employees "as demonstrated through [A.M.] Castle's ongoing, longer-term relationships with many of the same drivers over many years." *A.M. Castle & Co. v. Testa*, BTA No. 2013-5851, 2015 WL 1304477 (March 9, 2015), *5. Here, the petitioner has neither pointed to any evidence from the audit nor provided any evidence that indicates its intention to have longer-term relationships with many of the same employees over many years. In fact, not a single Supplemental worker of the 82 KTPO used worked the entirety of 2015, and only five Supplemental employees returned after a break of one week each. The petitioner contends that most Supplemental workers did not make it past the training process and those that do leave for their own reasons. This contrasts drastically with A.M. Castle's need for trained truck drivers with their own vehicle and the fact that A.M. Castle considered these drivers to be their customer representatives in the field. *Id.* at *3-4. Additionally, unlike here, all A.M. Castle permanently assigned employees were subject to the collective bargaining agreement with the union. *Id.* Further, not a single employee on the original KTPO placement list from 2010 worked during the audit period and Supplemental employees were substituted for KTPO employees subject to the collective bargaining agreement. KTPO's intent was not to permanently hire any Supplemental employees – it was to have substitutes available in the event KTPO's staff took leave. *A.M. Castle* points toward the intent being temporary substitutional labor, not permanent assignment.

²⁰ In fact, *Accel* and all of its predecessors had holdings limited to whether the assignment was permanent or due to short-term or seasonal workload concerns. See fn. 15.

²¹ Memo in Support, p.2.

²² Here, Supplemental had no contractual obligation to permanently assign employees to KTPO, and KTPO has not alleged Supplemental had a "unique business model" similar to the staffing company in *Accel*.

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Supplemental employees were provided as substitutes for current KTPO employees on a rolling basis. Additionally, the fact that Supplemental employees were sent home if no KTPO employees took leave is indicative of a short-term workload need. As the *Accel* court noted, short-term or seasonal employment is a question of “degree, not kind.” *Accel* at ¶48. KTPO states that absenteeism was an ongoing concern. However, the reason KTPO needed Supplemental employees was because it was unsure if its own union workers would take leave on a particular day. With that in mind, due to the uncertain nature of what its needs would be each day, KTPO’s unexpected absenteeism was a short-term, daily concern. Supplemental employees were provided as insurance for KTPO’s operations should extra workers be needed in the short-term, i.e., that day. If not needed that day, Supplemental employees would come back the next day to see if there was need then.²³ Accordingly, KTPO’s arrangement was not indicative of permanent assignment and it has failed to meet its burden to show otherwise. The petitioner’s objection is denied.

Penalty

The petitioner also requests an 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). In support, the petitioner states that the penalty imposition was erroneous and excessive. The Commissioner finds based on the surrounding facts and circumstances that a partial reduction of penalty is appropriate here. Therefore, the petitioner’s abatement request is well-taken in part.

Therefore, the assessment is adjusted as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$267,269.79	\$20,419.10	\$20,419.10	\$308,107.99

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

²³ Memo in Support, p.2.

MAY 27 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



Department of
Taxation

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

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FINAL DETERMINATION

Date:

MAY 21 2020

Lease Car Sales, Inc.
4509 Renaissance Parkway
Warrensville Heights, OH 44128-5701

Re: Assessment No. 100000296124
Consumer's Use Tax

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2018-2197, dated March 11, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner to review the documents supplied at hearing and determine whether the assessment should be retained, modified, or canceled.

This assessment was the result of an audit of the purchase of three boats plus storage and repairs for the audit period April 1, 2011, through June 30, 2015. The boats at issue in this assessment were:

- 1996 45' Sea Ray (name unknown)- OH-9796-EY-Serial #SERP3247C696
- 2002 55' Sea Ray "Sweet 'N Low" - Official #1126187 - Serial #SERY0930J102
- 2006 38' Fountain "Play Pen" - Official #1214939 -Serial #FGO38553D506

The petitioner filed a petition for reassessment, a hearing was held, and on October 19, 2018, a final determination in this matter was issued.

The final determination dated October 19, 2018 adjusted the assessment with respect to the three boats as follows:

Assessment Number	Tax	Preassessment Interest	Penalty	Total
100000296124	\$41,342.60	\$4,348.93	\$6,201.35	\$51,892.88

This final determination was appealed to the Board of Tax Appeals in case number 2018-2197, where a hearing was held and the taxpayer submitted hearing exhibits. The Board of Tax Appeals remanded the case to the Tax Commissioner so that any new documentation could be considered to determine if any further adjustment to the assessment was warranted.

Upon remand, the Tax Commissioner reviewed the hearing exhibits provided at the Board of Tax Appeals hearing. It was determined that much of the documentation provided at the Board of Tax Appeals hearing had already been reviewed by the Department prior to the issuance of the

final determination dated October 18, 2018. In fact, many of the documents were included in the statutory transcript submitted to the Board of Tax Appeals in case number 2018-2197.

Specifically, in Hearing Exhibit A, pages 2-11 were included in the previous statutory transcript in this matter. In Hearing Exhibit B, pages 2-4, 8-21, 24-30, 34, and 39-43 were included in the previous statutory transcript in this matter. In Hearing Exhibit D, pages 2-12 were included in the previous statutory transcript in this matter. In Hearing Exhibit F, pages 4-12 were included in the previous statutory transcript in this matter. In Hearing Exhibit G, page 2-10 and 14 were included in the previous statutory transcript in this matter. In Hearing Exhibit H, pages 4-10 and 10-18 were included in the previous statutory transcript in this matter. The other documents submitted at the hearing were new. Interestingly, several of the new documents were created after the commencement of the audit. Ultimately, when the new documents are considered, their addition is not sufficient to change the Tax Commissioner's previous final determination in the matter, and the assessment with regard to the 1996 45' Sea Ray (name unknown)- OH-9796-EY-Serial # is affirmed.

Due to contradictory and conflicting ownership information, the 1996 45' Sea Ray (name unknown)- OH-9796-EY-Serial # was also the subject of Assessment Number 100000295460 against Brian Litra. The 2002 55' Sea Ray "Sweet 'N Low" - Official #1126187 - Serial #SERY0930J102 and the 2006 38' Fountain "Play Pen" - Official #1214939 -Serial #FGO38553D506 were the subject Assessment Number 100000295596 against Richard Christenson.

Although the Tax Commissioner was compelled to include the boats in multiple assessments, it should be noted that it is not the intent of the Tax Commissioner to collect tax more than one time on its purchase. Accordingly, any payments that have been received on assessment 100000295596 or 100000295460 will be applied as a credit to this assessment.

Not Purchased for Resale

Despite the petitioner's claim that the boats were purchased for resale, nothing about either petitioner's business or the boats' ownership activity supports such an intent. First, the petitioner ran a used car dealership, not a watercraft dealership. Lease Car Sales, Inc., operated a small used car dealership. As indicated by its name, Lease Car Sales, Inc. sold cars and other motor vehicles. Lease Car Sales Inc. did not hold itself out to the public as a watercraft dealer or broker. It did not advertise itself as a watercraft dealer or broker. The business had no signage or other type of public posting to indicate that it was engaged in the business of boat sales.¹ Therefore, there was nothing to attract boat customers to this business enterprise.

Second, Lease Car Sales, Inc. did not have an Ohio watercraft dealer's license. The petitioner did not obtain a watercraft dealer's license until May 13, 2015. This was well after initial contact by the Ohio Department of Taxation on July 11, 2014.² It was also well after the

¹ See, photo from Google Maps "street view" of 4509 Renaissance Parkway, Warrensville Heights, Ohio of dealership signage.

² Letter from auditor dated July 11, 2014, regarding the investigation of the 2002 Sea Ray and the 2006 Fountain.

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purchases of the boats at issue. The 2006 Fountain was purchased in March 2011. The 1996 Sea Ray was purchased in May 2012. The 2002 Sea Ray was purchased in June 2012. It is difficult to argue that a business is purchasing boats as inventory for resale when the enterprise is not authorized to conduct business as a watercraft dealer.

Third, the boats were not advertised for sale on the petitioner's own website. The petitioner has a website that lists its inventory for sale.³ The website lists only motor vehicles for sale. Nowhere on the petitioner's website does it indicate that this business offers—or has ever offered—boats for sale. No boats are listed as inventory. No words or phrases referencing the sale (or purchase) of boats, watercraft, or vessels appear on the website. If Lease Car Sales, Inc. had the intent to purchase these boats as inventory for resale, it is not clear why it did not use its own website to make potential customers aware of the fact that it was selling boats and why it did not list each of these boats in its sales inventory. Not using its own website to promote the sale of these boats undermines Lease Car Sales' contention that it held the intent to purchase these boats for resale.

Fourth, the boats were only listed for sale by other boat brokers—never by Lease Car Sales, Inc.⁴ It seems only logical that a business would want to market and sell its own inventory. From a sheer profit perspective alone, it makes no sense to hire a boat broker (and pay that broker a percentage) to sell these boats if—as claimed—boats are part of the regular inventory being sold in the ordinary course of business by Lease Car Sales, Inc.

Fifth, boats purchased with the intent to resell are not documented with the United States Coast Guard. Both the 2002 Sea Ray and the 2006 Fountain were documented with the United States Coast Guard under a "recreational endorsement." Today, the U.S. Coast Guard is in charge of documentation and recreational vessels may also be documented.⁵ However, a vessel documented with a recreational endorsement may only be used for that purpose—"pleasure use only."⁶ There is no endorsement available for conducting the business of a boat dealer. Instead, boat dealers obtain their authority to use the waters of the State of Ohio for the purpose of

³ The petitioner's website had two different iterations from the beginning of the audit until the time of the Final Determination. At the time of the audit, the website was found at www.leasecarsales.net. At the time of the Final Determination, the website was found at www.leasecarsales2.com. In both instances the website only featured motor vehicles for sale. The website contained no reference to boats or any type of watercraft. The most recent version of the website is divided into the following "pages:" home; inventory; car finder; specials; we buy cars; financing; directions; and contact us. The home page features only motor vehicles. The inventory page consists of a listing comprised entirely of motor vehicles. The specials page contains all motor vehicles.

⁴ Information was supplied indicating the 2002 Sea Ray was offered for sale by North Shore Brokerage, Jefferson Beach Yacht Sales, LLC and MarineMax East Inc. No information was supplied to indicate how the 2006 Fountain was marketed. The 1996 Sea Ray was advertised in a tiny font, three-line, blind ad in the classified section of The Cleveland Plain Dealer under the section heading "Recreational/Sports" with no reference to Lease Car Sales, Inc. or any seller. This same boat was also offered for sale in two other advertisements with no the seller listed in the typed script. However, portions of these advertisements were obscured because Brian Litra's business card was superimposed over the photocopied ads.

⁵ See, <https://www.yachtworld.com/boat-content/2014/10/yacht-registration-vs-documentation/>.

⁶ 46 CFR 67.23(a) states, "A recreational endorsement entitles a vessel to pleasure use only."

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transporting and demonstrating boats for sale under their watercraft dealer licenses—not under U.S. Coast Guard documentation.⁷

Sixth, regular Ohio watercraft registration is inappropriate for a boat purchased as business inventory for resale. The 1996 Sea Ray was titled in Ohio and obtained a regular Ohio Watercraft Registration #OH-9796-EY under the name of Lease Car Sales, Inc. However, this registration was obtained by Brian Litra, and his signature appears on the “Boater Copy” of the registration card. A regular Ohio Watercraft Registration means that the watercraft is principally using the waters in Ohio.⁸ If this boat was purchased for “resale” and was only being held in inventory, Lease Car Sales Inc. would not have obtained a regular Ohio watercraft registration because Lease Car Sales, Inc. would not be operating the boat for the purpose of using and enjoying the waters of Ohio. Instead, a legitimate watercraft dealer would demonstrate the boat to potential customers via its Ohio Watercraft Dealer’s license which can be used while operating watercraft on the waters of Ohio. Therefore, this registration is further evidence that this boat was not purchased as inventory for resale, but as a pleasure vessel used by Mr. Litra.

Seventh, a business that is purchasing inventory for resale pays for that inventory. It finances its own purchases. Therefore, it makes no sense that Richard Christenson and Brian Litra each obtained personal financing for these boats under their own names as “borrower” on the loan documentation. If Lease Car Sales, Inc. was purchasing these boats as inventory for resale, Richard Christenson and Brian Litra would not have been listed as the “borrowers.” No individual would obtain a loan as the named “borrower” to fund the purchase of a boat that is inventory held for sale (and purportedly owned) by a business entity. Moreover, individuals would certainly not take out loans that required them to make 180 monthly payments on boats held as business inventory. Yet, Mr. Christenson did just that in order to purchase the 2002 Sea Ray and Mr. Litra did exactly the same in order to purchase the 1996 Sea Ray.⁹ No financing information was supplied for the 2006 Fountain even though this information was requested.¹⁰

Eighth, boats held as sales inventory are docked by the business selling the boats, they are not docked by individuals. If Lease Car Sales, Inc. purchased the boats with the intent to resell them, the boats would have been docked by Lease Car Sales, Inc. However, the boats were not docked by Lease Car Sales, Inc. Instead, the 1996 Sea Ray was docked under the name of Brian Litra at his private yacht club, Mentor Harbor Yachting Club. Mr. Litra kept the 1996 Sea Ray at dock #D-18 at the Mentor Harbor Yachting Club for at least the summer seasons of 2013 and 2014.¹¹ The 2002 Sea Ray was docked at Mentor Lagoons Nature Preserve Marina for three summer seasons under the name of Rick Christenson as “owner,” using his home address and

⁷ See, R.C. 1547.543.

⁸ R.C. 1547.531(D)

⁹ See, the Eaton Family Credit Union, Inc. “Loan Agreement and Consumer Credit Disclosure Statements” for financing obtained for the 1996 Sea Ray and the 2002 Sea Ray.

¹⁰ See Additional Information Requested letter dated May 31, 2016.

¹¹ The dock agreement for the summer of 2013 was supplied. Agent further confirmed with Mentor Harbor Yachting Club that the boat was docked by Brian Litra for the summer 2014. It is also possible that Mr. Litra kept the boat docked there in the summer of 2012 since the boat was purchased on May 14, 2012. However, complete dockage contracts were not provided for each year of ownership, even though they were specifically requested. See Additional Information Requested letter dated May 31, 2016.

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paying with his personal Mastercard.¹² Mr. Christenson also paid for heated inside storage for three winter seasons at MarineMax in Port Clinton.¹³ No dockage information was supplied for the 2006 Fountain even though this information was requested.¹⁴

Ninth, the length of time that these boats were held is also inconsistent with business inventory purchased for resale. A business operates with the goal of turning its inventory as quickly as possible. There is no profit in holding onto inventory and it results in additional carrying costs. However, these boats were kept for multiple years. The 1996 Sea Ray was purchased on May 14, 2012, and still remained unsold in September 2016, more than four years later. The 2002 Sea Ray was purchased on June 26, 2012, and was sold on May 13, 2015, nearly three years after purchase. The 2006 Fountain was purchased on March 3, 2011 and was sold on March 28, 2013 just over two years later. This extended turnaround time coupled with private individuals both financing and docking the vessels does not equate to business inventory purchased for resale.

Tenth, Lease Car Sales, Inc. was not the “named insured” for the insurance coverage on these boats. It is peculiar that Lease Car Sales, Inc. would not be the named insured for boats purportedly owned by Lease Car Sales, Inc. and held as business inventory for sale by Lease Car Sales, Inc. However, Mr. Rick Christenson was the named insured for the 2002 Sea Ray. In addition, while Mr. Christenson was a payee on two insurance checks for damages sustained by the boat after it was grounded, Lease Car Sales, Inc. was not a payee at all.¹⁵ Mr. Brian Litra was the named insured for the 1996 Sea Ray. Mr. Litra paid for the insurance premiums with funds from an unrelated corporation set up by Mr. Litra.¹⁶ No insurance information was supplied for the 2006 Fountain even though this information was requested.¹⁷

Eleventh, no payments for maintenance or repair were made by, or billed to, Lease Car Sales, Inc. even though the boats were alleged to be owned by Lease Car Sales, Inc. as business inventory for resale. Instead, the 2002 Sea Ray was repaired and maintained under Mr. Rick Christenson’s name (using his home address).¹⁸ Billings from MarineMax for repair and maintenance on this boat totaled \$75,378.71,¹⁹ a figure which seems extreme for a boat claimed

¹² See, Mentor Lagoons Nature Preserve Marina sales contracts and dockage deposits for dock space.

¹³ See, MarineMax 2012-2013 Winter Storage Agreement; MarineMax 2013-2014 Winter Storage Agreement; MarineMax 2014-2015 Winter Storage Agreement.

¹⁴ See Additional Information Requested letter dated May 31, 2016.

¹⁵ CNA, BoatUS Marine Insurance Program, check numbers 294493 (\$27, 500 pay to the order of Rick Christenson) and 311712 (\$23,361.77 pay to the order of Rick Christenson & Eaton Family Credit Union); claim number 1211826; date of loss 8/14/2012; policy number 3496600-12; insured Rick Christenson; underwritten by Continental Casualty Company.

¹⁶ A completely different corporation—Burton Auto Sales, Inc.—is funding this insurance payment. Burton Auto Sales, Inc. and Lease Car Sales, Inc. are two different corporations set up at different times by different people. While Lease Car Sales, Inc. was originally incorporated by John Papesch, Burton Auto Sales, Inc. was incorporated by Brian Litra.

¹⁷ See Additional Information Requested letter dated May 31, 2016.

¹⁸ Most payments were made on Mr. Christenson’s personal Mastercard. However, at least one payment was made from his personal Huntington Bank checking account held in the name of Rick W. Christenson, III.

¹⁹ MarineMax East, Inc., List of Customer Payments Received for Rick Christenson for Period from 01 Jan 12 to 10 Sep 15.

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to be held exclusively for resale. No boat repair/maintenance information was supplied for the 1996 Sea Ray or the 2006 Fountain even though this information was requested.²⁰

Properly Taxable

It is not possible to gain a perfect picture of Lease Car Sales' activities with respect to each boat at issue primarily because Lease Car Sales, Inc. was not forthcoming with information. As stated multiple times above, a detailed letter was submitted to Lease Car Sales requesting comprehensive information for each of the vessels at issue, as well as detailed business information with respect to the business entity itself. The petitioner ignored much of the information requested and provided only sparse and incomplete documentation when it did respond. However, based upon the information that was provided and the information that was obtained by the auditor, it is clear that Lease Car Sales, Inc. did not purchase these boats for the purpose of resale.

Much like the case of *Satullo v. Wilkins* (2006), 111 Ohio St.3d 399, the information available in this case contains conflicting evidence as to who is the actual purchaser of these boats. However, since Lease Car Sales, Inc. was the titled owner of the boats, use tax assessments against Lease Car Sales, Inc. are proper. Additionally, the totality of the evidence indicates that the boats were not purchased as business inventory intended for resale by Lease Car Sales, Inc., but as pleasure vessels for the recreational usage of Mr. Litra and Mr. Christenson. Therefore, the resale exemption is not applicable to these purchases. The fact that the boats were ultimately listed for sale does not undercut this finding. Plenty of boat owners seek to upgrade over time. Therefore, listing watercraft for resale after an extended period of pleasure usage does not contradict personal use.

The evidence indicates that Lease Car Sales, Inc. did not purchase the boats as inventory for resale. Instead, the boats were purchased for personal use. Therefore, the resale exemption does not apply and there is no basis for the exemption of any repairs or maintenance. The objection is denied.

Accordingly, the assessment, as previously adjusted in the October 18, 2018 Final Determination, is affirmed.

²⁰ See Additional Information Requested letter dated May 31, 2016.

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Current records indicate that payments and credits totaling \$21,000.00 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 post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

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FINAL DETERMINATION

Date:

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Brian Litra
6906 Arias Way
Painesville, OH 44077-2193

Re: Assessment No. 100000295460
Consumer's Use Tax

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2018-2196, dated March 11, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner to review the documents supplied at hearing and determine whether the assessment should be retained, modified, or canceled.

This assessment was originally the result of an audit of the purchase of three boats plus storage and repairs for the audit period April 1, 2011, through June 30, 2015. The boats at issue in this assessment were:

- 1996 45' Sea Ray (name unknown)- OH-9796-EY-Serial #SERP3247C696
- 2002 55' Sea Ray "Sweet 'N Low" - Official #1126187 - Serial #SERY0930J102
- 2006 38' Fountain "Play Pen" - Official #1214939 -Serial #FGO38553D506

The petitioner filed a petition for reassessment, a hearing was held, and on October 19, 2018, a final determination in this matter was issued.

The final determination dated October 19, 2018 canceled the portions of the assessment related to the 2002 55' Sea Ray "Sweet 'N Low" - Official #1126187 - Serial #SERY0930J102 and the 2006 38' Fountain "Play Pen" - Official #1214939 -Serial #FGO38553D506, leaving the 1996 45' Sea Ray (name unknown)- OH-9796-EY-Serial #SERP3247C696 the only boat at issue in this assessment. The final determination dated October 19, 2018 also adjusted the assessment with respect to the 1996 45' Sea Ray (name unknown)- OH-9796-EY-Serial #SERP3247C696 as follows:

Assessment Number	Tax	Preassessment Interest	Penalty	Total
100000295460	\$5,890.00	\$601.05	\$883.50	\$7,374.55

This final determination was appealed to the Board of Tax Appeals in case number 2018-2196, where a hearing was held and the taxpayer submitted hearing exhibits. The Board of Tax Appeals

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remanded the case to the Tax Commissioner so that any new documentation could be considered to determine if any further adjustment to the assessment was warranted.

Upon remand, the Tax Commissioner reviewed the hearing exhibits provided at the Board of Tax Appeals hearing. It was determined that much of the documentation provided at the Board of Tax Appeals hearing had already been reviewed by the Department prior to the issuance of the final determination dated October 18, 2018. In fact, many of the documents were included in the statutory transcript submitted to the Board of Tax Appeals in case number 2018-2196.

Specifically, in Hearing Exhibit A, pages 2-11 were included in the previous statutory transcript in this matter. In Hearing Exhibit B, pages 2-4, 8-21, 24-30, 34, and 39-43 were included in the previous statutory transcript in this matter. In Hearing Exhibit D, pages 2-12 were included in the previous statutory transcript in this matter. In Hearing Exhibit F, pages 4-12 were included in the previous statutory transcript in this matter. In Hearing Exhibit G, page 2-10 and 14 were included in the previous statutory transcript in this matter. In Hearing Exhibit H, pages 4-10 and 10-18 were included in the previous statutory transcript in this matter. The other documents submitted at the hearing were new. Interestingly, several of the new documents were created after the commencement of the audit. Ultimately, when the new documents are considered, their addition is not sufficient to change the Tax Commissioner's previous final determination in the matter, and the assessment with regard to the 1996 45' Sea Ray (name unknown)- OH-9796-EY-Serial # is affirmed.

Due to contradictory and conflicting ownership information, the 1996 45' Sea Ray (name unknown)- OH-9796-EY-Serial # is also one of the boats included in Assessment Number 100000296124 against Lease Car Sales, Inc. Although the Tax Commissioner was compelled to include the 1996 45' Sea Ray (name unknown)- OH-9796-EY-Serial # in both assessments, it should be noted that it is not the intent of the Tax Commissioner to collect tax more than one time on its purchase.

1996 45' Sea Ray (name unknown) – OH-9796-EY—Serial #SERP3247C696

The 1996 45' Sea Ray (name unknown) – OH-9796-EY—Serial #SERP3247C696 came to the attention of the Ohio Department of Taxation when the auditor was reviewing dockage information for the Mentor Harbor Yachting Club. It was discovered that the boat was docked at this private yacht club by one of its members, Brian Litra.¹ Mr. Litra was assessed as the owner for the tax due on the purchase of the boat.

Relationship with Lease Car Sales, Inc.

Brian Litra is directly associated with the used car dealership Lease Car Sales, Inc. As “the secretary/manager” of the dealership, he is both a corporate officer and in charge of day-to-day

¹See, <https://www.mhyc.us/index.php/contact/>. Brian Litra is an active member of the club. He is currently listed as the contact for Skeet under “Fleets and Committees.”

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operations of the business.² He also acted as the dealership's contact with the auditor from the Ohio Department of Taxation. Mr. Litra held himself out as having authority to both speak on behalf of Lease Car Sales, Inc. and to act for Lease Car Sales, Inc.

Purchase

According to the "Vessel Bill of Sale," the Sea Ray was purchased on May 14, 2012 from National Liquidators for \$76,000.00. The seller was Fifth Third Bank.³ The "Vessel Bill of Sale" indicates that the buyer was Lease Car Sales, Inc. However, other paperwork suggests that Mr. Litra was the true buyer. First, Mr. Litra signed the "Buyer's Agreement" above "Purchaser's Signature."⁴ Second, Mr. Litra signed the "Acceptance of Vessel As Is" above "Purchaser's Signature."

"Borrower" Brian D. Litra

The loan for the boat was obtained by Brian D. Litra, personally.⁵ The amount financed was \$106,657.00. Mr. Litra is the only "borrower" identified on the loan documentation. The loan was taken out in his own name using his home address. Brian Litra was the listed as "borrower" age 37, date of birth 4/18/75. Brian Litra signed the loan above "Signature of Borrower." Brian Litra then signed the document as manager of Lease Car Sales and checked the box "Owner of Collateral other than Borrower."

Titled Vessel

The ownership transfer documentation indicated that the boat was "a titled vessel" at the time of purchase and stated, "you will need to file with your state DMV."⁶ On May 24, 2012, the boat was titled to Lease Car Sales, Inc. in Lake County Ohio (#4302391167). The title reflected the purchase price of \$76,000.00. No tax was paid at the time the title was obtained. Instead, a claim of exemption was made based on "resale." However, Lease Car Sales, Inc. was not a watercraft dealer, it was a used car dealer. Lease Car Sales, Inc. was not in the business of selling boats. Lease Car Sales, Inc. did not indicate that it sold boats on its website, nor did the website list any boats for sale in its advertised inventory.⁷ Moreover, at the time of the purchase, Lease Car Sales did not have a watercraft dealer's license. It also seems implausible that Mr. Litra would have personally financed a boat to be titled to a used car dealer as part of its watercraft inventory being held for sale.

² Information provided with letter dated September 29, 2016, from Attorney Frank R. Brancatelli.

³ The documentation suggests that boat was sold at auction and may have been foreclosed upon.

⁴ Mr. Litra's signature can be found along with his printed name on the Mentor Harbor Yachting Club Agreement for Dock, Mooring or Dry-Sail Space. The signature matches Mr. Litra's known signature on the Buyer's Agreement.

⁵ Loan agreement with Eaton Family Credit Union, Inc. contained a security interest in the boat, 1996 Sea Ray 450 Sundancer, SERP3247C696.

⁶ Letterhead National Liquidators RE: Stock No. 27397.

⁷ See, <http://www.leasecarsales2.com/inventory.aspx>. Inventory printed from website on 10/19/2015 and again, on 9/27/2018.

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Ohio Watercraft Registration

The boat has a regular Ohio Watercraft Registration #OH-9796-EY under the name of Lease Car Sales, Inc. Again, this registration was obtained by Brian Litra. His signature appears on the “Boater Copy” of the registration card. A regular Ohio Watercraft Registration means that the watercraft is principally using the waters in Ohio.⁸ If this boat was purchased for “resale” and was only being held in inventory, it is unclear why Lease Car Sales Inc. would have obtained a regular Ohio watercraft registration as it would not be sailing for the purpose of using and enjoying the waters of Ohio. Instead, Lease Car Sales, Inc. would likely have desired to demonstrate the boat to potential customers and obtained an Ohio Watercraft Dealer’s license in order to do so. Therefore, the registration obtained by Mr. Litra is inappropriate for the alleged purpose indicated and is further evidence that this boat was not purchased as inventory for resale, but as a pleasure vessel for Mr. Litra to use the waters of Ohio.

Dockage

Brian Litra docked the boat, as a member, at his own private yacht club. The boat was docked at the Mentor Harbor Yachting Club in Brian Litra’s name. Information was obtained to indicate that the boat kept at dock #D-18 for at least the summer seasons of 2013 and 2014.⁹ The very nature of a “private” club rules out the idea of public access, conducting a business venture, and hosting its traffic. Such dockage makes no sense for business inventory purchased exclusively for resale. Furthermore, the length of the dockage also undercuts the claim of resale. The boat was purchased in May 2012. The boat was still docked at this private yacht club in the summer 2014. (At the time of the last update, September 29, 2016, the boat remained unsold.) A member of a private yacht club would want his own pleasure vessel moored conveniently for personal usage and social gatherings with other club members.

Insurance

The taxpayer has supplied the declarations page of the State Farm insurance policy on the boat (prepared April 15, 2015). According to this document, the policy was amended on April 7, 2015, but there is no indication as to exactly what was amended or how the policy looked for the first three years of ownership, and the full policy was not made available for review even though the complete policy was requested.¹⁰ However, several things are very interesting based upon the limited information provided.

First, although the policy is in the name of Lease Car Sales, Inc., the only named insured is Brian Litra—under his home address of 6906 Arias Way, Painesville, Ohio.

⁸ R.C. 1547.531(D)

⁹ The dock agreement for the summer of 2013 was supplied. Agent further confirmed with Mentor Harbor Yachting Club that the boat was docked by Brian Litra for the summer 2014. Complete dockage contracts were not provided for each year of ownership, even though it was specifically requested. See Additional Information Requested letter dated May 31, 2016.

¹⁰ See Additional Information Requested letter dated May 31, 2016.

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Second, the policy is a “boatowners policy” which covers a singular boat. It is not a “boat dealers” insurance policy. Boat dealer’s insurance protects a dealership’s entire boat or yacht inventory and other types of exposure associated with liability to the public (i.e. customer injuries on docks or during demo rides.)¹¹

Third, it does not appear that State Farm offers boat dealer insurance policies. The only type of State Farm boat insurance that was found via Internet research was found at www.statefarm.com/insurance/sport-leisure-vehicles/boats. This suggests that State Farm only offers coverage specific to sport and leisure boats—not to boat inventory held by a business for the purpose of resale.

It is unclear why a legitimate boat dealer would purchase a boatowners policy targeted to sport and leisure boats rather than purchase boat dealer’s insurance to cover inventory and associated business risks.

Insurance Payment Check

The taxpayer supplied a copy of a payment check made out to State Farm on May 6, 2016, in the amount of \$1,423.00. Even if it is accepted that this check was issued to pay the premiums on boatowner’s policy (policy number 70-B5-J594-2), this check reveals inconsistencies as to the true owner of the boat.

The name and address of the payor on the check is listed as: Burton Auto Sales, Inc. DBA Lease Car Sales” at 4509 Renaissance Parkway, Warrensville Heights, OH 44128. While the Renaissance Parkway address is the physical location of Lease Car Sales, Inc., the payment is not being made by Lease Car Sales, Inc. Instead, a completely different corporation—Burton Auto Sales, Inc.—is funding this insurance payment. Burton Auto Sales, Inc. and Lease Car Sales, Inc. are two different corporations set up at different times by different people. While Lease Car Sales, Inc. was originally incorporated by John Papesch, Burton Auto Sales, Inc. was incorporated by Brian Litra.

Brian Litra incorporated Burton Auto Sales, Inc. on June 22, 2006. The address of the corporation listed on the Secretary of State’s website is 571 Hidden Harbor Dr., Fairport Harbor, Ohio.¹² This is the address of a residential condominium that was occupied by Brian Litra at the time of incorporation.¹³ The “purpose for which corporation is formed” was listed as “broker, sales, and lease of **automobiles.**” (Emphasis added.) Therefore, once again, this business has nothing to do with boats. Even more peculiar, based upon the corporate address, the business cannot have

¹¹ See, www.wanchormarineinsurance.com/types-of-insurances/commercial-marine/dealers-and-brokers.

¹² Articles of Incorporation.

¹³ On October 10, 2006, Brian Litra also listed this as his home at the time of an automobile title transfer (as the owner) of a 1998 Honda Accord, title number 4301608782.

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anything to do with automobile sales/leasing either. There are stringent physical location requirements for motor vehicle dealers and a residential condominium would never meet them.¹⁴

In Ohio, motor vehicle dealer licenses are mandatory for the operation of any business involving the buying and selling of automobiles.¹⁵ Specific licenses are required to sell used motor vehicles, to wholesale motor vehicles, or to lease motor vehicles.¹⁶ No motor vehicle dealer license of any kind can be found for Burton Auto Sales, Inc.¹⁷ Therefore, it is impossible for Burton Auto Sales, Inc. to be legitimately selling or leasing cars. However, it is still listed as an active corporation by the Ohio Secretary of State.

The address of Burton Auto Sales, Inc. is also suspicious. According to the canceled check dated May 2, 2016, the address of Burton Auto Sales, Inc. was 4509 Renaissance Parkway (the same address as Lease Car Sales, Inc.). However, according to Ohio Department of Taxation records, the business address at that time was 6906 Arias Way (the home address of Mr. Brian Litra).

Finally, the use of the DBA "Lease Car Sales" by Burton Auto Sales, Inc. creates confusion. The two corporations are separate entities, one is not a DBA for the other.

Brian Litra signed the check to State Farm for insurance on a boat that he paid for. He was the only named director of the payor corporation, Burton Auto Sales, Inc.

Listed for Sale

The documentation that has been provided to support the taxpayer's claim that the boat was purchased by Lease Car Sales, Inc. as inventory for resale is not convincing. The first advertisement provided was a tiny font, three-line, blind ad in the classified section of The

¹⁴ Used motor vehicle dealers (including wholesale dealers) are required to have permanent signage displaying the business name in letters no less than six inches high, properly maintained, and prominently displayed by the entrance of the office if the sign is not visible from the public roadway. (Ohio Adm. Code 4501:1-3-03.) Used motor vehicle dealers must maintained business records and keep them easily accessible. (Ohio Adm. Code 4501:1-3-04.) Used motor vehicle dealers are required to have an established place of business meeting the following requirements: (1) has a display lot or area of at least 3500 square feet; (2) must be separated with a barrier from any other unrelated business; (3) includes a permanent usable structure that is identifiable as a motor vehicle dealership to the public and includes an easily accessible office of at least 180 square feet; (4) has a business telephone in service at all time that shall be answered and identified exclusively for the dealership's business with a legible, posted, conspicuous telephone number; (5) is open during posted business hours and the hours shall be legible and posted in a conspicuous place near the entrance to the office; and (6) staffed by the sole proprietor (or other business organization equivalent) or a licensed motor vehicle salesperson. (Ohio Adm. Code 4501:1-3-08.)

¹⁵ "According to Ohio regulations, anyone who intends to be the 'business of offering for sale, displaying for sale, or **selling at retail or wholesale used motor vehicles** or assume to engage in that business' must obtain a dealer permit." (Emphasis added.) "Dealer Licensing in Ohio." See, <https://www.dmv.org/oh-ohio/buy-sell/car-dealers/dealer-licensing.php>.

¹⁶ R.C. 4517.02.

¹⁷ Burton Auto Sales, Inc. is not a motor vehicle dealer of any type. It does not show up as a licensed motor vehicle dealer on as search of the Ohio BMV website, <https://services.dps.ohio.gov/BMVOnlineServices/Search/Dealer>.

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Cleveland Plain Dealer under the section heading “Recreational/Sports.”¹⁸ There was no reference to Lease Car Sales, Inc. offering boat as inventory for sale. In fact, no seller was listed.

The two additional advertisements that were provided contained photocopies of Mr. Litra’s business card superimposed on each. Therefore, it is not possible to see how the advertisements appeared originally. However, Lease Car Sales, Inc. was not mentioned as the seller anywhere in the advertisements besides the superimposed business cards.

It is unclear why Lease Car Sales, Inc. would not to list the boat as inventory for sale on its own website especially since the boat remained unsold as of September 2016.¹⁹ However, the auditor was not able to find any boats advertised as inventory on Lease Car Sales website, nor was there any indication that Lease Car Sales was in the business of selling watercraft at all.²⁰

Conclusion

The totality of the information indicates that the true owner of the boat is Mr. Brian Litra. Brian Litra signed the buyer’s agreement for the 1996 Sea Ray as well as the acceptance of the vessel. Mr. Litra financed the purchase of the boat personally. He was the only “borrower” identified on the loan documentation. Mr. Litra obtained the Ohio Watercraft Registration for the boat. His signature appears on the “Boater Copy” of the registration card. Brian Litra docked the boat in his own name at a private yacht club, the Mentor Harbor Yachting Club for multiple boating seasons. Brian Litra was the named insured on the insurance policy for the boat and the insurance premiums appear to have been paid by his alter ego (Burton Auto Sales, Inc.).

Based upon the entirety of the evidence, it is determined that the boat was not purchased with the intent to resell it as business inventory. Instead, it appears that Mr. Litra purchased the boat for his own recreation and pleasure, and through at least September 2016, he used it in that manner. Therefore, the purchase of the boat (1996 45’ Sea Ray (name unknown) – OH-9796-EY—Serial #SERP3247C696) is properly taxable to Mr. Litra.

The portion of the assessment related to the 1996 45’ Sea Ray (name unknown) – OH-9796-EY—Serial #SERP3247C696 is affirmed as issued.

¹⁸ This advertisement read in its entirety: “SEARAY 1996 45’ Sun-dancer. T-CAT Diesel. 420HP. Generator. \$129900 330-284-1468”

¹⁹ Letter dated September 29, 2016 from Attorney Frank Brancatelli.

²⁰ See, <http://www.leasecarsales2.com/inventory.aspx>.

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

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date:

MAY 27 2020

Petta Enterprises Rolling Stock, LLC
128 Steubenville Ave.
Cambridge, OH 43725-2213

Re: Assessment No. 100000659910
Use Tax

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$6,162.50	\$90.27	\$924.38	\$7,177.15

The assessment is the result of an audit of the petitioner's purchase of a truck. On December 5, 2016, the petitioner purchased a 2013 Peterbilt Truck (the "vehicle"). No tax was paid at the time of the purchase as the petitioner claimed it was exempt that the purchase was exempt for use in highway transport for hire. The exempt status of the 2013 Peterbilt could not be verified and this assessment was issued. The petitioner objects to the assessment. No hearing was requested.

Background

The petitioner has a facility located in Cambridge, Ohio. The petitioner's website states it has the "largest waste transfer/truck washout facilities in the tri-state area[.]" Its website further states it offers services such a multiple waste transfer stations, brine sales, truck wash outs, waste hauling, and drilling and testing of anchors.

Analysis

As an initial matter, an assessment is presumptively valid. *R.K.E. Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. Exemptions from taxation are strictly construed against the taxpayer's claim for relief. *Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, 978 N.E.2d 882 ¶18 (further citations omitted). 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).

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Motor vehicles that are primarily used for transporting tangible personal property belonging to others for consideration 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.”

The first issue is if the petitioner has operating authority from the Public Utilities Commission of Ohio (“PUCO”) or the United States Department of Transportation (“US DOT”) to engage in transportation for hire. R.C. 5739.01(Z). The Commissioner does not dispute that the petitioner was properly licensed with the US DOT for the relevant time periods to this assessment. Therefore, the petitioner has met the licensure requirement for the exemption.

The second issue is if the petitioner has submitted sufficient evidence showing the primary use of the vehicle was transporting tangible personal property for others for consideration. Initially, the petitioner submitted a questionnaire reflecting the use of this vehicle was 95% for hauling the petitioner’s own property and 5% hauling property for others. A month later, the petitioner submitted another questionnaire indicating the use of the vehicle was 100% hauling property for others. The petitioner indicated on both questionnaires the vehicle was used for hauling water, “processed water[,]” and brine. The petitioner later stated in its appeal that the first questionnaire was submitted incorrectly.

After this assessment was issued, the petitioner provided invoices and work orders related to the use of the vehicle at issue and another Peterbilt that was also assessed. The invoices and work orders did not specify which of the vehicles was used in the invoice or work order. The petitioner crossed out line items on invoices it stated did not apply to the use of the vehicle or other Peterbilt.

As an initial matter, the petitioner has failed its burden to show exempt use of this vehicle. Its provided evidence does not reflect the specific use of this vehicle. The work orders and corresponding invoices reflect the use of four trucks: unit 51, unit 52, unit 54, and unit 55. The petitioner did not specify which trucks were each unit. The petitioner did not specify why it was including work orders for four presumably different trucks when its letter stated it was providing information for two trucks. The Tax Commissioner cannot conclude based upon the provided information that the assessed vehicle was primarily used in an exempt manner. See *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, ¶27.

Further, the petitioner fails the transportation “for others” prong of the exemption. The evidence provided by the petitioner reflects that its trucks are used for hauling waste for disposal, such as wastewater, brine, and drill mud. Some of the evidence also indicates the petitioner occasionally transports fresh water, but the work orders do not reflect the petitioner’s trucks picking up the water from a location and hauling it to a different location. Instead the petitioner’s own documentation provides its transportation of water is a “water support” service. The petitioner is

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not in the business of transportation for hire. At least a portion of the petitioner's business is hauling waste discarded by its customers. 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 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). The evidence provided illustrates the petitioner's customers are hiring the petitioner to perform the business of waste removal and disposal. Additionally, the petitioner's initial questionnaire indicated that most of its transport was for its own items. 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.

To receive the exemption, the petitioner must show that the transportation was provided for consideration. 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). 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 920.¹ It does not appear from the evidence provided that the petitioner separated out its transportation fees as opposed to other fees such as water support and waste disposal. 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 [petitioner] 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 [sic] 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 reference to a transportation service on some of its invoices indicates that the petitioner received consideration from its customers in exchange for the primary service that the petitioner, per its own website, provides: waste transfer and waste disposal. The petitioner has failed to meet its burden to show how these transactions are exempt.

Additionally, the hauling of others' property for consideration must account for the primary use of the vehicle. R.C. 5739.02(B)(32). Based upon the foregoing, the petitioner has not shown that this requirement is met. The objection is denied.

Therefore, the assessment is affirmed.

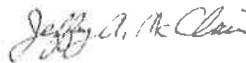
¹ *Accord Kurtz Bros., Inc. v. Tracy*, BTA No. 1994-P-614, et seq., 1995 WL 752290 (December 15, 1995), *aff'd*, *Kurtz Bros. v. Tracy*, 8th Dist. Cuyahoga Nos. 70078, et seq., 1996 WL 417133, and *Pallet World v. Levin*, BTA No. 2007-M-116, 2010 WL 2548349 (June 22, 2010).

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



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

Department of
Taxation

FINAL DETERMINATION

Date: **MAY 27 2020**

Petta Enterprises Rolling Stock, LLC
128 Steubenville Ave.
Cambridge, OH 43725-2213

Re: Assessment No. 100000659911
Use Tax

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$6,162.50	\$90.27	\$924.38	\$7,177.15

The assessment is the result of an audit of the petitioner's purchase of a truck. On December 5, 2016, the petitioner purchased a 2013 Peterbilt Truck (the "vehicle"). No tax was paid at the time of the purchase as the petitioner claimed it was exempt that the purchase was exempt for use in highway transport for hire. The exempt status of the 2013 Peterbilt could not be verified and this assessment was issued. The petitioner objects to the assessment. No hearing was requested.

Background

The petitioner has a facility located in Cambridge, Ohio. The petitioner's website states it has the "largest waste transfer/truck washout facilities in the tri-state area[.]" Its website further states it offers services such a multiple waste transfer stations, brine sales, truck wash outs, waste hauling, and drilling and testing of anchors.

Analysis

As an initial matter, an assessment is presumptively valid. *R.K.E. Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. Exemptions from taxation are strictly construed against the taxpayer's claim for relief. *Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, 978 N.E.2d 882 ¶18 (further citations omitted). 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,

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1999 WL 195629, citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

Motor vehicles that are primarily used for transporting tangible personal property belonging to others for consideration 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.”

The first issue is if the petitioner has operating authority from the Public Utilities Commission of Ohio (“PUCO”) or the United States Department of Transportation (“US DOT”) to engage in transportation for hire. R.C. 5739.01(Z). The Commissioner does not dispute that the petitioner was properly licensed with the US DOT for the relevant time periods to this assessment. Therefore, the petitioner has met the licensure requirement for the exemption.

The second issue is if the petitioner has submitted sufficient evidence showing the primary use of the vehicle was transporting tangible personal property for others for consideration. Initially, the petitioner submitted a questionnaire reflecting the use of this vehicle was 95% for hauling the petitioner’s own property and 5% hauling property for others. A month later, the petitioner submitted another questionnaire indicating the use of the vehicle was 100% hauling property for others. The petitioner indicated on both questionnaires the vehicle was used for hauling water, “processed water[,]” and brine. The petitioner later stated in its appeal that the first questionnaire was submitted incorrectly.

After this assessment was issued, the petitioner provided invoices and work orders related to the use of the vehicle at issue and another Peterbilt that was also assessed. The invoices and work orders did not specify which of the vehicles was used in the invoice or work order. The petitioner crossed out line items on invoices it stated did not apply to the use of the vehicle or other Peterbilt.

As an initial matter, the petitioner has failed its burden to show exempt use of this vehicle. Its provided evidence does not reflect the specific use of this vehicle. The work orders and corresponding invoices reflect the use of four trucks: unit 51, unit 52, unit 54, and unit 55. The petitioner did not specify which trucks were each unit. The petitioner did not specify why it was including work orders for four presumably different trucks when its letter stated it was providing information for two trucks. The Tax Commissioner cannot conclude based upon the provided information that the assessed vehicle was primarily used in an exempt manner. See *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, ¶27.

Further, the petitioner fails the transportation “for others” prong of the exemption. The evidence provided by the petitioner reflects that its trucks are used for hauling waste for disposal, such as

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wastewater, brine, and drill mud. Some of the evidence also indicates the petitioner occasionally transports fresh water, but the work orders do not reflect the petitioner's trucks picking up the water from a location and hauling it to a different location. Instead the petitioner's own documentation provides its transportation of water is a "water support" service. The petitioner is not in the business of transportation for hire. At least a portion of the petitioner's business is hauling waste discarded by its customers. 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 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). The evidence provided illustrates the petitioner's customers are hiring the petitioner to perform the business of waste removal and disposal. Additionally, the petitioner's initial questionnaire indicated that most of its transport was for its own items. 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.

To receive the exemption, the petitioner must show that the transportation was provided for consideration. 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). 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 920.¹ It does not appear from the evidence provided that the petitioner separated out its transportation fees as opposed to other fees such as water support and waste disposal. 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 [petitioner] 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 [sic] 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 reference to a transportation service on some of its invoices indicates that the petitioner received consideration from its customers in exchange for the primary service that the petitioner, per its own website, provides: waste transfer and waste disposal. The petitioner has failed to meet its burden to show how these transactions are exempt.

¹ *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).

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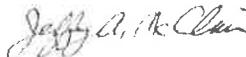
Additionally, the hauling of others' property for consideration must account for the primary use of the vehicle. R.C. 5739.02(B)(32). Based upon the foregoing, the petitioner has not shown that this requirement is met. The objection is denied.

Therefore, the assessment is affirmed.

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

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Production Control Units, Inc.
2280 W. Dorothy Ln.
Moraine, OH 45439

Re: Assessment No. 100000437949
Use Tax
Account No. 97-303093
Audit Period: 01/01/2010 – 12/31/2015

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

	<u>Pre-Assessment</u>		
<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$50,744.51	\$3,671.65	\$7,611.51	\$62,027.67

This assessment is the result of an audit of the petitioner's purchases for the period shown above. The petitioner operates a manufacturing company in Moraine, Ohio. A hearing was held on this matter.

Audit Methodology

Capital asset purchases were reviewed on a comprehensive basis. Audit Remarks, Page 5. However, a block sample was used to review expense invoices. Audit Remarks, Page 5. The taxpayer indicated that their purchases were not seasonal in nature, so January 1, 2015 through December 31, 2015 was chosen as the sample year. Data for the sample period was derived from information provided by the petitioner. Audit Remarks, Page 4. The tax deficient expense purchases were projected over the sample period based on 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 two accounts included in the audit data are not representative of the entire audit period and heavily skewed the assessed tax liability. The petitioner stated that the first account contains purchases for temporary labor services provided by ThinkPath Engineering Services. The second disputed account is comprised of recruiting services. The petitioner maintains that for both of these accounts, the same or similar services were provided by different vendors during the other years in the audit period, and they were not aware that tax was not being charged in the sample year. In

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support of this position, the petitioner submitted invoices and spreadsheets and requested an adjustment to the tax liability.

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 spreadsheets provided are not original documents and the invoices submitted are not from the sample period. After reviewing these items, it is not clear how the additional information supports the contention that the assessed tax should be lowered. Further, the sample methodology inherently incorporates situations such as vendor changes during the sample year because vendor changes can occur throughout the audit period. It may be true that vendors used during the sample period did not charge taxes while different vendors providing the same services outside of the sample period did charge sales tax. The opposite is also just as likely. The petitioner likely used vendors outside of the audit period who did not charge sales tax, while using different vendors during the audit period who did charge sales tax. Indeed, the purpose of the sample methodology is to project the tax liability of the audit period by using a representative sample of the taxpayer's transactions. The underlying premise is that the purchases audited are representative of similar transactions in the account.

Finally, the petitioner signed the Purchase Audit Letter of Agreement on July 29, 2016 that specified the methodology of the audit. The agreement specified that the audit would be conducted using a projection methodology. 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 objection is denied.

Offsite Monitoring

The petitioner contends that the audit includes nontaxable computer services as taxable purchases. Pursuant to R.C. 5739.01(B)(3)(e), computer services are included within the definition of a sale. Therefore, the sale of computer services is a taxable purchase. Computer services include, among other things, testing or otherwise ascertaining the operating capacity or characteristics of computer hardware or systems software. Ohio Adm.Code 5703-9-46(A)(2)(b). In support of their contention, the petitioner cites Ohio Adm.Code 5703-9-46(A)(4) which states that systems software does not include application software programs that are intended to perform business functions or control or *monitor processes*. (Emphasis added.) The petitioner maintains that the transactions at issue involved offsite monitoring services. During the audit, the petitioner discussed this concern with the auditor. The auditor requested a description of the services provided and after further review, determined these services to be taxable. Audit Remarks, Page 5. The petitioner also submitted invoices from the vendor to show that the majority of the charges are related to offsite monitoring. However, there is only one line item and it states that the charges are for "Level III Managed Services." Further review of the

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service description provided by the petitioner show that the services provided by the vendor go beyond monitoring. For example, other services provided include software updates, server firmware updates, application and program development, virus removal, and network firewall management. These are all computer services pursuant to Ohio Adm.Code 5703-9-46(A)(2). Based on review of the services included, the petitioner receives far more than monitoring services. Therefore, the objection is denied.

Penalty Abatement

The petitioner requests 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 on the facts and circumstances, penalty abatement is not warranted.

The assessment is affirmed as issued.

Current records indicate that a payment of \$62,027.67 has been made in full satisfaction of the assessment.

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

DATE:

MAY 21 2020

Rybak & Associates Inc
21821 Libby Road Suite 102
Bedford, OH 44146-6859

Re: Assessment No. 100000382732
Consumer's 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 consumer's use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
\$3,659.92	\$33.37	\$548.99	\$4,242.28

This assessment is the result of the petitioner's purchase of a 2015 van. The petitioner did not pay tax on the purchase of the van. A hearing was not requested.

The petitioner maintains that its purchase of the van qualifies for exemption because it is used directly in the rendition of a public utility service. The petitioner's contention is well taken.

Pursuant to R.C. 5739.02(B)(42)(a), sales where the purpose of the purchaser is to use the thing purchased directly in the rendition of a public utility service is exempt from taxation. Moreover, transportation by an ambulance service or by a person holding a certificate of public convenience and necessity is not taxable. R.C. 5739.01(B)(3)(r). Lastly, in accordance with R.C. 5739.01(P), a "public utility" includes a citizen holding and required to hold a certificate of public convenience and necessity.

The evidence provided establishes that the petitioner purchased an ambulance that is directly used in a public utility service. The evidence further establishes that the petitioner has a certificate of convenience and necessity.

The Ohio Administrative Code defines "ambulance" as, any motor vehicle or aircraft specially designed and equipped to provide medical transportation and includes ambulettes that are specially designed and equipped to provide transport to persons that require the use of a wheelchair. Ohio Adm.Code 5703-9-06(A)(2)(a). The petitioner provided sufficient evidence that its purchase meets the definition of an ambulance.

The petitioner provided sufficient evidence that the vehicle in question was purchased to provide non-emergency medical transportation to elderly and disabled individuals. The petitioner provided evidence that it contracted with the Cuyahoga County Board of Developmental Disabilities and the Western Reserve Area on Aging (Passport contract) to provide transportation services.

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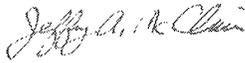
Additionally, the petitioner provided evidence that it is certified by the Ohio Department of Developmental Disabilities to provide transportation. The evidence supports the petitioner's contention that the vehicle is equipped to provide specialized transportation. Lastly, the evidence establishes that the petitioner has a certificate of public convenience and necessity.

In summary, the petitioner has a certificate of public convenience and necessity and the petitioner provides non-medical transportation service to the elderly and persons with disabilities on behalf of Cuyahoga County. Consequently, the evidence indicates that the vehicle is used directly in the rendition of a public utility service and therefore is exempt pursuant to R.C. 5739.02(B)(42)(a). Thus, the objection is granted.

Accordingly, the assessment is cancelled.

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of Taxation

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

FINAL DETERMINATION

Date: **MAY 21 2020**

SBC Leasing LLC
551 Dover Rd. N.E.
Sugarcreek, OH 44681

Re: Assessment No. 100000357020
Use Tax

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$4,644.54	\$57.23	\$696.68	\$5,398.45

This assessment was issued based upon the conduct of a special audit of the purchase of a motor vehicle. The petitioner purchased the vehicle without the payment of tax. It is the petitioner's contention that the purchase is exempt because the vehicle is used in transportation for hire. The Ohio Department of Taxation was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. A hearing was not requested in this matter.

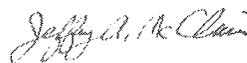
The petitioner contends the vehicle is exempt under R.C. 5739.02(B)(32). The evidence in file supports the petitioner's contention.

Accordingly, the assessment is cancelled.

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

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

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


JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 06 2020**

Stanley Convergent Security Solutions, Inc.
40 Shuman Blvd, Ste 160
Naperville, IL 60563

Re: Refund Claim No. 20181347024

This is the final determination of the Tax Commissioner on an application for refund, in the total amount of \$922,593.83 in use tax filed pursuant to R.C. 5739.07.

The claims were initially denied. The claimant disagreed with the denial and requested reconsideration of the claims.

In resolution of the matter, the claimant has agreed to reduce the amount claimed on the application for refund.

Therefore, the claims are approved in the adjusted amount of \$645,815.68, 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

2010030298



Department of Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Sunnyside Automotive III, LLC
d.b.a. Sunnyside Mitsubishi
7629 Pearl Rd.
Middleburg Heights, OH 44130

RE: Assessment No.: 100000304174
Use Tax
Account No.: 97-300206

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$20,811.43	\$2,100.48	\$1,040.46	\$23,952.37

The petitioner operates as an automotive dealership. The petitioner provides retail sales of new Mitsubishi vehicles and used vehicles. The petitioner also provides financing, leasing, and repair services, as well as sales for accessories and parts. This assessment is the result of a field audit of the petitioner's purchases from January 1, 2011 through December 31, 2013. The petitioner filed a petition for reassessment. A hearing was held.

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

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 the period of January 1, 2013 through December 31, 2013 was chosen as the sample period. It was agreed that the sample period was representative of the petitioner's business activity. The data sampled was derived from the accounts payable voucher files verified to the account detail reports. 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

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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 Department erred in assessing use tax on exempt transactions. Specifically, the petitioner contends that the Department incorrectly assessed transactions as taxable electronic information services rather than digital advertising services for its online advertising. The petitioner also contends that approximately half of its mailers are exempt as direct mail advertising which provide specific price and product offerings of the dealership pursuant to R.C. 5739.02(B)(35)(a). The petitioner contends that a reduction should be given for tax paid. The petitioner's objections are addressed in detail below.

Digital Advertising Services

The petitioner states that it utilizes online advertising through various online advertising vendors. The petitioner contends that these services consist of vehicle listings, lead generation, search engine optimizations, and search engine marketing; all of which are defined as exempt digital advertising services under R.C. 5739.01(RRR). The petitioner also contends that such services fail to meet the definition of taxable electronic information services pursuant to R.C. 5739.01(B)(3)(e) and, therefore, are exempt as digital advertising services. The petitioner contends that its transactions do not qualify as taxable electronic information services because the transactions are exempt as digital advertising services.

Cars.com

The petitioner contends that the Department erred in assessing use tax on transactions for digital advertising services for Cars.com. The petitioner states that Cars.com is one of the petitioner's vehicle listing and lead generation vendors. The petitioner contends that Cars.com operates a website which is the functional equivalent of classified ads in a newspaper. The petitioner states that the website is designed to attract customers by providing free access to vehicle listing, specifications, reviews, and other related information. The petitioner contends that it transmits vehicle listings to Cars.com to display as an advertisement on its website. The petitioner provides that Cars.com allows it to enter certain "dealer profile" information on the website which includes sales and service hours, dealership personnel names to contact, dealership description, promotional taglines, and dealership photographs. The petitioner states that Cars.com provides a Market Intelligence Report, which allows the dealership to assess the effectiveness of its online advertising with Cars.com. These reports include but are not limited to dealership metrics to the dealership marketplace, number of visits, average ratings, vehicle display pages, and website transfers.

The petitioner contends that the placement of vehicle listing information and the placement of dealership profit information fit within the definition of digital advertising services by providing the information to Cars.com and Cars.com places it into its computer equipment for the "purpose for electronically displaying promotional advertisements to potential customers about products or services or about industry or business brands." Petition for Reassessment Memorandum dated October 31, 2018, Page 3. The petitioner contends that the Market Intelligence Reports are supplemental and an addendum to the advertising services and would not exist if not for the vehicle listings on Cars.com;

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therefore, they are also exempt as digital advertising services.

The petitioner's contentions that the aforementioned services are exempt from taxation as digital advertising services pursuant to R.C. 5739.01(RRR) are not well taken. R.C. 5739.01(RRR) was not enacted until October 12, 2016 in H.B. 466 of the 131st General Assembly. It is important to note that the audit period was January 1, 2011 through December 31, 2013. The legislation which promulgated the Ohio Revised Code referenced by the petitioner does not apply to these transactions because they occurred prior to the effective date of this change to the Ohio Revised Code. Because the new section does not apply to the transactions included in the audit, it is not necessary to determine whether the contested transactions within the assessment meet the definition of digital advertising services. Therefore, this objection is denied.

TrueCar

Similar to Cars.com, the petitioner references its transactions with TrueCar as exempt pursuant to R.C. 5739.01(RRR). The petitioner contends that it advertises with TrueCar and TrueCar is a search engine optimization and search engine marketing vendor that brings traffic to the petitioner's website. The petitioner contends that it is subcontracting advertising and its goal is to increase showroom traffic. The petitioner's contentions that the aforementioned services are exempt from taxation as digital advertising services pursuant to R.C. 5739.01(RRR) are not well taken for the same analysis provided to Cars.com. Therefore, this objection is denied.

Electronic Information Services

The petitioner contends that the Department erred in assessing use tax on exempt electronic information services transactions and incorrectly assessed the transactions as taxable electronic information services pursuant to R.C. 5739.01(B)(3)(e). The petitioner provides that not all electronic information services are taxable. While the petitioner contends that such services are digital advertising services rather than taxable electronic information services, the Department will assess the petitioner's electronic information services contention separately since the exemption for digital advertising did not exist during the audit period.

The petitioner contends that various services purchased from Cars.com and TrueCar should not be included in the assessment because they are exempt digital advertising services. During the hearing, the petitioner provided that the true object of its transactions is advertising and the general public has access to it; therefore, there are no designated recipients as required for electronic information services under R.C. 5739.01(Y)(1)(c). The petitioner contends that its transactions do not qualify as electronic information services because they do not have designated recipients as defined in statute, and the true object of the transaction is advertising services. Therefore, the petitioner contends that the services were not electronic information services and that they should be removed from the assessment.

Designated Recipients

The petitioner contends that it provides data to various vendors, such as Cars.com to advertise its vehicles and services. The petitioner uses Cars.com as an example of how its vendors' services

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operate. The petitioner states that service offerings of TrueCar are sufficiently similar to Cars.com. Petition for Reassessment Memorandum dated October 31, 2018, Page 5. Therefore, any individual references to TrueCar or Cars.com shall be interpreted as referring to both companies.

The petition contends that the data is available to the general public; therefore, there are no designated recipients as required by R.C. 5739.01(Y)(1)(c) to qualify as electronic information services. Electronic information services is defined in R.C. 5739.01(Y)(1)(c) as providing access to computer equipment by means of telecommunications equipment for the purpose of *either* (1) examining or acquiring data stored in or accessible to the computer equipment *or* (2) placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment. (Emphasis added.) The petitioner relies on the second purpose included in R.C. 5739.01(Y)(1)(c)(ii) in contending that there are no designated recipients so the transaction cannot be taxable electronic information services.

The petitioner fails to address the first portion of the definition which only requires access to computer equipment by means of telecommunications equipment for the purpose of examining or acquiring data stored in or accessible to the computer equipment. The petitioner's purchases meet the definition of electronic information services. The petitioner purchased access to Cars.com and TrueCar's web-based applications for e-mail reporting i.e. Market Intelligence Reports, data management, and access to both vendors' databases, such as when the petitioner logs into its Cars.com account to update its inventory and information. This is "examining or acquiring data stored in or accessible to computer equipment." R.C. 5739.01(Y)(1)(c)(i). The petitioner contends that Cars.com Market Intelligence Reports are not accessed through Cars.com computer equipment because it is emailed to the petitioner by Cars.com. This contention is not well taken. The data is extrapolated by Cars.com through Cars.com computer equipment to provide to the petitioner. Cars.com computer equipment is accessed to produce the report. Further, the report would not exist if not for Cars.com computer equipment which provides such reports. Additionally, the data is available to the petitioner on the web application of Cars.com. Therefore, this contention lacks merit.

Alternatively, the petitioner's purchases also meet the second purpose provided in R.C. 5739.01(Y)(1)(c)(ii). The petitioner contends that it fails to meet the definition of electronic information services because the data is not retrieved by designated recipients. The petitioner contends that the data is available to the general public and therefore, no recipients are designated. The petitioner also states that it cannot be the designated recipient because it provides vehicle inventory data to Cars.com and TrueCar and the data is retrieved by the general public.

The petitioner, as the consumer, is the designated recipient of Cars.com and TrueCar's software, not the general public. The petitioner received a benefit by its use of both company's web applications and name recognition to receive data regarding the vehicle marketplace and promote the petitioner and its products and services. The petitioner is the designated recipient as a consumer who is charged a fee to have continued access to Cars.com and TrueCar's web applications. Access to these applications allow the petitioner to enter a wide variety of information on each company's platform to reach potential customers, such as dealer profile information and inventory listings, and to continue to update this information and receive feedback and data from each company's website. Therefore, while it has already been established that these transactions qualify as electronic information service under the first purpose, they also meet the second purpose included in the definition.

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True Object of the Transaction

The petitioner contends that various services purchased from Cars.com and TrueCar should not be included in the assessment because they are exempt as digital advertising services. The petitioner contends that the true object of its transactions is advertising; therefore, they are not taxable electronic information services. Pursuant to R.C. 5739.01(B)(3)(e), electronic information services are provided when (a) the services are provided for “use in business” and (b) the “true object of the transaction is the receipt by the consumer” of those services. As discussed above, the petitioner’s transactions satisfy the definition of electronic information services.

The petitioner provides that the true object of its transactions with Cars.com and TrueCar was to receive digital advertising services. As previously discussed, digital advertising was not defined as an exempt professional service during the audit period. The petitioner contends that the petitioner engaged Cars.com for the express business purpose to display the petitioner’s vehicle offerings and otherwise promote the petitioner and its products on Cars.com. The petitioner contends that to the extent that data is accessed, transmitted, or otherwise handled is merely a minor part or result of advertising and, therefore, incidental to the primary purpose.

The petition cites Ohio Department of Taxation Information Release ST 1999-04 in contending that Cars.com Market Intelligence Reports combine digital advertising services with electronic information services, and to be taxable electronic information services, the electronic information services must be a significant component of the transaction. The petitioner contends that the data provided in the reports is a direct result of the listing activity and the report or data would not exist if not for the listing; therefore, the report is incidental to the advertisement. The petitioner provides that advertising has evolved into an electronic medium and despite the change in the medium, the objective is the same. The petitioner contends that advertising has never been subject to tax. The petitioner correctly notes that advertising is exempt from taxation. R.C. 5739.01(RRR) defines digital advertising services as an exempt professional service, but the section did not exist during the audit period. H.B. 466 does not apply retroactively to support the petitioner’s contention.

The petitioner submitted invoices from Cars.com; however, the submitted invoices were not entered into between the vendor and the petitioner, but rather Sunnyside Honda. The petitioner is not a party; therefore, this evidence lacks merit. The petitioner also submitted minimal invoices from TrueCar. The submitted invoices describe the product as a monthly subscription and provide a consistent monthly fee of \$250.00. While the description included in the petitioner’s invoices as monthly subscriptions are not the only evidence the Department considers in assessing the type of transaction, it is important to note the Information Release provided by the petitioner. The Release states in part “Many types of subscription services that are available for use in business over the Internet are considered taxable electronic information services.” IR ST 1999-04. However, without a breakdown of what makes up the charge, the entire amount is subject to sales and use tax. Ohio Adm.Code 5703-9-46(B)(4). The petitioner failed to provide any other evidence, such as contracts to support that the transactions were for the purpose of professional services as advertising.

As provided in IR ST 1999-04, many transactions contain and combine digital advertising services with electronic information services and the electronic information services may be a significant

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component. The Department continues to hold taxable those components of these transactions that represent electronic information services and deem mixed transactions to be taxable. *Id.* The petitioner contends that even if the services include taxable electronic information services, these services are merely incidental to the true object of the transactions – exempt professional services as digital advertising. The petitioner’s contention lacks merit.

Pursuant to Ohio Adm.Code 5703-9-46(B)(3), when a transaction includes electronic information services, the true object of the transaction is the receipt of those taxable services if the electronic information services render a significant benefit to the consumer. The petitioner received a significant benefit by its use of TrueCar and Cars.com web applications and name recognition to promote the petitioner and receive data regarding the market trends, and feedback. The petitioner was charged a fee to have continued access to these web applications to promote the dealership and receive market data. Access to this application allowed the petitioner to enter a wide variety of information on TrueCar or Cars.com to reach a larger pool of customers.

Most notably, the Department reviewed the vendors’ websites and various corporate documents from TrueCar and Cars.com to ascertain the products and services provided by each company to better assist in determining the true object of these transactions. Under the “About” section of Cars.com’s website, it describes itself as a leading digital marketplace and solutions provider for the automotive industry that connects car shoppers with sellers.¹ Further, it provides in relevant part that the Company empowers shoppers with data, resources and digital tools. *Id.* “Cars.com enables dealerships and OEMs with innovative technical solutions and data-driven intelligence to better reach and influence ready-to-buy shoppers, increase inventory turn and gain market share.” *Id.*

Similar to Cars.com, TrueCar describes its business overview in its Form 10-K as follows, “We have established a diverse software ecosystem on a common *technology infrastructure*, powered by proprietary data and analytics.”² Our company-branded platform is available on our TrueCar website and mobile applications...” The Report also provides, “Our network of TrueCar Certified Dealers *interfaces with our platform primarily through our Dealer Portal*, an application that can be accessed online or using a mobile device.” The Report further clarifies the types of services the electronic information services portal provides to dealers. This portal allows dealers to “assess the competitiveness of their vehicle pricing *relative to their market*, create vehicle pricing rules, *access details on potential buyers wants and needs*, create custom detailed offers based on vehicles in stock, manage how their dealership profile appears on the network, assess their competitive market performance on vehicles sold through their dealership, as well as a number of administrative and other management tools.” *Id.* (Emphasis added.)

This information solidifies the fact that both company’s plethora of service offerings are electronic information services as the true object of its transactions are focused on their company-branded platforms available on their websites and mobile applications. Such applications generate significant data for the petitioner. Based on this information, it is evident that each company’s platform is the center of its purpose and existence. The true object of the transactions was the receipt of taxable

¹<https://www.cars.com/about/> (accessed April 3, 2020).

²<https://www.sec.gov/Archives/edgar/data/1327318/000132731818000019/truocar201710k.htm#s3E6A4A2D006A5636A24FF6DC5FE4E7C9> (accessed April 3, 2020).

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electronic information services in its access to each company's software and web application. Therefore, the receipt of electronic information services is the true object of the transaction and the request to remove the transactions from the assessment is denied.

Direct Mail Advertising

The petitioner contends that the Department incorrectly assessed its direct mail advertising which is exempt pursuant to R.C. 5739.02(B)(35)(a). The petitioner provides that it engages in direct mail advertising through US mail in sending postcards, letters, and flyers for the benefit of its service department. The petitioner contends that approximately half of its advertisements price and describe dealership products, and therefore qualify for exemption. The petitioner contends that transactions in the amount of \$4,228.83 and \$13,023.84 from MBI Direct Mailers and Prospect Technologies, respectively are exempt.

The petitioner provided invoices and mailed advertising material to support its contention. However, the petitioner could not provide the direct mailers it purchased from the aforementioned vendors. The petitioner contends that the invoice descriptions alone are sufficient evidence that the mailers were not for service reminders but offers and promotions. The petitioner also provided emails with MBI as evidence that the mailers were marketing pieces and not service reminders. The petitioner agrees that not all of its mailers price and describe its products and services and do not satisfy R.C. 5739.02(B)(35)(a). Additionally, the petitioner does not dispute the entirety of certain invoices which contain charges for exempt and non-exempt purchases, such as charges in the amount of \$400 from MBI for non-flyer related fees. The petitioner understands that service reminders and welcome mailers through its vendor Dealer Product Services and OneCommand Inc. are not exempt and are not disputed. The petitioner includes these invoices as reference to show the difference in the invoice descriptions.

MBI Direct Mail Inc.

The petitioner provided a list of disputed items in Appendix C of its petition with two transactions from MBI Direct Mail Inc. (MBI). Appendix G of its petition contained the two disputed invoices from MBI. The petitioner contends that it was not able to locate copies of the mailers containing the price and product descriptions; however, the petitioner included the two invoices, Invoice No. 117370 and Invoice No. 120140, and an email from MBI to support its contention. The invoices contain general information, but do not contain any descriptions to verify that the mailers contained or described prices and product listings which is required under R.C. 5739.02(B)(35)(a). Additionally, and most notably, Invoice No. 120140 was not a transaction between the petitioner and MBI, but rather Sunnyside Chevrolet. The invoice specifically lists Sunnyside Chevrolet in the description with Sunnyside Chevrolet's address. The petitioner is not a party to this transaction. This contention lacks merit. The petitioner has not met its burden to demonstrate these transactions were exempt pursuant to R.C. 5739.02(B)(35)(a). Therefore, this objection is denied

Prospect Technologies

Similar to MBI, the petitioner provided a list of disputed items in Appendix C of its petition with four transactions from Prospect Technologies (Prospect). Appendix G of its petition contained the four

disputed invoices from Prospect. The petitioner contends that it was not able to locate copies of the mailers containing the price and product descriptions; however, the petitioner included the four invoices, Invoice No. 3365, 3424, 3465, and 3481 from Prospect to support its contention. Two invoices, Invoice No. 3465 and 2481, contain general information, but do not contain any descriptions to verify that the advertising contained or described prices and product listings which is required under R.C. 5739.02(B)(35)(a). Additionally, Invoice No. 3365 and 3424 describe the mailers as service postcards incorporating offers and promotions. However, the general descriptions of “offers and promotions” do not to verify that the advertising contained or described prices and product listings which is required under R.C. 5739.02(B)(35)(a). The petitioner has not satisfied its burden that the invoices qualify for exemption. Therefore, this objection is denied.

Tax Paid

The petitioner contends that the Department erred in assessing tax on transactions in the amount of \$2,860.00 with HookLogic because the petitioner already paid sales tax on these transactions. The petitioner provided a list of disputed items in Appendix C of its petition. The list contained HookLogic advertising services provided to the petitioner from May 14, 2013 through November 27, 2013.

The petitioner provided the Department with two HookLogic Master Service Agreements effective September 15, 2013 and December 12, 2013. Both Agreements included terms that stated the price of services contains all taxes and fees. The petitioner cites this language in support of its position that such taxes have already been remitted. However, five of these transactions were prior to the effective date of these Agreements. Additionally, and most notably, these Agreements were not entered into between HookLogic and the petitioner, but rather Sunnyside Toyota and Sunnyside Chevrolet. The petitioner is not a party to either of these Agreements. Therefore, this contention lacks merit. Further, the petitioner contends that it is unable to provide documentation or receive clarification from the vendor, HookLogic, that tax was paid. The petitioner failed to provide any evidence to demonstrate that tax was remitted. The petitioner has not met its burden to demonstrate these transactions were assessed in error. Therefore, this objection is denied.

Penalty

The petitioner seeks remission of the penalty associated with the assessment. The evidence and circumstances support abatement of the penalty. The request for a penalty abatement is granted.

Accordingly, the assessment is modified as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$20,811.43	\$2,100.48	\$0.00	\$22,911.91

Current records indicate that \$3,037.24 of payments have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to “Treasurer – State of Ohio.” Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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



JEFFREY A. McCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Sunnyside Automotive II, LLC
d.b.a. Sunnyside Audi
7630 Pearl Rd.
Middleburg Heights, OH 44130

RE: Assessment No.: 100000279647
Use Tax
Account No.: 97-806832

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$22,944.55	\$3,458.83	\$816.31	\$27,219.69

The petitioner operates as an automotive dealership. The petitioner provides retail sales of new Audi vehicles and used vehicles. The petitioner also provides financing, leasing, and repair services, as well as sales for accessories and parts. This assessment is the result of a field audit of the petitioner's purchases from January 1, 2008 through December 31, 2013. The petitioner filed a petition for reassessment. A hearing was held.

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

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 the period of January 1, 2013 through December 31, 2013 was chosen as the sample period. It was agreed that the sample period 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

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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 Department erred in assessing use tax on exempt transactions. Specifically, the petitioner contends that the Department incorrectly assessed transactions as taxable electronic information services rather than digital advertising services for its online advertising. The petitioner's objections are addressed in detail below.

Digital Advertising Services

The petitioner states that it utilizes online advertising through various online advertising vendors. The petitioner contends that these services consist of vehicle listings, lead generation, search engine optimizations, and search engine marketing; all of which are defined as exempt digital advertising services under R.C. 5739.01(RRR). The petitioner also contends that such services fail to meet the definition of taxable electronic information services pursuant to R.C. 5739.01(B)(3)(e) and, therefore, are exempt as digital advertising services. The petitioner contends that its transactions do not qualify as taxable electronic information services because the transactions are exempt as digital advertising services.

Cars.com

The petitioner contends that the Department erred in assessing use tax on transactions for digital advertising services for Cars.com. The petitioner states that Cars.com is one of the petitioner's vehicle listing and lead generation vendors. The petitioner contends that Cars.com operates a website which is the functional equivalent of classified ads in a newspaper. The petitioner states that the website is designed to attract customers by providing free access to vehicle listing, specifications, reviews, and other related information. The petitioner contends that it transmits vehicle listings to Cars.com to display as an advertisement on its website. The petitioner provides that Cars.com allows it to enter certain "dealer profile" information on the website which includes sales and service hours, dealership personnel names to contact, dealership description, promotional taglines, and dealership photographs. The petitioner states that Cars.com provides a Market Intelligence Report, which allows the dealership to assess the effectiveness of its online advertising with Cars.com. These reports include but are not limited to dealership metrics to the dealership marketplace, number of visits, average ratings, vehicle display pages, and website transfers.

The petitioner contends that the placement of vehicle listing information and the placement of dealership profit information fit within the definition of digital advertising services by providing the information to Cars.com and Cars.com places it into its computer equipment for the "purpose for electronically displaying promotional advertisements to potential customers about products or services or about industry or business brands." Petition for Reassessment Memorandum dated October 31, 2018, Page 3. The petitioner contends that the Market Intelligence Reports are supplemental and an addendum to the advertising services and would not exist if not for the vehicle listings on Cars.com; therefore, they are also exempt as digital advertising services.

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The petitioner's contentions that the aforementioned services are exempt from taxation as digital advertising services pursuant to R.C. 5739.01(RRR) are not well taken. R.C. 5739.01(RRR) was not enacted until October 12, 2016 in H.B. 466 of the 131st General Assembly. It is important to note that the audit period was January 1, 2011 through December 31, 2013. The legislation which promulgated the Ohio Revised Code referenced by the petitioner does not apply to these transactions because they occurred prior to the effective date of this change to the Ohio Revised Code. Because the new section does not apply to the transactions included in the audit, it is not necessary to determine whether the contested transactions within the assessment meet the definition of digital advertising services. Therefore, this objection is denied.

Electronic Information Services

The petitioner contends that the Department erred in assessing use tax on exempt electronic information services transactions and incorrectly assessed the transactions as taxable electronic information services pursuant to R.C. 5739.01(B)(3)(e). The petitioner provides that not all electronic information services are taxable. While the petitioner contends that such services are digital advertising services rather than taxable electronic information services, the Department will assess the petitioner's electronic information services contention separately since the exemption for digital advertising did not exist during the audit period.

The petitioner contends that various services purchased from Cars.com should be removed from the assessment because they are exempt digital advertising services. Additionally, the petitioner contends that professional services purchased from MPG Interactive Inc. should be removed from the assessment because no tangible personal property was received, and the services are effectively advertising. During the hearing, the petitioner provided that the true object of its transactions is advertising and the general public has access to it; therefore, there are no designated recipients as required for electronic information services under R.C. 5739.01(Y)(1)(c). The petitioner contends that its transactions do not qualify as electronic information services because they do not have designated recipients as defined in statute, and the true object of the transaction is advertising services. Therefore, the petitioner contends that the services were not electronic information services and shall be removed from the assessment.

Designated Recipients

The petitioner contends that it provides data to various vendors, such as Cars.com to advertise its vehicles and services. The petition contends that the data is available to the general public; therefore, there are no designated recipients as required by R.C. 5739.01(Y)(1)(c). Electronic information services is defined in R.C. 5739.01(Y)(1)(c) as providing access to computer equipment by means of telecommunications equipment for the purpose of *either* (1) examining or acquiring data stored in or accessible to the computer equipment *or* (2) placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment. (Emphasis added.) The petitioner relies on the second purpose included in R.C. 5739.01(Y)(1)(c)(ii) in contending that there are no designated recipients so the transaction cannot be taxable electronic information services.

The petitioner fails to address the first portion which only requires access to computer equipment by

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means of telecommunications equipment for the purpose of examining or acquiring data stored in or accessible to the computer equipment. The petitioner's purchases meet the definition of electronic information services. The petitioner purchased access to Cars.com web-based applications for e-mail reporting i.e. Market Intelligence Reports, data management, and access to its vendor's database, such as when the petitioner logs into its Cars.com account to update its inventory and information. This is "examining or acquiring data stored in or accessible to computer equipment." R.C. 5739.01(Y)(1)(c)(i). The petitioner contends that Cars.com Market Intelligence Reports are not accessed through Cars.com computer equipment because it is emailed to the petitioner by Cars.com. This contention is not well taken. The data is extrapolated by Cars.com through Cars.com computer equipment to provide to the petitioner. Cars.com computer equipment is accessed to produce the report. Further, the report would not exist if not for Cars.com computer equipment which provides such reports. Additionally, the data is available to the petitioner on the web application of Cars.com. Therefore, this contention lacks merit.

Alternatively, the petitioner also meets the second purpose provided in R.C. 5739.01(Y)(1)(c)(ii). The petitioner contends that it fails to meet the definition of electronic information services because the data is not retrieved by designated recipients. The petitioner contends that the data is available to the general public and therefore, no recipients are designated. The petitioner also states that it cannot be the designated recipient because it provides vehicle inventory data to Cars.com and the data is retrieved by the general public.

The petitioner as the consumer, is the designated recipient of Cars.com software, not the general public. The petitioner received a benefit by its use of the company's web application and name recognition to receive data regarding the vehicle marketplace and promote the petitioner and its products and services. The petitioner is the designated recipient as a consumer who is charged a fee to have continued access to Cars.com web application. Access to this application allows the petitioner to enter a wide variety of information on the company's platform to reach potential customers, such as dealer profile information and inventory listings, and to continue to update this information and receive feedback and data from the company's website. Therefore, while it has already been established that these transactions qualify as electronic information service under the first purpose, they also meet the second purpose included in the definition.

True Object of the Transaction

The petitioner contends that various services purchased from Cars.com should be removed in the assessment because they are exempt as digital advertising services. The petitioner also contends that the true object of its transactions with MPG Interactive Inc. are photography services to be included with online advertising services. The petitioner contends that the true object of its transactions is advertising; therefore, they are not taxable electronic information services. Pursuant to R.C. 5739.01(B)(3)(e), electronic information services are provided when (a) the services are provided for "use in business" and (b) the "true object of the transaction is the receipt by the consumer" of those services. As discussed above, the petitioner's transactions satisfy the definition of electronic information services.

The petitioner provides that the true object of its transactions with Cars.com and MPG Interactive Inc.

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was to receive digital advertising services. As previously discussed, digital advertising was not defined as an exempt professional service during the audit period. The petitioner contends that the petitioner engaged Cars.com for the express business purpose to display the petitioner's vehicle offerings and otherwise promote the petitioner and its products on Cars.com. The petitioner contends that to the extent that data is accessed, transmitted, or otherwise handled is merely a minor part or result of advertising and therefore incidental to the primary purpose.

The petition cites Ohio Department of Taxation Information Release ST 1999-04, issued in January, 1999, and updated both in December, 2015 and again in September, 2016, in contending that Cars.com Market Intelligence Reports combine digital advertising services with electronic information services, and to be taxable electronic information services, the electronic information services must be a significant component of the transaction. The petitioner contends that the data provided in the reports is a direct result of the listing activity and the report or data would not exist if not for the listing; therefore, the report is incidental to the advertisement. The petitioner provides that advertising has evolved into an electronic medium and despite the change in the medium, the objective is the same. The petition contends that advertising has never been subject to tax. The petitioner correctly notes that advertising is exempt from taxation. R.C. 5739.01(RRR) defines digital advertising as an exempt professional service, but the section did not exist during the audit period. Moreover, H.B. 466 does not apply retroactively to support the petitioner's contention.

The Department requested that the petitioner provide evidence of the transactions, such as contracts and invoices that describe the transactions that are included in the assessment. The petitioner did not provide any information from the web application of Cars.com or MPG Interactive Inc. to evidence pricing or describing of products to qualify as advertising. The petitioner failed to submit any invoices or documents from MPG Interactive Inc. The petitioner submitted invoices from Cars.com; however, the invoices were not entered into between the vendor and the petitioner, but rather Sunnyside Honda. The petitioner is not a party; therefore, this contention lacks merit. The petitioner failed to provide any other evidence, such as contracts to support that the transactions were for the purpose of professional services as advertising. Without a detailed breakdown of what makes up the charge, the entire amount is subject to sales and use tax. Ohio Adm.Code 5703-9-46(B)(4).

The petitioner submitted a citation from the Ohio Department of Taxation's Tax Education portion of its website to further its contention that photography services without the receipt of tangible personal property is exempt from sales tax.¹ Unlike with Cars.com, the petitioner only addresses the true object of its transaction with MPG to contend that its services are not electronic information services. The petitioner provides that the sole purpose if its transactions are photography for digital advertising. The petitioner explains that MPG stages vehicles and photographs for it. The petitioner contends that the photographs are exported on the petitioner's online advertising sites, but the petitioner does not receive any prints, discs or any other tangible personal property.

The petitioner failed to submit any invoices from these vendors, or any other evidence to describe the transactions. As provided in the referenced Taxation website, if the invoice is not itemized, the total

¹<https://www.tax.ohio.gov/TaxEducation/photography.aspx>

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amount of the invoice is taxable. Since the petitioner failed to provide evidence of the transaction, the total transaction is taxable. Further, the petitioner ignores the definition of tangible personal property in contending that the photographs were not physically given to the petitioner and therefore are not tangible personal property. R.C. 5739.01(YY) defines tangible personal property as personal property that can be *seen*, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. (Emphasis added.) The photographs are licensed to the petitioner for use on its websites and can be seen by both the petitioner and its potential customers. The photographs are physical items that can be measured and while downloaded i.e. developed onto MPG's system and other systems, they are perceptible to the senses. The petitioner failed to provide evidence to substantiate its contention; therefore, this contention lacks merit.

Invoices are not the only evidence the Department considers in assessing the type of transaction. The Department reviews any information that may be helpful. It is important to note the Information Release provided by the petitioner. As provided in IR ST 1999-04, many transactions contain and combine digital advertising services with electronic information services and the electronic information services may be a significant component. The Department continues to hold taxable those components of these transactions that represent electronic information services and deem mixed transactions to be taxable. *Id.* The petitioner contends that even if the services include taxable electronic information services, these services are merely incidental to the true object of the transactions – exempt professional services as digital advertising. The petitioner's contention lacks merit.

Pursuant to Ohio Adm.Code 5703-9-46(B)(3), when a transaction includes electronic information services, the true object of the transaction is the receipt of those taxable services if the electronic information services render a significant benefit to the consumer. The petitioner received a significant benefit by its use of both vendors' web application and name recognition to promote the petitioner and receive data regarding market trends, photographs, and feedback. The petitioner was charged a fee to have continued access to Cars.com's web application to promote the dealership and receive market data. Access to this application allowed the petitioner to enter a wide variety of information on Cars.com to reach a larger pool of customers. Additionally, the petitioner was provided continued access and use of the photographs and vehicle data, which was transmitted by MPG to MPG's system, Cars.com, and other web applications.

The petitioner failed to provide any of its own invoices from either vendor. The electronic information services provided were not incidental as no other services were rendered. The electronic information services rendered a significant benefit to the petitioner as they were the only services provided. Therefore, the petitioner received a significant benefit from the electronic information services of Cars.com and MPG's web applications.

Most notably, the Department reviewed the vendor's website and various corporate documents from Cars.com to ascertain the products and services provided by the company to better assist in determining the true object of these transactions. Under the "About" section of Cars.com's website, it describes itself as a leading digital marketplace and solutions provider for the automotive industry that connects car shoppers with sellers.² Further, it provides in relevant part that the Company empowers

²<https://www.cars.com/about/> (accessed April 3, 2020).

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shoppers with data, resources and digital tools. *Id.* “Cars.com enables dealerships and OEMs with innovative technical solutions and data-driven intelligence to better reach and influence ready-to-buy shoppers, increase inventory turn and gain market share.” *Id.* Under the “About” section of MPG’s website, it provides the following as to some of what MPG does, “Our main concentration is Internet Marketing through Inventory Management, Websites and Management Tools (CRM). We provide a ‘Do-It-Yourself’ solution for entering data and photos of inventory for dispersal to third party websites (such as Autotrader.com, Cars.com, dealer websites, Manufacturer websites, and others)...”³

This information solidifies the fact that each company’s plethora of service offerings are electronic information services as the true object of its transactions are focused on the company-branded platform available on its websites and mobile application. Such applications generate significant data for the petitioner. Based on this information, it is evident that each company’s platform is the center of its purpose and existence. The true object of the transactions was the receipt of taxable electronic information services in its access to the company’s software and web applications to distribute and receive data. Therefore, electronic information services are the true object of the transactions and the request to remove the transactions from the assessment is denied.

Penalty

The petitioner seeks remission of the penalty associated with the assessment. The evidence and circumstances support abatement of the penalty. The request for a penalty abatement is granted.

Accordingly, the assessment is modified as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$22,944.55	\$3,458.83	\$0.00	\$26,403.38

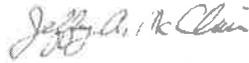
Current records indicate that \$12,157.71 of payments have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided 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.

³<http://www.autolotmanager.com/temps/website/whatwedo.cfm> (accessed April 7, 2020). MPG Interactive Inc.’s trade name is AutolotManager.com as verified by Ohio Secretary of State business filings. <https://bizimage.ohiosos.gov/api/image/pdf/201425401512>

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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



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Sunnyside Automotive I, LLC
d.b.a. Sunnyside Honda
7700 Pearl Rd.
Middleburg Heights, OH 44130

RE: Assessment No.: 100000280522
Use Tax
Account No.: 97-175200

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$59,257.90	\$9,041.93	\$2,022.48	\$70,322.31

The petitioner operates as an automotive dealership. The petitioner provides retail sales of new Honda vehicles and used vehicles. The petitioner also provides financing, leasing, and repair services, as well as sales for accessories and parts. This assessment is the result of a field audit of the petitioner's purchases and expenses from January 1, 2008 through December 31, 2013. The petitioner filed a petition for reassessment. A hearing was held.

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

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 the period of January 1, 2013 through December 31, 2013 was chosen as the sample period. It was agreed that the sample period 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

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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 Department erred in assessing use tax on exempt transactions. Specifically, the petitioner contends that the Department incorrectly assessed transactions as taxable electronic information services rather than digital advertising services for its online advertising. The petitioner contends that a reduction should be given for tax paid. The petitioner's objections are addressed in detail below.

Digital Advertising Services

The petitioner states that it utilizes online advertising through various online advertising vendors. The petitioner contends that these services consist of vehicle listings, lead generation, search engine optimizations, and search engine marketing; all of which are defined as exempt professional digital advertising services under R.C. 5739.01(RRR). The petitioner also contends that such services fail to meet the definition of taxable electronic information services pursuant to R.C. 5739.01(B)(3)(e) and, therefore, are exempt as digital advertising services. The petitioner contends that its transactions do not qualify as taxable electronic information services because the transactions are exempt as digital advertising services.

Cars.com

The petitioner contends that the Department erred in assessing use tax on transactions for digital advertising services for Cars.com. The petitioner states that Cars.com is one of the petitioner's vehicle listing and lead generation vendors. The petitioner contends that Cars.com operates a website which is the functional equivalent of classified ads in a newspaper. The petitioner states that the website is designed to attract customers by providing free access to vehicle listing, specifications, reviews, and other related information. The petitioner contends that it transmits vehicle listings to Cars.com to display as an advertisement on its website. The petitioner provides that Cars.com allows it to enter certain "dealer profile" information on the website which includes sales and service hours, dealership personnel names to contact, dealership description, promotional taglines, and dealership photographs. The petitioner states that Cars.com provides a Market Intelligence Report, which allows the dealership to assess the effectiveness of its online advertising with Cars.com. These reports include but are not limited to dealership metrics to the dealership marketplace, number of visits, average ratings, vehicle display pages, and website transfers.

The petitioner contends that the placement of vehicle listing information and the placement of dealership profit information fit within the definition of digital advertising services by providing the information to Cars.com and Cars.com places it into its computer equipment for the purpose of "electronically displaying promotional advertisements to potential customers about products or services or about industry or business brands." Petition for Reassessment Memorandum dated October 31, 2018, Page 3. The petitioner contends that the Market Intelligence Reports are supplemental and an addendum to the advertising services and would not exist if not for the vehicle listings on Cars.com; therefore, they are also exempt as digital advertising services.

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The petitioner's contentions that the aforementioned services are exempt from taxation as digital advertising services pursuant to R.C. 5739.01(RRR) are not well taken. R.C. 5739.01(RRR) was not enacted until October 12, 2016 in H.B. 466 of the 131st General Assembly. It is important to note that the audit period was January 1, 2011 through December 31, 2013. The legislation which promulgated the Ohio Revised Code referenced by the petitioner does not apply to these transactions because they occurred prior to the effective date of this change to the Ohio Revised Code. Because the new section does not apply to the transactions included in the audit, it is not necessary to determine whether the contested transactions within the assessment meet the definition of digital advertising services. Therefore, this objection is denied.

TrueCar & Autotropolis

Similar to Cars.com, the petitioner references its transactions with TrueCar and Autotropolis as exempt pursuant to R.C. 5739.01(RRR). The petitioner contends that it advertises with each company as a search engine optimization and search engine marketing vendor that brings traffic to the petitioner's website. The petitioner contends that it subcontracts advertising and its goal is to increase showroom traffic. The petitioner's contentions that the aforementioned services are exempt from taxation as digital advertising services pursuant to R.C. 5739.01(RRR) are not well taken for the same analysis provided to Cars.com. Therefore, this objection is denied.

Electronic Information Services

The petitioner contends that the Department erred in assessing use tax on exempt electronic information services transactions and incorrectly assessed the transactions as taxable electronic information services pursuant to R.C. 5739.01(B)(3)(e). The petitioner provides that not all electronic information services are taxable. While the petitioner contends that such services are digital advertising services rather than taxable electronic information services, the Department will assess the petitioner's electronic information services contention separately since the exemption for digital advertising did not exist during the audit period.

The petitioner contends that various services purchased from Cars.com, TrueCar, and Autotropolis should be removed from the assessment because they are exempt digital advertising services. During the hearing, the petitioner provided that the true object of its transactions is advertising and the general public has access to it; therefore, there are no designated recipients as required for electronic information services under R.C. 5739.01(Y)(1)(c). The petitioner contends that its transactions do not qualify as electronic information services because they do not have designated recipients as defined in statute, and the true object of the transaction is advertising services. Therefore, the petitioner contends that the services were not electronic information services and shall be removed from the assessment.

Designated Recipients

The petitioner contends that it provides data to various vendors, such as Cars.com to advertise its vehicles and services. The petitioner uses Cars.com as an example of how its vendors' services operate. The petitioner states that service offerings of TrueCar and Autotropolis are sufficiently similar to Cars.com. Petition for Reassessment Memorandum dated October 31, 2018, Page 5. Therefore, any

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individual references to TrueCar, Autotropolis, or Cars.com shall be interpreted as referring to all three companies.

The petition contends that the data is available to the general public; therefore, there are no designated recipients as required by R.C. 5739.01(Y)(1)(c) to qualify as electronic information services. Electronic information services is defined in R.C. 5739.01(Y)(1)(c) as providing access to computer equipment by means of telecommunications equipment for the purpose of *either* (1) examining or acquiring data stored in or accessible to the computer equipment *or* (2) placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment. (Emphasis added.) The petitioner relies on the second purpose included in R.C. 5739.01(Y)(1)(c)(ii) in contending that there are no designated recipients so the transaction cannot be taxable electronic information services.

The petitioner fails to address the first portion which only requires access to computer equipment by means of telecommunications equipment for the purpose of examining or acquiring data stored in or accessible to the computer equipment. The petitioner's purchases meet the definition of electronic information services. The petitioner purchased access to Cars.com and TrueCar's web-based applications for e-mail reporting i.e. Market Intelligence Reports, data management, and access to both vendors' databases, such as when the petitioner logs into its Cars.com account to update its inventory and information. This is "examining or acquiring data stored in or accessible to computer equipment." R.C. 5739.01(Y)(1)(c)(i). The petitioner contends that Cars.com Market Intelligence Reports are not accessed through Cars.com computer equipment because it is emailed to the petitioner by Cars.com. This contention is not well taken. The data is extrapolated by Cars.com through Cars.com computer equipment to provide to the petitioner. Cars.com computer equipment is accessed to produce the report. Further, the report would not exist if not for Cars.com computer equipment which provides such reports. Additionally, the data is available to the petitioner on the web application of Cars.com. Therefore, this contention lacks merit.

Alternatively, the petitioner also meets the second purpose provided in R.C. 5739.01(Y)(1)(c)(ii). The petitioner contends that it fails to meet the definition of electronic information services because the data is not retrieved by designated recipients. The petitioner contends that the data is available to the general public and therefore, no recipients are designated. The petitioner also states that it cannot be the designated recipient because it provides vehicle inventory data to Cars.com and TrueCar and the data is retrieved by the general public.

The petitioner, as the consumer, is the designated recipient of Cars.com and TrueCar's software, not the general public. The petitioner received a benefit by its use of both company's web applications and name recognition to receive data regarding the vehicle marketplace and promote the petitioner and its products and services. The petitioner is the designated recipient as a consumer who is charged a fee to have continued access to Cars.com and TrueCar's web applications. Access to these applications allow the petitioner to enter a wide variety of information on each company's platform to reach potential customers, such as dealer profile information and inventory listings, and to continue to update this information and receive feedback and data from each company's website. Therefore, while it has already been established that these transactions qualify as electronic information service under the first purpose, they also meet the second purpose included in the definition.

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True Object of the Transaction

The petitioner contends that various services purchased from Cars.com, TrueCar, and Autotropolis should be removed in the assessment because they are exempt as digital advertising services. The petitioner contends that the true object of its transactions is advertising; therefore, they are not taxable electronic information services. Pursuant to R.C. 5739.01(B)(3)(e), electronic information services are provided when (a) the services are provided for “use in business” and (b) the “true object of the transaction is the receipt by the consumer” of those services. As discussed above, the petitioner’s transactions satisfy the definition of electronic information services.

The petitioner provides that the true object of its transaction with Cars.com was to receive digital advertising services. As previously discussed, digital advertising was not an available tax exemption during the audit period. The petitioner contends that the petitioner engaged Cars.com for the express business purpose to display the petitioner’s vehicle offerings and otherwise promote the petitioner and its products on Cars.com. The petitioner contends that to the extent that data is accessed, transmitted, or otherwise handled is merely a minor part or result of advertising and therefore incidental to the primary purpose.

The petition cites Ohio Department of Taxation Information Release ST 1999-04, issued in January, 1999, and updated both in December, 2015 and again in September, 2016, in contending that Cars.com Market Intelligence Reports combine digital advertising services with electronic information services, and to be taxable electronic information services, the electronic information services must be a significant component of the transaction. The petitioner contends that the data provided in the reports is a direct result of the listing activity and the report or data would not exist if not for the listing; therefore, the report is incidental to the advertisement. The petitioner provides that advertising has evolved into an electronic medium and despite the change in the medium, the objective is the same. The petition contends that advertising has never been subject to tax. The petitioner correctly notes that advertising is exempt from taxation. R.C. 5739.01(RRR) provides a tax exemption for digital advertising services which did not exist during the audit period. H.B. 466 does not apply retroactively to support the petitioner’s contention.

The Department requested that the petitioner provide evidence of the transactions, such as contracts and invoices that describe the transactions that are included in the assessment. The petitioner did not provide any information from the web applications of TrueCar, Autotropolis, or Cars.com to evidence pricing or describing of products to qualify as advertising. The petitioner submitted invoices from TrueCar and Autotropolis. However, these invoices were not entered into between the vendors and the petitioner, but rather Sunnyside Toyota and Sunnyside Mitsubishi. The petitioner is not a party to either; therefore, this evidence lacks merit.

The petitioner also submitted invoices from Cars.com. The invoices from Cars.com contained numerous charges and a consistent monthly fee of roughly \$4,200.00. The invoices fail to provide descriptions regarding advertising services. Further, only one invoice provides a note that the online ad package is now called Baseline. However, no evidence is provided to describe the ad package invoiced. While the description included in the petitioner’s invoices as monthly subscriptions are not

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the only evidence the Department considers in assessing the type of transaction, it is important to note the Information Release provided by the petitioner. The Release states in part “Many types of subscription services that are available for use in business over the Internet are considered taxable electronic information services.” IR ST 1999-04. However, without a breakdown of what makes up the charge, the entire amount is subject to sales and use tax. Ohio Adm.Code 5703-9-46(B)(4). The petitioner failed to provide any other evidence, such as contracts to support that the transactions were for the purpose of professional services as advertising.

As provided in IR ST 1999-04, many transactions contain and combine digital advertising services with electronic information services and the electronic information services may be a significant component. The Department continues to hold taxable those components of these transactions that represent electronic information services and deem mixed transactions to be taxable. *Id.* The petitioner contends that even if the services include taxable electronic information services, these services are merely incidental to the true object of the transactions – exempt professional services as digital advertising. The petitioner’s contention lacks merit.

Pursuant to Ohio Adm.Code 5703-9-46(B)(3), when a transaction includes electronic information services, the true object of the transaction is the receipt of those taxable services if the electronic information services render a significant benefit to the consumer. The petitioner received a significant benefit by its use of TrueCar and Cars.com web applications and name recognition to promote the petitioner and receive data regarding the market trends, and feedback. The petitioner was charged a fee to have continued access to these web applications to promote the dealership and receive market data. Access to this application allowed the petitioner to enter a wide variety of information on TrueCar or Cars.com to reach a larger pool of customers.

Most notably, the Department reviewed the vendors’ websites and various corporate documents from TrueCar and Cars.com to ascertain the products and services provided by each company to better assist in determining the true object of these transactions. Under the “About” section of Cars.com’s website, it describes itself as a leading digital marketplace and solutions provider for the automotive industry that connects car shoppers with sellers.¹ Further, it provides in relevant part that the Company empowers shoppers with data, resources and digital tools. *Id.* “Cars.com enables dealerships and OEMs with innovative technical solutions and data-driven intelligence to better reach and influence ready-to-buy shoppers, increase inventory turn and gain market share.” *Id.*

Similar to Cars.com, TrueCar describes its business overview in its Form 10-K as follows, “We have established a diverse software ecosystem on a common *technology infrastructure*, powered by proprietary data and analytics.”² Our company-branded platform is available on our TrueCar website and mobile applications....” The Report also provides, “Our network of TrueCar Certified Dealers *interfaces with our platform primarily through our Dealer Portal*, an application that can be accessed online or using a mobile device.” The Report further clarifies the types of services the electronic information services portal provides to dealers. This portal allows dealers to “assess the competitiveness of their vehicle pricing *relative to their market*, create vehicle pricing rules, *access*

¹<https://www.cars.com/about/> (accessed April 3, 2020).

²<https://www.sec.gov/Archives/edgar/data/1327318/000132731818000019/truecar201710k.htm#s3E6A4A2D006A5636A24FF6DC5FE4E7C9> (accessed April 3, 2020).

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details on potential buyers wants and needs, create custom detailed offers based on vehicles in stock, manage how their dealership profile appears on the network, assess their competitive market performance on vehicles sold through their dealership, as well as a number of administrative and other management tools.” Id. (Emphasis added.)

This information solidifies the fact that both company’s plethora of service offerings are electronic information services as the true object of its transactions are focused on their company-branded platforms available on their websites and mobile applications. Such applications generate significant data for the petitioner. Based on this information, it is evident that each company’s platform is the center of its purpose and existence. The true object of the transactions was the receipt of taxable electronic information services in its access to each company’s software and web application. Therefore, electronic information services is the true object of the transaction and the request to remove the transactions from the assessment is denied.

Tax Paid

The petitioner contends that the Department erred in assessing tax on transactions with HookLogic and Great America Financial Services Corporation, respectively because the petitioner already paid sales tax on these transactions. The petitioner provided a list of disputed items in Appendix A of its petition. The list contained HookLogic services provided to the petitioner from January 3, 2013 through November 10, 2013. The list also contained services provided by Great America Financial Services to the petitioner from January 1, 2013 through November 27, 2013.

Hooklogic

The petitioner provided the Department with two HookLogic Master Service Agreements effective September 15, 2013 and December 12, 2013. Both Agreements included terms that stated the price of services contains all taxes and fees. The petitioner cites this language in support of its position that such taxes have already been remitted. However, over thirty of these transactions were prior to the effective date of these Agreements. Additionally, and most notably, these Agreements were not entered into between HookLogic and the petitioner, but rather Sunnyside Toyota and Sunnyside Chevrolet. The petitioner is not a party to either of these Agreements. Therefore, this evidence lacks merit. Further, the petitioner contends that it is unable to provide documentation or receive clarification from the vendor, HookLogic that tax was paid. The petitioner failed to provide any evidence to demonstrate that tax was remitted. Therefore, this objection is denied.

Great America Financial Services

Unlike Hooklogic, the petitioner failed to provide a service agreement between Great America Financial Services Corporation and the petitioner outlining included terms, such as the price of services contains all taxes and fees. The petitioner included an email from its vendor dated March 24, 2016 regarding Agreement 814460, in which Great America stated, “Lessees such as *Sunnyside Toyota* reimburse us for this tax.... Great America Financial Services Corporation appropriately paid the State of Ohio sales tax upfront.... The sales tax was then included in each monthly payment, therefore, you will not see sales tax separately stated on each monthly invoice.” (Emphasis added.) The petitioner

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cites this language in support of its position that taxes have been remitted. However, the referenced Agreement in the email was not entered into between Great America and the petitioner, but rather Sunnyside Toyota. The Department cannot verify that the petitioner is a party to this Agreement. Further, without an Agreement and evidence of payment from Great America, the Department cannot verify that sales tax was properly remitted on this lease. Accordingly, this objection is denied.

Penalty

The petitioner seeks remission of the penalty associated with the assessment. The evidence and circumstances support abatement of the penalty. The request for a penalty abatement is granted.

Accordingly, the assessment is modified as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$59,257.90	\$9,041.93	\$0.00	\$68,299.83

Current records indicate that \$18,270.25 of 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



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Sunnyside Automotive, Inc.
7660 Pearl Rd.
Middleburg Heights, OH 44130

RE: Assessment No.: 100000287736
Use Tax
Account No.: 97-806834

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$11,951.76	\$1,862.10	\$470.48	\$14,284.34

The petitioner operates as an automotive holding company which purchases and distributes capital assets for the individual Sunnyside automotive dealerships. This assessment is the result of a field audit of the petitioner's purchases and expenses from January 1, 2008 through December 31, 2013. The petitioner filed a petition for reassessment. A hearing was held.

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

The petitioner submitted a petition for reassessment that combined its contentions with one of its Sunnyside dealerships, Sunnyside Automotive IV LLC d.b.a Sunnyside Toyota. The combined petition contends that the Department erred in assessing tax in the amount of \$37,387.00 on exempt items. Specifically, the petitioner contends that its online advertising through various online advertising vendors is defined as exempt digital advertising services pursuant to R.C. 5739.01 (RRR). The petitioner also contends that it fails to meet the definition of electronic information services pursuant to R.C. 5739.01(Y)(1)(c). The petitioner contends that approximately half of its mailers are exempt as specific price and product offerings of the dealership pursuant to R.C. 5739.02(B)(35)(a). The petitioner contends that a reduction should be given for tax paid. Additionally, the petitioner contends that the Department used an inaccurate valuation method for its temporary use of motor vehicles listed in inventory pursuant to R.C. 5741.01(G)(4). The petitioner contends that use of the "cost method" provided for by the Internal Revenue Service is a more appropriate valuation method.

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However, the petitioner completed the standard Ohio Department of Taxation Petition for Reassessment form for both Sunnyside companies separately and exclusively contends that in regard to the petitioner's assessment, it is contesting only \$470.00. This amount is the majority of the penalty associated with this assessment. Since the petitioner did not present any evidence to support its other contentions, and merely submitted evidence related to other Sunnyside dealerships, the petitioner has not met its burden that that the tax had been overstated as the petitioner was not assessed tax in the amount of \$37,387.00. Further, the petitioner has not specified error in the assessment. Therefore, these objections are denied.

Penalty

The petitioner seeks remission of the penalty associated with the assessment. The evidence and circumstances support an abatement of the penalty. The request for a penalty abatement is granted.

Accordingly, the assessment is modified as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$11,951.76	\$1,862.10	\$0.00	\$13,813.86

Current records indicate that \$13,813.86 in full satisfaction of the assessment.

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

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


JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner



Department of Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Sunnyside Automotive IV, LLC
d.b.a. Sunnyside Toyota
27000 Lorain Rd.
North Olmstead, OH 44070

RE: Assessment No.: 100000286873
Use Tax
Account No.: 97-806723

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$119,416.13	\$16,954.76	\$3,782.69	\$140,153.58

The petitioner operates as an automotive dealership. The petitioner provides retail sales of new Toyota vehicles and used vehicles. The petitioner also provides financing, leasing, and repair services, as well as sales for accessories and parts. This assessment is the result of a field audit of the petitioner's purchases from January 1, 2008 through December 31, 2013. The petitioner filed a petition for reassessment. A hearing was held.

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

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 the period of January 1, 2013 through December 31, 2013 was chosen as the sample period. It was agreed that the sample period 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

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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 Department erred in assessing use tax on exempt transactions. Specifically, the petitioner contends that the Department incorrectly assessed transactions as taxable electronic information services rather than digital advertising services for its online advertising. The petitioner also contends that approximately half of its mailers are exempt as direct mail advertising which provide specific price and product offerings of the dealership pursuant to R.C. 5739.02(B)(35)(a). The petitioner contends that a reduction should be given for taxes paid. Additionally, the petitioner contends that the Department used an inaccurate valuation method for its temporary use of motor vehicles listed in inventory pursuant to R.C. 5741.01(G)(4). The petitioner's objections are addressed in detail below.

Digital Advertising Services

The petitioner states that it utilizes online advertising through various online advertising vendors. The petitioner contends that these services consist of vehicle listings, lead generation, search engine optimizations, and search engine marketing; all of which are defined as exempt professional digital advertising services under R.C. 5739.01(RRR). The petitioner also contends that such services fail to meet the definition of taxable electronic information services pursuant to R.C. 5739.01(B)(3)(e) and, therefore, are exempt as digital advertising services. The petitioner contends that its transactions do not qualify as taxable electronic information services because the transactions are exempt digital advertising services.

Cars.com

The petitioner contends that the Department erred in assessing use tax on transactions for digital advertising services for Cars.com. The petitioner states that Cars.com is one of the petitioner's vehicle listing and lead generation vendors. The petitioner contends that Cars.com operates a website which is the functional equivalent of classified ads in a newspaper. The petitioner states that the website is designed to attract customers by providing free access to vehicle listing, specifications, reviews, and other related information. The petitioner contends that it transmits vehicle listings to Cars.com to display as an advertisement on its website. The petitioner provides that Cars.com allows it to enter certain "dealer profile" information on the website which includes sales and service hours, dealership personnel names to contact, dealership description, promotional taglines, and dealership photographs. The petitioner states that Cars.com provides a Market Intelligence Report, which allows the dealership to assess the effectiveness of its online advertising with Cars.com. These reports include but are not limited to dealership metrics to the dealership marketplace, number of visits, average ratings, vehicle display pages, and website transfers.

The petitioner contends that the placement of vehicle listing information and the placement of dealership profit information fit within the definition of digital advertising services by providing the information to Cars.com and Cars.com places it into its computer equipment for the "purpose for electronically displaying promotional advertisements to potential customers about products or services or about industry or business brands." Petition for Reassessment Memorandum dated October 31,

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2018, Page 3. The petitioner contends that the Market Intelligence Reports are supplemental and an addendum to the advertising services and would not exist if not for the vehicle listings on Cars.com; therefore, they are also exempt as digital advertising services.

The petitioner's contentions that the aforementioned services are exempt from taxation as digital advertising services pursuant to R.C. 5739.01(RRR) are not well taken. R.C. 5739.01(RRR) was not enacted until October 12, 2016 in H.B. 466 of the 131st General Assembly. It is important to note that the audit period was January 1, 2011 through December 31, 2013. The legislation which promulgated the Ohio Revised Code referenced by the petitioner does not apply to these transactions because they occurred prior to the effective date of this change to the Ohio Revised Code. Because the new section does not apply to the transactions included in the audit, it is not necessary to determine whether the contested transactions within the assessment meet the definition of digital advertising services. Therefore, this objection is denied.

TrueCar & Autotropolis

Similar to Cars.com, the petitioner references its transactions with TrueCar and Autotropolis as exempt pursuant to R.C. 5739.01(RRR). The petitioner contends that it advertises with each company as a search engine optimization and search engine marketing vendor that brings traffic to the petitioner's website. The petitioner contends that it subcontracts advertising and its goal is to increase showroom traffic. The petitioner's contentions that the aforementioned services are exempt from taxation as digital advertising services pursuant to R.C. 5739.01(RRR) are not well taken for the same analysis provided to Cars.com. Therefore, this objection is denied.

Electronic Information Services

The petitioner contends that the Department erred in assessing use tax on exempt electronic information services transactions and incorrectly assessed the transactions as taxable electronic information services pursuant to R.C. 5739.01(B)(3)(e). The petitioner provides that not all electronic information services are taxable. While the petitioner contends that such services are digital advertising services rather than taxable electronic information services, the Department will assess the petitioner's electronic information services contention separately since exempt professional services of digital advertising did not exist during the audit period.

The petitioner contends that various services purchased from Cars.com, TrueCar, and Autotropolis should be removed from the assessment because they are exempt digital advertising services. During the hearing, the petitioner provided that the true object of its transactions is advertising and the general public has access to it; therefore, there are no designated recipients as required for electronic information services under R.C. 5739.01(Y)(1)(c). The petitioner contends that its transactions do not qualify as electronic information services because they do not have designated recipients as defined in statute, and the true object of the transaction is advertising services. Therefore, the petitioner contends that the services were not electronic information services and shall be removed from the assessment.

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Designated Recipients

The petitioner contends that it provides data to various vendors, such as Cars.com to advertise its vehicles and services. The petitioner uses Cars.com as an example of how its vendors' services operate. The petitioner states that service offerings of TrueCar and Autotropolis are sufficiently similar to Cars.com. Petition for Reassessment Memorandum dated October 31, 2018, Page 5. Therefore, any individual references to TrueCar, Autotropolis, or Cars.com shall be interpreted as referring to all three companies.

The petitioner contends that the data is available to the general public; therefore, there are no designated recipients as required by R.C. 5739.01(Y)(1)(c) to qualify as electronic information services. Electronic information services is defined in R.C. 5739.01(Y)(1)(c) as providing access to computer equipment by means of telecommunications equipment for the purpose of *either* (1) examining or acquiring data stored in or accessible to the computer equipment *or* (2) placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment. (Emphasis added.) The petitioner relies on the second purpose included in R.C. 5739.01(Y)(1)(c)(ii) in contending that there are no designated recipients so the transaction cannot be taxable electronic information services.

The petitioner fails to address the first portion which only requires access to computer equipment by means of telecommunications equipment for the purpose of examining or acquiring data stored in or accessible to the computer equipment. The petitioner's purchases meet the definition of electronic information services. The petitioner purchased access to Cars.com and TrueCar's web-based applications for e-mail reporting i.e. Market Intelligence Reports, data management, and access to both vendors' databases, such as when the petitioner logs into its Cars.com account to update its inventory and information. This is "examining or acquiring data stored in or accessible to computer equipment." R.C. 5739.01(Y)(1)(c)(i). The petitioner contends that Cars.com Market Intelligence Reports are not accessed through Cars.com computer equipment because it is emailed to the petitioner by Cars.com. This contention is not well taken. The data is extrapolated by Cars.com through Cars.com computer equipment to provide to the petitioner. Cars.com computer equipment is accessed to produce the report. Further, the report would not exist if not for Cars.com computer equipment which provides such reports. Additionally, the data is available to the petitioner on the web application of Cars.com. Therefore, this contention lacks merit.

Alternatively, the petitioner's transactions also meet the second purpose provided in R.C. 5739.01(Y)(1)(c)(ii). The petitioner contends that it fails to meet the definition of electronic information services because the data is not retrieved by designated recipients. The petitioner contends that the data is available to the general public and therefore, no recipients are designated. The petitioner also states that it cannot be the designated recipient because it provides vehicle inventory data to Cars.com and TrueCar and the data is retrieved by the general public.

The petitioner, as the consumer, is the designated recipient of Cars.com and TrueCar's software, not the general public. The petitioner received a benefit by its use of both company's web applications and name recognition to receive data regarding the vehicle marketplace and promote the petitioner and its products and services. The petitioner is the designated recipient as a consumer who is charged a fee to

have continued access to Cars.com and TrueCar's web applications. Access to these applications allow the petitioner to enter a wide variety of information on each company's platform to reach potential customers, such as dealer profile information and inventory listings, and to continue to update this information and receive feedback and data from each company's website. Therefore, while it has already been established that these transactions qualify as electronic information service under the first purpose, they also meet the second purpose included in the definition.

True Object of the Transaction

The petitioner contends that various services purchased from Cars.com, TrueCar, and Autotropolis should be removed in the assessment because they are exempt as digital advertising services. The petitioner contends that the true object of its transactions is advertising; therefore, they are not taxable electronic information services. Pursuant to R.C. 5739.01(B)(3)(e), electronic information services are provided when (a) the services are provided for "use in business" and (b) the "true object of the transaction is the receipt by the consumer" of those services. As discussed above, the petitioner's transactions satisfy the definition of electronic information services.

The petitioner provides that the true object of its transaction with Cars.com was to receive digital advertising services. As previously discussed, digital advertising was not defined as an exempt professional service during the audit period. The petitioner contends that the petitioner engaged Cars.com for the express business purpose to display the petitioner's vehicle offerings and otherwise promote the petitioner and its products on Cars.com. The petitioner contends that to the extent that data is accessed, transmitted, or otherwise handled is merely a minor part or result of advertising and, therefore, incidental to the primary purpose.

The petition cites Ohio Department of Taxation Information Release (IR) ST 1999-04 in contending that Cars.com Market Intelligence Reports combine digital advertising services with electronic information services, and to be taxable electronic information services, the electronic information services must be a significant component of the transaction. The petitioner contends that the data provided in the reports is a direct result of the listing activity and the report or data would not exist if not for the listing; therefore, the report is incidental to the advertisement. The petitioner provides that advertising has evolved into an electronic medium and despite the change in the medium, the objective is the same. The petition contends that advertising has never been subject to tax. The petitioner correctly notes that advertising is exempt from taxation. R.C. 5739.01(RRR) defines digital advertising as an exempt professional service, but the section did not exist during the audit period. Moreover, H.B. 466 does not apply retroactively to support the petitioner's contention.

The Department requested that the petitioner provide evidence of the transactions, such as contracts and invoices that describe the transactions that are included in the assessment. The petitioner did not provide any information from the web applications of TrueCar, Autotropolis, or Cars.com to evidence pricing or describing of products to qualify as advertising. Further, the petitioner submitted invoices that were not entered into between Cars.com and the petitioner, but rather a separate dealership, Sunnyside Honda. The petitioner is not a party; therefore, this evidence lacks merit.

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The petitioner submitted minimal invoices from TrueCar and Autotropolis. The TrueCar invoices describe the product as a monthly subscription and provide a consistent monthly fee of \$3,200.00. The two Autotropolis invoices contain varying fees; however, the invoices also list a generic description of a monthly fee. Invoices are not the only evidence the Department considers in assessing the type of transaction. The Department reviews any information that may be helpful. It is important to note the Information Release referenced by the petitioner. The Release states in part “Many types of subscription services that are available for use in business over the Internet are considered taxable electronic information services.” IR ST 1999-04. However, without a breakdown of what makes up the charge, the entire amount is subject to sales and use tax. Ohio Adm.Code 5703-9-46(B)(4). The petitioner failed to provide any other evidence, such as contracts to support that the transactions were for the purpose of professional services such as advertising.

As provided in IR ST 1999-04, many transactions contain and combine digital advertising services with electronic information services and the electronic information services may be a significant component. The Department continues to hold taxable those components of these transactions that represent electronic information services and deem mixed transactions to be taxable. *Id.* The petitioner contends that even if the services include taxable electronic information services, these services are merely incidental to the true object of the transactions – exempt professional services as digital advertising. The petitioner’s contention lacks merit.

Pursuant to Ohio Adm.Code 5703-9-46(B)(3), when a transaction includes electronic information services, the true object of the transaction is the receipt of those taxable services if the electronic information services render a significant benefit to the consumer. The petitioner received a significant benefit by its use of each vendor’s web applications and name recognition to promote the petitioner and receive data regarding market trends and feedback. The petitioner was charged a fee to have continued access to these web applications to promote the dealership and receive market data. Access to this application allowed the petitioner to enter a wide variety of information on TrueCar, Autotropolis, and Cars.com to reach a larger pool of customers.

Based upon the petitioner’s invoice information, it appears that the electronic information services by TrueCar were the only services billed to the petitioner. None of the invoices describe possible exempt professional services. The electronic information services provided were not incidental as no other services were rendered. The electronic information services rendered a significant benefit to the petitioner as they were the only services provided. Therefore, the petitioner received a significant benefit from the electronic information services of each company’s web application.

Most notably, the Department reviewed the vendors’ websites and various corporate documents from TrueCar and Cars.com to ascertain the products and services provided by each company to better assist in determining the true object of these transactions. Under the “About” section of Cars.com’s website, it describes itself as a leading digital marketplace and solutions provider for the automotive industry that connects car shoppers with sellers.¹ Further, it provides in relevant part that the Company empowers shoppers with data, resources and digital tools. *Id.* “Cars.com enables dealerships and OEMs with innovative technical solutions and data-driven intelligence to better reach and influence ready-to-buy shoppers, increase inventory turn and gain market share.” *Id.*

¹<https://www.cars.com/about/> (accessed April 3, 2020).

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Similar to Cars.com, TrueCar describes its business overview in its Form 10-K as follows, “We have established a diverse software ecosystem on a common *technology infrastructure*, powered by proprietary data and analytics.² Our company-branded platform is available on our TrueCar website and mobile applications....” The Report also provides, “Our network of TrueCar Certified Dealers *interfaces with our platform primarily through our Dealer Portal*, an application that can be accessed online or using a mobile device.” The Report further clarifies the types of services the electronic information services portal provides to dealers. This portal allows dealers to “assess the competitiveness of their vehicle pricing *relative to their market*, create vehicle pricing rules, *access details on potential buyers wants and needs*, create custom detailed offers based on vehicles in stock, manage how their dealership profile appears on the network, assess their competitive market performance on vehicles sold through their dealership, as well a number of administrative and other management tools.” *Id.* (Emphasis added.)

This information solidifies the fact that each company’s plethora of service offerings are electronic information services as the true object of its transactions are focused on their company-branded platforms available on their websites and mobile applications. Such applications generate significant data for the petitioner. Based on this information, it is evident that each company’s platform is the center of its purpose and existence. The true object of the transactions was the receipt of taxable electronic information services in its access to each company’s software and web application. Therefore, the receipt of electronic information services is the true object of the transaction and the request to remove the transactions from the assessment is denied.

Direct Mail Advertising

The petitioner contends that the Department incorrectly assessed its direct mail advertising which is exempt pursuant to R.C. 5739.02(B)(35)(a). The petitioner provides that it engages in direct mail advertising through US mail in sending postcards and flyers for the benefit of its service department. The petitioner contends that approximately half of its advertisements price and describe dealership products, and therefore qualify for the exemption. The petitioner contends that transactions with Traffic Builders are exempt.

The petitioner provided invoices and mailed advertising material to support its contention. The petitioner agrees that not all of its mailers price and describe its products and services, such as welcome letters and service reminders, and do not satisfy R.C. 5739.02(B)(35)(a). The petitioner also understands and does not dispute invoices in the amount of \$19,818.40 from Traffic Builders that advertise services.

The petitioner provided a list of disputed items in Appendix D of its petition with nineteen transactions from Traffic Builders. However, Appendix F of its petition only included eleven invoices to support its contention. The petitioner included eleven disputed invoices and marketing materials to correspond with those invoices. The invoices contained minimal descriptions with terms such as mailer. However, the marketing materials varied in detail with some transactions qualifying as exempt advertising

²<https://www.sec.gov/Archives/edgar/data/1327318/000132731818000019/truecar201710k.htm#s3E6A4A2D006A5636A24FF6DC5FE4E7C9> (accessed April 3, 2020).

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material that price and describe tangible personal property offered for retail sale by the petitioner under R.C. 5739.02(B)(35)(a).

The Department reviewed the eleven invoices provided, and of the eleven invoices the petitioner provided sufficient evidence to warrant a reduction of assessed tax on six invoices in the amount of \$11,285.88 which qualify as exempt advertising material. The remaining invoices, Invoice Number 14806, 15341, 17176, 17637, and 17723 contained coupons or displayed services and reminders which did not price and describe products or services. The petitioner provided two invoices, Invoice Number 17637 and 17723, which were followed by one mailer. This mailer could not be tied to either invoice as the mailer lacked any identifier to be associated with the attached invoice theme descriptions. Because the mailer could not be tied to either invoice, both invoices fail to qualify for exemption.

The Board clarified in *Doyle d.b.a. AD Mail v. Tracy*, that the language in R.C. 5739.02(B)(37)(a), now R.C. 5739.02(B)(35)(a) exempts advertising material “...that prices and describes tangible personal property offered for retail sale.” (Emphasis added.) By its plain meaning, this provision requires two things: 1) that the advertising medium be one of the alternatives listed, and 2) that it ‘prices and describes.’” *Doyle d.b.a AD Mail v. Tracy*, BTA No. 98-V-131, 2001 WL 930340 (Aug. 10, 2001). Here as with *Doyle*, the petitioner merely provided evidence of advertising material that displayed products and services but failed to include pricing. Therefore, the remaining mailers do not describe prices and product listings which is required under R.C. 5739.02(B)(35)(a). The petitioner has not satisfied its burden to support the invoices qualify for exemption. Therefore, this objection is granted in part.

Temporary Use of Inventory

The petitioner contends that the Department used an inaccurate valuation method for its temporary use of motor vehicles listed in inventory pursuant to R.C. 5741.01(G)(4). The petitioner contends that use of the “cost method” is a more appropriate valuation method for its value of vehicles held in inventory.

R.C. 5741.01(G)(4) provides, “In the case of tangible personal property held in this state as inventory for sale or lease, and that is temporarily stored, used, or otherwise consumed in a taxable manner, the price is the value of the temporary use. A price determination made by the consumer *is subject to review and redetermination by the commissioner.*” (Emphasis added.) The petitioner cites a Department of Taxation Information Release in contending that the “cost method” is an acceptable means for determining value for temporary use of inventory. Information Release ST 1995-06. The petitioner also cites the first sentence of R.C. 5741.01(G)(4) in contending that the value of the temporary use supports the cost method. However, the petitioner fails to read the entirety of both citations. The cited Information Release specifically states, “As an alternative, **with the exception of motor vehicles**, the purchase price (cost) of the item divided by the product of the minimum useful life, as depicted in the true value computation (TVC) tables for Ohio Personal Property Tax times 12 months, will yield a representative monthly value for that item.” *Id.* Further the Release specifically provides for the necessary valuation method, which was used in the audit, for temporary use of motor vehicles in inventory. *Id.* Additionally, the plain language of R.C. 5741.01(G)(4) provides that price determinations regarding inventory are subject to the Tax Commissioner’s review.

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The petitioner failed to provide any evidence regarding a disparity in the valuation or elaborate on a valuation differential using the cost method. The petitioner has not met its burden that the tax had been overstated. Further, the petitioner has not specified error in the assessment. Therefore, this objection is denied.

Tax Paid

The petitioner contends that the Department erred in assessing tax on transactions with Hooklogic because the petitioner already paid sales tax on these transactions. The petitioner provided the Department with a Hooklogic Master Service Agreement. The Agreement included terms that stated the price of services contains all taxes and fees. The petitioner cites this language in support of its position that such taxes have already been remitted. However, the petitioner contends that it is unable to provide documentation or receive clarification from the vendor, Hooklogic that tax was paid. The petitioner failed to provide evidence to demonstrate that tax was remitted. The petitioner has not met its burden to demonstrate these transactions were assessed in error. Accordingly, this objection is denied.

Penalty

The petitioner seeks remission of the penalty associated with the assessment. The evidence and circumstances support abatement of the penalty. The request for a penalty abatement is granted.

Accordingly, the assessment is modified as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$116,694.68	\$16,473.26	\$0.00	\$133,167.94

Current records indicate that \$68,234.76 of 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



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 27 2020**

Taft Stettinius & Hollister
425 Walnut St., Ste. 1800
Cincinnati, OH 45202

RE: Assessment No.: 100000808841
Use Tax
Account No.: 97-129847

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

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$102,547.74	\$8,025.19	\$15,382.09	\$125,955.02

The petitioner operates as a law firm with five locations in Ohio. This assessment is the result of a field audit of the petitioner's purchases and expenses from July 1, 2013 through September 30, 2016. The petitioner filed a petition for reassessment. A hearing was held on Wednesday, April 23, 2020.

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

The assessment is based upon an audit of petitioner's fixed assets and expenses for the audit period. A mutually agreed upon statistical sampling methodology was used to determine liability. Audit Remarks, Page 6. 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 a three-month sample period of January through March 2016 was chosen as the sample period. It was agreed that the sample period 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 test 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

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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 objects to the inclusion of transactions with certain vendors. The petitioner included an Excel spreadsheet with its contentions and proposed adjustments, and revised audit workpapers to include its proposed adjustments. The petitioner's objections are addressed below.

Government Expenditures

The petitioner contends that three transactions are exempt from sales and use tax as government expenditures and should be removed from the assessment. The petitioner provided a screenshot of the PACER website to support its contention that PACER is a governmental organization.

R.C. 5739.02 levies "an excise tax" on any retail sale made in this state. A similar use tax is imposed by R.C. 5741.02 upon each consumer storing, using or consuming tangible personal property in Ohio. 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). R.C. 5739.02(B)(1) exempts from the definition of retail sale sales that are made to the state of Ohio or any of its political subdivisions. Additionally, R.C. 5739.02(B)(10) provides that tax does not apply to sales not within the taxing power of this state under the Constitution or laws of the United States or the Constitution of this state.

The petitioner provided sufficient evidence that the three contested transactions qualify as purchases from a governmental entity. The Department does not dispute the validity of these organizations as governmental entities. The Department understands that the Ohio Board of Tax Appeals noted in *Fluor Daniel Fernald, Inc. v. Zaino*, BTA No. 2001-T-120, 2002 WL 31409424 (Oct. 23, 2002) that the Government Printing Office is a part of the legislative branch of the Government of the United States, and, therefore, is exempt from tax. Additionally, the Department does not dispute that PACER is a governmental entity. The taxability of the assessed transactions is not based on the seller's status as a governmental entity, but rather the status of the consumer – the petitioner, which is not a governmental entity. Further the petitioner failed to provide evidence that it is a tax-exempt organization. Therefore, the petitioner does not satisfy the exemption in R.C. 5739.02(B)(1).

The petitioner failed to provided evidence to qualify its purchases as tax-exempt. The petitioner fails to include a legal basis as to why its purchases qualify for exemption but merely states government expenditures are not subject to tax. The Department does not dispute that the petitioner purchased from a governmental entity; however, the transactions at issue are not tax-exempt governmental expenditures within the meaning of R.C. 5739.02 as the petitioner is not a governmental entity.

Further, while the petitioner failed to include any legal basis for its contention, the Department understands that the Board of Tax appeals reduced an appellant's assessment for tax-exempt purchases of publications from the U. S. Government by citing R.C.5739.02(B)(10). *Southwestern Portland Cement Co. v. Lindley*, BTA No. 1982-B-1371, 1986 WL 28650 (Oct. 16, 1986) However, the Board later clarified *Southwestern* in *Fluor Daniel Fernald, Inc. v. Zaino*, BTA No. 2001-T-1208, 2003 WL 21291893 (May 30, 2003). In *Fluor*, the appellant also purchased printing materials from the Government Printing Office. The appellant sought a refund of tax paid on the basis that its purchases

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were from the federal government and were exempt from sales and use tax. Unlike the petitioner, the appellant in *Fluor* cited R.C. 5739.02(B)(10) and *Southwestern Portland Cement Co. v. Lindley* in support of its contention. The Board agreed with the Tax Commissioner that while the state and federal governments are sovereign and the federal government is supreme; the federal government's constitutional immunity from state taxation is not infringed when a state imposes a tax on private corporations as entities independent of the United States using property in connection with their own commercial activities for profit-making. The Board noted that the Tax Commissioner was not seeking to tax the federal government but taxing the appellant, as the consumer of the materials in question, who is also a private corporation. The Board also provided that the decision in *Southwestern Portland Cement* failed to consider that a use tax had been assessed, rather than a sales tax.

It is well established that property purchased by a private person from the Federal Government becomes a part of the general mass of property in the state and must bear its fair share of the expenses of local government. *Oklahoma Tax Comm. v. Texas Co.*, 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949). A tax is considered to be directly on the Federal Government only "when the levy is on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99L.Ed.2d 592 (1988) quoting *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d. 580 (1982). Here, as with *Fluor*, the petitioner does not allege that title to the publications passed to the federal government, nor does it claim that it made the purchases as an agent for the government. It is clear the petitioner purchased materials for its own use in carrying out its endeavors as a private law firm. There is no support for the contention that an exemption applies merely because the federal government was a party to transactions by which title passed to the petitioner. Therefore, the petitioner fails to provide evidence of how the transactions are exempt as R.C. 5739.02(B)(1) and 5739.02(B)(10) do not apply to the petitioner's contention. Therefore, this objection is denied.

Electronic Newsletter Subscriptions

The petitioner contends that four transactions are exempt from sales and use tax as electronic newsletter subscriptions and should be removed from the assessment. The petitioner provided an example of its contested electronic newsletter, Law360.

The petitioner failed to provided evidence to qualify its purchases as tax-exempt. The petitioner does not include a legal basis to explain why its purchases qualify for tax exemption but merely states electronic newsletter subscriptions are not subject to sales or use tax.

R.C. 5739.02(B)(4) exempts sales of newspapers and sales or transfers of magazines distributed as controlled circulation publications. "Newspaper" as defined in R.C. 5739.01(SS) means an unbound publication bearing a title or name that is regularly published, at least as frequently as biweekly, and distributed from a fixed place of business to the public in a specific geographic area, and that contains a substantial amount of news matter of international, national, or local events of interest to the general public. Additionally, as provided in Ohio Adm.Code 5703-9-28 newspaper *does not include a newsletter* or similar unbound periodical *of interest only to certain trade, professional, commercial, or hobby interests* and which does not serve the purpose of providing instruction, enlightenment, or entertainment to the general public. (Emphasis added).

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The petitioner contends that Law360 is a newsletter. Pursuant to Ohio Adm.Code 5703-9-28 newsletters of interest only to certain professional interests are not exempt as newspapers. Law360 specifically markets itself to the legal profession.¹ In its product overview, Law 360 includes three packages of subscriptions, all of which include varying legal professionals as the designated audience.² For example, the lower tier subscription package lists the following as who the product is designed for attorneys with a niche or singular practice focus, law firms with focused expertise and presence, companies and agencies focused on a specific practice or industry, and in-house counsel. *Id.*

Law360 may be published on a regular interval and distributed from a fixed place of business to the public, but it is not readily available to the public with an annual subscription cost of \$7,000 and provides little interest to the general public. Additionally, it is uncontested that the newsletter falls within the exclusion in Ohio Adm.Code 5703-9-28 to the definition of a newspaper because it is an unbound periodical of interest only to a certain professional group, legal professionals. Similarly, the Board in *Constr. News Corp., Inc., d.b.a. Ohio Constr. News v. Tracy*, BTA No. 96-T-1750, 1998 WL 375122 (June 30, 1998) found that the publication Ohio Construction News did not qualify as a newspaper because the publication did not generally provide information that would instruct the public who are unfamiliar with construction terms. The Board further noted that the format, the vocabulary employed, and the information provided in the publication were geared toward those who are in, and have knowledge of, the construction business and was therefore excluded from the definition of “newspaper.” *Id.* This is analogous to the publication of Law360 because Law360 may be of interest to certain members of the public; however, it is designed for those in the legal profession and uses vocabulary common to the legal profession. Therefore, this publication is not a newspaper for purposes of Ohio Adm.Code 5703-9-28. Accordingly, this objection is denied.

Audit Methodology

The petitioner objects to the audit methodology used for one of its transaction with vendor K-Cura Corporation. The petitioner contends that one of its IT licensing fee transactions for litigation support accounted for 20 percent of the sample and contained a much higher error rate than all other accounts. The petitioner contends that the error rate for this single transaction was not statistically accurate and this sample distorts the numbers. The petitioner proposes that this transaction be treated separately because the amount was overstated by extrapolating too large of an error rate.

Pursuant to R.C. 5741.13(A)(2), the Tax Commissioner may audit a representative sample of a consumer’s purchases and may issue an assessment based thereon. The Ohio Board of Tax Appeals has ruled that purchase audits are an accepted form of estimating tax liability for over thirty years. *Latchaw v Limbach*, BTA No. 87-D-1101, 1989 WL 1464740 (Nov. 24, 1989).

The petitioner contends that an error occurred from its vendor, K-Cura Corporation, in disproportionately overstating the percentage of IT Product Purchases and Maintenance Accounts in the sample period. The petitioner also provides that this error rate resulted in a tax due that accounts for 60 percent of the assessment. During the hearing, the petitioner provided that this account resulted

¹ <https://www.law360.com/about#begin> (accessed April 28, 2020).

² <https://www.law360.com/Law360-Product-Overview.pdf> (accessed April 28, 2020).

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in 20 percent of the sample. The petitioner contends that the extrapolation was unreasonable for this line item. However, during the audit the petitioner provided the percentage of usage in Ohio for the vendor K-Cura Corporation. Audit Remarks, Page 6. The Department sent a memorandum of agreement to the petitioner that specified the methodology of the audit. The agreement was provided to the petitioner with a ten-day correspondence requesting that if the petitioner disagreed with the audit methodology, an alternative methodology must be submitted in written form within ten days. The petitioner signed the memorandum of agreement. Additionally, on August 23, 2017, the petitioner signed an addendum that specified and confirmed the percentage of users in Ohio for the calculation of software from its vendor K-Cura Corporation. Specifically, the petitioner agreed through signature that the percentages listed in the agreement were the number of users in Ohio and that percentage would be applied to the account listing for the audit.

During the hearing, the petitioner acknowledged that the contested account was a large account. The petitioner did not provide evidence from its vendor of an error in the account records. The petitioner proposes the account be excluded because of its size. During the audit, the petitioner provided its contract with the above vendor and signed agreement regarding the number of users and percentages in which it now contests. *Id.* The petitioner mischaracterizes this account as a single line item that was incorrectly extrapolated over the entire audit period. However, the invoices provided by the petitioner indicate that this account was a three-year installment contract, which encompassed more than two years of the audit period from April 2014 through September 30, 2016.

Because the petitioner did not indicate that its business activity was seasonal, the three-month sample period of January through March 2016 was reviewed and agreed to with an error rate projected over the entire audit period. The petitioner has not demonstrated error in the assessment. Therefore, this objection is denied.

Penalty

The petitioner seeks remission of the penalty associated with the assessment. The petitioner contends that it was cooperative throughout the audit review. 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). 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 modified as follows:

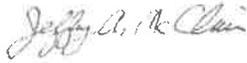
<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$102,547.74	\$8,025.19	\$10,254.71	\$120,827.64

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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



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

Department of
Taxation

FINAL DETERMINATION

Date: **MAY 21 2020**

The Coca-Cola Company, Michael Wall – NAT1150
P.O. Box 1734
Atlanta, GA 30301

Re: Assessment No.: 100000512081
Use Tax
Account No. 97-145838
Audit Period: 07/01/2009 – 09/30/2013

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:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$803,150.04	\$129,724.10	\$40,157.53	\$973,031.67

The petitioner is a bottler and distributor for The Coca-Cola Companies. This assessment is the result of an audit of the petitioner's purchases for the period shown above. A hearing was held on April 11, 2019.

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). Evidence that is summary in nature without any further corroboration from primary records does not meet a taxpayer's burden to prove error in a use tax assessment. R.C. 5741.15; *Bay Mechanical & Electrical Corporation v. Levin*, BTA No. 2008-K-1687, 2011 WL 2446198, *3 (June 14, 2011), *aff'd sub nom. Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, 978 N.E.2d 882, ¶ 36.

Background

The assessment is based upon an audit of petitioner's fixed assets and expenses for the audit period. A mutually agreed upon statistical sampling methodology was used to determine liability. Audit Remarks, Page 12. The petitioner appealed objecting to the inclusion of transactions with

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certain vendors. The hearing officer requested a list of the specific transactions with those vendors to which the petitioner had objection, but none were provided. The petitioner's raised objections are addressed below.

Objections

Dematic and HK Systems

The petitioner first objects to the inclusion of transactions with vendors HK Systems and that company's later buyer, Dematic Corporation ("HK" and "Dematic"). The petitioner states that it entered into a month-to-month service agreement with HK for the maintenance of the petitioner's automated warehouse equipment. The petitioner produced an agreement from 2006 with HK that reflected HK would provide support for the automated warehouse equipment. That warehouse equipment includes four aisle unit load storage and retrieval machines, a conveyor, twenty-five automated guided vehicles, floor wire and floor driver, two high speed Muller wrappers, and ten vertical lifts. Audit Remarks, Page 21. Per the petitioner, Dematic then assumed that contract after purchasing HK. The petitioner provided a contract with Dematic dated three years after the audit period reflecting service and support for automated warehouse equipment. Invoices from the audit period reflect that petitioner was purchasing "automated warehouse equipment support full-time on" from Dematic.

Transactions pursuant to an agreement by which a vendor agrees to repair or maintain the tangible personal property of a consumer are taxable sales. R.C. 5739.01(B)(7). The petitioner objects that these purchases were "management services" not a taxable service contract. It provided a copy of Ohio Tax Information Release ST 1995-02 from 2004 in support. However, the petitioner has not described or provided evidence to show how these services are building management services, or even how the petitioner is a building manager. ST 1995-02, p.1. The hearing officer requested that the petitioner provide a written narrative of its specific objection, information regarding the equipment at issue, and the work performed in relation to the automated warehouse support contracts. The petitioner did not provide anything further. The petitioner has not shown how maintaining and repairing its tangible personal property constitutes building management services. Therefore, this objection is denied.

Ecolab Inc.

The petitioner objects to the inclusion of transactions with Ecolab, Inc. ("Ecolab"). Specifically, the petitioner contracted with Ecolab on a price per case basis for the purchase of conveyor lubricants as well as clean-in-place chemicals, such as acid detergents, alkaline cleaners, and sanitizers. Ecolab billed the petitioner electronically and provides no delineation of the product purchased or the quantity of each product delivered in a given month. The auditor was unable to discern what products were purchased and taxpayer did not provide any detail regarding the products purchased. As a result, the purchases were held taxable for the audit period. Audit Remarks, Page 14.

The use tax does not apply to a purchase when "the purpose of the purchaser is * * * [t]o use the thing transferred, as described in [R.C.] 5739.011 * * *, primarily in a manufacturing operation

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to produce tangible personal property for sale.” R.C. 5739.02(B)(42)(g). The auditor previously concluded that the petitioner’s operations constituted a manufacturing operation per R.C. 5739.01(S). Audit Remarks, Page 2. The petitioner cites to *General Motors Corporation v. Limbach*, BTA No. 85-B-67, 1989 WL 83048 (June 2, 1989) for the proposition that these mostly cleaning chemicals are exempt as an “adjunct.” This is not the case. Per Ohio Adm. Code 5703-9-21(D)(9), things transferred for use in a manufacturing operation do not include: machinery, equipment, and other tangible personal property used to clean, repair, or maintain real or personal property in the manufacturing facility. The Ecolab purchases of cleaning chemicals are taxable.

Further, to show that a purchase is primarily used in an exempt manner, there must be proof of that use. *R.K.E. Trucking*, 98 Ohio St.3d 495, ¶ 27. Even if the petitioner’s purchases met a legal exemption, it has not provided a list of contested transactions or any relevant, probative evidence that would allow the Commissioner to verify and quantify any correction of a claimed error in the assessment. It did not identify the specific chemicals, their alleged use in the petitioner’s manufacturing operation, and corresponding amount of alleged overstated tax. This evidence was requested at the hearing. The petitioner did not provide any further information. Therefore, the Tax Commissioner cannot conclude the petitioner has met its burden to show error in the assessment. The objection is denied.

CCNA

The petitioner objects to the inclusion of pallet purchases from Coca-Cola North America, Inc. (“CCNA”). It states that CCNA charges a specific amount for pallets used in delivering products. The petitioner objects as it claims each charge is a deposit that is eventually returned.

Generally, any use or other consumption of tangible personal property or services within Ohio is taxable. R.C. 5741.02(A)(1). The auditor noted that the CCNA invoices indicated that the petitioner was purchasing pallets, none of the invoices had any credit amounts or notation indicating the pallets were returned, and the auditor could not determine that any of the 14 unmatched credit transactions in the audit population could be reconciled with the 4,095 pallet purchase transactions. Audit Remarks, Page 20. At hearing, the petitioner also provided two screenshots from three years after the audit period in support of its objection. As a result, the hearing officer requested further information regarding the petitioner’s contentions. No further information or evidence was provided. Without this information, the Tax Commissioner cannot find the assessment was in error. The objection is denied.

Centimark

The petitioner objects to the inclusion of a transaction with vendor Centimark for repairs to the roof of CCR’s security entrance. It claims these transactions were exempt from tax as an exempt construction contract under R.C. 5739.01(B)(5) and Ohio Adm.Code 5703-9-14(D)(1).

Construction contracts only apply when the purchase involves real property, not business fixtures. Generally, repairs of business fixtures are taxable sales while repairs to real property are not. R.C. 5741.02(A)(1), 5739.01(B)(1), 5739.01(B)(3)(a), and 5739.01(B)(3)(b). Business

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fixtures are items of tangible personal property that are permanently affixed to the land or a building and primarily benefit the business conducted by the occupant on the premises. R.C. 5701.03(B).

Whether an item constitutes a business fixture is a fact-specific determination and corroborating documentation is necessary to show error in an assessment. *Pep Boys v. Testa*, BTA No. 2015-706, 2016 WL 3018415, *4 (April 4, 2016). The hearing officer requested documentation regarding the security entrance and repairs from the petitioner, but the petitioner failed to provide any evidence to support its contention. A security entrance by its very nature benefits the business conducted by the petitioner. It is not common to all buildings. R.C. 5701.03(B). It is uncertain if the security entrance would or could be utilized on the property if CCR left. *See Oregon Ford v. Wilkins*, BTA No. 2005-A-111, 2006 WL 247160, *6 (January 27, 2006). Further, the petitioner has not presented the exemption certificate required for construction contracts. Ohio Adm. Code 5703-9-14(D)(2). The petitioner has presented no evidence to show error in the assessment. The objection is denied.

Symbiont

The petitioner objects to two transactions with vendor Symbiont. Symbiont designed equipment that monitors and neutralizes the pH levels in the water used in the manufacturing process. The petitioner contends these transactions were purchases of exempt production equipment. Based upon the evidence provided at hearing, this objection is well-taken. The portion of the assessment related to Symbiont invoices 17778 and 17795 shall be removed and the tax, interest, and penalty has been adjusted below.

Premier Fleet

The petitioner objects to three transactions with Premier Fleet Services (“Premier”). It states these purchases were out-of-state with proper sales tax paid. Based upon the evidence provided in the petition and at hearing, this objection is well-taken. The portion of the assessment related to Premier invoices 7395, 9024, and 9027 shall be removed and the tax, interest, and penalty has been adjusted below.

Therefore, the assessment shall be modified as follows:

<u>Tax</u>	<u>Pre-Assessment Interest</u>	<u>Penalty</u>	<u>Total</u>
\$788,738.96	\$127,391.66	\$39,437.04	\$955,567.66

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

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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

0000000415



Department of
Taxation

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

FINAL DETERMINATION

Date: **MAY 21 2020**

Jeremy Scott Turner
129 East Doris Dr.
Fairborn, OH 45324

Re: Use Tax Assessment 100001032232

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

	<u>Pre-Assessment</u>		
<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$1,282.50	\$57.31	\$192.38	\$1,532.19

The petitioner contends that the assessment was issued in error. 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