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Ohio Tax & Jobs 2017...
Significant Developments in Sales & Use Tax

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Columbus

Tuesday, January 24, 2017
10:00 a.m. to 12:15 p.m.

Biographical Information

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Edward J. (“Ted”) Bernert concentrates his practice in the area of state and local taxes with a particular emphasis on the major Ohio taxes affecting businesses and business owners–sales and use, financial institution, personal income, commercial activity and real property taxes. He represents national companies concerning Ohio tax matters related to compliance, planning and tax legislation. Mr. Bernert regularly deals with various tax department officials upon audit or administrative appeals. He has an active tax litigation practice before the Ohio Board of Tax Appeals and upon appeal to the courts, including the Supreme Court of Ohio.

Mr. Bernert is a member of the Executive Committee of the American Bar Association’s State and Local Tax Committee and is a past chair of the Ohio State Bar Association Taxation Committee and the State and Local Tax Section of the Columbus Bar Association. Mr. Bernert was appointed by the Governor to the Ohio Business Gateway Steering Committee to address the continued development of an electronic link for filing taxes and other matters affecting business. He also serves as a member of The Ohio Chamber of Commerce Taxation Committee. Mr. Bernert is an adjunct professor of state and local taxes at the Capital University Law and Graduate Center and served as Chief Editor of Ohio Tax Review, formerly published by the Center. He currently serves as the co-editor of the Guidebook to Ohio Taxes, published by Commerce Clearing House. He has repeatedly been named an “Ohio Super Lawyer” in the area of Taxation and holds an AV rating by Martindale-Hubbell.

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SALES AND USE TAX UPDATE – 2017

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Legislation

- Digital Advertising
- Part of the broader issues of using computers to provide services

Legislation – Digital Advertising

- The car inventory is being marketed by a website.
- Is this advertising or ADP/EIS?

Legislation – Digital Advertising

- Tax Department concluded that the transaction was ADP/EIS.
- General Assembly responded with legislation providing an exemption for:

> "Digital advertising services" means providing access, by means of telecommunications equipment, to computer equipment that is used to enter, upload, download, review, manipulate, store, add, or delete data for the purpose of electronically displaying, delivering, placing, or transferring promotional advertisements to potential customers about products or services or about industry or business brands.

Legislation – Digital Advertising

- Tax Commissioner responded by saying that advertising has never been taxed and he may still tax computer-oriented services.

Legislation – Exemption Certificates for Employment Services

- Tax Department refused to recognize exemption certificates to relieve vendor of responsibility to collect employment services tax.

Legislation – Exemption Certificates for Employment Services

- The General Assembly amended R.C. 5739.03, in part, as follows:

  (B)(1)(a) If any sale is claimed to be exempt …. or if the consumer claims the transaction is not a taxable sale due to one or more of the exclusions provided under divisions (JJ)(1) to (5) of section 5739.01 of the Revised Code, the consumer must provide to the vendor, and the vendor must obtain from the consumer, a certificate specifying the reason that the sale is not legally subject to the tax. The certificate shall be in such form, and shall be provided either in a hard copy form or electronic form, as the tax commissioner prescribes.

  (*cont.*)

Legislation – Exemption Certificates for Employment Services

R.C. 5739.03(B)(1) (*cont.*)

(b) A vendor that obtains a fully completed exemption certificate from a consumer is relieved of liability for collecting and remitting tax on any sale covered by that certificate.

Legislation – Exemption Certificates for Employment Services

- What happens if service provider does not obtain an exemption certificate and cannot later obtain a letter of usage?
- The service provider should not be foreclosed from arguing that the transaction is not in the first instance an employment service.
- When should service providers that are not traditional employment service providers obtain exemption certificates?

Legislation

- Gold bullion and gold coins are exempt
- Sales by municipal gas companies are exempt

Legislation - vetoed

- “Direct use in oil and gas production” redefined
- Digital products played in a juke box would have been exempt.
- Exemptions may be revisited in next Session of the General Assembly.

Information Release

- Information Release ST 2001-01, Nexus revised to reflect new statute.

Information Release

- Among the earlier changes in the statute were:
  - Ability of out-of-state company to overcome presumption of nexus

    "A seller may rebut the presumption of substantial nexus by demonstrating that the activities conducted by the seller or on the seller's behalf are not significantly associated with the seller's ability to establish or maintain the seller's market in Ohio."

Information Release

- Among the earlier changes in the statute were:
  - Use of common carrier in-state does not confer nexus.

    The Ohio Supreme Court addressed the concept of common carriage in *Epic Aviation* described below.

Internet Tax Freedom

- Made permanent in 2016
- Grandfather provision ends June 30, 2020
- What beside pure internet access is covered by the grandfather provision?

Employment Services

- *A.M. Castle & Company*; case voluntarily dismissed by Appellant Tax Commissioner.
- *ACCEL, Inc.*; on appeal to the Ohio Supreme Court, Case No. 2015-1332.
- *Seaton Corp.*; on appeal to the Ohio Supreme Court, 2016-1188.

Employment Services

- Ohio imposes sales and use tax on employment services.
- The tax base is not just the fee imposed by the employment service provider but the amount paid to the worker for wages, taxes and other withholdings.
- Several exemptions are set forth in R.C. 5739.01(JJ), including when the arrangement calls for permanent assignment to the customer and when customer does not supervise the personnel.

Employment Services

In *A.M. Castle*:

- At issue was the provision of drivers under a one-year contract.
- The Tax Department argued that there was too much fluctuation in the number of drivers in order to qualify for permancy.

Employment Services

- In *A.M. Castle*, the BTA rejected the imposition of a requirement that the number of individuals must be static.
- The BTA focused on the intent of the parties and the long-standing relationship between the parties to support the conclusion that the employees were permanently assigned.
- This case is now final because the Tax Commissioner dismissed the appeal to the Ohio Supreme Court.

Employment Services

- The *ACCEL* case currently pending before the Supreme Court also concerns the permanent placement exemption.
- In *ACCEL*, the Taxpayer assembled gift baskets on behalf of its customers. Taxpayer contracted with Resources to provide personnel.

Employment Services

- The BTA cited the test in *H.R. Options* that assigning an employee on a permanent basis means assigning the employee with an indefinite end date, not as a substitute for a current employee who is on leave and not to meet seasonal or short term workload conditions.

Employment Services

- The agreement between the Taxpayer and Resources was oral only and the number of personnel fluctuated with the seasons.
- The specific personnel assigned "changed quite often in a temporary manner." The BTA cited *Excel Temporaries, Inc. v. Tracy*, for the position that even a high degree of turnover does not defeat exemption.

Employment Services

- *ACCEL* argued that the intent was to have the workers permanently assigned and if the requirements were reduced, that reduction would be reflected by decreased hours and not decreased personnel and the personnel were not assigned elsewhere by Resources.
- The BTA reversed the Tax Commissioner's assessment on the basis that the personnel were permanently assigned.
- The Tax Commissioner appealed and the case is pending before the Ohio Supreme Court.

Employment Services

- In *Seaton Corp* the BTA decided that on-site management service provided by Seaton to Mars was not an employment service:
  - Mars supervised its own employees.
  - Mars did not directly supervise the Seaton employees.

Employment Services

- Seaton had supervisors for each shift who had the responsibility to supervise the Seaton production workers on the floor.
- Seaton was responsible for recruiting, hiring and ensuring that the employees were available for the shifts.
- The Tax Commissioner appealed to the Supreme Court.

Employment Services

- Possibility of legislative change
  - Seems to be renewed interest in repealing or revising the employment services tax.
  - Revenue loss remains the hurdle to the legislative amendment.

Automatic Data Processing

Dayton Physicians case

- Preparation of verbatim transcription of entries to be added to a medical chart is ADP.
- Despite the skill of the human doing the transcription, no “cognitive” thought.
- The court assumed that it was ADP as converting data--audio to transcript--and then did not find that the service fit within one of the defined personal or professional exemptions from ADP.

Automatic Data Processing

Dayton Physicians case

- Court did not first address the nature of the service in determining whether it was ADP in the first instance.
- How is this different than a court reporter in a BTA hearing?

Resale – Sham Transaction

- *Pi in the Sky* seeks the resale exemption for aircraft leased from an LLC to its sole member, a corporation owning a string of hair salons.
- Still at the BTA
- Tax Commissioner cites authority under R.C. 5703.56 to disregard lease as a sham.

Resale – Sham Transaction

- Tax Commissioner can cite several irregularities.
  - Personal use by an individual who was a pilot;
  - No demonstrated use of the aircraft for hair salon business;
  - Low lease payments and apparently some advances to pay costs; and
  - Problems with the documentation.

Resale – Sham Transaction

- Some of the factors cited by Tax Appeals Division in *Pi in the Sky* seem too far reaching:
  - Having only one lessee with no marketing should not mandate a finding of a sham transaction.
  - A lease from a SMLLC to its member should not be deemed to be a sham for that reason alone when other factors, such as rent payments and lease terms support respecting the transaction.

Manufacturing

- In *Lafarge*, the issue is slag hauling when the slag had been produced in the manufacturing process many years before it is reclaimed.
- Lafarge broke up the slag before transporting it to a screening plant.

Manufacturing

- The issue is whether the breaking up of the slag before transport is commitment, i.e. the beginning of the manufacturing process.
- The BTA distinguished an earlier line of cases in which the recovery of *steel* as part of the overall manufacturing process was found to be manufacturing.

Packaging

- The *ACCEL* case remains on appeal to the Ohio Supreme Court.
- One issue is whether a fill and assembly operation for gift baskets sets was assembly such that the packages would be exempt.

Common Carriage

- The *Epic Aviation* case was decided by the Supreme Court finding that the fuel used by AirNet qualified for exemption under the public utility exemption.
- AirNet was the third largest air package carrier in the U.S.
- AirNet used small planes so it did not qualify for a certificate of public convenience and necessity—it qualified as an air taxi and Part 135 operator.
- Supreme Court concluded that a Part 135 carrier could qualify to the extent it operated as a common carrier.

Common Carriage

- A common carrier is an entity that has the benefit and burden of service to public.
  - Must serve the public
  - Cannot discriminate in its operations
- AirNet was regulated as a common carrier under FAA regulations but the Court applied the common law of Ohio tax cases.

Common Carriage

- Applying the analogy of trucking operations, common carriage occurs only when operating as a common carrier.
- Court focused on certain operations as indicating common carriage:
  - pre-arranged routes
  - the fact that AirNet could not discriminate when providing service to the public—had to have non-discriminatory pricing
    - but did not have to have rates fixed by a public authority.

Common Carriage

- Case could have implication beyond air freight business including defining the common carrier for purposes of the safe harbor from a finding of nexus.

Local Lodging Tax

- Court of appeals struck down an additional municipal lodging tax when it duplicated a county tax contrary to state law.
- Ohio General Assembly had authority to control rates despite Home Rule.

Responsible Officer

- Direct Pay
  - Dulay, an officer of a direct pay holder challenges personal liability for use tax on purchases as violating his constitutional rights.

Responsible Officer

- Operation under a management agreement
  - Corporate officer that attempted to sell the bar and have the bar operated by purchasers under management agreements was liable for underreporting by the purchasers.

Presenting Appeals

- Not enough to submit evidence, such as by attaching documents to the notice of appeal, but must submit testimony to lay the foundation for the documents.
- Do not expect the BTA to undertake an independent review of documents absent an explanation for the basis for refund.
- BTA continues to remand cases to Tax Commissioner when Tax Appeals Division does not address issues raised on the petitions for reassessment.

Refunds

- Statute of limitation for refund must be applied as written.
- Period will not be enlarged for equitable circumstances, such as employee fraud.

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SALES AND USE TAX UPDATE - 2017

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I. LEGISLATION

A. H.B. 466 (131st General Assembly) Digital Advertising

In 2015, the Tax Department added examples of the types of transactions that were deemed to be taxable Internet Access Services in Information Release ST 1999-04. Included among the listed services was a service that permits a vendor to display its inventory (e.g. cars for sale) on a website.

The Ohio General Assembly responded by adding R.C. 5739.01(RRR) to exempt digital advertising services and certain taxable electronic services provided incidentally to the digital advertising services. For this purpose, "digital advertising services" means providing access, by means of telecommunications equipment, to computer equipment that is used to enter, upload, download, review, manipulate, store, add, or delete data for the purpose of electronically displaying, delivering, placing, or transferring promotional advertisements to potential customers about products or services or about industry or business brands.

The Tax Commissioner responded to the amendment by updating ST 1999-04 as follows:

> In H.B. 466 of the 131st General Assembly, "digital advertising services" was added to an enumerated list of what was considered personal or professional services. [After listing the statutory language, the Information Release continues.] Advertising (digital or otherwise) is not and has not been treated as a taxable service by the Department. However, for many transactions that may contain and combine digital advertising services with electronic information services, the electronic information services may be a significant component. The Department will continue to hold taxable those components of these transactions that represent electronic information services and deem mixed transactions [described elsewhere in the Information Release] to be taxable.

The scope of the digital advertising exemption will require further clarification.

B. Sub. S.B. 235 (131st General Assembly)

1. Exemption Certificates for Employment Services

A vendor or consumer claiming that certain transactions are exempt from sales and use tax under divisions (JJ)(1) through (5) of R.C. 5739.01, related to potential employment services, must now obtain or provide an exemption certificate effective January 1, 2017. The effective date is set by Section 11 of Sub. S.B. 235, which amended R.C.5739.03. Service providers that bill by the hour, but which are not providing employment services, should consider obtaining exemption certificates from their customers.

2. Veto of the Modification of the Exemption for Oil and Gas Production Property

The Governor vetoed the following language to be added to R.C. 5739.02(B)(42)(a) when describing the use of items used "directly in the exploration for, and production of, crude oil and nature gas":

> As used in this paragraph, "directly in producing tangible personal property for sale by production of crude oil and nature gas," includes production operation as defined by section 1509.01 of the Revised Code except that the term does not include tanks and other storage devices for holding solutions used in hydraulic fracturing, equipment used for earth moving and reclamation at a well site, or property used to transport, deliver or remove other equipment to or from a well site or to store such equipment before using it at a well site.

The new language (which was vetoed) was declared to be a clarification of prior law and not an expansion of the exemption.

3. Vetoed Exemption for Digital Product Played on a Juke Box or Similar Item

The Governor vetoed an exemption for digital products used in juke boxes and similar items. Sub. S.B. 235 would have added the following exemption in R.C. 5739.02(B(55).

> (55) Sales of a specified digital product electronically transferred for use in or for delivery through use of a machine that accepts direct cash payments or direct payments by a financial transaction device to operate and that operates primarily for the purpose of providing entertainment or amusement, such as a juke box, music machine, arcade game, or other similar machine. As used in division (B)(55) of this section, "financial transaction device" has the same meaning as in section 113.40 of the Revised Code.

Note: It is unclear whether the 132nd General Assembly will revisit either of the amendments vetoed by the Governor.

C. Sub. S.B. 172 (131st General Assembly) Investment Bullion and Coins

Exempts from the sales and use tax, the sale of investment metal bullion and investment coins. For the purposes of the exemption, investment metal bullion is gold, silver, platinum, or palladium bullion in excess of the minimum fineness required by a contract market for delivery in satisfaction of a commodity futures contract. An investment coin is defined to be any coin composed primarily of gold, silver, platinum, or palladium. The exemption first applied starting January 1, 2017.

D. Sub H. B. 390 Municipal Gas Company

Exempts from sales and use tax the sale of natural gas by a municipal gas company. Intended to be remedial and applies to sales made before and after enactment.

II. INFORMATION RELEASES

A. ST 2001-01 Use Tax Information Release-Sales and Use Tax-Use Tax Nexus Standards, August 2016.

As reported last year, changes were made to the Ohio nexus standard for remote sellers for purposes of the use tax. One new addition was the implementation of "click-through nexus." The new law implemented click-through nexus using the New York model (click-through activities by Ohio residents create a presumption of nexus), but the statutory amendment also makes other changes. Arguably, the other changes provide new safe harbors from a finding of Ohio nexus for activities conducted in Ohio.

Some of the changes included:

- Merely registering to do business or being licensed in Ohio no longer creates nexus.

- Selling to a state agency requires registration in the same manner as a use tax seller.

- The catch-all language is eliminated that formerly provided that nexus is created by any contact with Ohio other than those contacts that the U.S. Constitution would prohibit using to create nexus. Thus, the Ohio Tax Commissioner must point to some statutory basis for asserting that a point of contact creates nexus.

- Certain activities conducted in Ohio by *common carriers* specifically do not provide nexus. See R.C. 5739.01(I)(2)(a). For a discussion of the concept of common carriage, see the discussion of the *Epic Aviation* case below.

- The new statue in R.C. 5739.01(I)(3) provides that even if a presumption of nexus exists, the remote seller can overcome that presumption by

proving that the seller "did not engage in any activities within [Ohio] during the preceding twelve months that were *significantly* associated with the seller's ability to establish or maintain the seller's market in this state ..." See R.C. 5741.01(I)(4); emphasis added. This language would suggest that some kinds of non-marketing activities conducted in Ohio do not create nexus.

The Tax Commissioner's Information Release was updated in August, 2016 to reflect the changed statute.

B. Federal legislation - Internet Tax Freedom Act

The Internet Tax Freedom Act ("ITFA") was extended and made permanent in P.L. 114-125. The grandfather clause, which applies to 7 states, including Ohio, is scheduled to expire on June 30, 2020.

ITFA prohibits the tax on an internet access service, which is defined as a "service that enables users to access content, information, electronic mail, or other services offered over the internet and may also include access to proprietary content, information, and other services as part of a package of services, offered to consumers." Certain states that already had taxes on internet access were grandfathered meaning those states could continue to impose those taxes. In 1998, 13 states had tax provisions that were grandfathered under the first ITFA. Currently, the number of states claiming to collect tax revenue from internet access has been reduced to 7 states: Hawaii, New Mexico, North Dakota, Ohio, South Dakota, Texas, and Wisconsin. See Congressional Research Service "The Internet Tax Freedom Act: In Brief," April 13, 2016. In addition to preventing the imposition of tax on internet access, ITFA prohibits multiple or discriminatory taxes on electronic commerce.

III. ADMINISTRATIVE ACTIONS

A. Streamlined-Related - Taxability Matrix

The Ohio Tax Department last updated the Taxability Matrix issued pursuant to the Streamlined Sales Tax Agreement effective May 4, 2016, which also includes "Best Practices." A copy of the Matrix appears in the Appendix. This is a useful document because sellers and certified service providers generally can rely on the information represented in the Matrix.

B. Interest Rate

The interest rate increases to 4% for 2017 for the underpayment and overpayment of sales and use taxes. The interest rate chart appears in the Appendix.

IV. DECISIONS AND OPINIONS

A. Employment Services

1. Permanent Placement

At issue was the provision of drivers by a third party for the Taxpayer's motor vehicles. The Taxpayer claimed exemption from the employment services tax on the basis of the permanent assignment exemption of R.C. 5739.01(JJ)(3) under which an exemption from the employment services tax exists when a contract exists between the taxpayer and provider for at least one year and the personnel are permanently assigned to the customer. The Tax Commissioner agreed that the contract was for at least one year but argued that the Taxpayer's drivers were not permanently assigned because the drivers were provided "as required" so that the Taxpayer retained the ability to adjust the number of drivers assigned to the fleet as required at any given time according to business needs. The Ohio Board of Tax Appeals ("BTA") rejected the imposition of a requirement that the number of individuals must be static. The BTA focused on the intent of the parties and the long-standing relationship between the contracting parties to support the conclusion that the drivers were permanently assigned.

The Supreme Court dismissed the appeal on February 18, 2016 in response to an application of the Tax Commissioner. It appears that the Tax Commissioner continues to assert that fluctuation in the number of employees defeats the permanent placement exemption contrary to the BTA's finding that a static number of employees is not required in *A.M. Castle.*

A.M. Castle & Company v. Testa, BTA No. 2013-5851, March 9, 2015; appeal to the Supreme Court, Case No. 2015-0551; dismissed on application of Appellant Tax Commissioner on February 18, 2016.

2. Permanent Placement Exemption and Element of Supervision and Control

Taxpayer assembled gift baskets on behalf of its customers. Taxpayer contracted with Resource Staffing and Manpower ("Resource") to provide personnel. The BTA cited the test in *H.R. Options, Inc. v. Zaino,* 100 Ohio St. 3d 373, 2004-Ohio-1 ¶ 21 for the proposition "that assigning an employee on a permanent basis means assigning the employee with an indefinite end date, not as a substitute for a current employee who is on leave and not to meet seasonal needs, or short term workload conditions." The agreement between the Taxpayer and Resource was oral only and the number of personnel provided by Resource fluctuated with the seasons. The specific personnel assigned "changed quite often in a temporary manner" according to the Tax Commissioner. The BTA cited *Excel Temporaries, Inc. v. Tracy,* BTA No. 1997-T-257, October 30, 1998, for the position that even a high degree of turnover does not defeat exemption. The Taxpayer argued that the intent was to have the workers permanently assigned and when the required numbers of employees declined, that reduction would be reflected by decreased hours and not

decreased numbers of personnel. Moreover, the personnel were not assigned elsewhere by Resource.

In addition to the permanent assignment defense, the Taxpayer also argued that Resource provided its own supervisors, which prevented the contracts from meeting the definition of employment services that requires supervision and control by the customer. While the BTA did not specifically rule on the assignment of supervisors by Resource, it appears that the BTA agreed with the Taxpayer on this point.

The Tax Commissioner appealed this decision to the Ohio Supreme Court. The case is awaiting oral argument.

ACCEL, Inc. v. Testa, BTA Case No. 2012-2840, July 15, 2015; on appeal to the Ohio Supreme Court, Case No. 2015-1332.

3. Contractor/Element of Control

The BTA decided that an on-site management service provided by Seaton to Mars was not an employment service. Mars supervised its own employees. Mars did not directly supervise the Seaton employees. Seaton had supervisors for each shift who had the responsibility to supervise the Seaton production workers on the floor. Seaton was responsible for recruiting, hiring and ensuring that the employees were available for the shifts.

The Tax Commissioner appealed to the Ohio Supreme Court. The matter is in mediation at the Supreme Court.

Seaton Corp v. Testa, Ohio BTA Case Nos. 2015-224 and 2015-743, July 13, 2016; Supreme Court Case No. 2016-1188.

4. Proposed Legislation

Amended House Bill 343 had been introduced in the prior session of the General Assembly to eliminate the employment service and employment placement taxes or in the alterative, limit the reach of the employment services tax, e.g. by limiting the tax to the fee and not taxing the wage base or providing an exemption for use primarily in manufacturing. Support appears to exist for the repeal among legislators but the revenue impact makes the repeal uncertain.

B. Automatic Data Processing Services - Medical Transcription Service

The Montgomery County Court of Appeals affirmed the BTA in the factual finding that the medical transcription service at issue by which a verbatim transcript of entries made by a physician for a patient's chart is taxable automatic data processing. The Court found that there was a separate true object test in the automatic data processing statute and the transcription service did not fit within the specific list of "professional and personal services" as exemptions from automatic data processing.

Despite the skill involved in making such a transcript, the service was found to be taxable because the service provider did not study, alter, analyze interpret or adjust the data and thus did not provide significant cognitive thought. Testimony at the hearing showed a significant reduction in physician satisfaction and perceived usability when the transcription is done automatically with Dragon software compared with human transcription because of the value of cleaning up the audio recording through formatting and elimination of incidental statements and repetitions.

The court of appeals did not address how this service could be distinguished from court reporting services, which have always been treated as personal services. Rather than rendering a computer service, the computer here seems to be the means of providing a personal service.

Dayton Physicians, LLC. v. Testa, Montgomery App. No. 26881, 2016-Ohio-5348.

C. Resale - Aircraft

Pi in the Sky, LLC ("Lessor") claims a resale exemption for an aircraft purchased for lease to the Lessor's sole member, Mitchell's Salon and Day Spa, Inc. ("Mitchell's Salon"). In a Final Determination, the Tax Commissioner invoked his authority under R.C. 5703.56 to conclude that the lease was a sham and thus deny the resale exemption. The Tax Commissioner cited many factors in support of a sham transaction finding:

- Deborah M. Schmidt ("Schmidt"), the owner of Mitchell's Salon, was a pilot and appeared to use the aircraft in ways that do not seem to be related to the business of Mitchell's Salon.

- The documentation was found to reflect a role for Schmidt in her personal capacity such as signing the lease on behalf of both Lessor and Mitchell's Salon without a clear differentiation of her respective roles in the two entities and Schmidt was said to be the borrower on the loan in her individual capacity.

- The Tax Commissioner found the absence of a "legitimate aircraft leasing" business because there was no marketing materials promoting the leasing operation; the operation was run out of Schmidt's home; the only lessee was the sole member of the Lessor; the rents were low and the leasing operation was conducted at a loss with no possibility of a gain; no fixed term was provided for the lease, and Mitchell's Salon agreed to pay all of the expenses.
- Mitchell's Salon was said to advance funds to Lessor in order to meet expenses.

Lessor appealed the Final Determination to the BTA. Lessor waived hearing.

The appeal is significant because of the absence of precedent on the Tax Commissioner's authority to disregard transactions under the sham transaction statute. There seem to be a

number of factors in this case that the BTA could cite in support of disregarding the lease.

Hopefully, the BTA will not subscribe to the Tax Commissioner's overly-broad assertion that a lease from single member limited liability company to its member can be treated as a non-lease because of the supposed identity of the member and limited liability company. A lease between related but distinct entities should be respected so long as the lease has a business purpose, the formalities are respected, and the rent and other lease terms are at arm's length.

Pi in the Sky LLC v. Testa, Assessment No. 06201330435419, BTA Case No. 2015-2005.

D. Manufacturing

Taxpayer processed slag pellets from slag that had been created decades earlier. Taxpayer broke up the slag before transporting the slag to a screening plant, which screening plant took materials from several steel companies. The breaking up of the material was found not to be the commitment to the taxpayer's manufacturing operation and the equipment used to break up the slag was found to be not entitled to the manufacturers' exemption. The BTA distinguished cases such as *Harsco v. Tracy,* BTA Case No. 1997-P-1560 (April 14, 2000), because those cases concerned operations conducted during the manufacturing process whereas the process in this case started with slag that had been created in the past. The taxpayer has appealed the case to the Ohio Supreme Court.

Lafarge North America, Inc. v. Testa, BTA Case No. 2015-763, June 21, 2016, Supreme Court Case No. 2016-1074.

E. Packaging

Taxpayer assembled gift baskets on behalf of its customers such as Bath & Body Works and Victoria's Secret and thereby transformed individual products, i.e. shampoos, lotions, shower jells, etc. into a distinct new product--a gift set consisting of such products specifically assembled into a re-usable container (a basket). Taxpayer worked with its customers to design the gift sets and to implement the designs through fill and assembly operations. Taxpayer argued that the packaging materials it acquired were entitled to the packaging exemption of R.C. 5739.02(B)(15), which is available only to those engaged in manufacturing or assembly or as a retailer. If Taxpayer were only packaging the items into the baskets, the packaging exemption would not apply whereas if the activities were found to be manufacturing or assembly, Taxpayer would qualify for the packaging exemption. While the BTA found that Taxpayer was not engaged in manufacturing, the BTA concluded that Taxpayer was involved in assembly as defined in R.C 5739.01(R) by attaching or fitting together parts to form a product such that Taxpayer qualified for the packaging exemption.

The Tax Commissioner appealed this decision to the Ohio Supreme Court. The case is awaiting the assignment of oral argument.

ACCEL, Inc. v. Testa, BTA Case No. 2012-2840, July 15, 2015; on appeal to the Ohio Supreme Court, Case No. 2015-1332.

F. Transportation Exemptions – Air Carrier

AirNet Systems Inc. sought a refund for aviation fuel used in delivering packages on the basis that the fuel was used directly in the rendition of a public utility service. The refund was filed by Epic Aviation, LLC, as the supplier of the fuel. AirNet was the third largest package handling company in the United States; had scheduled routes; and had a significant role in delivering radiopharmaceuticals and other biological products and bank checks as part of the check-clearing process. AirNet was a Part 135 operator for FAA regulatory purposes and as such was subject to a great deal of regulation both as a Part 135 carrier and under its specific Operations Specifications. AirNet was not a Part 121 operator. A Part 121 carrier is limited to the class of airlines using the largest aircraft like the large passenger airlines, and packaging delivery airlines like UPS and FedEx.

The Tax Commissioner argued that AirNet could not qualify as a public utility because it operated under Part 135 and was not a Part 121 operator citing *Castle Aviation v. Wilkins,* 109 Ohio St. 3d 290, 2006-Ohio-2420. AirNet argued that the relevant statute, R.C. 5739.01(P), was amended after the *Castle Aviation* decision and the amendment provided that while qualifying as a Part 121 carrier was sufficient to claim the public utility exemption, the carrier was not required to be a Part 121 carrier in order to qualify as a public utility.

The BTA affirmed the Tax Commissioner on the basis of insufficient regulation of AirNet to qualify the carrier as a public utility. The BTA agreed, however, that qualification of the carrier as a Part 121 carrier was not a requirement to qualify as a public utility for Ohio tax purposes. The case was appealed to the Supreme Court of Ohio.

The Supreme Court reversed the BTA and remanded the case to the Tax Commissioner for further proceedings. The case settled.

The Supreme Court concluded that a carrier need not be a Part 121 carrier to qualify as a public utility. Moreover, the Court revisited the use of regulation as the principal determinant for qualification. Justice Pfeiffer writing for the majority, understood that applying regulation as the Tax Commissioner argued would deny exemption to all but the Part 121 carriers, contrary to the express terms of the statute.

Instead, the Court focused on the role of the air carrier as a "common carrier" and tied common carriage in this context to the concept of being a public utility. The Court applied a common law standard as developed under the tax cases. Neither federal nor state statutes define common carriage. The key to common carriage is the benefit and burden of holding out the services of the carrier to the public.

AirNet argued that because it was a Part 135 carrier, it necessarily operated only as a common carrier in contrast to a Part 91 carrier that was engaged in private carriage. The

Court was unwilling to go that far. Instead, Justice Pfeifer used trucking company precedents, and focused on the use of aircraft by Part 135 carrier that nevertheless is being used in charter operations. For example, at oral argument, the justices focused on when a customer might engage the entire aircraft. Even though the Part 135 air carrier would be operating as a common carrier generally for purposes of federal law, this use of the aircraft (and fuel) for a particular customer would be like a trucker operating as a contract carrier rather than as a common carrier in that that aircraft at that time would not be available to any other customer. It also appears that the Court equated scheduled, pre-announced routes as consistent with the common law concept of a meaningful obligation to carry in that customers (and competitors) would know and be able to use the scheduled flights for delivery of packages, which the common carrier could not refuse to carry if the carrier had space and was authorized to carry the package in question. The Court seemed to focus on non-discriminatory rates as being required to comply with common carrier concepts of service being promised without discrimination. Note that non-discriminatory rates may not be regulated as to amount. Non-discrimination in this context means that carrier could not charge its competitors more than it charges its own customers.

This case likely will have impact beyond that for package delivery by airlines. The Court meaningfully added to our understanding of what it means to be a common carrier for tax purposes.

Epic Aviation, LLC v. Testa, Slip Opinion No. 2016-Ohio-3392.

G. Construction Contracts

1. Failure of Proof

A burglar/fire alarm, an outdoor illuminated sign, electrical wiring and switches, a security/surveillance system, store remodel, and air compressor were all found to be business fixtures and not realty. The taxpayer did not provide evidence to support the claims that the items became part of the realty. The BTA suggested that the taxpayer perhaps could have prevailed on some of the categories of items if some evidence had been submitted.

Pep Boys-Manny, Moe & Jack of Delaware, Inc. v. Testa, BTA Case No. 2015-706, April 4, 2016.

2. Golf Course Irrigation

The installation of an irrigation system for a golf course was otherwise classified as a business fixture and did not constitute real property. The irrigation system was found to be specialized to address the unique water and fertilization needs of the golf course and thus benefitted the business on the land and did not primarily benefit the land. The cost of installation was part of the price of the system.

Hoffman Properties Limited Partnership v. Testa, BTA No. 2011-1372, April 29, 2014; aff'd 2015-Ohio-3931, (9th Ct. App., 2015); on appeal to the Supreme Court, Case No. 2015-1779, jurisdiction declined, February 24, 2016.

H. Local Lodging Tax

A municipal ordinance that imposed an additional lodging tax violated R.C. 5739.09(B)(1) because the county already had an additional lodging tax in place. The restriction on duplicative taxation enacted by the Ohio General Assembly did not violate the Home Rule Authority of Article XVIII, Section 3 of the Constitution of the State of Ohio.

Evans v. Avon, 2016-Ohio-5460 (9th Dist. Ct. App., Aug. 22, 2016).

I. Responsible Officer

1. Direct Pay Permit

Responsible officer challenges the imposition of tax against him individually based on the failure of his employer to have paid use tax under a Direct Pay Permit. The officer raises Due Process and Equal Protection among other bases in challenging the assessment.

Dulay v. Testa, Ohio BTA Case No. 2014-2074, December 3, 2015; on appeal to the Ohio Supreme Court, Case No. 2015-2111.

2. Corporate Officer Remains Liable When the Bar is Operated Under a Management Agreement

Corporate officer oversaw the sale of a bar and entered into three management agreements as successive potential purchasers attempted to secure transfer of the liquor license. These types of management agreements are common. The corporate officer testified that he ensured that taxes were paid each month while the management agreements were in place. Upon audit, however, the Tax Department found that there had been underreporting by the bar operators acting under the management agreements. The seller's corporate officer was found responsible for the underreporting by the potential buyers.

Painter v. Testa, Ohio BTA Case No. 2015-111, February 26, 2016.

J. Presenting Appeals

A number of taxpayers failed to obtain relief when documents were attached to the notice of appeal but no hearing was conducted to obtain testimony to lay the foundation for the records. Also, the BTA will not review documents such as bank statements to support a claim for refund. The appellant must show the basis for recovery.

Ridg-U-Rak, Inc. v. Testa, BTA Case No. 2016-249, December 8, 2016.

K. Review at Tax Appeals Division

BTA reversed the Tax Commissioner when the Tax Appeals Division had not addressed the issues raised by taxpayers on the petitions for reassessment.

Keller v. Testa, Ohio BTA No. 2015-1749, July 6, 2016.

Lamour Nails Spa, LLC v. Testa, BTA Case No. 2016-320, December 1, 2016.

L. Refunds

Taxpayer sought refund of amounts that that been the subject of internal employee fraud. Taxpayer waited while the underlying fraud went through the criminal process before seeking the refund. In the meantime, the statute of limitations expired for the filing of refund claims. The BTA upheld the bar of the statute of limitations because of the sound policy of having a date certain requirement for filing refunds and because principles of equity do not apply.

Energy Fit Living Inc. v. Testa, BTA Case No. 2016-219, November 9, 2016.

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Ohio State Taxability Matrix

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The Taxability Matrix contains four sections that must be completed: Section A – Administrative Definitions, Section B – Sales Tax Holidays, Section C – Product Definitions and Section D – Tax Administration Practices.

Instructions for Sections A, B and C of the Taxability Matrix
Each of the items listed in Sections A, B and C below are defined in the Library of Definitions in the Streamlined Sales and Use Tax Agreement (SSUTA) as amended through May 4, 2016. Refer to Appendix C of the SSUTA for each definition.

Place an "X" in the appropriate column under the heading "Treatment of definition" to indicate the treatment of each definition in your state. If a product definition was not adopted by your state, enter "NA" in the column under the heading "Statute/Rule Cite" and indicate in the "Treatment of definition" columns the treatment of the product in your state. In accordance with the SSUTA, your state must adopt the definitions in the Library of Definitions that apply to your state without qualifications, except for those allowed by the SSUTA. For this reason, do not enter any comments or qualifications in the two columns under the heading "Treatment of definition." If your state has adopted a definition in the Library of Definitions with a qualification not specified in the SSUTA, do not place an "X" in either column under the heading "Treatment of definition" but include a comment in the "Comment" column explaining the qualification. Enter the applicable statute/rule cite in the "Statute/Rule Cite" column.

With respect to Sections A, B and C of the taxability matrix, sellers and certified service providers are relieved from tax liability to the member state and its local jurisdictions for having charged and collected the incorrect amount of sales and use tax resulting from the seller or certified service provider relying on erroneous data provided by the member state relative to treatment of the terms defined in Sections A, B and C. **To the extent possible under each state's laws**, sellers and CSPs are also relieved from tax liability to the member state and its local jurisdictions for having charged and collected the incorrect amount of sales and use tax until the first day of the calendar month that is at least 30 days after notice of a change to Sections A, B, or C of the state's taxability matrix is submitted to the governing board, provided the seller or CSP relied on the prior version of the taxability matrix.

Instructions for Section D of the Taxability Matrix
With respect to Section D, "tax administration practices" have been approved by the Streamlined Sales Tax Governing Board (SSTGB) for each of the products, procedures, services, or transactions identified pursuant to Section 335 of the Streamlined Sales and Use Tax Agreement (SSUTA), as amended through May 4, 2016.

Use of the term "State" in each practice refers to the state completing the matrix.

Place an "X" in the appropriate column to indicate whether your State does or does not follow each practice identified.

For each tax administration practice identified in this matrix and further described in Appendix E of the SSUTA which your State follows, place an "X" in the "Yes" column and enter the statute or rule that applies to your state's treatment of this practice in the Statute/Rule Cite column.

For each tax administration practice identified in this matrix and further described in Appendix E of the SSUTA that your State does not follow, place an "X" in the "No" column, enter the statute or rule that applies to your state's treatment of this practice in the Statute/Rule Cite column and, if necessary, describe in the Comments column your state's practice in this area.

Conformance to a tax administration practice by a state is voluntary and no state shall be found not in compliance with the Agreement if it does not follow a tax administration practice adopted by the Governing Board.

With respect to Section D of this taxability matrix **and to the extent possible under each state's laws**, sellers and CSPs are relieved from tax liability to the member state and its local jurisdictions for having charged and collected the incorrect amount of sales and use tax resulting from the seller or certified service provider relying on erroneous data provided by the member state relative to the tax administration practices contained in Section D. In addition, **to the extent possible under each state's laws**, sellers and CSPs are also relieved from tax liability to the member state and its local jurisdictions for having charged and collected the incorrect amount of sales and use tax until the first day of the calendar month that is at least 30 days after notice of a change to Section D of the state's taxability matrix is submitted to the governing board, provided the seller or CSP relied on the prior version of the taxability matrix.

Administrative Definitions		Treatment		Reference	
Reference Number	Sales price: Identify how the options listed below are treated in your state. The following options may be excluded from the definition of sales price only if they are	Included in Sales Price	Excluded From Sales Price	Statute/Rule Cite	Comment

	separately stated on the bill to the purchaser.				
10010	Charges by the seller for any services necessary to complete the sale other than delivery and installation	X		R.C. 5739.01(H)(1)(a)(iii)	
10070	Telecommunication nonrecurring charges	X			No specific provision
10040	Installation charges	X		R.C. 5739.01(H)(1)(a)(v)	
10060	Value of trade-in	X		R.C. 5739.01(H)(1)(a)(vi)	Unless it is the trade-in of a motor vehicle on the purchase of a new motor vehicle
Reference Number	**Delivery Charges for personal property or services other than direct mail. The following charges are included in the definition of sales price unless your state excludes them from sales price when such charges are separately stated on the bill to the purchaser.**	**Included in Sales Price**	**Excluded From Sales Price**	**Statute/Rule Cite**	**Comment**
11000	Handling, crating, packing, preparation for mailing or delivery, and similar charges	X		R.C. 5739.01(H)(1)(a)(iv)	
11010	Transportation, shipping, postage, and similar charges	X		R.C. 5739.01(H)(1)(a)(iv)	
Reference Number	**Delivery Charges for direct mail. The following charges are included in the definition of sales price unless your state excludes them from sales price when such charges are separately stated on the bill to the purchaser.**	**Included in Sales Price**	**Excluded From Sales Price**	**Statute/Rule Cite**	**Comment**
11020	Handling, crating, packing, preparation for mailing or delivery, and similar charges	X		R.C. 5739.01(H)(1)(a)(iv)	
11021	Transportation, shipping, and similar charges	X		R.C. 5739.01(H)(1)(a)(iv)	
11022	Postage	X		R.C. 5739.01(H)(1)(a)(iv)	
Reference Number	**State and Local Taxes - A state may exclude from the sales price any or all state and local taxes on a retail sale that are imposed on the seller, if the state statute authorizing or imposing the tax provides that the seller may, but is not required, to collect such tax from the consumer. The tax must be separately stated on the invoice, bill of sale or similar document given to the purchaser. Sales and use taxes are not included in the sales price. If applicable list all state and local taxes, other than sales and use taxes imposed on the seller that your state excludes from sales price under this provision.**	**Included in Sales Price**	**Excluded From Sales Price**	**Statute/Rule Cite**	**Comment**
11110	N/A				
Reference Number	**TRIBAL TAXES - A state may exclude from the sales price tribal taxes on a retail sale that are imposed on the seller if the Tribal law authorizing or imposing the tax provides that the seller may, but is not required, to collect such tax from the consumer The tax must be separately stated on the invoice, bill of sale or similar document given to the purchaser. If applicable list all tribal taxes on a retail sale that are imposed on the seller if the Tribal law authorizing or imposing the tax provides that the seller may, but is not required, to collect such tax from the consumer. The tax must be separately stated on the invoice, bill of sale or similar document given to the purchaser.**	**Included in Sales Price**	**Excluded From Sales Price**	**Statute/Rule Cite**	**Comment**
11120	N/A				
	Federal Excise Taxes – A state may exclude				

	federal excise taxes or fees that are not directly imposed on a consumer if the state lists those taxes and a reference to the specific law on the state's taxability matrix. The tax must be separately stated on the invoice, bill of sale or similar document given to the purchaser. List all federal excise taxes or fees that are not directly imposed on the consumer that your states excludes from the sales price under this provision.		**Included in Sales Price**	**Excluded From Sales Price**		
11130	N/A					
Sales Tax Holidays			**Yes**	**No**		
Sales Tax Holidays: Does your state have a sales tax holiday?			X			
Reference Number	**If yes, indicate the tax treatment during your state sales tax holiday for the following products.**	**Amount of Threshold**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
20060	All Energy star qualified products. If only specific energy star qualified products or energy star qualified classifications, list those below.	$0	X			
20060		$0				
20150	All Disaster Preparedness Supply	$0	X			
20160	Specific Disaster preparedness general supply	$0	X			
20170	Specific Disaster preparedness safety supply	$0	X			
20180	Specific Disaster preparedness food-related supply	$0	X			
20190	Specific Disaster preparedness fastening supply	$0	X			
20070	School supply	$20		X	Sub. S.B. 264 of the 131st General Assembly, uncodified section 1.	August 5, 2016 through August 7, 2016 only.
20080	School art supply	$0	X			
20090	School instructional material.	$20		X	Sub. S.B. 264 of the 131st General Assembly, uncodified section 1.	August 5, 2016 through August 7, 2016 only.
20100	School computer supply	$0	X			
20105	All WaterSense products. If only specific WaterSense products or specified WaterSense classifications	$0	X			

	on the WaterSense listing, list those below.					
20105		$0				
Reference Number	**Other products defined in Part II of the Library of Definitions included in your state sales tax holiday.**	**Amount**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
20120		$0				
20130	Clothing	$75		X	Sub. S.B. 264 of the 131st General Assembly, uncodified section 1.	August 5, 2016 through August 7, 2016 only.
20110	Computers	$0	X			

Product Definitions		**Treatment**		**Reference**	
Reference Number	**Clothing and related products**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
20010	Clothing	X		R.C. 5739.01(B)(1)	All clothing is taxable
20015	Essential clothing priced below a state specific threshold	X		R.C. 5739.01(B)(1)	
20050	Fur clothing	X		R.C. 5739.01(B)(1)	
20020	Clothing accessories or equipment	X		R.C. 5739.01(B)(1)	
20030	Protective equipment	X		R.C. 5739.01(B)(1)	
20040	Sport or recreational equipment	X		R.C. 5739.01(B)(1)	
Reference Number	**Computer related products**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
30100	Computer	X		R.C. 5739.01(B)(1)	
30040	Prewritten computer software	X		R.C. 5739.01(B)(1)	
30050	Prewritten computer software delivered electronically	X		R.C. 5739.01(B)(1)	
30060	Prewritten computer software delivered via load and leave	X		R.C. 5739.01(B)(1)	
30015	Non-prewritten (custom) computer software		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
30025	Non-prewritten (custom) computer software delivered electronically		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
30035	Non-prewritten (custom) computer software delivered via load and leave		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
Reference Number	**Mandatory computer software maintenance contracts**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
30200	Mandatory computer software maintenance contracts with respect to prewritten computer software	X		Ohio Admin. Code 5703-9-59	
30210	Mandatory computer software maintenance contracts with respect to prewritten computer software which is delivered electronically.	X		Ohio Admin. Code 5703-9-59	
30220	Mandatory computer software maintenance contracts with respect to prewritten computer software which is delivered via load and leave	X		Ohio Admin. Code 5703-9-59	
30230	Mandatory computer software maintenance contracts with respect to non-prewritten (custom) computer software		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
	Mandatory computer software maintenance contracts with respect to			R.C. 5739.01(B)(3)(e), Ohio Admin. Code	Custom system software for business

30240	non-prewritten (custom) software which is delivered electronically		X	5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	use is a taxable computer service
30250	Mandatory computer software maintenance contracts with respect to non-prewritten (custom) software which is delivered via load and leave		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
Reference Number	**Optional computer software maintenance contracts**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
30300	Optional computer software maintenance contracts with respect to prewritten computer software that only provide updates or upgrades with respect to the software	X		Ohio Admin. Code 5703-9-59	
30310	Optional computer software maintenance contracts with respect to prewritten computer software that only provide updates or upgrades delivered electronically with respect to the software	X		Ohio Admin. Code 5703-9-59	
30320	Optional computer software maintenance contracts with respect to prewritten computer software that only provide updates or upgrades delivered via load and leave with respect to the software	X		Ohio Admin. Code 5703-9-59	
30330	Optional computer software maintenance contracts with respect to non-prewritten (custom) computer software that only provide updates or upgrades with respect to the software		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
30340	Optional computer software maintenance contracts with respect to non-prewritten (custom) computer software that only provide updates or upgrades delivered electronically with respect to the software		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
30350	Optional computer software maintenance contracts with respect to non-prewritten (custom) computer software that only provide updates or upgrades delivered via load and leave with respect to the software		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
30360	Optional computer software maintenance contracts with respect to non-prewritten (custom) computer software that only provide support services to the software		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
30370	Optional computer software maintenance contracts with respect to non-prewritten (custom) computer software that provide updates or upgrades and support services to the software		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
30380	Optional computer software maintenance contracts with respect to non-prewritten (custom) computer software that provide updates or upgrades delivered electronically and support services to the software		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
30390	Optional computer software maintenance contracts with respect to non-prewritten (custom) computer software provide updates or upgrades delivered via load and leave and support services to the software		X	R.C. 5739.01(B)(3)(e), Ohio Admin. Code 5703-9-46(A)(2)(c) and 5703-9-46(B)(1)	Custom system software for business use is a taxable computer service
Reference Number	**Indicate your state's tax treatment for optional computer software maintenance contracts with respect to prewritten computer software sold for one non-itemized price that include updates and upgrades and/or support services. Use percentages in the taxable and exempt columns to denote tax treatment in your state. For example: if all taxable put 100% in the taxable column; if all nontaxable/exempt put 100% in the exempt column; if 50% taxable and 50%**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**

	nontaxable/exempt put 50% in the taxable column and 50% in the exempt column.				
30400	Optional computer software maintenance contracts with respect to prewritten computer software that provide updates or upgrades and support services to the software	100%	0%	Ohio Admin. Code 5703-9-59	
30410	Optional computer software maintenance contracts with respect to prewritten computer software that provide updates and upgrades delivered electronically and support services to the software	100%	0%	Ohio Admin. Code 5703-9-59	
30420	Optional computer software maintenance contracts with respect to prewritten computer software that provide updates and upgrades delivered via load and leave and support services to the software	100%	0%	Ohio Admin. Code 5703-9-59	
30430	Optional computer software maintenance contracts with respect to prewritten computer software that only provide support services to the software	0%	100%	Ohio Admin. Code 5703-9-59	
Reference Number	**Digital products(excludes telecommunications services, ancillary services and computer software)**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
31000	A state imposing tax on products "transferred electronically" is not required to adopt definitions for specified digital products. ("Specified digital products" includes the defined terms: digital audio visual works; digital audio works; and digital books.) Does your state impose tax on products transferred electronically other than digital audio visual works, digital audio works, or digital books?		X	R.C. 5739.01(B)(3)(e) and (u)	Taxes "electronic information services" and "electronic publishing services" that provide access to computer equipment to obtain information if used in business
Reference Number	**For transactions other than those included above, a state must specifically impose and separately enumerate a broader imposition of the tax. Does your state impose tax on:**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
31065	Digital audio visual works sold to users other than the end user.		X		
31050	Digital audio visual works sold with rights of use less than permanent use...	X		R.C. 5739.01(B)(12), R.C. 5739.01(QQQ)	
31060	Digital audio visual works sold with rights of use conditioned on continued payment.	X		R.C. 5739.01(B)(12), R.C. 5739.01(QQQ)	
31095	Digital audio works sold to users other than the end user.		X		
31080	Digital audio works sold with rights of use less than permanent.	X		R.C. 5739.01(B)(12), R.C. 5739.01(QQQ)	
31090	Digital audio works sold with rights of use conditioned on continued payments.	X		R.C. 5739.01(B)(12), R.C. 5739.01(QQQ)	
31125	Digital books sold to users other than the end user.		X		
31110	Digital books sold with rights of use less than permanent.	X		R.C. 5739.01(B)(12), R.C. 5739.01(QQQ)	
31120	Digital books sold with rights of use conditioned on continued payments.	X		R.C. 5739.01(B)(12), R.C. 5739.01(QQQ)	
31121	Does your state treat subscriptions to products "transferred electronically" differently than a non-subscription purchase of such product?		X		
Reference Number	**Digital products(excludes telecommunications services, ancillary services and computer software)**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
31040	Digital audio visual works sold to an end user with rights for permanent use	X		R.C. 5739.01(B)(12), R.C. 5739.01(QQQ)	
				R.C. 5739.01(B)(12),	

31070	Digital audio works sold to an end user with rights for permanent use	X		R.C. 5739.01(QQQ)	
31100	Digital books sold to an end user with rights for permanent use	X		R.C. 5739.01(B)(12), R.C. 5739.01(QQQ)	
Reference Number	**Section 332.H. provides that states may have product based exemptions for specific items within specified digital products. ("Specified digital products" includes the defined terms: digital audio visual works; digital audio works; and digital books.) List product based exemptions for specific items included in specified digital products. Example: digital textbooks**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
32000	N/A				
Reference Number	**Food and food products**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
40010	Candy	X		Ohio Const. Article XII, § 3, and R.C. 5739.02(B)(2)	Food for consumption off the premises where sold is exempt
40020	Dietary Supplements	X		R.C. 5739.01(B)(1) and 5739.01(EEE)(1)	
40030	Food and food ingredients excluding alcoholic beverages and tobacco	X		Ohio Const. Article XII, § 3, and R.C. 5739.02(B)(2)	Food for consumption off the premises where sold is exempt
40040	Food sold through vending machines	X		Ohio Const. Article XII, § 3, and R.C. 5739.02(B)(2)	Food for consumption off the premises where sold is exempt
40050	Soft Drinks	X		R.C. 5739.01(EEE)(2)(c)	
40060	Bottled Water	X		Ohio Const. Article XII, § 3, and R.C. 5739.02(B)(2)	Food for consumption off the premises where sold is exempt
41000	Prepared Food	X		Ohio Const. Article XII, § 3, and R.C. 5739.02(B)(2)	Food for consumption off the premises where sold is exempt
Reference Number	**Prepared food options - The following food items heated, mixed or combined by the seller are included in the definition of prepared food unless a state elects to exclude them from the definition of prepared food. Such food items excluded from prepared food are taxed the same as food and food ingredients. (Indicate how the options for the following food items that otherwise meet the definition of prepared food are treated in your state.)**	**Included in Prepared Food**	**Excluded From Prepared Food**	**Statute/Rule Cite**	**Comment**
41010	Prepared food sold without eating utensils provided by the seller whose primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries)			N/A	
41020	Prepared food sold without eating utensils provided by the seller in an unheated state by weight or volume as a single item			N/A	
41025	Meat or seafood products that meet the definition of prepared food sold without eating utensils provided by the seller in an unheated state by weight or volume as a single item			N/A	
41030	Bakery items that meet the definition of prepared food sold without eating utensils provided by the seller, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, tortillas			N/A	
41040	Prepared food sold without eating utensils provided by the seller that ordinarily requires cooking (as opposed to just reheating) by the consumer prior to consumption			N/A	
Reference Number	**Health-care products Drugs (indicate how the options are treated in your state) Drugs**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**

	for human use				
51010	Drugs, other than over-the-counter drugs, for human use without a prescription	X		R.C. 5739.01(B)(1)	
51020	Drugs, other than over-the-counter drugs, for human use with a prescription		X	R.C. 5739.02(B)(18)	
51050	Insulin for human use without a prescription		X	R.C. 5739.02(B)(18)	
51060	Insulin for human use with a prescription		X	R.C. 5739.02(B)(18)	
51090	Medical oxygen for human use without a prescription	X		R.C. 5739.01(B)(1)	
51100	Medical oxygen for human use with a prescription		X	R.C. 5739.02(B)(18)	
51130	Over-the-counter drugs for human use without a prescription	X		R.C. 5739.01(B)(1); Information Release 2010-03	
51140	Over-the-counter drugs for human use with a prescription	X		R.C. 5739.01(B)(1)	
51170	Grooming and hygiene products for human use that don't meet the definition of "drug"	X		R.C. 5739.01(B)(1)	
51171	Grooming and hygiene products for human use that meet the definition of "drug" without a prescription	X		R.C. 5739.01(B)(1)	
51172	Grooming and hygiene products for human use that meet the definition of "drug" with a prescription	X		R.C. 5739.01(B)(1)	
51190	Over-the-counter drugs for human use to hospitals	X		R.C. 5739.01(B)(1)	
51195	Over-the-counter drugs for human use to other medical facilities	X		R.C. 5739.01(B)(1)	
51200	Prescription drugs for human use to hospitals		X	R.C. 5739.01(B)(18)	
51205	Prescription drugs for human use to other medical facilities		X	R.C. 5739.01(B)(18)	
51240	Free samples of drugs for human use	X		R.C. 5739.01(B)(1)	
51250	Free samples of prescription drugs for human use		X	R.C. 5739.01(B)(18) and 5741.02(C)(7)	
Reference Number	**Drugs for animal use**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
51030	Drugs, other than over-the-counter drugs, for animal use without a prescription	X		R.C. 5739.01(B)(1)	
51040	Drugs, other than over-the-counter drugs, for animal use with a prescription	X		R.C. 5739.01(B)(1)	
51070	Insulin for animal use without a prescription	X		R.C. 5739.01(B)(1)	
51080	Insulin for animal use with a prescription	X		R.C. 5739.01(B)(1)	
51110	Medical oxygen for animal use without a prescription	X		R.C. 5739.01(B)(1)	
51120	Medical oxygen for animal use with a prescription	X		R.C. 5739.01(B)(1)	
51150	Over-the-counter drugs for animal use without a prescription	X		R.C. 5739.01(B)(1)	
51160	Over-the-counter drugs for animal use with a prescription	X		R.C. 5739.01(B)(1)	
51180	Grooming and hygiene products for animal use	X		R.C. 5739.01(B)(1)	
51210	Over-the-counter drugs for animal use to veterinary hospitals and other animal medical facilities	X		R.C. 5739.01(B)(1)	

51220	Prescription drugs for animal use to veterinary hospitals and other animal medical facilities	X		R.C. 5739.01(B)(1)	
51260	Free samples of drugs for animal use	X		R.C. 5739.01(B)(1)	
51270	Free samples of prescription drugs for animal use	X		R.C. 5739.01(B)(1)	
Reference Number	**Durable medical equipment (indicate how the options are treated in your state)**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
52010	Durable medical equipment, not for home use, without a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52020	Durable medical equipment, not for home use, with a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52030	Durable medical equipment, not for home use, with a prescription paid for by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52040	Durable medical equipment, not for home use, with a prescription reimbursed by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52050	Durable medical equipment, not for home use, with a prescription paid for by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52060	Durable medical equipment, not for home use, with a prescription reimbursed by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52070	Durable medical equipment for home use without a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52080	Durable medical equipment for home use with a prescription		X	R.C. 5739.02(B)(19)	
52090	Durable medical equipment for home use with a prescription paid for by Medicare		X	R.C. 5739.02(B)(19)	
52100	Durable medical equipment for home use with a prescription reimbursed by Medicare		X	R.C. 5739.02(B)(19)	
52110	Durable medical equipment for home use with a prescription paid for by Medicaid		X	R.C. 5739.02(B)(19)	
52120	Durable medical equipment for home use with a prescription reimbursed by Medicaid		X	R.C. 5739.02(B)(19)	
52130	Oxygen delivery equipment, not for home use, without a prescription	X		R.C. 5739.02(B)(18).	Taxable unless it is medical oxygen-dispensing equipment purchased by hospitals, nursing homes, or other medical facilities
52140	Oxygen delivery equipment, not for home use, with a prescription	X		R.C. 5739.02(B)(18).	Taxable unless it is medical oxygen-dispensing equipment purchased by hospitals, nursing homes, or other medical facilities
52150	Oxygen delivery equipment, not for home use, with a prescription paid for by Medicare	X		R.C. 5739.02(B)(18).	Taxable unless it is medical oxygen-dispensing equipment purchased by hospitals, nursing homes, or other medical facilities
52160	Oxygen delivery equipment, not for home use, with a prescription reimbursed by Medicare	X		R.C. 5739.02(B)(18).	Taxable unless it is medical oxygen-dispensing equipment purchased by hospitals, nursing homes, or other medical facilities
	Oxygen delivery equipment, not for home use, with a prescription paid for				Taxable unless it is medical oxygen-dispensing equipment

52170	by Medicaid	X		R.C. 5739.02(B)(18).	purchased by hospitals, nursing homes, or other medical facilities
52180	Oxygen delivery equipment, not for home use, with a prescription reimbursed by Medicaid	X		R.C. 5739.02(B)(18).	Taxable unless it is medical oxygen-dispensing equipment purchased by hospitals, nursing homes, or other medical facilities
52190	Oxygen delivery equipment for home use without a prescription	X		R.C. 5739.01(B)(1)	
52200	Oxygen delivery equipment for home use with a prescription		X	R.C. 5739.02(B)(19)	
52210	Oxygen delivery equipment for home use with a prescription paid for by Medicare		X	R.C. 5739.02(B)(19)	
52220	Oxygen delivery equipment for home use with a prescription reimbursed by Medicare		X	R.C. 5739.02(B)(19)	
52230	Oxygen delivery equipment for home use with a prescription paid for by Medicaid		X	R.C. 5739.02(B)(19)	
52240	Oxygen delivery equipment for home use with a prescription reimbursed by Medicaid		X	R.C. 5739.02(B)(19)	
52250	Kidney dialysis equipment, not for home use, without a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52260	Kidney dialysis equipment, not for home use, with a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52270	Kidney dialysis equipment, not for home use, with a prescription paid for by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52280	Kidney dialysis equipment, not for home use, with a prescription reimbursed by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52290	Kidney dialysis equipment, not for home use, with a prescription paid for by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52300	Kidney dialysis equipment, not for home use, with a prescription reimbursed by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52310	Kidney dialysis equipment for home use without a prescription	X		R.C. 5739.01 (B)(1)	
52320	Kidney dialysis equipment for home use with a prescription		X	R.C. 5739.02(B)(19)	
52330	Kidney dialysis equipment for home use with a prescription paid for by Medicare		X	R.C. 5739.02(B)(19)	
52340	Kidney dialysis equipment for home use with a prescription reimbursed by Medicare		X	R.C. 5739.02(B)(19)	
52350	Kidney dialysis equipment for home use with a prescription paid for by Medicaid		X	R.C. 5739.02(B)(19)	
52360	Kidney dialysis equipment for home use with a prescription reimbursed by Medicaid		X	R.C. 5739.02(B)(19)	
52370	Enteral feeding systems, not for home use, without a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52380	Enteral feeding systems, not for home use, with a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52390	Enteral feeding systems, not for home use, with a prescription paid for by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52400	Enteral feeding systems, not for home use, with a prescription reimbursed by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	

52410	Enteral feeding systems, not for home use, with a prescription paid for by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52420	Enteral feeding systems, not for home use, with a prescription reimbursed by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52430	Enteral feeding systems for home use without a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
52440	Enteral feeding systems for home use with a prescription		X	R.C. 5739.02(B)(19)	
52450	Enteral feeding systems for home use with a prescription paid for by Medicare		X	R.C. 5739.02(B)(19)	
52460	Enteral feeding systems for home use with a prescription reimbursed by Medicare		X	R.C. 5739.02(B)(19)	
52470	Enteral feeding systems for home use with a prescription paid for by Medicaid		X	R.C. 5739.02(B)(19)	
52480	Enteral feeding systems for home use with a prescription reimbursed by Medicaid		X	R.C. 5739.02(B)(19)	
52490	Repair and replacement parts for durable medical equipment which are for single patient use		X		Only if the durable medical equipment itself is exempt
Reference Number	**Mobility enhancing equipment (indicate how the options are treated in your state)**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
53010	Mobility enhancing equipment without a prescription	X		R.C. 5739.01(B)(1)	
53020	Mobility enhancing equipment with a prescription		X	R.C. 5739.02(B)(19)	
53030	Mobility enhancing equipment with a prescription paid for by Medicare		X	R.C. 5739.02(B)(19)	
53040	Mobility enhancing equipment with a prescription reimbursed by Medicare		X	R.C. 5739.02(B)(19)	
53050	Mobility enhancing equipment with a prescription paid for by Medicaid		X	R.C. 5739.02(B)(19)	
53060	Mobility enhancing equipment with a prescription reimbursed by Medicaid		X	R.C. 5739.02(B)(19)	
Reference Number	**Prosthetic devices (indicate how the options are treated in your state)**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
54010	Prosthetic devices without a prescription	X		R.C. 5739.01(B)(1)	
54020	Prosthetic devices with a prescription		X	R.C. 5739.02(B)(19)	
54030	Prosthetic devices with a prescription paid for by Medicare		X	R.C. 5739.02(B)(19)	
54040	Prosthetic devices with a prescription reimbursed by Medicare		X	R.C. 5739.02(B)(19)	
54050	Prosthetic devices with a prescription paid for by Medicaid		X	R.C. 5739.02(B)(19)	
54060	Prosthetic devices with a prescription reimbursed by Medicaid		X	R.C. 5739.02(B)(19)	
54070	Corrective eyeglasses without a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54080	Corrective eyeglasses with a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54090	Corrective eyeglasses with a prescription paid for by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54100	Corrective eyeglasses with a prescription reimbursed by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54110	Corrective eyeglasses with a prescription paid for by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19),	

				R.C. 5739.01(JJJ)	
54120	Corrective eyeglasses with a prescription reimbursed by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54130	Contact lenses without a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54140	Contact lenses with a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54150	Contact lenses with a prescription paid for by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54160	Contact lenses with a prescription reimbursed by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54170	Contact lenses with a prescription paid for by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54180	Contact lenses with a prescription reimbursed by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54190	Hearing aids without a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19)	
54200	Hearing aids with a prescription		X	R.C. 5739.02(B)(19)	
54210	Hearing aids with a prescription paid for by Medicare		X	R.C. 5739.02(B)(19)	
54220	Hearing aids with a prescription reimbursed by Medicare		X	R.C. 5739.02(B)(19)	
54230	Hearing aids with a prescription paid for by Medicaid		X	R.C. 5739.02(B)(19)	
54240	Hearing aids with a prescription reimbursed by Medicaid.		X	R.C. 5739.02(B)(19)	
54250	Dental prosthesis without a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54260	Dental prosthesis with a prescription	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54270	Dental prosthesis with a prescription paid for by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54280	Dental prosthesis with a prescription reimbursed by Medicare	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54290	Dental prosthesis with a prescription paid for by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
54300	Dental prosthesis with a prescription reimbursed by Medicaid	X		R.C. 5739.01(B)(1), R.C. 5739.02(B)(19), R.C. 5739.01(JJJ)	
Reference Number	**Telecommunications & related products**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
60010	Ancillary Services	X		R.C. 5739.01(B)(3)(f)	
60020	Conference bridging service	X		R.C. 5739.01(B)(3)(f)	
60030	Detailed telecommunications billing service	X		R.C. 5739.01(B)(3)(f)	
60040	Directory assistance	X		R.C. 5739.01(B)(3)(f)	
60050	Vertical service	X		R.C. 5739.01(B)(3)(f)	
60060	Voice mail service	X		R.C. 5739.01(B)(3)(f)	
Reference Number	**Telecommunications (Indicate how the options are treated in your state)**	**Taxable**	**Exempt**	**Statute/Rule Cite**	**Comment**
61000	Intrastate Telecommunications Service	X		R.C. 5739.01(B)(3)(f)	

61010	Interstate Telecommunications Service	X		R.C. 5739.01(B)(3)(f)	
61020	International Telecommunications Service	X		R.C. 5739.01(B)(3)(f)	
61030	International 800 service	X		R.C. 5739.01(B)(3)(f)	
61040	International 900 service		X	R.C. 5739.02(B)(46)	
61050	International fixed wireless service	X		R.C. 5739.01(B)(3)(f)	
61060	International mobile wireless service	X		R.C. 5739.01(B)(3)(f)	
61080	International prepaid calling service	X		R.C. 5739.01(B)(3)(f)	
61090	International prepaid wireless calling service	X		R.C. 5739.01(B)(3)(f)	
61100	International private communications service	X		R.C. 5739.01(B)(3)(f)	
61110	International value-added non-voice data service		X	R.C. 5739.02(B)(47)	
61120	International residential telecommunications service	X		R.C. 5739.01(B)(3)(f)	
61130	Interstate 800 service	X		R.C. 5739.01(B)(3)(f)	
61140	Interstate 900 service		X	R.C. 5739.02(B)(46)	
61150	Interstate fixed wireless service	X		R.C. 5739.01(B)(3)(f)	
61160	Interstate mobile wireless service	X		R.C. 5739.01(B)(3)(f)	
61180	Interstate prepaid calling service	X		R.C. 5739.01(B)(3)(f)	
61190	Interstate prepaid wireless calling service	X		R.C. 5739.01(B)(3)(f)	
61200	Interstate private communications service	X		R.C. 5739.01(B)(3)(f)	
61210	Interstate value-added non-voice data service		X	R.C. 5739.02(B)(47)	
61220	Interstate residential telecommunications service	X		R.C. 5739.01(B)(3)(f)	
61230	Intrastate 800 service	X		R.C. 5739.01(B)(3)(f)	
61240	Intrastate 900 service		X	R.C. 5739.02(B)(46)	
61250	Intrastate fixed wireless service	X		R.C. 5739.01(B)(3)(f)	
61260	Intrastate mobile wireless service	X		R.C. 5739.01(B)(3)(f)	
61280	Intrastate prepaid calling service	X		R.C. 5739.01(B)(3)(f)	
61290	Intrastate prepaid wireless calling service	X		R.C. 5739.01(B)(3)(f)	
61300	Intrastate private communications service	X		R.C. 5739.01(B)(3)(f)	
61310	Intrastate value-added non-voice data service		X	R.C. 5739.02(B)(47)	
61320	Intrastate residential telecommunications service	X		R.C. 5739.01(B)(3)(f)	
61325	Paging service	X		R.C. 5739.01(B)(3)(f)	
61330	Coin-operated telephone service		X	R.C. 5739.01(B)(3)(f)	
61340	Pay telephone service	X		R.C. 5739.01(B)(3)(f)	
61350	N/A				

D. Tax Administration Practices on Vouchers from Appendix E		Does Your State Follow this Practice?		Add Additional Comments if Desired. If You Answered No, Describe the Difference Between the Practice as Adopted by the Governing Board and Your State's Treatment	
Reference Number	**Disclosed Practice 1 - Vouchers**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
					Assuming the voucher is for taxable tangible

Vouchers 1.1	The member state administers the difference between the value of a voucher allowed by the seller and the amount the purchaser paid for the voucher as a discount that is not included in the sales price (i.e., same treatment as a seller's in-store coupon), provided the seller is not reimbursed by a third party, in money or otherwise, for some or all of that difference.		X		personal property or a taxable service, the full value of the voucher is subject to sales tax. For example, a purchaser pays $50 for a voucher that allows the purchaser to obtain $100 worth of taxable tangible personal property. The seller must charge sales tax on $100.
Vouchers 1.2	The member state provides that when the discount on a voucher will be fully reimbursed by a third party the seller is to use the face value of the voucher (i.e., same as the treatment of a manufacturer's coupon) and not the price paid by the purchaser as the measure (sales price) that is subject to tax.	X			
Vouchers 1.3	The member state provides that costs and expenses of the seller are not deductible from the sales price and are included in the measure (sales price) that is subject to tax. Further, reductions in the amount of consideration received by the seller from the third party that issued, marketed, or distributed the vouchers, such as advertising or marketing expenses, are costs or expenses of the seller.	X			
D. Tax Administration Practices on Credits from Appendix E		**For each section, place an "X" in the Yes column for the Practice your State follows. Place an "X" in the No column if the practice does not apply in your State.**		**For sections with only No responses, describe your State's tax treatment. Additional comments may be added for any response.**	
Reference Number	**Disclosed Practice 2 - Credits**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Definition	"Tax Paid" means the tax that was (1) paid and (2) previously due from either the seller or the purchaser when the sale of that product is taxable in that state and it was properly sourced based on that state's sourcing rules. "Tax paid" includes tax that was (1) paid and (2) previously due from the purchaser (or seller, if applicable) because the purchaser moved the product to a different jurisdiction. "Tax paid" does not include the portion of tax paid that is currently eligible for a credit or refund or tax paid that is eligible for refund under a tax-incentive program or agreement.				
Reference Number	**2.1 Credit Against Use Tax**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.1	The State imposing tax on the purchaser provides credit for "sales or use taxes paid" on a product against the State's use tax.	X		R.C. 5741.02(C)(5)	
Reference Number	**2.2 Credit Against Sales Tax**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.2	The State imposing tax provides credit for the "sales or use taxes paid" on a product against the State's sales tax.		X	R.C. 5741.02(C)(5)	
Reference Number	**2.3 Reciprocity**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.3.a	The credit the State provides in 2.1 and 2.2 applies regardless of whether another state provides a reciprocal credit.	X		R.C. 5741.02(C)(5)	
Credits 2.3.b.	The credit the State provides in 2.1 and 2.2 only applies when the other state where the tax was paid provides a reciprocal credit.		X	R.C. 5741.02(C)(5)	
Reference Number	**2.4 State and Local Sales and Use "Tax Paid"**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**

Credits 2.4.a.	The credit provided for in 2.1 and 2.2 is for the **combined** amount of state and local "tax paid" to another state or local jurisdiction against both the state and local taxes due to the State.	X		R.C. 5741.02(C)(5)	
Credits 2.4.b.	The credit provided for in 2.1 and 2.2 is for **only** the state "tax paid" to another state against the taxes due to the State (i.e., no credit for local tax against state tax). If the State has local sales or use taxes, it only provides credit for state tax against state tax and local tax against local tax.		X	R.C. 5741.02(C)(5)	
Reference Number	**2.5 Credit for "Similar Tax" Paid to Another Jurisdiction**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.5	The credit provided for in 2.1 and 2.2 includes "similar taxes" that were (1) paid and (2) previously due to another state or local jurisdiction against the sales or use taxes due. If applicable, list below all known similar or like taxes the State provides credit for even if such tax does not meet the definition of a "similar tax."	X		R.C. 5741.02(C)(5)	Similar tax must be "based upon the sale, purchase, or use of tangible personal property or services rendered legally, levied by and paid to another state or political subdivision thereof, or to the District of Columbia, where the payment of such tax does not entitle the taxpayer to any refund or credit for such payment."
Credits 2.5					
Reference Number	**2.6. Credit Against "Similar Tax" Imposed by the State**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.6	The credit provided for in 2.1 and 2.2 includes "sales or use taxes paid" to another state or local jurisdiction against "similar taxes" due. If applicable, list below "similar taxes" imposed that the State provides credits against.		X		Ohio does not impose any similar taxes.
Credits 2.6					
Reference Number	**2.7 Sourcing when Receipt Location is Known**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.7	The credit provided for in 2.1 and 2.2 applies when the other state's "sales or use taxes" were (1) paid and (2) previously due based on: i) that other state's sourcing rules, or ii) the purchaser's location of use of a product subsequent to the initial sale.	X		R.C. 5741.02(C)(5)	
Reference Number	**2.8 Sourcing when Receipt Location is Unknown**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.8	Except as provided in Credits 2.13, the credit provided for in 2.1 and 2.2 applies when the seller sources the initial sale pursuant to the SSUTA Sections 310.A.3, 310.A.4, or 310.A.5, because the location where the product was received by the purchaser was unknown to the seller.	X		R.C. 5741.02(C)(5)	
Reference Number	**2.9 Characterization of Sale**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.9	The credit provided for in 2.1 and 2.2 applies regardless of the other state's characterization of the product as tangible personal property, a service, digital good, or product delivered electronically.	X		R.C. 5741.02(C)(5)	
Reference Number	**2.10 Sales Price Components**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.10.a.	2.10.a. Full Credit Allowed - The credit provided for in 2.1 and 2.2 applies to all components of the SSUTA "sales price" definition, whether taxable or nontaxable in the State.		X	R.C. 5741.02(C)(5)	

Credits 2.10.b.	2.10.b. Partial Credit Allowed - When taxable and non-taxable charges are itemized on the invoice, the credit provided for in 2.1 and 2.2 is only for the "tax paid" on the taxable components of the sales price in the State.	X		R.C. 5741.02(C)(5)	
Reference Number	**2.11 Transactions with Taxable and Exempt Products**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.11.a.	2.11.a. Full Credit Allowed - The credit provided for in 2.1 and 2.2 applies to the full amount of "tax paid" on a transaction consisting of taxable and exempt products.		X	R.C. 5741.02(C)(5)	
Credits 2.11.b.	2.11.b. Partial Credit Allowed - When taxable and non-taxable products are itemized on the invoice the credit provided for in 2.1 and 2.2 is only for the "tax paid" on the taxable products of a transaction in the State.	X		R.C. 5741.02(C)(5)	
Reference Number	**2.12 Audit Sampling**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.12	The credit provided for in 2.1 and 2.2 applies when the sale or purchase of the product was part of the population sampled pursuant to an audit sampling method.	X		R.C. 5741.02(C)(5)	
Reference Number	**2.13 Direct Mail**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.13	The credit provided for in 2.1 and 2.2 applies when the seller sources the sale of Advertising and Promotional Direct Mail pursuant to Section 313.A.4.	X		R.C. 5741.02(C)(5)	
Reference Number	**2.14 Accelerated Payments on Lease/Rentals**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.14	The credit provided for in 2.1 and 2.2 includes the "tax paid" to another state or local jurisdiction on a lease/rental transaction based on the sum of the lease payments ("accelerated basis"), against the "sales or use taxes" due on the balance of the lease/rental payments.	X		R.C. 5741.02(C)(5)	Information Release ST 2003-08, Leases and Rentals and question 20 on attached letter.
Reference Number	**2.15 Inception-Deferred Collection on Lease/Rentals**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.15	The credit provided for in 2.1 and 2.2 includes the "tax paid" to another state or local jurisdiction on a lease/rental transaction based on a deferred collection/remittance method against the "sales or use taxes" due on the balance of the lease/rental payments.		X	R.C. 5741.02(C)(5)	
Reference Number	**2.16 Lessor Acquisition**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
Credits 2.16	The credit provided for in 2.1 and 2.2 includes the "tax paid" by the lessor to another state or local jurisdiction on the acquisition of the product against the "sales or use taxes" due on the balance of the lease/rental payments provided the tax reimbursement is documented and disclosed to the lessee.		X	R.C. 5741.02(C)(5)	
D. Tax Administration Practices on Liability Relief from Appendix E **(Note: These tax administration practices address whether a member state provides liability relief although the state is only required to provide relief "to the extent possible," as specified in sections 328(C) and (D) of the Agreement.)**		**Does Your State Follow this Practice?**		**Add Additional Comments if Desired. If You Answered No, Describe the Difference Between the Practice as Adopted by the Governing Board and Your State's Treatment**	
Reference Number	**Disclosed Practice 3 – Liability Relief**	**Yes**	**No**	**Statute/Rule Cite**	**Comment**
	Disclosed Practice 3.1 - Liability relief for erroneous information in the tax administration practices section of the taxability matrix	**If you answer "Yes" to 3.1, you do not need to complete 3.1.a, b, and c below.**	**If you answer "No" to 3.1, please complete 3.1.a, b, and c below.**		

Liability Relief 3.1	The State provides sellers and CSPs with liability relief for tax, interest and penalties if the sellers and CSPs charged and collected the incorrect tax due to erroneous information in the tax administration practices section of the taxability matrix.		X	O.A.C. 5703-9-54 & R.C. 5703.05	
Liability Relief 3.1.a.	Liability Relief for Tax	X		O.A.C. 5703-9-54 & R.C. 5703.05	
Liability Relief 3.1.b.	Liability Relief for Interest		X	R.C. 5739.12, R.C.5739.133, R.C. 5741.14	The tax commissioner does not have any specified authority to abate (remit) interest, but if the liability is reduced to $0, the interest would be adjusted accordingly.
Liability Relief 3.1.c.	Liability Relief for Penalties	X		O.A.C. 5703-9-54, R.C. 5703.05, R.C. 5739.12(D), R.C. 5739.133, & R.C. 5741.14	Penalties are discretionary.
	Disclosed Practice 3.2 - Extended liability relief for changes to the tax administration practices section of the taxability matrix	**If you answer "Yes" to 3.2, you do not need to complete 3.2.a, b, and c below.**	**If you answer "No" to 3.2, please complete 3.2.a, b, and c below.**		
Liability Relief 3.2	When the State makes a change to its tax administration practice section of the taxability matrix, the State provides sellers and CSPs with liability relief for the tax, interest and penalties for having charged and collected the incorrect tax until the first day of the calendar month that is at least 30 days after notice of the change to the state's tax administration practices section of the taxability matrix is submitted to the governing board, provided the seller or CSP relied on the prior version of the taxability matrix.		X	O.A.C. 5703-9-54 & R.C. 5703.05	
Liability Relief 3.2.a.	Liability Relief for Tax	X		O.A.C. 5703-9-54 & R.C. 5703.05	
Liability Relief 3.2.b.	Liability Relief for Interest		X	R.C. 5739.12, R.C. 5739.133 & R.C. 5741.14	The tax commissioner does not have any specified authority to abate (remit) interest, but if the liability is reduced to $0, the interest would be adjusted accordingly.
Liability Relief 3.2.c.	Liability Relief for Penalties	X		O.A.C. 5703-9-54, R.C. 5703.05, R.C. 5739.12(D), R.C. 5739.133, & R.C. 5741.14	Penalties are discretionary.
	Disclosed Practice 3 .3 Extended liability relief for changes to the library of definitions section of the taxability matrix	**If you answer "Yes" to 3.3, you do not need to complete 3.3.a, b, and c below.**	**If you answer "No" to 3.3, please complete 3.3.a, b, and c below.**		
Liability Relief 3.3	When the State makes a change to the library of definitions section of its taxability matrix, the State provides sellers and CSPs with liability relief for the tax, interest and penalties for having charged and collected the incorrect tax until the first day of the calendar month that is at least 30 days after notice of the change to the member state's library of definitions section of the taxability matrix is submitted to the governing board, provided the seller or CSP relied on the prior version of the taxability matrix.		X	O.A.C. 5703-9-54 & R.C. 5703.05	
Liability Relief 3.3.a.	Liability Relief for Tax	X		O.A.C. 5703-9-54 & R.C. 5703.05	
					The tax commissioner does not have any

Liability Relief 3.3.b.	Liability Relief for Interest		X	R.C. 5739.12, R.C. 5739.133 & R.C. 5741.14	specified authority to abate (remit) interest, but if the liability is reduced to $0, the interest would be adjusted accordingly.
Liability Relief 3.3.c.	Liability Relief for Penalties	X		O.A.C. 5703-9-54, R.C. 5703.05, R.C. 5739.12(D), R.C. 5739.133, & R.C. 5741.14	Penalties are discretionary.

Tax Professionals

Annual Certified Interest Rates

By Oct. 15 of each year, the Ohio Tax Commissioner certifies the interest rates that will apply to overdue taxes during the next calendar year. For most taxes, the interest rate is calculated by adding three percentage points to the federal short-term rate (rounded to the nearest percentage point) that was in effect during July of the current year.

Based on this formula, the Tax Commissioner has certified that the interest rate that will apply to most overdue taxes will be 4 percent. A table of interest rates that apply to previous years may be found below.

Since July 1, 2005, a different rate of interest has applied to overdue estate taxes and tangible personal property taxes. This rate is calculated by simply rounding the federal short term rate to the nearest percentage point. Accordingly, the interest rate on overdue tangible personal property and estate taxes will be 1 percent. See Table 2 for the rate in effect in previous years.

An example of how to calculate interest using these tables is also listed below, as well as copies of recent journal entries certifying these rates.

Table 1 - Certified interest rates for most taxes

Calendar Year	Annual Rate	Monthly Accrual
2017*	4.0%	0.33%
2016*	3.0%	0.25%
2015*	3.0%	0.25%
2014*	3.0%	0.25%
2013*	3.0%	0.25%
2012*	3.0%	0.25%
2011*	4.0%	0.33%
2010*	4.0%	0.33%
2009*	5.0%	0.42%
2008*	8.0%	0.67%
2007*	8.0%	0.67%
2006*	6.0%	0.50%
2005*	5.0%	0.42%
2004	4.0%	0.33%
2003	6.0%	0.50%
2002	7.0%	0.58%
2001	9.0%	0.75%
2000	8.0%	0.67%
1999	8.0%	0.67%
1998	9.0%	0.75%
1997	9.0%	0.75%
1996	9.0%	0.75%
1995	9.0%	0.75%
1994	7.0%	0.58%
1993	7.0%	0.58%
1992	10.0%	0.83%

1991	11.0%	0.92%
1990	11.0%	0.92%
1989	11.0%	0.92%
1988	10.0%	0.83%
1987	6.0%	0.50%
1986	8.0%	0.67%
1985	9.0%	0.75%
1984	9.0%	0.75%
1983	10.0%	0.83%

*See Table 2 for estate tax and tangible personal property tax interest rates.

Table 2: Interest rate for estate tax and tangible personal property tax

	Annual Rate	Monthly Accrual
Calendar Year 2017	1.0%	0.08%
Calendar Year 2016	0.0%	0.0%
Calendar Year 2015	0.0%	0.0%
Calendar Year 2014	0.0%	0.0%
Calendar Year 2013	0.0%	0.0%
Calendar Year 2012	0.0%	0.0%
Calendar Year 2011	1.0%	0.08%
Calendar Year 2010	1.0%	0.08%
Calendar Year 2009	2.0%	0.17%
Calendar Year 2008	5.0%	0.42%
Calendar Year 2007	5.0%	0.42%
Calendar Year 2006	3.0%	0.25%
July - December 2005	2.0%	0.17%
January - June 2005	5.0%	0.42%

Journal Entries:

- Interest Rate Certification for Calendar Year 2017(PDF)
- Interest Rate Certification for Calendar Year 2016(PDF)
- Interest Rate Certification for Calendar Year 2015(PDF)
- Interest Rate Certification for Calendar Year 2014(PDF)
- Interest Rate Certification for Calendar Year 2013(PDF)
- Interest Rate Certification for Calendar Year 2012(PDF)
- Interest Rate Certification for Calendar Year 2011(PDF)
- Interest Rate Certification for Calendar Year 2010(PDF)
- Interest Rate Certification for Calendar Year 2009(PDF)
- Interest Rate Certification for Calendar Year 2008(PDF)
- Interest Rate Certification for Calendar Year 2007(PDF)
- Interest Rate Certification for Calendar Year 2006(PDF)
- Interest Rate Certification for Calendar Year 2005(PDF)
- Interest Rate Certification for Calendar Year 2004(PDF)

Interest Rate Formula

Tax due x interest rate x number of days late ÷ number of days in year = Interest

Example: 2012 IT-1040 filed June 21, 2014 with a tax due of $60.00 (return was due April 15, 2013)

$60.00 x 3% x 260 days ÷ 365 = $1.28 (April 16 - December 31, 2013)

$60.00 x 3% x 172 days ÷ 365= $0.85 (January 1 - June 21, 2014)

Total Interest = $2.13

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Epic Aviation, L.L.C. v. Testa,* Slip Opinion No. 2016-Ohio-3392.]

SLIP OPINION NO. 2016-OHIO-3392

EPIC AVIATION, L.L.C., APPELLANT, *v.* TESTA, TAX COMMR., APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Epic Aviation, L.L.C. v. Testa,* Slip Opinion No. 2016-Ohio-3392.]

Sales and use tax—R.C. 5739.02(B)(42)(a) and 5739.01(P)—Tax exemption for purchases used directly in the rendition of a public-utility service—Refund sought for sales tax paid on purchases of jet fuel by air-cargo carrier—Common-carrier test for exemption developed by case law—Purchases of fungibles are apportionable when used for both exempt and nonexempt purposes—Decision of Board of Tax Appeals vacated and cause remanded to tax commissioner for additional proceedings.

(No. 2014-1691—Submitted January 5, 2016—Decided June 15, 2016.)

APPEAL from the Board of Tax Appeals, No. 2012-1557.

PFEIFER, J.

{¶ 1} In this case, the tax commissioner, appellee, denied a claim for refund of sales tax brought by appellant, Epic Aviation, L.L.C. ("Epic"), a vendor of jet fuel, on behalf of its consumer, AirNet Systems, Inc. ("AirNet"), and the Board of Tax Appeals ("BTA") affirmed. Epic argues that AirNet purchased the jet fuel intending to use the fuel "directly in the rendition of a public utility service" under R.C. 5739.02(B)(42)(a) and that the purchases are therefore exempt from sales tax. AirNet does not hold a certificate of public convenience and necessity from the federal government, and the tax commissioner denied the exemption on the primary ground that AirNet's business was not sufficiently regulated to qualify as a "public utility service."

{¶ 2} Epic contends that the tax commissioner and the BTA placed too much emphasis on the lack of the certificate by essentially concluding that the certificate is a prerequisite to public-utility-service status. We agree with Epic. That portion of AirNet's business that consisted of providing regular package-delivery service at a reasonable and nondiscriminatory price according to preannounced schedules qualifies as "common carrier" service under our precedents and therefore as a "public utility service" under R.C. 5739.02(B)(42)(a) that is exempt from the sales tax. Accordingly, we vacate the BTA's decision and remand this cause to the tax commissioner with instructions that the tax commissioner allow evidence to be submitted to establish the portion of the fuel purchases pertaining to the common-carrier service.

I. The Statutes at Issue

{¶ 3} Unless an exemption applies, jet fuel is taxable under the sales-tax law as tangible personal property transferred for consideration, R.C. 5739.01(B)(1), and under the use-tax law as tangible personal property subject to being used in the state, R.C. 5741.02(A)(1). In this case, Epic sold jet fuel to AirNet, collected sales tax on it, and remitted the tax to the state. Epic, as the vendor, brought a refund

claim, but the claim is on behalf of AirNet, and it is AirNet's operations that govern whether the exemption Epic seeks applies.

{¶ 4} R.C. 5739.02(B) states that the sales tax "does not apply to":

> (42) Sales where the purpose of the purchaser is to do any of the following:
>
> (a) * * * use or consume the thing transferred * * * directly in the rendition of a public utility service * * *.

{¶ 5} R.C. 5739.01(P) states that " '[u]sed directly in the rendition of a public utility service' means * * * fuel or power used in the production, transmission, transportation, or distribution system." R.C. 5739.01(P) concludes by stating, "In this definition, 'public utility' includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under 49 U.S.C. 41102." This final sentence of R.C. 5739.01(P) was added to the statute in 2006. Am.Sub.H.B. No. 699, 151 Ohio Laws, Part V, 8537.

II. Background

{¶ 6} Epic seeks a $1,727,790.27 refund of sales tax paid by AirNet on its purchases of jet fuel from Epic during the time period of January 1, 2006, through April 30, 2009. To support its claim, Epic provided a spreadsheet referencing invoice numbers and showing the dates and sale prices of fuel purchased, along with the tax amounts. Epic also submitted a "spaghetti map" showing AirNet's hub-and-spoke system of flights and a copy of the schedule of AirNet's regularly scheduled cargo service, showing take-off times at departure airports and landing times at destination points.

{¶ 7} At the BTA hearing, AirNet's vice president of operations, Thomas Schaner, testified that AirNet's operations are based on a "super expedited" air-cargo-delivery system using the hub-and-spoke model, which was reflected on the

"spaghetti map" showing "all the connections where we have aircraft flying from airport to airport." He stated, "Anybody could * * * find our Web site, and they could book a shipment," after which "we would dispatch a courier, and we go pick up a shipment, bring it to the airport, put it on the airplane, get it out there, and then we would take it to the end point and then we would have couriers on the other end that would deliver the shipment."

{¶ 8} AirNet's delivery services are comprised of two primary segments—bank services and express services. The former include the immediate delivery of canceled checks, which has long been a core part of AirNet's business. Express services (described by Schaner as "everything that wasn't bank" service) include transporting time-sensitive radiopharmaceuticals (pharmaceuticals used in medical imaging and treatment that must often be used within hours of creation, before they break down), human tissue and organs for transplant, and blood for the American Red Cross. Schaner testified that AirNet received special approval and encouragement from the federal government after the terrorist attacks of September 11, 2001, to permit it to have access to air space to transport checks to maintain the operation of the country's banking system. AirNet also played a vital role in transporting emergency blood supplies immediately after those attacks.

A. AirNet's FAA certification is under Part 135 of Title 14 of the Code of Federal Regulations

{¶ 9} Kent Jackson, an active pilot and aviation lawyer and the author of a number of books explaining federal aviation regulations and other aviation-law matters, was qualified as an expert at the BTA hearing and testified on behalf of Epic. Jackson testified that the federal government's regulation of the aviation industry in this country can be generally divided into two broad categories: (1) economic regulation, which is administered by the United States Department of Transportation ("DOT"), through the Office of the Secretary of Transportation, as the successor to the former Civil Aeronautics Board and (2) safety regulation,

which is administered by the Federal Aviation Administration ("FAA"), an agency of the DOT. He stated that obtaining a certificate of public convenience and necessity from the DOT is usually associated with obtaining safety certification under Part 121 of Title 14 of the Code of Federal Regulations ("Part 121") and that Part 298 of Title 14 of the Code of Federal Regulations ("Part 298") provides an exemption from the need for the certificate. As an "air taxi operator," 14 C.F.R. 298.3, AirNet was not required to obtain a certificate of public convenience and necessity.

{¶ 10} Exemption from the requirement of a certificate of public convenience and necessity is associated with safety regulation occurring under Part 135 of Title 14 of the Code of Federal Regulations ("Part 135") rather than under Part 121. Pursuant to its status as an "air taxi operator" under Part 298, AirNet operates as a Part 135 carrier. Part 135 regulations, like Part 121 regulations, impose numerous safety requirements, including limits on how long a pilot can be at the controls. In some respects, safety regulation under Part 135 involves more direct agency oversight than regulation under Part 121, because compliance measures for Part 121 regulations are often performed by the air carrier's own employees, as designated by the FAA.

{¶ 11} To obtain a certificate of public convenience and necessity, an applicant must prove its financial viability. Jackson (admittedly oversimplifying) testified that Part 121 regulation is "for Boeings"—i.e., for larger aircraft and passenger service—and that passenger airlines typically obtain the certificate and fall under the Part 121 regulations. Jackson testified that AirNet probably could not obtain such a certificate even if it applied, because the certificate of public convenience and necessity is not required for the cargo-transport services that AirNet provides and is not appropriate for the types of aircraft that AirNet uses.

{¶ 12} Jackson testified that at one time, economic aspects of airline-passenger service were heavily regulated as to matters such as routes flown and

rates charged. Pursuant to federal deregulation legislation that was fully phased in by 1985, this type of economic regulation was substantially relaxed. By contrast, according to Jackson, "[t]he FAA and the DOT simply don't care if you create a schedule for cargo. They don't regulate that. They never have." But Jackson testified that the air-carrier certificate issued by the FAA nonetheless authorizes "common carrier" service by a cargo-service provider such as AirNet, and that means that "you earn the right to hold out to the public" that you are willing to furnish air-carrier services, "and part of the responsibility of earning that right is the responsibility to do so."

{¶ 13} The record contains AirNet's air-carrier certificate, which expressly authorizes AirNet "to operate as an air carrier and conduct common carriage operations" in accordance with applicable laws and regulations. AirNet's vice president testified that as a common carrier, AirNet must accept packages tendered to it that AirNet has legal authorization to carry and that it operates "without discrimination or any kind of preferential treatment."

B. The tax commissioner's determination

{¶ 14} The tax commissioner determined that AirNet's purchases of jet fuel did not qualify for exemption. The tax commissioner, relying on *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420, found that AirNet's lack of a certificate of public convenience and necessity, along with other similarities to the carrier seeking the exemption in that case, were critical reasons supporting the denial of the exemption. Although Epic attempted to distinguish AirNet from Castle Aviation by pointing to AirNet's regularly scheduled cargo-delivery services, the tax commissioner rejected the point by referring to an FAA order that defines the phrase "scheduled operations" in terms of an operator's provision of passenger services; under the FAA order, an all-cargo operation—such as AirNet—is defined as a "nonscheduled operation." On this basis, the tax commissioner concluded that AirNet's de facto scheduled service was not a factor

indicating that it had provided a public-utility service. Although the tax commissioner argues before this court that holding a certificate of public convenience and necessity is a statutory prerequisite for exemption, the tax commissioner never specifically stated that view in his determination.

C. The BTA's decision

{¶ 15} The BTA affirmed the denial of the exemption. Although it recognized that R.C. 5739.01(P) does not make a certificate of public convenience and necessity a prerequisite for AirNet to qualify as a provider of a public-utility service, the BTA nonetheless found that *Castle Aviation*, which was decided before the General Assembly amended R.C. 5739.01(P) by adding the final sentence, essentially controls the present case. The BTA found that "AirNet is not subject to the great degree of 'special regulation and control' " that must exist for it to be a public utility under the analysis in *Castle Aviation*. BTA No. 2012-1557, 2014 WL 5406457, *4 (Sept. 3, 2014), quoting *Castle Aviation*, 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420, at ¶ 27. The BTA devoted little attention to Epic's argument that AirNet was a common carrier in a manner different from the charter service whose attempt to obtain exemption in *Castle Aviation* was denied.

III. Analysis

A. R.C. 5739.01(P) does not condition the exemption on the holding of a certificate of public convenience and necessity

1. The plain language of R.C. 5739.01(P) does not make the certificate a necessary condition for exemption

{¶ 16} The tax commissioner asserts in his brief to this court (as he did before the BTA) that the holding of a certificate of public convenience and necessity is a prerequisite to public-utility-service exemption from the sales tax. To the extent that that position is based on the wording of the statute, it is clearly unfounded. The plain language of R.C. 5739.01(P) now "includes" the holder of such a certificate among those who qualify for exemption—it does not purport to

exclude those who do not hold a certificate. Epic asserts that the language of the statute makes the holding of a certificate a sufficient condition for exemption, meaning that passenger airlines and cargo carriers that are regulated under Part 121 and hold a certificate will routinely qualify as rendering a "public utility service" under Ohio sales-tax law. We agree with Epic and reject the tax commissioner's view that R.C. 5739.01(P) makes the holding of the certificate a *necessary* condition for the exemption, a position that is inconsistent with the wording of R.C. 5739.01(P) and our precedents.

2. Castle Aviation *should not be construed to broadly preclude application of the exemption to air carriers*

{¶ 17} There is a second element to the tax commissioner's argument that holding a certificate of public convenience and necessity is a required condition for an air carrier to qualify for the public-utility-service exemption: the scope of our decision in *Castle Aviation*, 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420. In *Castle Aviation*, the claimant was admittedly an air-charter service, but it nonetheless claimed entitlement to the public-utility-service exemption on the grounds that broad-based federal airline deregulation had erased the regulatory distinctions that previously justified denying the exemption to charter services. *See Castle Aviation, Inc. v. Zaino*, BTA No. 2003-M-146, 2005 WL 176679, *8 (Jan. 14, 2005), in which the BTA stated that "Castle argues that * * * the regulations placed upon Part 121 carriers such as Federal Express are now so similar to the regulations placed on Part 135 carriers such as itself that no distinction is warranted." The BTA considered and rejected this claim "in reliance upon the earlier case law," concluding that "Castle does not meet the definition of a public utility," with the result that "its purchases are not excepted from taxation." *Id.*

{¶ 18} In affirming the BTA's decision, this court narrowed the inquiry to focus on what we identified as the most important criterion for public-utility status, which we stated to be "special regulation and control by a governmental regulatory

agency." 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420, at ¶ 27-28. But in light of the general federal deregulation of air carriers' business operations, this approach engendered the possibility that no air carriers could qualify for exemption. This potential implication underlies the tax commissioner's current argument: because it is conceivable (and perhaps even probable) that no air carriers can qualify under the *Castle Aviation* regulatory standard, only those air carriers that enjoy the specific benefit conferred by the 2006 amendment to R.C. 5739.01(P) can be exempted.

{¶ 19} We reject this aspect of the tax commissioner's argument. Doing so requires us to revisit our decision in *Castle Aviation* and to clarify that the ultimate ground for denying the exemption in that case was, as the BTA had stated, that the air-charter service seeking the exemption could not qualify for it under the common-carrier test developed by the earlier case law.

B. Determining public-utility status calls for determining whether AirNet actually operated as a common carrier

1. The case law equates public-utility service with common carriage

{¶ 20} In *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638, ¶ 18-19, we summed up the longstanding test for public-utility status for motor carriers in a way that is fully applicable to the air carrier in this case. Construing the highway-transportation-for-hire exemption in light of earlier cases involving the public-utility-service exemption, we identified the three criteria for exemption developed by the case law: "(1) the purchaser must be a common carrier, (2) the purchaser must actually be operating as a common carrier, and (3) the primary-use test is to be applied if the property is used both in a way that would make it eligible for the [exemption] and in a way that would make it not eligible." *Id.* at ¶ 22.

{¶ 21} The *R.K.E.* test raises a further question: what is the definition of common carrier as that term is specifically used in the taxation context? As it

happens, the air-carriage cases supply an answer. In affirming the denial of an exemption from sales and use tax to a helicopter-airlift service, the First District Court of Appeals stated that the principal characteristic of a public utility " 'is that of service to, or readiness to serve, an indefinite public, *which has a legal right to demand and receive its services*.' " (Emphasis sic.) *Ohio Valley Air Ways, Inc. v. Bowers*, 114 Ohio App. 427, 428, 177 N.E.2d 303 (1st Dist.1961), quoting 45 Ohio Jurisprudence 2d, Public Utilities, Section 2, at 166 (1960). *Accord Midwest Haulers, Inc. v. Glander*, 150 Ohio St. 402, 405, 83 N.E.2d 53 (1948) ("the principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public which has a legal right to demand and receive the utility's services or commodities").

{¶ 22} This line of reasoning was applied in subsequent BTA decisions involving air carriers. *See, e.g., Marion Air Serv., Inc. v. Bowers*, BTA No. 49695, 1962 Ohio Tax LEXIS 1 (Dec. 20, 1962); *Dade Leasing, Inc. v. Kosydar*, BTA No. C-93, 1974 Ohio Tax LEXIS 1 (Sept. 16, 1974). Among those BTA decisions is one that we affirmed on review: *Castle Aviation, Inc. v. Zaino*, 2005 WL 176679, *aff'd,* 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420.

2. The common-carrier test and Castle Aviation

{¶ 23} In *Castle Aviation,* we reviewed a decision of the BTA that affirmed the tax commissioner's denial of the public-utility-service exemption, and we affirmed the BTA's decision. A review of the BTA's decision in that case shows that the record clearly established Castle Aviation's characterization that its entire business involved "charter" service, both as to cargo and as to passengers. 2005 WL 176679 at *2; *see also* 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420, at ¶ 5-7. Castle Aviation's aircraft and crews were "chartered" in the sense of the "leasing or hiring of an airplane," *Black's Law Dictionary* 284 (10th Ed.2014), or the "hir[ing] or rent[ing]" of an airplane "for temporary use," *id.* at 285. Instead of holding itself out as furnishing a regular cargo-delivery service with announced

times and a hub-and-spoke system, Castle Aviation entered into customer-by-customer or job-by-job contracts. *See* 2005 WL 176679 at *3-5. As the BTA explained in its decision in *Castle Aviation*, "the distinctive characteristic of a common carrier [is] that it undertook to carry for all people, indifferently, as opposed to private carriers, who were not obligated to carry unless the obligation was 'voluntarily assumed by virtue of a special contract.' " *Id.* at *8, quoting *Sundorph Aeronautical Corp. v. Lindley*, BTA No. 82-D-842, 1986 WL 28027, *5 (Jan. 10, 1986). Thus, Castle Aviation was not providing a public-utility service under the parameters set forth in *Ohio Valley Air Ways* and in *Midwest Haulers*.

{¶ 24} In affirming the BTA's decision in *Castle Aviation*, we essentially narrowed the focus to a single criterion, which was "special regulation and control by a governmental agency." *Castle Aviation* at ¶ 27. In doing so, we ignored the common-carrier standard that had previously been established, both for motor carriers and for air carriers, that the BTA had applied in its decision. Moreover, in *Castle Aviation*, we indicated that for an air carrier, the important question is whether there is governmental regulation of the carrier's "business operations." *Id.* at ¶ 28. In light of the general federal deregulation of the economic aspects of the aviation industry, the emphasis on regulatory control articulated in *Castle Aviation* threatened to make it impossible for any air carriers to qualify for the exemption.

{¶ 25} The General Assembly responded to our *Castle Aviation* decision in 2006 by enacting the final sentence of R.C. 5739.01(P) to ensure that Part 121 carriers, i.e., the passenger airlines and cargo carriers that generally use large aircraft, would retain their exemptions. In the final bill analysis for Am.Sub.H.B. No. 699, the Ohio Legislative Service Commission explained that the effect of that amendment to R.C. 5739.01(P) was to provide that the public-utility exemption from sales and use tax applies to "sales of property, fuel, or power used in, or used in the repair and maintenance of, foreign or interstate air transportation of

passengers or property by aircraft as a common carrier for compensation, or in furtherance of the transportation of mail by aircraft."

3. The common-carrier test should be applied to the jet fuel at issue here, on an apportioned basis

{¶ 26} At oral argument, the tax commissioner's counsel stated that in order to satisfy the economic-regulation test articulated by this court in *Castle Aviation*, Epic would have to show governmental regulation of rates and routes. But uncontroverted expert testimony in this case, along with other evidence, indicates that that type of regulation of air transportation of cargo does not exist. Instead, federal regulations authorize "common carrier" service by a cargo service such as AirNet. According to Jackson, the expert who testified on behalf of Epic, that means that "you earn the right to hold [yourself] out to the public, and part of the responsibility of earning that right is the responsibility to do so."

{¶ 27} This testimony is consistent with Ohio's common law. We have stated:

> [T]he tendency and undoubted weight of authority is in favor of the doctrine that a common carrier is charged with a *quasi* public duty to transport merchandise on equal terms for all parties, where the carrying for some shippers at a lower price than for others will create monopoly by injuring or destroying the business of those less favored.

Scofield v. Lake Shore & Michigan S. Ry. Co., 43 Ohio St. 571, 600, 3 N.E. 907 (1885). *See also Morgan Run Ry. Co. v. Pub. Util. Comm.*, 98 Ohio St. 218, 120 N.E. 295 (1918), paragraph one of the syllabus (a railroad organized and operated under the laws of Ohio "is a common carrier under obligation to serve the public without discrimination").

{¶ 28} Today we revisit *Castle Aviation* and clarify that the proper test to be applied to an air carrier is the common-carrier test that the BTA applied in that case. By extension, that test should be applied in the present case as well. We emphasize that applying that test does not necessarily lead to an all-or-nothing conclusion.

{¶ 29} Epic argues that AirNet's entire business is common carriage and thus that all of AirNet's fuel purchases should be exempt from the sales tax, and Epic's counsel contended at oral argument that serving customers by specific contract, or contract carriage, is part of AirNet's common-carrier service, distinct from "private carriage" service, which AirNet, according to Epic's attorney, does not conduct. The record contains an "advisory circular" issued by the FAA, dated April 24, 1986, that addresses the distinction between "private carriage" and "common carriage." That circular defines a "common carrier" as a carrier that " 'holds itself out' to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it." The circular defines "private carriage" narrowly as "[c]arriage for hire" that "does not involve 'holding out,' " and that in general involves "carriage for one or several selected customers, generally on a long-term basis."

{¶ 30} We cannot, however, reconcile that distinction with our case law in taxation cases, which uses somewhat different terms and definitions to determine the type of carriage that is exempt from the sales tax for our purposes here. The distinction drawn by our case law is between common carriage, which is exempt, and chartered service, which is not. For example, in *Castle Aviation*, we affirmed the denial of the exemption for an entity that held a certificate authorizing common carriage but that conducted its business as a charter service engaged in contract carriage. 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420, at ¶ 5-7.

{¶ 31} Contrary to an all-or-nothing approach, the case law calls for examining each item that might be taxed in light of the aspect of the taxpayer's

business in which it is used. In *Manfredi Motor Transit Co. v. Limbach*, 35 Ohio St.3d 73, 76, 518 N.E.2d 936 (1988), we held that the exemption in the case of a dual-nature business must be applied on an item-by-item basis through "a review of the entire operation" that questions whether a particular item was used in the portion of the business that qualified as a public-utility service.

{¶ 32} By contrast to the air carrier seeking the exemption in *Castle Aviation*, Schaner, AirNet's vice president, testified that about 60 percent of AirNet's express services during the time period at issue involved nonexclusive, "noncontract" regular-delivery service from one point to another on AirNet's "spaghetti map." Schaner estimated that AirNet conducted "less than half" of its bank services during the time period pursuant to contracts, which means that he believed that more than 50 percent of those deliveries was "noncontract." As to what Schaner described as noncontract regular delivery service, AirNet was clearly providing the services of a common carrier within the meaning of the analysis in *Midwest Haulers* to the extent that those services were made available to the public at reasonable prices "without discrimination or any kind of preferential treatment," as Schaner put it.

{¶ 33} At the other end of the spectrum, as to any services provided by AirNet that constituted chartered service—of the type provided by Castle Aviation in the case in which it sought exemption—AirNet was not providing the services of a common carrier under the standards developed in the case law. Other services provided by AirNet on a contract-by-contract basis would require additional review to determine whether they constituted part of AirNet's "actual operation" as a common carrier. *See Midwest Haulers*, 150 Ohio St. at 406, 83 N.E.2d 53 ("authorization to act as a common carrier does not in and of itself conclusively establish that there is such operation. The actual operation of a business determines its legal status"). We hold that the criteria for common-carrier service that qualifies

for exemption is the shipping of cargo at a time and to a place announced to the public in advance and doing so at a reasonable and nondiscriminatory charge.

{¶ 34} Finally, our case law makes special provision for a case that involves jet fuel. Items that are "fungibles," such as the jet fuel here, are subject to specific apportionment, not to an all-or-nothing determination based on the application of a primary-use test. In *B.F. Goodrich Co. v. Lindley*, 58 Ohio St.2d 364, 390 N.E.2d 330 (1979), the BTA had applied a primary-use test to determine that all the taxpayer's fuel purchases at issue were exempt from taxation, because the majority of the fuel was used for an exempt purpose. *See id.* at 367. On appeal, we reversed, holding that "[t]he primary use test does not apply to a sale of fungibles used for both taxable and non-taxable purposes, where such use is apportionable before or after sale." *Id.* at the syllabus.

4. On remand, the tax commissioner should audit Epic's claim, applying the common-carrier test

{¶ 35} Throughout this litigation, Epic has argued on behalf of AirNet for a 100 percent exemption from the sales tax and did not submit evidence to establish the portion of the fuel purchases that was used "directly in the rendition of a public utility service" under R.C. 5739.02(B)(42)(a) pursuant to the precedents we discuss and apply in this opinion. Under the general rule applicable to this situation, Epic's failure to raise an apportionment claim normally would constitute a bar to the claim being considered and would also prevent Epic from being afforded the opportunity to present evidence on the point.

{¶ 36} The present circumstances, however, take this case out of the confines of the general rule and bring it within an established exception. The exception applies in situations in which our review on appeal leads us to announce a development or clarification of the law that the parties might reasonably not have anticipated in light of previously existing case law. In *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision*, 139 Ohio St.3d 92, 2014-Ohio-1588, 9

N.E.3d 1004, we recognized for the first time a restriction on the presumption that an arm's-length sale was recent to the tax-lien date. *Id.* at ¶ 26. We noted that "the parties might not have anticipated this innovation." *Id.* at ¶ 28. We stated that when we announce a decision that clarifies and corrects the legal standards that apply in a way that may not have been readily anticipated, "we ordinarily remand with the understanding that the BTA may hear additional evidence" and that the shifting of the burden of production arising from our clarification of the law meant that "the school board should have the opportunity to present evidence if it desires." *Id.* at ¶ 29. Accordingly, we remanded the cause to the BTA with instructions that it permit the taking of new evidence and determine the value of the property in light of the entire record. *Id.* at 30. *See also Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision*, 121 Ohio St.3d 175, 2009-Ohio-762, 902 N.E.2d 984, ¶ 31-33 (finding that the BTA and the parties "misconstrued" our decision in a previous case, clarifying the proper interpretation of the previous case, vacating the BTA's decision, and remanding to the BTA for it to take additional evidence and hold a new hearing, if necessary); *Cruz v. Testa*, 144 Ohio St.3d 221, 2015-Ohio-3292, 41 N.E.3d 1213, ¶ 50 (vacating the BTA's decision in part and remanding to the BTA to take additional evidence).

{¶ 37} Moreover, we have had occasion to remand a case to the tax commissioner instead of the BTA when our decision has either clarified a legal standard or otherwise effected a change of circumstances in such a way that the determination of a taxpayer's claim should begin anew. *See Timken Co. v. Lindley*, 64 Ohio St.2d 224, 230, 416 N.E.2d 592 (1980); *Hanna Mining Co. v. Limbach*, 20 Ohio St.3d 3, 6, 484 N.E.2d 691 (1985); *Crown Communication, Inc. v. Testa*, 136 Ohio St.3d 209, 2013-Ohio-3126, 992 N.E.2d 1135, ¶ 41.

{¶ 38} Similar reasoning applies here; Epic should have an opportunity to present evidence to establish the portion of the jet fuel purchased by AirNet that is exempt from taxation under the common-carrier standard as it is clarified in this

opinion. Accordingly, we vacate the BTA's decision to deny in its entirety the claim for exemption, and we remand this cause to the tax commissioner with instructions to conduct additional proceedings to determine the exempt portion of the fuel sales pursuant to the common-carrier standard.

IV. Conclusion

{¶ 39} For the foregoing reasons, we vacate the decision of the BTA and remand the cause to the tax commissioner for further proceedings as indicated in this opinion.

Decision vacated
and cause remanded.

O'CONNOR, C.J., and LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

O'DONNELL, J., dissents and would affirm the decision of the Board of Tax Appeals.

Baker & Hostetler, L.L.P., Edward J. Bernert, Elizabeth A. McNellie, and Trischa Snyder Chapman, for appellant.

Michael DeWine, Attorney General, and Daniel G. Kim and Daniel W. Fausey, Assistant Attorneys General, for appellee.

OHIO BOARD OF TAX APPEALS

SEATON CORP., (et. al.),

Appellant(s),

vs.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),

Appellee(s).

CASE NO(S). 2015-224, 2015-743

(SALES AND USE)

DECISION AND ORDER

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Entered Wednesday, July 13, 2016

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

These matters are considered by the Board of Tax Appeals upon two notices of appeal from two final determinations of the Tax Commissioner, filed herein by Seaton Corp. ("Seaton") and Kal Kan Foods Inc. ("Kal Kan"), respectively. In his determinations, the commissioner concluded that Seaton and Kal Kan entered into a contract for the provision of taxable employment services. Seaton was assessed sales tax for the period of January 1, 2010 through December 31, 2012 and Kal Kan was assessed use tax for the period of January 1, 2007 through June 30, 2010, based upon transactions related to their contractual relationship. We consider these appeals upon the notices of appeal, the statutory transcripts certified to this board by the Tax Commissioner ("S.T."), the evidence and testimony presented at a hearing before the board ("H.R."), and the written argument of the parties.

At the outset, we acknowledge the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative

evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Kern*, supra; *Alcan*, supra.

Kal Kan operates a pet food manufacturing plant in Columbus, Ohio. Kal Kan contracted with Seaton to provide staffing services, to assist in the production operations. Specifically, Seaton provides workers for lower skilled positions, who primarily "handle manual tasks such as loading the tubs into the tub feeders and palletizing the product. *** No previous experience is required ***. *** The educational requirements are limited." Seaton/Kal Kan Brief at 4. Both Seaton and Kal Kan contest the portion of the subject assessments relating to the service provided by Seaton, which it claims does not constitute an "employment service," in the first instance, as defined in R.C. 5739.01(JJ), and, moreover, is excludable from tax, pursuant to R.C. 5739.01(JJ)(1) and/or (3).

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 *** [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 provided or supplied receive their wages, salary, or other compensation from the provider or supplier of the employment service or from a third party that provided or supplied the personnel to the provider or supplier." Pertinent to the arguments advanced by appellant, R.C. 5739.01(JJ)(1) states that "'[e]mployment service does not include *** [a]cting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser." Further, R.C. 5739.01(JJ)(3) also 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."

Seaton contends that it does not provide an employment service, taxable under R.C. 5739.01(B)(3)(k) and defined in R.C. 5739.01(JJ), but, instead, operates an "on-site management operation, which *** hired, trained and managed" the workers in question. Seaton/Kal Kan Brief at 5. Seaton made "job assignments," monitored "the productivity of the work," and determined "whether *** [the workers] were operating safely" and communicated "any new procedures to *** [the workers]." Seaton/Kal Kan Brief at 5. "[W]e recruit the entry level, less skilled positions for the location, and we manage – we train those associates, and we manage those – manage those *** associates on a shift by shift and daily basis." H.R. at 69. Seaton maintains an attendance policy and monitors productivity issues, making sure the workers are working efficiently. H.R. at 70. Due to the level of control and direction Seaton maintains over the workers it provides, Seaton contends that its contractual relationship with Kal Kan does not meet the statutory provisions of R.C. 5739.01(JJ), which necessarily limits the supervision and control over such workers to Kal Kan.

The Supreme Court, in *Moore Personnel Services v. Zaino*, 98 Ohio St.3d 337, 2003-Ohio-1089, ¶14, held:

> "To satisfy the definition of 'employment service,' a service must meet three separate requirements: (1) it must provide or supply personnel on a temporary or long-term basis, (2) the personnel must perform work or labor under the supervision or control of another, and (3) the personnel must receive their wages, salary, or other compensation from the provider of the service." Id.

See, also, *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St.3d 356, 2005-Ohio-2167.

Seaton first argues that it does not satisfy the second requirement. We agree. Testimony before this board indicates that Kal Kan supervisors have no work-related interaction with Seaton workers on the job floor, unless a Seaton worker is committing a safety violation that could cause harm to the worker(s) or the manufacturing process/product; otherwise, Kal Kan supervisors report any problems with Seaton workers to Seaton supervisors, for further action. Likewise, any problems observed by Seaton workers must be reported to Seaton supervisors, who in turn, report the problems to Kal Kan supervisors. H.R. at 27-28, 72, 89. All training of Seaton's workers regarding general manufacturing processes, as well as safety issues, is done by Seaton, with the expectation that Seaton workers will have "the same knowledge" as Kal Kan employees do. H.R. at 33-34. Seaton gathers the scheduling requests from the workers and thereafter, creates the work schedules for its workers. H.R. at 88. Seaton is also responsible for payment of the workers. H.R. at 145.

The commissioner argues that "Kal Kan controls the entire manufacturing process and all production lines. *** The entire production line and employment relationship put Kal Kan firmly in control of all employees engaged in the production line. *** It is Kal Kan that determines the need for such employees and how those persons will play a role in its production line." Comm. Brief at 3. The commissioner's agent testified that "Kal Kan *** directed and controlled the activity of the Seaton employees." H.R. at 145. The commissioner concluded that "[w]hen, as here, the leased labor is engaged to perform the day-to-day work of the employer – in this case, to fulfill low-skill positions on Kal Kan's production lines – then the employees are *necessarily* under the employer's direction and control." (Emphasis sic.) Comm. Brief at 3. We disagree that control over the manufacturing process and production lines somehow equates to control over the Seaton workers themselves. Kal Kan's contract with Seaton indicates Seaton's responsibilities with regard to its workers, which go beyond simply providing "supplemental staffing service workers," as argued by the commissioner; the contract specifically provides that Seaton will "furnish, manage and supervise" such workers. Seaton S.T. at 896. It provides that Seaton workers "are employees" of Seaton and that Seaton has "the exclusive right to control all" Seaton workers. It also requires that Seaton "maintain an attendance policy" for Seaton workers. Seaton S.T. at 898. Seaton was provided an on-site dedicated office space, and was required, at its own cost, to equip that space with office supplies necessary to provide its services. Seaton S.T. at 899. Seaton was required to "provide on-site supervision that is responsible for all shift management of the contractor employees," including, but not limited to worker orientation, worker performance management, worker coaching and counseling, interfacing with workers, processing timecards/payroll, and enforcement of workplace rules. Seaton S.T. at 910. With regard to pre-employment activities, Seaton was required to perform pre-screening, interviewing and testing of work candidates, as well as job orientation. Seaton S.T. at 911-913. Once hired by Seaton, workers were provided uniforms and safety equipment, at Seaton's expense. Seaton S.T. at 913.

Apparent from the record is Seaton and Kal Kan's intent to purposefully enter into a contract adopting an on-site management model. Seaton S.T. at 945-1020. The specific contract language supports the notion of separate employers, providing that neither Kal Kan nor Seaton could "assign, direct, or oversee" the activities of the other party's workforce. Seaton S.T. at 931. In describing its relationship with Seaton, Kal Kan stated that it "only communicates the production goals for a particular period and it is the responsibility of Seaton to perform and staff these needs appropriately." Seaton S.T. at 938.

The commissioner suggests that "the petitioner must demonstrate that the orders given to the Seaton site supervision/management personnel regarding manufacturing processes, procedures, and output did not originate from the petitioner [Kal Kan]," in order to establish that the Seaton workers are not under Kal Kan's control. Kal Kan S.T. at 2. The commissioner seems to indicate that Kal Kan must somehow expressly cede its authority over the entire production process to Seaton, in order for Seaton to successfully claim that it was not providing "employment services," even though the supervision and direction of the overall production process should properly be handled by the manufacturer, Kal Kan, including the production schedule and control of Kal Kan employees. Kal Kan, as the manufacturer in charge of its own operations, has the right to establish its own manufacturing processes and procedures, to which employees must adhere in the completion of their job tasks. Kal Kan, however, has given over a small portion of its

authority to Seaton, but only for the supervision and control of the Seaton workers. We find this to be a critical distinction between what is viewed as a "traditional" employment services agreement, that would have Seaton workers reporting to and being supervised by Kal Kan on a daily basis, and the on-site management model agreement that we have here, with Seaton workers reporting to and being supervised by Seaton, on Kal Kan's premises, in all instances.

Because we conclude that Seaton workers are not under the direct control of Kal Kan, the contract between Seaton and Kal Kan cannot be classified as an "employment services" agreement. Accordingly, we need not address any further arguments regarding whether other requisite elements of an employment services agreement have been established. Thus, based upon the totality of the evidence in the record before us, we conclude that Seaton did not provide an employment service to Kal Kan during the periods in question. The instant matters are hereby remanded to the commissioner for purposes of removing all transactions between Seaton and Kal Kan from the subject assessments, including all penalties and interest associated with such transactions.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

Kathleen M. Crowley, Board Secretary

OHIO BOARD OF TAX APPEALS

ANKLE & FOOT CARE CENTERS LLP, (et. al.),

Appellant(s),

vs.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),

Appellee(s).

CASE NO(S). 2016-208

(SALES AND USE)

DECISION AND ORDER

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Entered Tuesday, January 10, 2017

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant, Ankle & Foot Care Centers LLP ("A&FCC") from a final determination of the Tax Commissioner relating to an audit of A&FCC's purchases from January 1, 2008 through October 31, 2013. The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of the hearing before this board ("BTA Audio") as well as the evidence admitted ("Ex."), and the written argument filed by the parties.

In reviewing appellant's appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (1989). It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar*, 38 Ohio St.2d 135 (1974); *Midwest Transfer Co. v. Porterfield*, 13 Ohio St.2d 138 (1968). Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy*, 72 Ohio St.3d 347 (1995); *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213 (1983). Where no competent and probative evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern*, supra; *Kroger Co. v. Limbach*, 53 Ohio St.3d 245 (1990); *Alcan*, supra.

A&FCC "is a medical practice that provides podiatry care." S.T. at 1. It appealed only the portion of the commissioner's final determination regarding medical transcription services wherein the commissioner concluded that A&FCC was properly assessed use tax for the purchase of medical transcription services. A&FCC contends that such services are personal/professional services that are exempt from taxation, rather than taxable automatic data processing ("ADP") services, as characterized by the commissioner.

During the audit period in question, R.C. 5739.01(B)(3)(e) provided that:

> "(B) 'Sale' and 'selling' include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:
>
> "***
>
> "(3) All transactions by which:
>
> "***
>
> "(e) Automatic data processing, computer services, or 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 automatic data processing, computer services, or electronic information services rather than the receipt of personal or professional services to which automatic data processing, computer services, or electronic information services are incidental or supplemental. ***"

Automatic data processing was defined in R.C. 5739.01(Y) as:

> "(Y)(1)(a) *** processing of others' data, including keypunching or similar data entry services together with verification thereof, or providing access to computer equipment for the purpose of processing data.
>
> "***
>
> "(d) 'Automatic data processing, computer services, or electronic information services' shall not include personal or professional services.
>
> "(2) As used in divisions (B)(3)(e) and (Y)(1) of this section, 'personal and professional services' means all services other than automatic data processing, computer services, or electronic information services, including but not limited to:
>
> "(a) *** any other situation where the service provider receives data or information and studies, alters, analyzes, interprets, or adjusts such material."

R.C. 5739.01(Y)(2)(a)-(j) also provided specific examples of personal and professional services, including, for example, accounting and legal services, analysis of business policies and procedures, identification of management information needs, feasibility studies, provision of credit information, and provision of debt collection services.

Finally, Ohio Adm. Code 5703-9-46(A)(1)(a) defines automatic data processing as "[p]rocessing others' data, including all activities incident to processing of data such as keypunching, keystroke verification, rearranging, or sorting of previously documented data for the purpose of data entry or automatic processing, changing the medium on which data is stored, and preparing business documents such as reports, checks, or bills, whether these activities are done by one person or several persons[.]"

The auditor who reviewed A&FCC's purchases for the period in question remarked that "[t]axpayer made purchases of Medical Transcription services form [sic] independent contractors based from home. These services consisted of taking the doctor's firsthand account recorded on a Dictaphone and transcribing the information that was already in existence into a written text. The Medical Transcriptionist is charging per line for their service." S.T. at 206-207.

The practice administrator for A&FCC testified before this board. Not a medical transcriptionist himself, he was responsible for managing office operations, including issues relating to staffing, general business agreements and finances. He specifically indicated that A&FCC needed transcriptionists to provide accurate, timely transcribed physicians' reports, and who had an understanding of the terminology and documents used by the physicians in the practice. The administrator indicated that the transcriptionists sent their completed reports to A&FCC via an email link. Hard copies of the reports were then given to the physicians, with questions flagged for the doctors' specific review. The transcriptionists were expected to make verbatim reports, however the physicians were ultimately responsible for all aspects of the completed reports, including the correction of any errors.

A&FCC did not directly employ the transcriptionists it used. Instead, A&FCC entered into an oral agreement with an individual, whose company was retained to provide trained personnel to handle all transcription services. (BTA Audio.) A&FCC had no written contract with the transcriptionist provider, only an oral contract. Based upon the terms of such agreement with the provider, the practice administrator had no direct contact with the individual transcriptionists; he neither participated in interviewing potential transcriptionists for hire, nor reviewed their credentials or qualifications. He could not guesstimate how many transcriptionists had worked during the period in question and admitted that he had only met a few of them during such time. (BTA Audio.)

As evidence of the qualifications of the transcriptionists used by A&FCC, copies of diplomas/certificates were provided indicating completion of coursework in medical transcription and medical secretarial work. Exs. A-F. We note, however, that the record does not indicate the nature of the coursework completed, the level of proficiency attained, or the nature of the institution from which the diploma/certificate was obtained. Further, we note that A&FCC itself did not require proof of such training prior to a transcriptionist starting to work for it; A&FCC's administrator testified that he "trusted" the transcriptionist provider to make sure that the transcriptionists that were hired were qualified, but there is no evidence in the record as to whether the provider required proof of a diploma/certificate before a transcriptionist could be hired. Additionally, there is nothing in the record to establish that any of the individuals named on such documentation actually worked for A&FCC during the relevant time period.

Thus, we must determine the nature of the transcription service provided to A&FCC, and, specifically, whether it constitutes ADP services or personal/professional services. As we concluded in *Columbus Oncology Associates, Inc. v. Testa* (Sept. 28, 2015), BTA No. 2014-3984, unreported, "[b]ased upon our review of the examples set forth in R.C. 5739.01(Y)(2)(a)-(j), and the testimony and evidence presented herein, *** the foregoing statutory provisions contemplate that a provider of personal/professional services performs a skilled service using the data provided by the customer *** by applying specialized cognitive skills to study, alter, analyze, interpret, or adjust the data." In *Columbus Oncology*, supra, we went on to discuss relevant case law, holding:

> "While R.C. 5739.01(Y)(2) provides what constitutes 'personal and professional services,' in the context of an ADP transaction, we also look to other sales tax case law analysis, which echoes the same types of considerations. Specifically, the Supreme Court has held that '[i]n paragraph one of the syllabus in *Emery* [*Industries, Inc. v. Limbach* (1989), 43 Ohio St.3d 134], we defined a "personal service" as: "Any intellectual or manual act involving a recognized skill performed by a person who is specifically engaged by the purchaser to perform the act. (*Koch v. Kosydar* [1972], 32 Ohio St.2d 74, *** modified.)"' *Community*

> *Mutual Insurance Company v. Tracy* (1995), 73 Ohio St.3d 371, 376. Further, in *Burke Marketing Services, Inc. v. Tracy* (Sept. 6, 1996), BTA No. 1991-J-377, unreported, this board found the taxpayer's purchases to be taxable, distinguishing *Community Mut. Ins.*, supra, 'by pointing to the limited, if any, cognitive thought required of the service providers: "The appellant has failed to submit any evidence that the outside firms such as Pine Co. performed anything other than processing data collected by the appellant. *** The outside firms processed the raw information into the form previously established by the appellant. Any personal service was performed by the appellant by establishing the form the report should take. Because the appellant failed to submit any evidence showing that the outside firms performed anything other than processing data collected by others, we find no evidence of significant cognitive thought which would constitute a personal service." Id. at 14-15. (Citation omitted.)' *Continental Cablevision of Ohio, Inc. v. Tracy* (July 10, 1998), BTA Nos. 1996-K-6, 518, unreported. In *NTN Communications, Inc. v. Tracy* (May 12, 1995), BTA No. 1993-X-353, unreported, we described a personal/professional service as one where 'the service provider engaged in some cognitive act or analytical thought for the benefit of the purchaser.'" Id. at 4-5.

There is nothing in the record of the instant case to distinguish its facts from those in *Columbus Oncology*, supra, or *Dayton Physicians, LLC v. Testa* (Sept. 28, 2015), BTA No. 2014-3986, unreported, affirmed, 2nd Dist. Montgomery No. CA26881, 2016-Ohio-5348. In both *Columbus Oncology* and *Dayton Physicians*, this board concluded that the testimony and evidence presented indicated that the transcription services purchased did not constitute personal or professional services. We concluded that "[u]pon receipt of the dictated notes or information for transcription, the transcriptionist does not study, alter, analyze, interpret or adjust the material. See R.C. 5739.01(Y)(2)(a)-(j). The transcriptionist reduces the physician's spoken word to written form. While undoubtedly, transcriptionists that perform their duties accurately and in a timely fashion are preferred by their customers, there is no specialized training that is required to perform their jobs, no licensing or certification process that must be completed in order to work as a transcriptionist, and no regulatory authority that oversees the profession. H.R. at 183-184." *Columbus Oncology*, supra, at 5. Thus, based upon the analysis set forth in the above-cited cases, we conclude that the transcription services purchased by A&FCC during the audit period in question did not constitute personal/professional services, but actually ADP services.

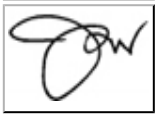
A&FCC contends that the instant case is distinguishable from those previously cited because in this instance, diplomas and certificates were provided to establish that the individuals performing the transcription were specially trained. No doubt, A&FCC is relying upon the court's statement in *Dayton Physicians, LLC v. Testa*, 2nd Dist. Montgomery No. CA26881, 2016-Ohio-5348, ¶15, that "a non-taxable professional service *may* be found when a taxpayer enters into a written contract with a transcriptionist service specifying that each transcriptionist must hold a certificate from an approved college program and must utilize specific professional skills acquired from the certificate program to complete the transcriptionist's task." (Emphasis added.)

Such pronouncement contemplates many factors, including not only a verified level of education and proficiency by the transcriptionists, as A&FCC argues it has demonstrated by the certificates/diplomas provided, but also other considerations, all of which are not borne out by the instant facts. Specifically herein, we have no written contract wherein A&FCC has specified the necessary qualifications and "specific professional skills" needed for the transcriptionists it would use. Additionally, we do not have any information regarding the nature of the institutions listed on the diplomas/certificates presented, i.e., whether the institutions offered an "approved" program and/or even what constitutes an "approved" program. For example, the following certificates and diplomas of various individuals were presented by A&FCC, containing only the following information: a diploma from Trumbull Business College indicating graduation with a medical secretarial diploma in 1987, Ex. A; a certificate of achievement in beginning medical transcription from The Inner Office, Ltd., dated May 2000, Ex. B; two certificates from Kent State University Trumbull Campus recognizing successful completion of a medical transcription course of 240

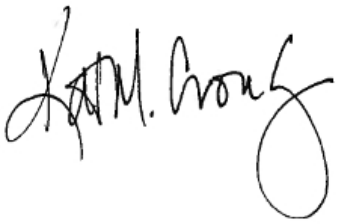
hours, offered by the Workforce Development & Continuing Studies Center from 2007-2008 and 2008-2009, Ex. C and Ex. E; a certificate of achievement indicating completion of a medical transcription course from The Inner Office, Ltd. dated March 2012, Ex. D; and a certificate of achievement indicating completion of an on-line medical transcription program from The Inner Office, Ltd. dated December 2011, Ex. F.

Thus, no specific level of education and certification attained by the transcriptionists was demonstrated by A&FCC. In fact, there is nothing in the record to confirm that the individuals named on the documents were actually the transcriptionists that provided services to A&FCC, through its provider. A&FCC's practice administrator repeatedly stated that he relied upon the transcriptionist provider to screen all candidates and employ only those transcriptionists who had the necessary credentials to successfully complete the A&FCC job. As a result, he had little, if any, first-hand knowledge about the transcriptionists' identities, let alone their qualifications/credentials.

Accordingly, in consideration of the foregoing, appellant has not met its burden of demonstrating with competent and probative evidence that the transcription services that were taxed constituted personal/professional services. *Kern*, supra; *Alcan*, supra. Accordingly, this board has determined that the Tax Commissioner's findings were reasonable and lawful. It is the decision and order of the Board of Tax Appeals that the decision of the Tax Commissioner must be and hereby is affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Kathleen M. Crowley, Board Secretary

OHIO BOARD OF TAX APPEALS

PI IN THE SKY, LLC, (et. al.),

Appellant(s),

vs.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),

Appellee(s).

CASE NO(S). 2015-2005

(USE TAX)

DECISION AND ORDER

APPEARANCES:

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Entered Thursday, January 19, 2017

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

This appeal is considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant, Pi in the Sky, LLC ("taxpayer") from a final determination of the Tax Commissioner. Therein, the commissioner affirmed his previously issued use tax assessment against taxpayer relating to the purchase of a new aircraft. S.T. at 1. The matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, and any written argument filed by the parties, as the hearing before this board was waived by all parties. To the extent any attachments to taxpayer's brief, including, but not limited to exhibits 1-7, were not already part of the record certified to this board by the commissioner, they will not be considered for purposes of rendering our decision herein, as they constitute unsworn statements that do not rise to the level of evidence upon which we may rely. See *Lynde v. Tracy* (Dec. 19, 1994), BTA No. 1994-M-111, unreported; *Executive Express, Inc. v. Tracy* (Nov. 5, 1993), BTA No. 1992-P-880, unreported. Further, the record cannot be "supplemented" with such information without the consent of all parties, which has not been demonstrated. Additionally, any written argument by way of brief related to such attachments will be accorded no weight. Accordingly, taxpayer's motion for leave to file a surreply is denied.

The findings of the Tax Commissioner are presumed valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (1989). It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar*, 38 Ohio

St.2d 135 (1974); *Midwest Transfer Co. v. Porterfield*, 13 Ohio St.2d 138 (1968). Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy*, 72 Ohio St.3d 347 (1995); *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213 (1983). Where no competent and probative evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern*, supra; *Kroger Co. v. Limbach*, 53 Ohio St.3d 245 (1990); *Alcan*, supra.

Taxpayer is a limited liability company that is the registered owner of the aircraft under consideration herein; taxpayer "was formed for the purpose of holding an aircraft for lease. *** Since its formation to present, the Company [taxpayer] has engaged in no business activity other than the resale (leasing) of aircraft." Brief at 2. Mitchell's Salon and Day Spa, Inc. ("Mitchell's") is the sole member of taxpayer. Mitchell's owner and president, Deborah Mitchell Schmidt, a licensed pilot herself, in her individual capacity, "was the borrower on the loan for the [purchase of the] aircraft." S.T. at 5. Mitchell's entered into a "Non-Exclusive Aircraft Lease Agreement" for the rental of the subject aircraft from taxpayer, with Ms. Schmidt signing as the president of Mitchell's, on behalf of Mitchell's, as the lessee, and as president of the taxpayer, on behalf of the taxpayer, as the lessor. S.T. at 415-425. All flights logged on the aircraft between May 2012 and May 2014 were taken by Mitchell's and no other lessee, including some flights to Ms. Schmidt's out-of-state lakefront home. Taxpayer Brief at 5; S.T. at 5.

In accordance with the provisions of such lease, taxpayer contends that it purchased the subject aircraft for the purpose of leasing it to its sole member, Mitchell's, and others, and as such, the transaction was exempt from sales tax, pursuant to R.C. 5739.01(E) and 5741.02(C), as "tangible personal property purchased for resale in the same form as received, by a person engaging in business." S.T. at 1. The commissioner ultimately concluded that the lease transaction between Mitchell's and taxpayer constituted a sham transaction, pursuant to R.C. 5703.56(A), i.e., "a transaction *** without economic substance because there is no business purpose or expectation of profit other than obtaining tax benefits." As such, the commissioner disregarded taxpayer's lease transaction(s) with Mitchell's and determined taxpayer's liability based upon the sale price paid for the aircraft. R.C. 5703.56(B).

R.C. 5739.01(B) provides that "'Sale' and 'selling' include *** transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever," including, per R.C. 5739.01(B)(1), "[a]ll transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted." Further, R.C. 5739.01(E) goes on to provide the sale-for-resale exception, i.e., that sales are not taxable when "the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person." Additionally, "'[b]usiness' includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect." R.C. 5739.01(F).

It is the commissioner's position that taxpayer did not engage in a legitimate "business," resulting in taxpayer's lease agreement with Mitchell's declared a sham, and, therefore, the aircraft's purchase was determined not to be a proper sale-for-resale exception to the imposition of sales tax. Taxpayer argues that "[t]here is no valid basis for disregarding the separate corporate existence of the parties, or the lease transaction[s] between the parties, so as to deny the resale exemption." Taxpayer Brief at 5.

As noted by the commissioner in his final determination, "not all leases of aircraft qualify for the resale exception. If the owner of an aircraft furnishes both the aircraft and the operator, the owner remains in possession and control of the aircraft and no 'sale' of the aircraft occurs. See, *Fliteways, Inc. v. Lindley*, (1981), 65 Ohio St.2d 21; *Laurel Transportation, Inc. v. Zaino* (2001), 92 Ohio St. 3d 220. If, on the other hand, the owner of an aircraft furnishes only the aircraft (via a dry lease), the aircraft is considered to be resold when leased and the purchase of the aircraft qualifies for exemption from taxation under R.C. 5739.01(E)(1), as long as the owner of the aircraft is engaged in business." S.T. at 1-2. It appears that the

commissioner does not dispute that taxpayer, in the lease relationship created, furnished only the aircraft, via a dry lease, and, as such could potentially claim a sale-for-resale exception, but only so long as taxpayer was "engaged in business."

This board has previously considered the sale-for-resale exception in the context of the charter of a yacht by a company related to the yacht owner. In *The Barth Co. v. Tracy* (Aug. 26, 1994), BTA No. 1992-A-1014, unreported, this board determined that the owner of a luxury yacht, Barth, chartered the yacht to other entities in the same form as it had purchased it, i.e., without a crew, and, as such, it met the requirements for the sale-for-resale exception to sales tax. The commissioner argued "that this Board must employ a 'primary use test' when considering the 'resale' of the subject yacht, since it was often leased to an affiliated company, in what the Commissioner termed a 'less than arm's-length' transaction. The Commissioner argues that the transactions among the affiliated companies do not constitute 'resales' for purposes of R.C. 5739.01(E)(1), and thus, the primary use of the yacht was for appellant's own purposes, and not, as stated, for charter purposes." Id. In effect, the commissioner in *Barth*, as he has here, asked the board to disregard the separate corporate existence of Barth, as related to its affiliated charterers, so as to find that in fact, "the subsidiary was formed for the purpose of perpetrating a fraud and that domination by the parent corporation over its subsidiary was exercised [so] as to defraud complainant." Id., quoting *North v. Higbee Co.*, 131 Ohio St. 507 (1936), syllabus.

As this board recognized in *Barth*, "[c]ourts have been reluctant to disregard the corporate entity and have done so only where the corporation has been used as a cloak for fraud or illegality *or where the sole owner exercised such excessive control over the corporation that it no longer has a separate existence*. *** It has also been stated that the corporate entity should be disregarded only when justice cannot be served in any other way. ***." (Emphasis added.) *Barth*, supra, quoting *E.S. Preston Assoc., Inc. v. Preston*, 24 Ohio St.3d 7, 11 (1986). In *Barth*, this board considered that Barth chartered the subject yacht virtually the same number of days per year to its affiliate(s), as it did to third parties, and charged the same rates to its affiliates as it did to third parties. Further, Barth maintained separate books from its affiliates, and did not share profits gained through the charters of the yacht with its affiliates. Finally, Barth, the titled owner of the yacht, reported the yacht for federal income tax/regulatory purposes. Id.

Thus, we must look to the record before us to determine the nature of the relationship between taxpayer and Mitchell's, the primary/only lessee of the aircraft. Upon this board's review of the provisions of the "Non-Exclusive Aircraft Lease Agreement" entered into by taxpayer and Mitchell's, we agree with the commissioner that such lease "lacked both factual and economic substance." Tax Comm. Brief at 1. There is no defined lease term; each lease period "commences with delivery of the Aircraft to Lessee and concludes with the return of the Aircraft to Lessor." S.T. at 442. The subject "Aircraft is leased to Lessee on a non-exclusive basis and may be subject to use by Lessor, and/or to additional non-exclusive leases to other parties during the Term." S.T. at 442. The "Lessor may approve or deny any flight-scheduling request in Lessor's sole discretion," S.T. at 442, because the lease "does not confer upon Lessee any recurring or continuous right to use the Aircraft." S.T. at 443. The aircraft was leased to lessee at an hourly rate of $80.00, but Mitchell's was responsible for the costs of operating the aircraft, including, for example, fuel, maintenance service plans, storage, insurance, and retention of qualified mechanics and pilot services. S.T. at 4, 200, 419-421, 424. Finally, the lease was signed by Ms. Schmidt on behalf of both the lessor and the lessee.

Most telling of the foregoing lease considerations is that Ms. Schmidt signed on behalf of both the lessor and the lessee in the purported lease transaction between taxpayer and Mitchell's. Because Ms. Schmidt acted in such a dual capacity, the arm's-length nature of the transaction is called into question, specifically, whether the terms of the lease were negotiated and in whose interests Ms. Schmidt was acting. Further, the non-exclusive lease terms and the taxpayer's reservation of right to deny any flight scheduling request, for example, are only feasible between two entities that are, practically speaking, one and the same, i.e., "although the lease gives the lessee no defined right to use the aircraft, the lease places full responsibility for all the costs of operating and storing the aircraft on the lessee." S.T. at 4.

Outside of the lease terms, we find other indicia that taxpayer and Mitchell's are, in effect, one operation. Taxpayer's address is the residential address for Ms. Schmidt; taxpayer has no reported business location, out of which it operates, other than apparently Ms. Schmidt's home. Although taxpayer contends that the subject aircraft "is maintained in a visible hangar location and leased from the hangar," there is nothing in the record to indicate that any business is conducted out of that location. Flight logs indicate that all flights taken during the audit period were taken by Mitchell's, with no use by any third-party lessee. In fact, the record fails to demonstrate any desire or attempt to lease the subject aircraft to "others." Taxpayer does not engage in advertising the availability of its aircraft for lease; while advertising is not the only indicator of a legitimate business purpose, its lack thereof, in combination with taxpayer's lack of business location, causes this board to question the intent behind taxpayer's formation. Moreover, the loan for the purchase of the subject aircraft was signed by Ms. Schmidt in her individual capacity, as opposed to any type of representative capacity on behalf of taxpayer.

Based upon the foregoing, this board concludes that taxpayer did not purchase the subject aircraft for purposes of leasing it to others, as part of a business enterprise. On the contrary, appellant's position is belied by the record, as recounted herein. In fact, we find no evidence to support appellant's contentions and we conclude that the purchase of the subject aircraft and ensuing lease transactions between taxpayer and Mitchell's, its sole member, constitute "transactions without economic substance because there is no business purpose or expectation of profit other than obtaining tax benefits." R.C. 5703.56(A)(1). As the commissioner concluded, "[t]here is no separation between these entities and actors." S.T. at 5.

Taxpayer contends that it was engaged in a legitimate business, i.e., leasing operation, separate and apart from Mitchell's, for several reasons, including but not limited to its ability to limit taxpayer's liability, its ability to protect the privacy of a lessee, like Mitchell's, due to public availability of information regarding the taxpayer's use of the aircraft, and the taxpayer's ability, under the dry lease provisions, to incur less financial/administrative burdens. Brief at 11. While we acknowledge taxpayer's stated considerations, we do not agree that they establish a legitimate business purpose in taxpayer; on the contrary, they reinforce taxpayer's sole basis for existence, to lease the aircraft, but only to one lessee, Mitchell's, the sole member of taxpayer. While taxpayer claims that Mitchell's, which only has salon locations in Ohio, has a need for the aircraft for assignments outside of Ohio, we find no evidence in the record to support such claim. Thus, taxpayer has failed to provide the necessary evidence to support its position herein.

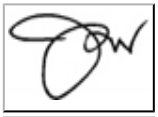
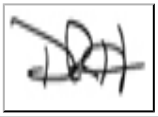
With regard to taxpayer's alternative argument that if the assessment is affirmed, the assessed penalties should be abated "because The Company made diligent efforts to comply with Ohio law, and acted in good faith and with reasonable cause in claiming the resale exemption," Taxpayer Brief at 16, we look to the court's pronouncement in *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67 (1984), wherein it held that "[r]emission of the penalty is discretionary. *** Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred. ***" Id. at 70. Further, in *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83 (1985), the court held "'"In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. ***"' *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222." Id. at 87. See, also, *J.M. Smucker, L.L.C. v. Levin,* 113 Ohio St.3d 337, 2007-Ohio-2073, ¶16. "[G]ood-faith efforts at compliance are not sufficient to show an abuse of the commissioner's discretion." *Kings Entertainment Company v. Limbach*, 63 Ohio St.3d 369, 371 (1992). In this instance, taxpayer has failed to carry its burden and provide any evidence or testimony to this board to support its position that it is deserving of an abatement of the penalties assessed; in fact, based upon the commissioner's conclusion, and this board's agreement, that taxpayer perpetrated a sham transaction, we are constrained to conclude that taxpayer did not demonstrate any good faith or reasonable cause relating to its claimed exemption.

Finally, with regard to issues raised regarding sales tax paid by taxpayer on lease payments for the subject aircraft, the only assessment under consideration in the instant appeal is a use tax assessment relating to the

purchase of the subject aircraft. Accordingly, we have no jurisdiction to address issues unrelated to such use tax assessment and/or the application of sales tax payments previously made to a use tax liability.

As this board has held, "[w]e will not engage in reweighing of evidence ***. *** After having been advised by the commissioner [through the final determination] that *** [appellant's] evidence was 'not sufficient' ***, appellant did not avail *** [itself] of the further opportunity to present [competent, probative] evidence on appeal before this board." *Gifford, Adams County Auditor v. Levin* (Apr. 8, 2014), BTA Nos. 2010-716-718, 2010-807-805, unreported. For example, taxpayer had the opportunity to bring competent, probative evidence to dispute the commissioner's finding of a sham transaction(s), but instead, waived hearing and relied upon its written argument. As this board held in *Ace Doran Hauling & Rigging Co. v. Tracy* (Sept. 30, 1994), BTA No. 1992-R-213, unreported, one consideration when determining whether intercompany rental payments are taxable is "was there testimony or other evidence that these transactions had substance, or were they merely instituted for accounting purposes?" In this instance, there was no testimony or evidence presented to dispute the commissioner's conclusions in the final determination regarding the nature of the lease transactions.

The burden is on appellant to establish its entitlement to any exception to the assessed tax through competent, probative evidence. When no evidence is offered to demonstrate that the Tax Commissioner's findings are incorrect, the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern*, supra; *Kroger Co. v. Limbach*, 53 Ohio St.3d 245 (1990); *Alcan*, supra. We conclude that appellant has failed to rebut the presumption that the findings of the Tax Commissioner are valid. *Alcan*, supra. Therefore, it is the decision of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

Kathleen M. Crowley, Board Secretary