Ohio Tax

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Tuesday & Wednesday, January 23-24, 2018

Hyatt Regency Columbus, Columbus, Ohio

Workshop J

The Taxation of Employment Services in Ohio … Increasingly Significant as Employers Strive to Meet Labor Needs in a Dynamic & Specialized Economy

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Tuesday, January 23, 2018
3:00 p.m. to 4:00 p.m.

Biographical Information

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Larry Kidd is recognized throughout the State of Ohio as an award-winning entrepreneur and economic development expert. With more than 15 years of experience fueling domestic and international trade throughout the US, Latin America, Europe and Asia, he has been an integral player in statewide business development initiatives while starting up or turning around multiple companies.

This two-time Entrepreneur of the Year and serial business owner launched and currently leads Reliable Staffing Services and RSS Professional, temporary and permanent staffing companies serving employers throughout the US. He turned around American Warehouse & Logistics, modernized and overhauled International Packaging & Specialties after rising through the ranks in manufacturing management, purchasing, logistics and regional sales leadership roles at Luigino's, Inc. and Hilti, Inc.
Larry was appointed Director of JobsOhio by Governor John Kasich where he also serves as Treasurer, Secretary and Chairman of the Compensation Committee. He is the Director and Chair-Elect of the Ohio Chamber of Commerce, Chair of the Board of Trustees of Rio Grande Community College, Founder of the Business Council, and Co-founder of 10-in-10, an initiative striving to create 10,000 new jobs in southeastern Ohio over a 10-year period. He also serves as Ohio Commodore and a Director of Holzer Health Systems.

Larry previously served as Past Director of the Ohio Staffing Association, Past Vice Chair of the Jackson County Republican Party, Past Chair of Jackson County Economic Development and Past Chair of Junior Achievement of Jackson County. He earned an MBA from National University and a BS in Marketing from Miami University. He resides in Jackson, Ohio.

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Dave is an associate attorney in McDonald Hopkins' Tax and Benefits Group who advises clients on a multitude of tax issues, particularly state and local taxes. As a former Assistant Attorney General for the Ohio Attorney General, Mike DeWine, Dave has defended the Ohio Tax Commissioner in tax litigation before the Ohio Board of Tax Appeals and Ohio courts of appeal, including several cases before the Ohio Supreme Court. He has extensive experience with all types of state and local taxes. These taxes include the income tax, sales and use tax, excise tax, personal and real property tax, and Ohio's gross receipts tax, the CAT.

Dave also advises clients with respect to federal tax matters, including federal tax structuring and analysis for business transactions, federal tax controversies including IRS audits, executive compensation matters, and estate planning.

Dave attended The Ohio State University Max M. Fisher College of Business, where he earned his B.S. with honors in Accounting and Finance. He also attended The Ohio State University Moritz College of Law on a full ride merit scholarship and graduated with honors.

Biographical Information

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Daniel Fausey is a 2005 graduate of the Ohio State University Moritz College of Law. Dan was a law clerk for Chief Justice Thomas Moyer and Chief Justice Eric Brown of the Ohio Supreme Court. Dan has worked as an Assistant Attorney General in several sections of the Ohio Attorney General's Office, including Executive Agencies, Charitable Law, and currently Taxation, where he is the Assistant Section Chief. Dan also has been a Deputy Solicitor for the State Solicitor's Major Appeals Group.

Dan's practice is mainly litigation, having appeared before more than 30 trial-level courts across the state and several administrative agency hearings. Dan's practice has a heavy appellate focus: he has appeared before numerous Ohio appellate Courts, the Sixth Circuit Federal Court of Appeals, and has made multiple appearances before the Supreme Court of Ohio. Dan previously served as an Adjunct Professor at Ohio State's Moritz College of Law, where he taught Appellate Advocacy.

In his free time, Dan races mountain bikes and serves as a board member for the non-profit Central Ohio Mountain Biking Organization. Dan lives in Columbus with his wife and three children.

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Currently, Laura Stanley is Legal Counsel for sales and use taxes for the Ohio Department of Taxation, within the Business Tax Division. In this position, Laura is responsible for drafting final determinations, legal ruling requests, administrative rules, information releases, and reviewing proposed legislation, as well as advising the Administrators of the Business Tax Division and Commissioner's Office on legal matters. Previously, Laura served as Legal Counsel for various taxes, including the commercial activity and petroleum activity taxes within the Business Tax Division and the excise taxes within the Excise & Energy Tax Division. Prior to becoming Legal Counsel, Laura worked as a Management Analyst Supervisor in the Commercial Activity Tax Division and was instrumental in several projects, including the Voluntary Disclosure Program. Additionally, Laura assisted her predecessor in her capacity as Legal Counsel for the Commercial Activity, Motor Fuel, and Excise Tax Divisions. Laura enjoys the presentation circuit and looks forward to building relationships through interaction with the public. Laura graduated from The University of Akron in Akron, Ohio with a Bachelors of Science in Political Science & Criminal Justice and an Associate of Applied Science in Criminal Justice Technology. Additionally, Laura earned her J.D. from Capital University School of Law in Columbus, Ohio.

Taxation of Employment Services

Presented By:

David Ebersole, Esq.
McDonald Hopkins, LLC

Larry Kidd
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Daniel Fausey, Esq.
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Laura Stanley, Esq.
Ohio Dept. of Taxation

Taxation of Employment Services

- Overview: Employment Services Industry and Sales Taxation
- Case Law Update: *Accel, Inc. v. Testa*
- Audit Practice and Exclusions From Sales Tax
- Best Practices and Audit Defense

Employment Services

- How is the client cost calculated?
  - Wage
  - Employer liabilities
  - BWC burden
  - Benefits desired by Client (vacation, insurance, etc.)
  - Employment Services Margin

  Example: Payrate $10.00/hr., mark-up 1.5 times payrate, bill rate is $15.00/hr. Bill rate covers the above and my company's overhead and profit.

The Employment Services Industry

- 14.6 million people are employed through staffing firms each year
- Annual industry sales of $130 billion
- Average tenure of a temporary worker is 11 weeks
- In Ohio, there are 550,000 employed each year through staffing firms
  - Average annual wage for temporary worker is over $30,000

Sales Tax on Employment Services

- The Ohio General Assembly subjected employment services to sales tax beginning on January 1, 1993
- Sales tax on employment services annually raises $160 million in tax revenue
- Ohio is one of 12 states with the tax
  - 38 states do not levy sales tax on employment services
  - PA and WV are only border states with the tax

Sales Tax on Employment Services

- R.C. 5739.01(B)(3) includes in the definition of a "sale" and "selling" transactions where:
  - (k) "Employment service is or is to be provided."

"Employment Services" Defined

Per R.C. 5739.01(JJ), "Employment services" means:

- Personnel are provided or supplied on either a temporary or long-term basis;
- Personnel provided or supplied are under the supervision or control of another; and
- Personnel provided or supplied receive their wages, salary, or other compensation from the employment service provider.

"Employment Services" Defined

- *Moore Personnel Serv., Inc. v. Zaino*, 98 Ohio St.3d 337, 2003-Ohio-1098

- Facts:
  - Moore hired employees identified by their clients
- Issue:
  - Did Moore "provide or supply" employees even though they did not interview or select the employees?
- Held: Yes

"Employment Services" Defined

- *Seaton Corp v. Testa,* BTA Case No. 2015-224/743 (Jul. 13, 2016), Ohio Supreme Court Case No. 2016-1188 (pending before Ohio Supreme Court)
- Facts:
  - Seaton provided employees to Kal Kan; maintained some control over employees on Kal Kan's manufacturing line
- Issue:
  - Given the facts, when are employment services "under the supervision or control of another" and thus taxable?

Exclusions from the Tax

- Five Exclusions from the Definition of "Employment Services" Per R.C. 5739.01(JJ):
  - Permanent Placement Exclusion – (JJ)(3)
  - Sale for Resale Exclusion – (JJ)(5)
  - Medical/Health Care Exclusion – (JJ)(2)
  - Affiliated Group Exclusion – (JJ)(4)
  - Contractor/Subcontractor Exclusion – (JJ)(1)

Permanency Exclusion

- Test Your Knowledge:

  Engineering Inc. decides to outsource their office staff, including an office manager and two secretaries to ES Service Company.

  Executed contract stipulates staff are permanently assigned for at least one year.

  Contract further stipulates the monthly fee charged is $4,500.00.

Permanency Exclusion

– As long as a review of the invoices shows continuous monthly invoices/payments of $4,500, this service is nontaxable.

Permanent Placement Exclusion

- Per R.C. 5739.01(JJ)(3), "Employment Services" does not include situations where employment services are provided:
  - Pursuant to a contract of at least one year; and
  - Each employee assigned under the contract is assigned to the purchaser on a "permanent" basis

- Auditors will review contracts and invoices to investigate permanent assignment

Permanent Placement Exclusion

- *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1
- Held:
  - "Permanent" means indefinite or unlimited time period
    - Not for: "short-term workload conditions"; or "as a substitute for a current employee who is on leave"
  - To determine permanency, review (a) the contracts; and (b) the facts and circumstances of the assignment
  - Factors: length of the contract; seasonal nature

Permanent Placement Exclusion

- *Bay Mechanical & Electrical Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312
- Facts:
  - Bay Mechanical argued that service providers supplied them with "permanent placement" employees excluded under R.C. 5739.01(JJ)(3)
- Evidence:
  - Testimony of Controller regarding summary exhibits (created from absent invoices) provided first at BTA
- Issue:
  - Does contract language alone satisfy the permanent placement exclusion?
- Held: No, look to "what actually is being done"
  - BTA did not abuse discretion in rejecting summary exhibits

Permanent Placement Exclusion

- *A.M. Castle & Co. v. Testa*, BTA Case No. 2013-5851 (Mar. 9, 2015)

- Issue: Were employees provided on a permanent basis where:
  - the contract does not expressly state "permanent"; and
  - no fixed number of employees in the contract?
- Held:
  - Taxpayer claiming exemption must have intent to maintain employees provided on a permanent basis
  - Taxpayer satisfied burden to show exemption

Permanent Placement Exclusion

- *Accel, Inc. v. Testa*, 2017-Ohio-8798
- Facts:
  - Accel, Inc. purchased "employment services" and materials to be used and incorporated into gift sets
  - Use tax assessed on these transactions
  - Contracts did not list number of workers
  - Number of workers provided to Accel "fluctuated significantly throughout the year and was greatest during the fall as the holidays approached"
  - Worker hours reduced during low-activity periods

Permanent Placement Exclusion

- *Accel, Inc. v. Testa*, 2017-Ohio-8798
- Evidence:
  - Testimony of Accel CFO
    - Accel sought to have employees return once trained
    - When less work available, Resource Staffing reduced hours rather than discharge workers
  - Testimony of Resource Staffing CFO
    - Resource Staffing supplied 647 persons to Accel during contract period; 358 worked there more than one year
    - Resources Staffing did not reassign workers to other clients when work slow
  - Affidavit of Manpower President (not live testimony)
    - Did not address whether the labor provided to Accel was seasonal

Permanent Placement Exclusion

- *Accel, Inc. v. Testa*, 2017-Ohio-8798
- BTA finds that Resource Staffing labor is "permanent" but Manpower labor is not
  - BTA struck from the record the exhibit that formed the basis for Resource Staffing CFO testimony
- Issue: Did BTA "unreasonably and unlawfully" find workers provided on permanent basis where:
  - (a) service provider and purchaser testified that they intended to hire permanent employees;
  - (b) number of employees not listed in contract; and
  - (c) some fluctuation in employees during contract?

Permanent Placement Exclusion

- *Accel, Inc. v. Testa*, 2017-Ohio-8798
- Held:
  - Court affirms BTA finding that Resource Staffing workers are permanently placed
  - Court affirms BTA finding that Manpower workers are not permanently placed
  - No ruling on whether BTA properly struck exhibit from the record

Permanent Placement Exclusion

- *Accel, Inc. v. Testa*, 2017-Ohio-8798
- Issues Going Forward:
  - Does Accel, Inc. affect audits? If so, how?
  - Does Accel, Inc. affect taxpayer burden before the BTA? Compare, *Bay Mechanical*
    - Do rules of evidence apply before the BTA? How so?
  - How do we determine if seasonal workers are excluded as permanent?
  - Does the employer's intent matter?

Resale Exclusion

- Test Your Knowledge:

  - ES Provider A needs to provide for 15 groundskeepers for an upcoming concert and doesn't have the staff. ES Provider contracts XYZ Provider for the staffing.

  - Does this meet the exclusion?

Resale Exclusion

- The charge between ES and XYZ is excluded per the exemption found in R.C. 5739.01(JJ)(5).

- ES Provider to the concert hall is taxable employment services.

Resale Exclusion

- Enacted in 2007, R.C. 5739.01(JJ)(5) provides that "Employment Services" does not include situations where employment service providers purchase personnel from other providers due to their own staff shortages.

General Resale Exception

- Resale exception under R.C. 5739.01(E) requires reselling "the benefit of the service provided"
- *Bellemar Parts Industries, Inc. v. Tracy*, 88 Ohio St.3d 351 (2000)
  - Benefit of employment services is flexible, less costly, and more efficient workforce
- *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St.3d 356 (2005)
  - Reseller of employment services must itself provide employment services

Medical Services Exclusion

- Test Your Knowledge:
  - Which of the following is considered a taxable employment service?
    - Physician A is hired by a surgery center to perform medical services on patients; or
    - Physician B is hired by a surgery center to be the medical director in charge of the facility.

Medical Services Exclusion

- Physician B is considered to provide taxable employment services because the Physician is not performing patient care.

Medical Services Exclusion

- Per R.C. 5739.01(JJ)(2), "Employment services" does not include "medical and health care services."

Affiliated Entity Exclusion

- Per R.C. 5739.01(JJ)(4), "Employment Services" does not include "transactions between members of an affiliated group."
- Affiliated Group: R.C. 5739.01 (B)(3)(e) defines "affiliated group" as:
  - "[T]wo or more persons related in such a way that one person owns or controls the business operation of another member of the group."
  - "In the case of corporations with stock, one corporation owns or controls another if it owns more than fifty per cent of the other corporation's common stock with voting rights."
  - Federal attribution rules do not apply.

Contractor Exclusion

- Test Your Knowledge:
  - Which of the following is considered a taxable employment service?
    - Company A hires an electrician to wire a new office; or
    - Company B hires an electrician to perform work under the direction of the plant manager.

Contractor Exclusion

– Company B is considered to be taxable employment services.

Contractor Exclusion

- Per R.C. 5739.01(JJ)(1), "Employment Services" does not include "acting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser."

Claiming Exemption

- Exemption Certificate must be completed if claiming exemption as 501(c)(3) organization, government entity, or church

- Manufacturing exemption denied

- PRIOR to January 1, 2017 - If claiming one of the five exclusions, document as well as possible: contracts, chart of accounts, invoices, show intent of the purchaser

AFTER December 31, 2016, O.R.C. 5739.03 allows consumers to claim exclusion through exemption certificate presented to vendor; continue to document as well

Audit Procedures

- Auditing procedures may include:
  - Determination if employment services have been provided
- This will include review of the chart of accounts
- Conducting facility tours
- Learning taxpayer's operation and use of outside personnel
  - Review of contracts
  - Review of invoices
  - Review of performance
  - Review of exemption certificates

Best Practices

- Written agreements
  - At least one year and "permanent" assignment
  - Each person must be assigned "permanently or indefinitely"
- Performance
  - Know the facts and document them
  - Know the statutes and decisional law
- Audit
  - Be honest and avoid offhand remarks
  - Describe the tasks that personnel perform

Questions?

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[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Accel, Inc. v. Testa,* Slip Opinion No. 2017-Ohio-8798.]

SLIP OPINION NO. 2017-OHIO-8798

ACCEL, INC., APPELLEE AND CROSS-APPELLANT, *v.* TESTA, TAX COMMR., APPELLANT AND CROSS-APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Accel, Inc. v. Testa,* Slip Opinion No. 2017-Ohio-8798.]

Sales and use tax—R.C. 5739.02(B)(42)(a) and 5739.01(R)—Tax exemption for purchases of items used in "assembling" or "assembly"—R.C. 5739.01(JJ)(3)—Tax exemption for employment-services transactions involving employees assigned "on a permanent basis"—Decision of Board of Tax Appeals affirmed.

(No. 2015-1332—Submitted September 26, 2017—Decided December 6, 2017.)

APPEAL from the Board of Tax Appeals, No. 2012-2840.

Per Curiam.

{¶ 1} The Ohio Tax Commissioner, appellant and cross-appellee, conducted a consumer-use-tax audit of certain purchases made by appellee and cross-appellant, Accel, Inc., during the period January 1, 2003, through December

31, 2009, and the tax commissioner issued a tax assessment based on that audit. On appeal, the Board of Tax Appeals ("BTA") affirmed the assessment in part and reversed the assessment in part.

{¶ 2} The BTA reversed the imposition of use tax on materials Accel acquired to be used and incorporated into gift sets, holding that the purchases were entitled to exemption under R.C. 5739.02(B)(42)(a) and 5739.01(R) because the preparation of the gift sets involved "assembling" or "assembly." The BTA also reversed the imposition of use tax on certain transactions by which Accel obtained "employment services" through one of its suppliers, holding that the transactions were exempt under R.C. 5739.01(JJ)(3), which exempts transactions involving the assignment of employees "on a permanent basis." The tax commissioner appeals these findings and asserts in conjunction with his appeal that the BTA should have deferred to his own factual findings.

{¶ 3} In its cross-appeal, Accel contests the BTA's ruling that no portion of the assessment is time-barred by R.C. 5703.58(B). Accel also contends that the production of gift sets qualifies for exemption directly under the definition of "manufacturing operation" in R.C. 5739.01(S) and that the employment-services transactions with a different supplier should also have been exempted.

{¶ 4} Finally, each party contests the BTA's decision to admit into evidence the report and testimony of the opposing party's expert witness.

{¶ 5} Based on our review of the issues presented, the record before us, the briefs, and the relevant case law, we conclude that the BTA acted reasonably and lawfully with respect to all of the contested findings. We therefore affirm the decision of the BTA.

COURSE OF PROCEEDINGS

{¶ 6} The tax commissioner issued a use-tax assessment against Accel on January 18, 2011. Accel petitioned for reassessment, and the tax commissioner issued his final determination on June 26, 2012, stating the amount of unpaid use

tax as $2,447,159.84, plus preassessment interest of $651,862.91 and a penalty of $122,357.99, for a total assessment of $3,221,380.74. Accel appealed to the BTA.

{¶ 7} The BTA held a hearing at which Accel presented the testimony of its president, its cost-accounting manager, an expert on manufacturing, the tax department's audit agent, Accel's chief financial officer, and the chief financial officer of Resource Staffing, Inc., a company through which Accel obtained some of its workers. The tax commissioner presented the testimony of an expert on packaging. Numerous exhibits were introduced into evidence, some subject to objections to be resolved by the BTA in its decision.

{¶ 8} The BTA found that those items purchased by Accel that, through "assembly," became part of the gift sets qualified for exemption. BTA No. 2012-2840, 2015 WL 4410600, *3-4 (July 15, 2015). It arrived at this conclusion in two steps. First, the BTA stated that Accel was not engaged in "merely packaging products," and it went on to find that "Accel's activities do not involve packaging." *Id.* at *3. Second, the BTA determined that Accel's preparation of the gift sets did constitute "assembly." *Id.* at *4.

{¶ 9} Next, the BTA found that the evidence showed that the employees supplied to Accel by Resource Staffing were assigned "on a permanent basis," with the result that Accel did not owe sales or use tax on the purchase of employment services from Resource Staffing. *Id.* at *5. In contrast, the BTA found that there was insufficient evidence for it to find that employees supplied to Accel by Manpower, Inc., were assigned on a permanent basis, so those transactions were found to be taxable. *Id*. at *6.

{¶ 10} Finally, the BTA found that R.C. 5703.58(B) imposed no time bar on any aspect of the assessment, because that provision did not take effect until after the tax commissioner issued the assessment. *Id*.

ANALYSIS

Standard of Review

{¶ 11} In reviewing a decision of the BTA, we determine whether the decision is "reasonable and lawful." *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 14. Although the BTA is responsible for determining factual issues, this court " 'will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion.' " *Id*., quoting *Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino*, 93 Ohio St.3d 231, 232, 754 N.E.2d 789 (2001).

The BTA Reviews Tax-Commissioner Determinations De Novo

{¶ 12} Under his second proposition of law, the tax commissioner argues that the BTA erred because it "merely substituted its own fact finding for that of the Tax Commissioner." The tax commissioner relies on *Hatchadorian v. Lindley*, 21 Ohio St.3d 66, 488 N.E.2d 145 (1986), paragraph one of the syllabus, which articulates a "clearly unreasonable or unlawful" standard for rebutting the tax commissioner's findings. We have mentioned that standard in subsequent cases. *E.g., Am. Fiber Sys., Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, 928 N.E.2d 695, ¶ 42; *Newman v. Levin*, 120 Ohio St.3d 127, 2008-Ohio-5202, 896 N.E.2d 995, ¶ 31; *Nusseibeh v. Zaino*, 98 Ohio St.3d 292, 2003-Ohio-855, 784 N.E.2d 93, ¶ 10. Although the "clearly unreasonable and unlawful" standard does imply that the BTA should accord deference to the tax commissioner's findings of fact, two strands of case law establish that deference is not required.

{¶ 13} First, longstanding case law unequivocally holds that the BTA's standard for reviewing the tax commissioner's findings is de novo, as to both facts and law. *Key Servs. Corp. v. Zaino*, 95 Ohio St.3d 11, 16, 764 N.E.2d 1015 (2002), citing *Higbee Co. v. Evatt*, 140 Ohio St. 325, 332, 43 N.E.2d 273 (1942); *accord MacDonald v. Shaker Hts. Bd. of Income Tax Rev.*, 144 Ohio St.3d 105, 2015-Ohio-

3290, 41 N.E.3d 376, ¶ 21. De novo review is, of course, the opposite of deferential review.

{¶ 14} Second, our case law establishes—without any reference to a "clearly unreasonable" standard—that the tax commissioner's findings are presumed valid subject to rebuttal: "The rule is well settled that a taxpayer challenging the assessment has the burden to ' " 'show in what manner and to what extent * * * the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect.' " ' " *Krehnbrink v. Testa*, 148 Ohio St.3d 129, 2016-Ohio-3391, 69 N.E.3d 656, ¶ 30, quoting *Maxxim Med., Inc. v. Tracy*, 87 Ohio St.3d 337, 339, 720 N.E.2d 911 (1999), quoting *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 215, 450 N.E.2d 687 (1983), quoting *Midwest Transfer Co. v. Porterfield*, 13 Ohio St.2d 138, 141, 235 N.E.2d 511 (1968). Notably, under this standard, the burden for rebutting the tax commissioner's findings is simply to prove that the findings were incorrect.

{¶ 15} We recently invoked the *Hatchadorian* standard in the context of vacating a finding of the BTA that had contradicted the tax commissioner's own finding that a trust was a "nonresident trust" for purposes of R.C. 5747.01(I)(3). *T. Ryan Legg Irrevocable Trust v. Testa*, 149 Ohio St.3d 376, 2016-Ohio-8418, 75 N.E.3d 184, ¶ 62-63. But close examination shows that our decision in that case did not require the BTA to defer to the tax commissioner as a finder of fact. To the contrary, we set forth two specific reasons for setting aside the BTA's finding of the trust's residency. First, the BTA's finding was defective because the BTA failed to consider one essential statutory element of trust residency. *Id.* at ¶ 58. Second, the tax commissioner's finding that the trust was a nonresident trust had not been contested at the BTA and no probative evidence had been presented to show that the tax commissioner's original determination was factually incorrect. *Id*. at ¶ 62. These considerations did not cause us to reverse the BTA's residency finding; instead, we vacated the BTA's finding on the grounds that the presumptive

validity of the tax commissioner's finding had not been rebutted because it had not been contested, with an offer of proof, at the BTA. *Id*. at ¶ 63. Thus, as relevant here, *T. Ryan Legg Irrevocable Trust* stands for nothing more than the proposition that the BTA must affirm a finding of the tax commissioner when the finding has not been shown to be incorrect.

{¶ 16} For the foregoing reasons, we reject the tax commissioner's second proposition of law. We hold that the BTA owed no deference to the tax commissioner's findings beyond placing the evidentiary burden on the taxpayer, Accel, to show them to be, by a preponderance of the evidence, incorrect. And in reviewing the BTA's own factual findings, "[w]e must affirm * * * if they are supported by reliable and probative evidence, and we afford deference to the BTA's determination of the credibility of witnesses and its weighing of the evidence subject only to an abuse-of-discretion review on appeal." *HealthSouth Corp. v. Testa*, 132 Ohio St.3d 55, 2012-Ohio-1871, 969 N.E.2d 232, ¶ 10.

Accel's Preparation of Gift Sets Could Reasonably Be Found to Involve "Assembling" or "Assembly"

{¶ 17} R.C. 5739.02(B)(42)(a) provides an exemption from taxation for "[s]ales where the purpose of the purchaser is to * * * incorporate the thing transferred as a material or a part into tangible personal property to be produced for sale by manufacturing, *assembling*, processing, or refining * * *." (Emphasis added.) "Manufacturing" is not by itself defined, but "manufacturing operation" is defined in R.C. 5739.01(S):

> "Manufacturing operation" means a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, *assembling parts*, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing

> such materials or parts to the manufacturing process. "Manufacturing operation" does not include packaging.

(Emphasis added.) R.C. 5739.01(R) defines "assembly" and "assembling" as "attaching or fitting together parts to form a product, but [assembly and assembling] do not include packaging a product."

{¶ 18} The BTA applied these interlocking definitions to find that Accel's gift-set production involved "assembly" or "assembling" but not "manufacturing" per se. According to the BTA, Accel was attaching or fitting together components to create a new whole but it was not engaging in an operation producing the type of change of form that characterizes manufacturing per se. 2015 WL 44106005 at *4, citing *Sauder Woodworking Co. v. Limbach*, 38 Ohio St.3d 175, 177, 527 N.E.2d 296 (1988). The BTA also specifically found that Accel's activities did not constitute "packaging." *Id*. at *3.

{¶ 19} Under his third proposition of law, the tax commissioner contests the BTA's finding that Accel was not engaged in "packaging"; under his fourth proposition of law, the tax commissioner challenges the finding that "assembling" was involved. In its cross-appeal, Accel challenges the BTA's finding that it was not engaged in "manufacturing." Although we agree with the tax commissioner that the activity at issue did meet the definition of "packaging," we reject his contention that the activity did not constitute "assembling." And because we hold that the BTA reasonably and lawfully found that assembling was involved, we need not consider whether Accel was engaged in manufacturing per se.

{¶ 20} At the outset, there was sufficient evidence to support the BTA's finding that "Accel does more than merely package products," 2015 WL 4410600 at *3, and that Accel engaged in "assembling." Accel's cost-accounting manager testified that Accel produced its gift sets through a three-stage process—a design phase, a planning phase, and an assembly phase. In the design phase, Accel worked

with its clients "to brainstorm ideas on how to build that gift set, how that gift set is going to be presented in an aesthetic form so that it is sellable in a retail environment." The design phase also involved drawing up a written "specification" document setting forth instructions for building the gift set and stating the materials to be used. Those instructions were then incorporated into an internal document for Accel's use that set forth the production-line procedures it would employ. The initial two phases involved determining the costs of the items to be included in the gift set and the cost of the labor to do the assembly. The design and planning process usually took between two and six months to complete before the assembly phase began. According to its cost-accounting manager, Accel was engaging in approximately 217 such projects per year at the time of the BTA hearing.

{¶ 21} The tax commissioner levels a four-pronged legal challenge to the BTA's finding. First, the tax commissioner argues that a canon of statutory construction, noscitur a sociis, calls for construing "assembling" to involve a change in state or form in the same way "manufacturing," "processing," and "refining" would. The Latin phrase means "it is known by its associates," *Black's Law Dictionary* 1224 (10th Ed.2014); the tax commissioner maintains that the scope accorded to "assembling" must be limited by the other terms included in R.C. 5739.02(B)(42)(a).

{¶ 22} We disagree. The fact that the legislature chose to define "assembling" in R.C. 5739.01(R) in accordance with its ordinary meaning indicates the intent that "assembling" adds an element to the listing in R.C. 5739.02(B)(42)(a) that is otherwise absent. Under this reading, "assembling" extends the exemption to situations in which there is no transformation of substances but there is a putting together of components into a new functional (or in this case aesthetic) whole. *See Webster's Third New International Dictionary* 131 (2002) (defining "assemble" in part as "to fit together various parts of so as to

make into an operative whole"). This is clear enough that we need not resort to the statutory canon noscitur a sociis.

{¶ 23} Second, the tax commissioner argues that because the definition of "assembling" in R.C. 5739.01(R) excludes "packaging," any activity that qualifies as "packaging" cannot constitute "assembling." Thus, according to the tax commissioner, even if an activity independently qualifies as manufacturing, assembling, processing, or refining, it does not trigger the exemption if it also constitutes "packaging."

{¶ 24} To consider this argument, it is necessary to consult the statutory definition of "packaging"; R.C. 5739.02(B)(15) defines "packages" and "packaging" in connection with the packaging exemption as follows:

> "Packages" includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers, but does not include motor vehicles or bulk tanks, trailers, or similar devices attached to motor vehicles. *"Packaging" means placing in a package*.

(Emphasis added.)

{¶ 25} The preparation of gift sets clearly involves "placing in a package" because the various items Accel included in the gift sets—manufactured soaps, lotions, and other accessory and toiletry items—were boxed, wrapped, and bound together in being made part of a gift set. Moreover, the activity satisfies the case-law consideration that "packaging" involves "restrain[ing] movement" of the items in the gift set "in more than one plane of direction." *Custom Beverage Packers, Inc. v. Kosydar*, 33 Ohio St.2d 68, 73, 294 N.E.2d 672 (1973). We accordingly disagree with the BTA's conclusion that Accel's activities did not constitute "packaging."

{¶ 26} Although Accel's operations did involve packaging, that fact alone does not disqualify its production of gift sets from constituting "assembling." The issue here is how to treat an activity that is covered by *both* the assembling definition *and* the packaging definition, and the case law cuts against the tax commissioner's position in this regard. In *Cole Natl. Corp. v. Collins*, 46 Ohio St.2d 336, 339, 348 N.E.2d 708 (1976), this court effectively held that "packaging" can be an incidental function, meaning that even when the packaging definition applies, that is not determinative of the taxable status of the transactions.

{¶ 27} In *Cole Natl.*, a manufacturer sought to obtain the packaging exemption for display cases and racks that contained manufactured merchandise; the manufacturer shipped the initial order of merchandise to a retailer in the display cases or on display racks. Thus, the display cases and racks served as packages, but they were also designed to be used by retailers to store and display the merchandise for sale to customers. *Id.* at 336-337. This court affirmed the denial of the packaging exemption for the display cases and racks, holding that the function of the display cases and racks as packaging was "incidental to their use as a marketing aid." *Id.* at 339. By the same logic, the fact that the gift sets here functioned as "packaging" for the included items is incidental to the fact that in assembled form, they constituted a new and differently marketable product.

{¶ 28} Third, the tax commissioner contends that Accel's own use of the words "package" and "packaging" in describing its business to the public cuts against its exemption claim. And the record contains promotional materials and news articles in which Accel's executives and others refer to the company's participation in the "contract packaging industry," call the company a "contract packager," and refer to its production as involving "packaging." This is, of course, significant because the definitions of "assembling," R.C. 5739.01(R), and "manufacturing operation," R.C. 5739.01(S), both specifically exclude the mere "packaging" of a product. But the BTA's rejection of this argument was not

unreasonable—Accel's promoting itself as a "packager" for business purposes did not necessarily preclude the conclusion that its operations involved "assembling" as that word is specially defined for purposes of tax exemption.

{¶ 29} Fourth, the tax commissioner contends that case law of this court precludes the BTA's finding that "assembling" occurred in this case. This argument is unpersuasive because the cases the tax commissioner relies on did not involve a situation in which manufactured goods were (at least arguably) being "assembled" into a new, separately marketable whole. For example, *Fichtel & Sachs Industries, Inc. v. Wilkins*, 108 Ohio St.3d 106, 2006-Ohio-246, 841 N.E.2d 294, was a personal-property-tax-exemption case involving the issue whether putting clutch components into packages for shipment constituted "processing," thereby defeating a claimed exemption for inventory held "for storage only" under R.C. 5701.08 and 5711.22. We did state that "[p]ackaging is not processing," *id.* at ¶ 40, but the issue in *Fichtel & Sachs* is not apposite to the one presented in this appeal, which involves "assembling" manufactured items into a new aesthetic whole.

{¶ 30} In *Sauder Woodworking*, 38 Ohio St.3d at 176, 527 N.E.2d 296, a manufacturer of "knock down" furniture—furniture that was sold in an unassembled state to consumers—sought a sales-and-use-tax exemption for boxes in which furniture components were shipped. Sauder Woodworking argued that the packaging material was exempt because it was used directly in manufacturing or processing its products; we agreed with the tax commissioner and the BTA in rejecting this contention, based on the principle that "the container is [not] an inherent part of the product, as the furniture was equally functional and usable prior to its packaging." *Id.* at 177. By contrast, the gift sets in this case do constitute a new product of which the packaging materials are a component.

{¶ 31} In *Scholz Homes, Inc. v. Porterfield*, 25 Ohio St.2d 67, 266 N.E.2d 834 (1971), forklifts were used to move component parts that were later to be

assembled into homes from a plant's "fabricating" area to an "expediting" area, where the items were packed for shipment. *Id.* at 68-69. Rejecting a claim that the forklifts were used as part of a process that involved "assembling," we held that "assembling" means "more than the mere gathering together of fabricated materials"; "assembling" means fitting together various parts to make a new operative whole. *Id*. at 72. Quite simply, the BTA was justified in finding that the activity at issue in this case constituted "assembling," as the word is described in *Scholz Homes*.

{¶ 32} For the foregoing reasons, we reject the tax commissioner's first through fourth propositions of law relating to the BTA's finding that Accel was engaged in "assembling." At oral argument, counsel for the tax commissioner advanced an alternative contention that "some of this stuff is not even [the production of] a gift set; it's 'I'm putting it in a box to send it off.' " But neither the notice of appeal nor the tax commissioner's main brief argues that the case should be remanded with an instruction that transactions that involved "assembling" of gift sets should be segregated from those transactions that did not. Under these circumstances, the tax commissioner has abandoned the argument. *See Navistar, Inc. v.* Testa, 143 Ohio St.3d 460, 2015-Ohio-3283, 39 N.E.3d 509, ¶ 39, citing *E. Liverpool v. Columbiana Cty. Budget Comm.*, 116 Ohio St.3d 1201, 2007-Ohio-5505, 876 N.E.2d 575, ¶ 3.

Accel's Transactions with Resource Staffing Could Reasonably Be Found Exempt under R.C. 5739.01(JJ)(3)

{¶ 33} "Employment service" is subjected to sales and use tax pursuant to R.C. 5739.02 and 5739.01(B)(3)(k). Pursuant to R.C. 5739.01(JJ):

> "Employment service" means 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. "Employment service" does not include:
>
> * * *
>
> (3) Supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.

{¶ 34} The BTA found that Accel's dealings with Resource Staffing qualified under the permanent-assignment exemption of R.C. 5739.01(JJ)(3), while Accel's dealings with Manpower did not. Under his fifth proposition of law, the tax commissioner contests the first finding; on cross-appeal, Accel contests the latter finding.

The BTA made no formal finding concerning the "supervision or control" of personnel supplied by Resource Staffing

{¶ 35} After determining that Accel's arrangements with Resource Staffing triggered the permanent-assignment exemption, the BTA stated:

> Moreover, Accel argues that the employees provided by Resource Staffing were not "under the supervision or control of another," as is required to meet the definition of "employment service" in R.C. 5739.01(JJ). The testimony of [Moises Lluberes] indicated that Resource Staffing supplied supervisors, on its own payroll, not Accel's, to supervise and direct the employees provided for Accel's production activities.

2015 WL 4410600 at *6. The BTA's decision then starts a new paragraph addressing a totally different subject: whether Accel's arrangement with Manpower triggered the permanent-assignment exemption.

{¶ 36} In his notice of appeal and his brief, the tax commissioner treats the statement quoted above as if it were a finding and then argues that the BTA erred in making that finding. The tax commissioner points out that the contract between Resource Staffing and Accel itself recited that the employees would be under Accel's supervision and control. In its brief, Accel also treats the BTA's statement as if it were a finding that the personnel did not act under Accel's own supervision and control.

{¶ 37} We conclude that the quoted passage from the BTA's decision does not constitute a formal finding. The passage recites an additional argument advanced by Accel and alludes to its evidentiary significance, but it does not explicitly draw any conclusion as to the argument's validity. And making such a finding was unnecessary, because the BTA had already found that the permanent-assignment exemption applied to Accel's dealings with Resource Staffing. Because there was no formal finding regarding the supervision of the employees, we decline to address this contention.

The tax commissioner raises legal arguments that have been rejected by the case law

{¶ 38} On its face, the permanent-assignment exemption of R.C. 5739.01(JJ)(3) appears to turn on the content of the employment-services contract underlying the transaction. And consistent with that plain reading, the tax commissioner's fifth proposition of law asserts that the BTA erred by finding that the permanent-assignment exemption applied regarding employees supplied to Accel by Resource Staffing: "When an employment services contract fails to provide an express term for 'permanent' employees, the [BTA] cannot supply the missing terms by inquiring into facts and circumstances of the employment

relationship." The tax commissioner then focuses his argument on the content of the written employment-services agreement between Accel and Resource Staffing.

{¶ 39} But the tax commissioner is reviving an argument that this court has rejected in previous cases. This court has twice declined to adopt an analysis that narrowly focuses on whether an employment-services contract "specifies" permanent assignment and has instead applied a broader facts-and-circumstances test. First, in *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, 800 N.E.2d 740, the tax commissioner had argued to the BTA that H.R. Options's contracts with its clients contained "no contractual provision that 'specifies permanent' assignment" and that its "practice of continuous employment cannot be offered as evidence when no written contract provision exists." *See* BTA No. 2001-M-808, 2002 WL 1813907, *3 (Aug. 2, 2002). Neither the BTA nor this court accepted the tax commissioner's contract-centered approach. Indeed, this court's analysis placed greater emphasis on the individual employment contracts between the employees and the employment-services provider that were in the record than on the overarching employment-services contracts between the provider and its clients. *H.R. Options* at ¶ 23-25.

{¶ 40} In *H.R. Options*, we articulated a test that does not emphasize the wording of the employment-services contract, as advocated by the tax commissioner here. Instead, the test for permanent assignment has two elements: (1) the employee must be assigned for an indefinite period, i.e., the contract stating the employee's assignment does not specify an ending date, and (2) the employee must not be provided as a substitute for a current employee who is on leave or to meet seasonal or short-term-workload needs. *Id.* at ¶ 21. In applying the test, "both the contract and the facts and circumstances of the employee's assignment are factors that must be reviewed to determine whether the employee is being assigned on a permanent basis." *Id.* Most significantly, we then approved the exemption from taxation for some of the employees based on the facts and circumstances when

the employment-services contract between the provider and the client plainly did not specify that they were assigned on a permanent basis. *Id*. at ¶ 23-24. And we remanded transactions involving certain other employees to the BTA for further review to determine whether they were purely seasonal, i.e., nonexempt, assignments. *Id*. at ¶ 26.

{¶ 41} In *Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, 978 N.E.2d 882, ¶ 19, we explained that in *H.R. Options*, we had "construed the exemption as turning on the facts of each employee's assignment rather than on the presence of 'magic words' in the employment-service agreements themselves." We then took the additional step of holding that the presence of the "magic words" in the employment-services contracts could not, in light of *H.R. Options*, be dispositive in favor of exemption. *Bay Mechanical* at ¶ 22.

{¶ 42} The tax commissioner tries to bolster his emphasis on R.C. 5739.01(JJ)(3)'s "specifies" language with a contract-law argument. The tax commissioner contends that an approach that determines the exemption's applicability based on facts-and-circumstances evidence violates principles of contract law by allowing course of performance to supply a contract term that is not present in the actual contract. The tax commissioner maintains that because under contract law, a contract term that is not set forth in the contract itself is "deemed to have no existence," *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989), and therefore cannot be shown by extrinsic evidence, R.C. 5739.01(JJ)(3) cannot properly be construed to support application of a facts-and-circumstances test to establish that the employees here were "assigned * * * on a permanent basis" when the employment-services contract failed to specify permanent assignment.

{¶ 43} This argument also is at odds with the case law. It cannot be reconciled with the facts-and-circumstances test set forth in *H.R. Options* and explained by *Bay Mechanical*. Indeed, the tax commissioner's argument had been

rejected by the BTA at the time *H.R. Options* was decided, and those earlier decisions formed the basis for the approach taken in *H.R. Options*. *See Bay Mechanical* at ¶ 23 ("*H.R. Options* adopts a consistent theme sounded by the BTA itself when reviewing exemption claims: when 'determining whether an exception or exemption to taxation applies, it is not just the form of a contract that is important,' but instead, the 'crucial inquiry becomes a determination of what the seller is providing and of what the purchaser is paying for in their agreement' "), quoting *Excel Temporaries, Inc. v. Tracy*, BTA No. 97-T-257, 1998 WL 775284, *2 (Oct. 30, 1998).

{¶ 44} For the foregoing reasons, the tax commissioner's objections based on his proposed interpretation of R.C. 5739.01(JJ)(3) to the BTA's finding regarding permanent assignment of the Resource Staffing employees are without merit.

The BTA's finding of permanent assignment is neither unreasonable nor unlawful

{¶ 45} In his brief, the tax commissioner then turns away from his contract-centered argument based on R.C. 5739.01(JJ)(3)'s wording and delves into the facts and circumstances of this case. Most importantly, he points to substantial evidence in the record that the employee assignments at issue here may have been seasonal or designed to meet "short-term workload conditions," *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, 800 N.E.2d 740, at ¶ 21. Under *H.R. Options*, neither of those types of assignment transactions qualifies for the permanent-assignment exemption. The tax commissioner in his final determination had found "compelling" evidence that Accel's "labor force fluctuates with the seasons," noting the nature of its business and the fact that invoices from Manpower and Resource Staffing demonstrated fluctuating payroll dollar amounts with heaviest spending on employee labor from August through December, and therefore had determined that the employees were "seasonal in nature."

{¶ 46} In arriving at a contrary conclusion regarding employees supplied by Resource Staffing, the BTA relied primarily on the testimony of Accel's chief financial officer, Daniel Harms, and Moises Lluberes, the chief financial officer of Resource Staffing. The gist of their testimony was that Accel sought to have employees return for job after job once they had been trained and that during periods when less work was available, Resource Staffing would reduce the hours the employees worked rather than discharging them. Lluberes specifically testified that Resource Staffing supplied 647 persons to Accel as employees from 2006 through 2011 (when its contract with Accel ended) and that about 358 of those employees worked more than one year at Accel.[1] Lluberes also testified that Resource Staffing would not reassign personnel placed with Accel to other clients when the workload at Accel decreased. The BTA relied on this testimony to conclude that the personnel supplied by Resource Staffing were "assigned on a permanent basis." 2015 WL 4410600 at *5.

{¶ 47} Although there is no question that the number of Resource Staffing workers at Accel fluctuated significantly throughout the year and was greatest during the fall as the holidays approached, the BTA concluded that the retention of the same personnel through high-activity and low-activity periods negated their status as seasonal employees. This is best viewed as an aspect of the BTA's factual determination that merits our deference.

{¶ 48} Ultimately, the distinction between seasonal or short-term-workload employment and more regular employment is one of degree, not of kind. In every enterprise, the workload may experience periods of ebb and flow. It seems entirely

[1] Lluberes testified in part based on an exhibit that the BTA in its decision ultimately struck from the record. The exhibit was a document stating the names and tenures of employees supplied by Resource Staffing to Accel and was prepared at Lluberes's direction by Resource Staffing's accounting department. But even if he had not stated precise numbers, Lluberes's testimony explained the nature of the permanent-assignment relationship, as to which he was not cross-examined. And the tax commissioner did not move to strike Lluberes's general testimony regarding the employees' tenures, which appeared to rely on a foundation beyond that of the excluded exhibit.

reasonable, therefore, that what matters in an ebb-and-flow business for purposes of R.C. 5739.01(JJ)(3) and our precedents is the continuity of the workforce, i.e., are the same workers having their hours adjusted or are new workers being brought in to handle the extra work during the busy season only? Based on Lluberes's testimony, the BTA found the former to be true. Under *H.R. Options*, bringing back the same workers each time with differing hours is consistent with permanent assignment; using new workers just for a brief workload spike is not.

{¶ 49} The tax commissioner argues that Lluberes's testimony was so biased that the BTA could not have reasonably relied on it. But as discussed, we review the BTA's weighing of evidence and determinations of witness credibility under an abuse-of-discretion standard, meaning that we will reverse a decision of the BTA only if we detect an arbitrary or unconscionable attitude. *HealthSouth Corp.*, 132 Ohio St.3d 55, 2012-Ohio-1871, 969 N.E.2d 232, at ¶ 10; *NWD 300 Spring, L.L.C. v. Franklin Cty. Bd. of Revision*, ___ Ohio St.3d ___, 2017-Ohio-7579, ___ N.E.3d ___, ¶ 14. Although Lluberes undeniably had a business interest in relation to his testimony, the BTA did not abuse its discretion by crediting that testimony in spite of any possible bias.

The BTA Reasonably Concluded that Accel Did Not Show that Manpower Personnel Were Permanently Assigned

{¶ 50} On cross-appeal, Accel argues that the BTA erred by regarding the evidence as insufficient to establish that the personnel supplied by Manpower were also permanent-assignment employees. *See* 2015 WL 4410600 at *6. Accel challenges that finding by pointing to the affidavit of its president, David Abraham.

{¶ 51} Abraham's affidavit summarily recited that no written agreement existed with Manpower but that the parties contemplated "a long term relationship of at least one year" and that Accel requested that the employees be assigned indefinitely because they would have been trained and exposed to confidential manufacturing processes. The affidavit also detailed some types of work performed

by the employees. Notably, the affidavit did not even address the question of seasonal labor.

{¶ 52} We reject Accel's contention that the BTA erred by failing to grant exemption based on the affidavit. Accel bore the burden of proof to show that it was entitled to a tax exemption, but it adduced a much smaller quantum of proof with respect to the Manpower transactions than it did regarding the transactions involving Resource Staffing, failing to even address central concerns regarding the applicability of the exemption for the transactions involving Manpower. Under these circumstances, Accel has failed to demonstrate an abuse of discretion.

R.C. 5703.58(B) Is Inapplicable Because It Became Law after the Issuance of the Assessment at Issue

{¶ 53} R.C. 5703.58(B) prohibits the tax commissioner from "mak[ing] or issu[ing] an assessment against a consumer for any tax due under Chapter 5741 of the Revised Code, or for any penalty, interest, or additional charge on such tax, if the tax was due before January 1, 2008." Accel argues on cross-appeal that this provision applies to this case. If the provision is applicable, it would bar a considerable portion of the tax commissioner's assessment.

{¶ 54} But the provision was enacted as part of 2011 Am.Sub.H.B. No. 153, and it became effective on September 29, 2011. The tax commissioner issued his assessment on January 18, 2011. Because the provision was not in effect when the tax commissioner issued his assessment, it did not bar the issuance of that assessment. We therefore affirm the BTA's ruling on this point.

The BTA Did Not Abuse Its Discretion Regarding the Expert Testimony and Experts' Reports

{¶ 55} On various grounds, each party contests the other party's expert testimony and expert's written report offered into evidence at the BTA hearing. Our starting point for evaluating the arguments is that we accord the BTA wide discretion in evaluating proffered expert testimony. *Steak 'n Shake, Inc. v. Warren*

Cty. Bd. of Revision, 145 Ohio St.3d 244, 2015-Ohio-4836, 48 N.E.3d 535, ¶ 20 ("the proper use of expert opinions [lies] within the sound discretion of the BTA," and this court "defer[s] to the BTA's determination of the *competency* as well as to the board's determination of the *credibility* of the evidence presented to it" [emphasis sic]); *accord Johnston Coca-Cola Bottling Co., Inc. v. Hamilton Cty. Bd. of Revision*, 149 Ohio St.3d 155, 2017-Ohio-870, 73 N.E.3d 503, ¶ 32, 36. It follows that the deferential abuse-of-discretion standard is applicable to the arguments advanced regarding the experts.

{¶ 56} The need for considering those arguments, however, is obviated by the fact that the BTA's decision sets forth extensive analysis in support of its conclusions without relying on evidence offered by either expert. When "nothing in the BTA's decision" indicates that exhibits "were given any weight," we have held that "any error in admitting [the] exhibits" constitutes "harmless error." *Higbee Co. v. Cuyahoga Cty. Bd. of Revision*, 107 Ohio St.3d 325, 2006-Ohio-2, 839 N.E.2d 385, ¶ 30. The same is true regarding the experts' opinions and testimony here, and we accordingly find no merit to the arguments.

CONCLUSION

{¶ 57} For the foregoing reasons, we affirm the decision of the BTA.

Decision affirmed.

O'CONNOR, C.J., and O'DONNELL, KENNEDY, FRENCH, O'NEILL, FISCHER, and DEWINE, JJ., concur.

Corsaro & Associates Co., L.P.A., Joseph G. Corsaro, Christian M. Bates, Steven B. Beranek, and Scott R. Poe, for appellee and cross-appellant.

Michael DeWine, Attorney General, and Daniel W. Fausey, Assistant Attorney General, for appellant and cross-appellee.

BAY MECHANICAL & ELECTRICAL CORPORATION, APPELLANT, *v.* TESTA, TAX COMMR., APPELLEE.

**[Cite as *Bay Mechanical & Elec. Corp. v. Testa,*
133 Ohio St.3d 423, 2012-Ohio-4312.]

Sales tax—R.C. 5739.01—Taxpayer burden—Decision affirmed.

(No. 2011-1197—Submitted August 22, 2012—Decided September 26, 2012.)

APPEAL from the Board of Tax Appeals, No. 2008-K-1687.

Per Curiam.

{¶ 1} In this case, Bay Mechanical & Electrical Corporation, a specialty mechanical contractor, challenges a sales-tax assessment issued by the tax commissioner with respect to Bay's purchase of allegedly taxable "employment services." During the audit period, which extends from January 1, 2003, through December 31, 2005, Bay purchased the services from two entities. Bay treated the personnel supplied by Tradesmen International, Inc. and Construction Labor Contractors ("CLC") as "permanent-assignment" employees and therefore regarded the attendant employment services as exempt pursuant to R.C. 5739.01(JJ)(3).[1]

{¶ 2} On audit, the commissioner overruled Bay's exempt treatment of the transactions on the primary ground that Bay had failed to supply "facts and circumstances" evidence in relation to the assignment of individual employees.

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1. After the audit period at issue, the General Assembly amended the definition of "employment service" at R.C. 5739.01(JJ) and added an exception at paragraph (5). Sub.H.B. No. 293, 151 Ohio Laws, Part V, 8842, 8864. The amendment is not material to the analysis of the statute in this opinion, and it did not change the language of paragraph (3) at all. In this opinion, however, R.C. 5739.01(JJ) and 5739.01(JJ)(3) refer to the version in effect during the audit period. 145 Ohio Laws, Part III, 4009, 4297.

On appeal, the BTA found that the testimony and the summary exhibits offered by Bay were insufficient to prove entitlement to the exemption, with the result that the BTA affirmed the commissioner's denial of the exemption**.** *Bay Mechanical & Elec. Corp. v. Levin*, BTA No. 2008-K-1687, 2011 WL 2446198, *3-4 (June 14, 2011).

{¶ 3} Before this court, Bay renews its contention that the language of its contracts and the testimony offered satisfy the one-year and permanent-assignment criteria of R.C. 5739.01(JJ)(3). We disagree, and we therefore affirm the decision of the BTA.

I. Course of proceedings

{¶ 4} Bay Mechanical & Electrical Corporation is a construction contractor that provides various services such as plumbing, piping, HVAC, electrical wiring, and maintenance work. Bay directly employed "core employees" to carry out its projects, but additionally relied on labor supplied by third parties—in other words, Bay purchased "employment services," which are generally subject to sales tax unless specifically excepted.

{¶ 5} During the audit period, which stretches from January 1, 2003, through December 31, 2005, Bay held a direct-payment permit. Although the sales-tax law usually requires vendors to charge the tax to their consumers and then remit the collected tax to the state, see R.C. 5739.03 and 5739.29, another section—R.C. 5739.031—empowers the commissioner to issue direct-payment permits to consumers. Under such a permit, the consumer files monthly sales-tax returns that ascertain its own liability to pay the tax on its own purchases.

1. The audit and assessment

{¶ 6} The tax commissioner commenced his audit of Bay's purchases with a notification letter dated February 13, 2006. Over the course of several months, the tax agent worked out the method for the audit with Bay. On December 20, 2006, Bay representatives met with the tax agent at Bay's Lorain

headquarters, and during that meeting, the taxability of the purchases from Tradesmen and CLC was a principal subject of discussion. A second meeting on February 20 resolved several issues but not the disagreement regarding the taxability of the employment services that Bay had purchased. Bay argued that the Tradesmen and CLC transactions were exempt as "permanent assignment" sales under R.C. 5739.01(JJ)(3). The parties agreed that Bay would produce additional information for the tax agent's review. That additional information would have included employment-service invoices from Tradesmen and CLC as well as "job cost summary sheets and supporting accrual information."

{¶ 7} By letter dated March 7, 2007, Bay's controller announced that Bay had decided not to produce the additional information. The letter recited that Bay had furnished to the tax agent the employment-service contracts between it and Tradesmen and CLC and that Bay had paid sales tax on employment services as to specified temporary employees supplied by other vendors. Bay took the position that it had "followed the intent and the letter of the law with regard to leased construction labor" and asked the tax agent to proceed to issue his preliminary report without the benefit of additional documentation.

{¶ 8} The tax agent's audit remarks reveal the department's own position. After reviewing the two CLC contracts and the three Tradesmen contracts, the tax agent concluded that two of the Tradesmen contracts were disqualified as a basis for exemption because they referred to nonpermanent assignments. In reviewing the other contracts, the agent first confirmed the existence of clauses that established that the contracts were "for at least one year" as required by R.C. 5739.01(JJ)(3). Next, the agent stated that although the remaining three contracts referred to indefinite or permanent assignment of the employees, they did not qualify as a basis for exemption because they failed to specify those employees or positions subject to such permanent or indefinite assignment. With respect to Tradesmen, the additional question arose whether

employees had been assigned pursuant to the temporary-service contract or the permanent-assignment contract.

{¶ 9} As a result of the audit, the tax department issued a use-tax assessment against Bay on May 25, 2007, calling for payment of $105,078.77 of use tax, of which $74,574.65 related to employment services.[2] In addition to the tax, penalties and interest were assessed.

2. Petition for reassessment

{¶ 10} On July 17, 2007, Bay filed its petition for reassessment, which challenged the employment-services portion of the assessment and stated that Bay was not requesting a hearing. An attorney with the tax department's Office of Chief Counsel wrote to Bay's counsel, noting that the audit agent had requested "additional information, including comprehensive invoice and time sheet information for employees supplied to the petitioner by Tradesmen International, Inc. and Construction Labor Contractors." The attorney stated that the information was "necessary in order to determine whether or not the employees were placed with the petitioner on a permanent basis per *H.R. Options, Inc. v. Zaino* (2004), 100 Ohio St.3d 373, 800 N.E.2d 740," and requested that Bay supply it. After receiving a second, similar letter, Bay's counsel responded that Bay "has declined to submit any additional information, including comprehensive invoice and time sheet information for employees supplied to Bay Mechanical by Tradesmen International, Inc. and Construction Labor Contractors," while also asserting that "[t]he information was provided to the auditor during the course of the audit." The record does not support the latter statement.

2. The commissioner assessed the tax owed as use tax, not as sales tax. The distinction has no practical significance in this context, because the undisputed realization of the benefit of the employment services within Ohio means that the purchases entail a taxable "use" as long as the separate sales-tax obligation remains unpaid. *See* R.C. 5741.02(C)(1) (transactions subject to the sales tax are exempted from the use tax, *but only if the sales tax has been paid*). Moreover, if the purchases are excepted from sales tax, there is no use tax, either. R.C. 5741.02(C)(2).

{¶ 11} On July 22, 2008, the tax commissioner issued his final determination, which denied the exemption on the ground that Bay had failed to supply "facts and circumstances" evidence in the form of "comprehensive invoice and time-sheet information" and that Bay had failed to submit the tax department's employment-services questionnaire. The commissioner additionally faulted Bay for not supplying contracts with individual employees. The commissioner concluded that he could not grant the exemption because Bay had "not supplied information regarding the employees' contracts or the facts and circumstances regarding the employees' assignments."

3. The BTA appeal

{¶ 12} Bay appealed to the BTA and, at the BTA hearing, presented the testimony of Bay's controller along with four summary exhibits. The exhibits (1) identified the assigned employees by name, (2) associated each employee with either Tradesmen or CLC, (3) set forth the precise duration of each employee's assignment, and (4) stated the reason each employee had stopped working for Bay. The controller testified that she had prepared the documents by referring to the employment-service invoices received from Tradesmen and CLC—documents that the tax agent had requested during the audit but that were not produced.[3]

{¶ 13} The tax commissioner objected to the introduction of the exhibits on the grounds that the invoices themselves constituted the evidence, but the board received the exhibits and made them a part of the record.

{¶ 14} On June 14, 2011, the BTA issued its decision. The BTA stated that Bay had the burden to prove that each employee covered under the contracts was assigned to Bay on a permanent basis—meaning that the personnel were assigned for a indefinite period and not assigned either as a substitute for an

3. In its reply brief, Bay argues that its production of the invoices in discovery at the BTA should substitute for its failure to produce them during the audit. We address this contention in the legal analysis below.

employee who was on leave or to meet seasonal or short-term workload conditions. *Bay Mechanical*, BTA No. 2008-K-1687, 2011 WL 2446198, *2, citing *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, 800 N.E.2d 740, ¶ 21-22. The BTA found that the controller's testimony and exhibits, presenting as they did information "gleaned from records not before us," did not rise to the level of proof required by *H.R. Options*. Accordingly, the board affirmed the final determination of the commissioner, and the cause is now before us on an appeal of right.

II. Legal Analysis

{¶ 15} In a claim for tax exemption, the "onus is on the taxpayer to show that the language of the statute 'clearly express[es] the exemption' in relation to the facts of the claim." *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, 937 N.E.2d 547, ¶ 16, quoting *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104, 554 N.E.2d 1310 (1990). And when a decision issued by this court furnishes a definitive construction of the exemption statute, we typically reject an exemption claim that would expand the exemption beyond the scope described in that decision. *See id*. at ¶ 22.

{¶ 16} Also significant are two settled propositions that govern, respectively, the BTA's review of the tax commissioner's determinations and our review of a BTA decision. First, before the BTA, "[t]he Tax Commissioner's findings 'are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.' " *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, 876 N.E.2d 928, ¶ 7, quoting *Nusseibeh v. Zaino*, 98 Ohio St.3d 292, 2003-Ohio-855, 784 N.E.2d 93, ¶ 10. It was therefore Bay's burden to rebut the presumptive validity of denying the exemption by affirmatively proving its entitlement to it. Second, under R.C. 5717.04, the question for our determination is whether the BTA's decision is reasonable and lawful, and because "[t]he function of weighing evidence and determining credibility belongs

to the BTA, * * * our review of that aspect of its findings" applies the highly deferential abuse-of-discretion standard. *HealthSouth Corp. v. Testa*, 132 Ohio St.3d 55, 2012-Ohio-1871, 969 N.E.2d 232, ¶ 10.

{¶ 17} With these preliminaries in mind, we turn to the exemption claim at issue. Effective January 1, 1993, Ohio imposes sales and use tax on the provision of "employment services." Am.Sub.H.B. No. 904, 144 Ohio Laws, Part IV, at 6598, 6688-6689, 6698, and 6797, codified at R.C. 5739.01(B)(3)(k) and 5739.01(JJ). We have held that a service, to be taxable pursuant to the definition of employment services at R.C. 5739.01(JJ), must meet three 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." *Moore Personnel Serv., Inc. v. Zaino*, 98 Ohio St.3d 337, 2003-Ohio-1089, 784 N.E.2d 1178, ¶ 14. There is no dispute that these elements are present in the transactions at issue.

{¶ 18} Shortly after enactment of the sales tax on employment services, the General Assembly decided to create an additional exception for "permanent assignment" employees. Am.Sub.H.B. No. 152, 145 Ohio Laws, Part III, at 4297, codified at R.C. 5739.01(JJ)(3). Under that provision, "employment service" did 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." In *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, 800 N.E.2d 740, ¶ 21, we explained that "permanent" in the context of (JJ)(3) means that an employee is "assign[ed] to a position for an indefinite period," which in turn means that (1) the assignment has no specified ending date and (2) the employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonal or short-term workload conditions. *Id*., ¶ 21. We also held that R.C.

5739.01(JJ)(3) was to be treated as an exception or exemption from taxation, with the result that it must be strictly construed against the taxpayer's claim for tax relief. *H.R. Options*, ¶ 17, clarified by *H.R. Options, Inc. v. Wilkins*, 102 Ohio St.3d 1214, 2004-Ohio-2085, 807 N.E.2d 363, ¶ 2.

{¶ 19} *H.R. Options* is additionally significant because we construed the exemption as turning on the facts of each employee's assignment rather than on the presence of "magic words" in the employment-service agreements themselves. *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, 800 N.E.2d 740, ¶ 21. Instead of requiring that the contracts recite "permanent" (or "indefinite") assignment,[4] we viewed the language of the contracts as one element that, along with the facts and circumstances of the individual assignments, established whether the provider was truly "supplying personnel" in an exempt manner. Indeed, instead of requiring the commissioner to focus on contract language in *H.R. Options*, we directed that official to look at two types of evidence when auditing a claim of exemption: (1) the employment-services contract itself, to see whether it is consistent with the requirements set forth at (JJ)(3), and (2) the facts and circumstances of the assignment, in order to ascertain whether in actual practice the assignment of the particular employees was "indefinite" in character, or whether the assignments were seasonal, substitutional, or designed to meet short-term workload conditions. *Id*., ¶ 22.

{¶ 20} These legal standards furnish the basis for our analysis of Bay's appeal.

4. As Bay points out, the *H.R. Options* contracts contained no such language themselves. The contract language in that case was significant to the extent that it provided a contract term of at least one year and that it did not otherwise conflict with the conclusion that the personnel were assigned on a permanent basis.

1. Bay's argument that its contract language entitles it to exemption without regard to the facts and circumstances is wrong

{¶ 21} Bay argues that "the plain language of the [employment service contracts] alone is sufficient" to establish the exemption with respect to the purchase of employment services associated with employees assigned under those contracts. In Bay's view, the mere presence of "permanent" and "indefinite" assignment terminology in its contracts is dispositive: no inquiry into facts and circumstances of the assignment of individual employees is necessary.

{¶ 22} The foregoing discussion establishes that Bay is mistaken. In *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, 800 N.E.2d 740, the claim for exemption was potentially viable even though the contracts did not contain the magic words. *Id*. at ¶ 21. That was so because *H.R. Options* viewed contract language as merely one important element of establishing entitlement to the exemption. *Id*.

{¶ 23} Just as the absence of magic words is not dispositive of a permanent-assignment claim, neither does the presence of those words establish entitlement to the exemption as a matter of law. In this regard, *H.R. Options* adopts a consistent theme sounded by the BTA itself when reviewing exemption claims: when "determining whether an exception or exemption to taxation applies, it is not just the form of a contract that is important," but instead, the "crucial inquiry becomes a determination of what the seller is providing and of what the purchaser is paying for in their agreement." *Excel Temporaries, Inc. v. Tracy*, BTA No. 97-T-257, 1998 WL 775284, *2 (Oct. 30, 1998) (applying the permanent-assignment exception before *H.R. Options*); *see also Stein, Inc. v. Tracy*, BTA No. 92-T-1388, 1997 WL 704479, *16 (Nov. 7, 1997) ("not just the form of the contract" is important in determining whether [the sale-for-resale] exception applies, but also "what actually is being done by the parties involved"), 84 Ohio St.3d 501, 705 N.E.2d 676 (1999). Despite R.C. 5739.01(JJ)(3)'s

explicit reference to contract language, the statute justifies the focus on "what actually is being done" by requiring that the provider actually "supply[ ] personnel" on a permanent-assignment basis.

{¶ 24} Accordingly, *H.R. Options* teaches that supplying personnel on an exempt basis under R.C. 5739.01(JJ)(3) means that the employees are actually provided to work for an indefinite period—i.e., that they are not serving as seasonal workers, as substitutes for regular employees on leave, or as labor needed to meet a short-term workload. It follows that a contract can contain all the right language, but if a particular employee *is* seasonal, substitutional, or on a short-term-workload assignment, the provider is not "supplying" that employee "pursuant to" the agreement for purposes of qualifying for exemption under R.C. 5739.01(JJ)(3).

2. The existence and production of contracts with individual employees is not a necessary condition for exemption under R.C. 5739.01(JJ)(3)

{¶ 25} In his final determination, the commissioner faults Bay for not producing contracts with individual employees. Although the commissioner appears to have abandoned this contention, we think it prudent to address and dispose of it.

{¶ 26} In *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, 800 N.E.2d 740, the commissioner audited and assessed against a *vendor* of employment services and, as it happened, that vendor had written agreements with the personnel that it supplied to the consumers of its employment services. Those contracts with individual employees became important pieces of "facts and circumstance" evidence in determining the case. By contrast, the present case presents an audit and assessment of a *consumer* of employment services. As a result, the taxpayer would not in the ordinary course have possession of such contracts, even if they existed. Nor is there any reason why such contracts are a necessary element for claiming exemption, especially given the statute's explicit

focus on the employment-services contracts and its omission of any mention of employee contracts.

{¶ 27} We hold that the existence of contracts with individual employees was not a necessary condition for exemption under R.C. 5739.01(JJ)(3).[5]

3. Claiming an exemption in the context of a direct-payment audit calls for producing appropriate documentation on request

{¶ 28} It is significant that the present claim for exemption from the sales tax arises in the context of an audit of purchases made by a taxpayer that holds a direct-payment permit under R.C. 5739.031. As noted, that section authorizes the issuance of permits that allow the taxpayer to avoid paying sales tax to vendors and instead report and remit tax on its purchases directly to the state.

{¶ 29} Under R.C. 5739.031(D), the holder of a direct-payment permit has the duty to "keep and preserve suitable records of purchases together with invoices of purchases, bills of lading, asset ledgers, depreciation schedules, transfer journals, and such other primary and secondary records and documents in such form as the commissioner requires." As for the tax auditor, R.C. 5703.19(A) authorizes the commissioner and his agents to "inspect books, accounts, records, and memoranda of any person or public utility subject to [the] laws" that the tax commissioner is required to administer. Additionally, *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, 800 N.E.2d 740, unequivocally establishes that "both the contract and the facts and circumstances of the employee's assignment * * * must be reviewed to determine whether the employee is being assigned on a permanent basis." *Id*. at ¶ 21.

{¶ 30} In this case, the commissioner fulfilled his duty by specifically requesting facts-and-circumstances evidence—notably, the employment-service invoices. But Bay made a deliberate decision to refuse to honor that request.

5. If such contracts do exist and are in the possession of the taxpayer, however, they ought to be produced on request.

Under these circumstances, the commissioner acted reasonably and lawfully when he denied the exemption because of Bay's failure to produce the requested pertinent documentation.

{¶ 31} In so holding, we acknowledge that cases may arise where a taxpayer's good-faith efforts to produce documentation could lead to failure. In a given case, for example, a fire may have destroyed the relevant records or the records may be in the possession of someone other than the taxpayer and unattainable by the taxpayer. Such circumstances might in a proper case justify suspending the requirement that facts-and-circumstances evidence be produced and reviewed. Nor do we hold that a taxpayer must comply with arbitrary requests by the commissioner—indeed, the commissioner's power to require production is constrained by the principle that the information request be reasonably calculated to lead to the production of matter relevant to whether personnel have been permanently assigned within the intendment of R.C. 5739.01(JJ)(3) as construed by *H.R. Options*.

{¶ 32} This case, however, presents a straightforward refusal by Bay to produce clearly relevant documents on request, some of which the taxpayer itself later used to prepare summary exhibits at the BTA. The commissioner therefore acted appropriately in denying the exemption.

4. The BTA acted reasonably and lawfully in affirming the commissioner's denial of the exemption

{¶ 33} As discussed, at the BTA, Bay took a step beyond its reliance on the employment-service contracts when it presented not only the testimony of its controller, but also four summary exhibits concerning the individual assignments that were referable to the contracts at issue. The summary exhibits purport to show the names and periods of employment of particular employees pursuant to the employment-service contracts. The testimony establishes that their foundation lies partly in invoices that the tax agent had previously requested without success.

The BTA held that the evidence was not sufficient because of its summary nature, with the primary documentation not before the board. *Bay Mechanical*, BTA No. 2008-K-1687, 2011 WL 2446198, *3-4. In other words, the BTA decided not to accord evidentiary weight to the exhibits.

{¶ 34} Because (as already discussed) the BTA's determinations of the credibility of witnesses and its weighing of the evidence are subject to a highly deferential abuse-of-discretion review on appeal, we will reverse only if we find an abuse of discretion. *HealthSouth Corp.*, 132 Ohio St.3d 55, 2012-Ohio-1871, 969 N.E.2d 232, ¶ 10. In two respects, the *HealthSouth* decision is instructive in applying the abuse-of-discretion standard in this context.

{¶ 35} First, although the taxpayer's evidence in *HealthSouth* showed substantial evidential weaknesses, we nonetheless affirmed the BTA's decision to order the commissioner to issue a reduced assessment based on the totality of the record. The same broad deference that we exercised toward the BTA's judgment in *HealthSouth* is merited in this case as well.

{¶ 36} Second, *HealthSouth* was a case in which the record contained not only the taxpayer's summary exhibits presented at the BTA, but other documentation to support the taxpayer's claim that had been submitted contemporaneously with the original tax returns on which the commissioner had predicated his assessment. *HealthSouth*, ¶ 23, 25-26. By contrast, the underlying facts-and-circumstances evidence in the present case was neither shown to the tax agent during the audit, nor presented in support of Bay's petition for reassessment, nor offered as an exhibit at the BTA hearing. Accordingly, the record in this case was devoid of documentation that would corroborate the summary exhibits on which Bay chose to rely.

{¶ 37} Bay suggests that by producing the underlying documentation to the tax commissioner's counsel on CDs during discovery at the BTA, it cured its earlier failure to produce it during the audit or in connection with the petition for

reassessment. According to Bay, it "should not be penalized for producing the requested information for the first time during proceedings before [the BTA]." But imposing a penalty is completely beside the point. The issue is: did the primary documentation ever become part of the record so that the BTA could review it in deciding Bay's appeal? It did not. Neither Bay nor the commissioner presented the documentation as a hearing exhibit. And because Bay had the burden of rebutting the commissioner's determination, it was not the commissioner's responsibility to offer the documents as evidence, even if he did obtain them through discovery. Moreover, a taxpayer at the BTA is not entitled to relief merely because the commissioner adduces no evidence contra his claim. *Higbee Co. v. Evatt*, 140 Ohio St. 325, 332, 43 N.E.2d 273 (1942).

{¶ 38} To show that the BTA abused its discretion by according no weight to the hearing exhibits, Bay must prove that the BTA's "attitude is unreasonable, arbitrary, or unconscionable." *J.M. Smucker, L.L.C. v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, 865 N.E.2d 866, ¶ 16. Given that *H.R. Options* calls for the consideration of facts-and-circumstances evidence, that the documentation was completely withheld on audit, and that it was not offered as an exhibit at the BTA hearing, we conclude that the BTA did not act unreasonably, arbitrarily, or unconscionably when it disregarded the summary exhibits in spite of the controller's foundational testimony.

{¶ 39} Finally, Bay suggests that by virtue of admitting the summary exhibits under Evid.R. 1006, the BTA was constrained to accord them some evidential weight. We disagree. The Rules of Evidence are not binding at the BTA, even though they may be consulted for guidance. *Plain Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 130 Ohio St.3d 230, 2011-Ohio-3362, 957 N.E.2d 268, ¶ 20. When a determination of the tax commissioner is appealed, the BTA convenes an evidentiary hearing, *see* R.C. 5717.02(D) ("upon the application of any interested party the board shall order the hearing of

additional evidence"), and at the hearing evidence is received. But just as the BTA's discretion to receive evidence is unconstrained by the Rules of Evidence, so also is its discretion to accord no weight to the evidence so received.

III. Conclusion

{¶ 40} For the foregoing reasons, the BTA acted reasonably and lawfully when it upheld the tax commissioner's sales-tax assessment against Bay. We therefore affirm the decision of the BTA.

Decision affirmed.

O'CONNOR, C.J., and LANZINGER, CUPP, and MCGEE BROWN, JJ., concur.

PFEIFER and LUNDBERG STRATTON, JJ., dissent.

O'DONNELL, J., not participating.

PFEIFER, J., dissenting.

{¶ 41} The issue before us is a close one. It boils down to whether Bay Mechanical & Electrical Corporation has submitted evidence of its claim for an R.C. 5739.01(JJ)(3) exclusion from sales tax. Bay Mechanical believes that submitting the contracts and a summary of the work assignments at issue to the Board of Tax Appeals ("BTA"), having its controller testify regarding the contracts and work assignments before the BTA, and submitting the underlying documentation to the tax commissioner's counsel are sufficient to establish its claim. I agree.

{¶ 42} It would have been better if Bay Mechanical had submitted the information earlier—to the tax commissioner before the necessity of an appeal to the BTA. It would have been better if Bay Mechanical had submitted the underlying documentation to the BTA as well as the tax commissioner. But the bottom line is that the information is now readily available, was available at the time of the appeal to the BTA, and is sufficient to establish Bay Mechanical's entitlement to the tax exclusion. I dissent.

LUNDBERG STRATTON, J., concurs in the foregoing opinion.

Brouse McDowell, L.P.A., Joseph T. Dattilo, Thomas J. Ubbing, and Caroline L. Marks, for appellant.

Michael DeWine, Attorney General, and Sophia Hussain, Assistant Attorney General, for appellee.

H.R. OPTIONS, INC., APPELLEE, *v.* ZAINO, TAX COMMR., APPELLANT.

[Cite as *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1.]

Taxation — Sales tax on company that provides third-party employment services for its clients — Exclusions — R.C. 5739.01(JJ)'s definition of an "employment service" applied — Board of Tax Appeals' decision reversed when unreasonable and unlawful.

(No. 2002-1477 — Submitted October 8, 2003 — Decided January 7, 2004.)

APPEAL from the Board of Tax Appeals, No. 01-M-808.

LUNDBERG STRATTON, J.

{¶1} H.R. Options, Inc. ("HRO") is a California-based human resources firm that provides third-party employment services for its clients. HRO serves as the employer of record for persons whose services its clients want to utilize but whom the clients do not want to hire as employees or as independent contractors. By having HRO hire the desired personnel and furnish them for the clients' use, the clients are able to avoid various potential tax and pension problems. HRO hires persons referred to it by the clients, puts them on its own payroll, and provides them for use by its clients.

{¶2} HRO pays the employee's wages, as well as all the taxes and other costs associated with being an employer. HRO bills the client for reimbursement of the wages and all other costs (taxes, FICA, etc.) it pays as the employer. As compensation for its services, HRO also charges its clients a fee, which is a mark-up based on the wages paid to the employee and other factors.

{¶3} HRO and the five clients it had in Ohio entered into written agreements that provided that the client desired to retain HRO as the common-law employer of employees with appropriate qualifications and skills to provide

services to be utilized by the clients. The agreements further provided that the clients would refer candidates to HRO for employment. HRO does not fill the employment needs of any of its clients from its own pool of available employees. Most of the agreements between HRO and its clients provided for a term of two or three years. However, some of the contracts included the right to terminate 30 days after written notice.

{¶4} The agreements between HRO and its employees provided that the employees could be terminated at any time, without cause, with or without notice, at the option of HRO or the employee. With only a few exceptions, the employment agreements between HRO and the employees it provided contained a starting date, but no ending date.

{¶5} The Tax Commissioner assessed HRO a sales tax for the audit period January 1, 1993, through June 30, 1997. HRO filed a petition for reassessment. After a hearing, the Tax Commissioner affirmed his assessment, finding that HRO services constituted an "employment service" as defined in R.C. 5739.01(JJ). The Tax Commissioner further found that HRO's contracts with its clients did not meet the requirements for exclusion from the tax on "employment service" found in R.C. 5739.01(JJ)(3). HRO appealed to the BTA.

{¶6} The BTA reversed the Tax Commissioner, finding that HRO's activities did not meet R.C. 5739.01(JJ)'s definition of an "employment service." The BTA found that HRO did not provide or supply personnel as required by that definition. Instead, the clients referred personnel to HRO. Moreover, even if HRO were an employment service, the employees were assigned to the clients on a permanent basis, within the meaning of the exclusion contained in R.C. 5739.01(JJ)(3), because the employees were never reassigned by the service provider and were assigned for an indefinite duration.

{¶7} This cause is before the court upon an appeal as of right.

{¶8} In his brief, the Tax Commissioner contends that the BTA did not have jurisdiction to consider whether the transactions between HRO and its clients constituted an employment service. Although the Tax Commissioner raised this jurisdictional issue for the first time in his brief to this court, we will treat the Tax Commissioner's contention as preserved because a party cannot waive subject-matter jurisdiction, regardless of procedural deficiencies. *Mid-States Terminal, Inc. v. Lucas Cty. Bd. of Revision* (1996), 76 Ohio St.3d 79, 82, 666 N.E.2d 1077.

{¶9} When an appeal is filed with the BTA from a final determination of the Tax Commissioner, R.C. 5717.02 requires that the notice of appeal "shall also specify the errors therein complained of." This court has previously stated that in resolving questions regarding the effectiveness of a notice of appeal, we are not disposed to deny review by a hypertechnical reading of the notice. *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 197, 625 N.E.2d 597. We find that under a fair reading, the notice of appeal filed by HRO with the BTA does raise the issue of whether HRO was providing an employment service and, therefore, we deny the Tax Commissioner's challenge to the BTA's jurisdiction to decide the issue of whether HRO was providing an employment service.

{¶10} The Tax Commissioner next contends that the BTA erred in finding that the services provided by HRO do not constitute an "employment service." R.C. 5739.01(JJ) defines the term "employment service" as "providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so supplied receive their wages, salary, or other compensation from the provider of the service."

{¶11} When the BTA considered the facts of this case, it determined that its decision in *Moore Personnel Serv., Inc. v. Zaino* (Apr. 12, 2002), B.T.A. No.

99-R-2098, 2002 WL 595178, was dispositive. The business of Moore Personnel Services, Inc. was conducted in essentially the same manner as that of HRO. In both cases, the taxpayers served as employer of record for employees that were sent to them by their clients. In both cases, the taxpayers contended that, since they did not recruit the employees, they were not "providing" or "supplying" the personnel within the meaning of R.C. 5739.01(JJ).

{¶12} This court decided *Moore Personnel Serv., Inc. v. Zaino*, 98 Ohio St.3d 337, 2003-Ohio-1089, 784 N.E.2d 1178, after HRO had filed this appeal. We reversed the BTA's decision in *Moore* and held that Moore's activities constituted an "employment service." In that decision we stated:

{¶13} "The relevant facts are that Moore was providing and supplying personnel on a temporary or long-term basis to perform work for another. The personnel supplied by Moore were Moore's employees, although they worked under the supervision or control of Moore's clients. The personnel supplied to Moore's clients received their compensation from Moore, the 'provider of the service.' Thus, Moore's services meet the definition of 'employment service' set forth in R.C. 5739.01(JJ)." *Moore Personnel Serv., Inc.* at ¶ 20.

{¶14} The facts in this case are essentially identical to those in *Moore.* The only basis for the BTA's decision that HRO's activities did not constitute an employment service was its decision in *Moore*, and since that decision has been reversed by this court, the BTA's decision finding that HRO's activities did not constitute an "employment service" is also reversed. Thus, we conclude that HRO is an employment service under R.C. 5739.01(JJ).

{¶15} Because HRO's activities constitute an "employment service," then the separate and distinct issue arises of whether the BTA erred in finding that HRO's services were excluded from the definition of "employment service" by R.C. 5739.01(JJ)(3), which became effective July 1, 1993. Am. Sub.H.B. No. 152, 145 Ohio Laws, Part III, 4297. After setting forth the definition for

"employment service," R.C. 5739.01(JJ) sets forth four exclusions. The exclusion at issue here, R.C. 5739.01(JJ)(3), excludes from the definition of "employment service," and therefore from taxation, transactions where the provider of the service is:

{¶16} "(3) Supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis."

{¶17} Because R.C. 5739.01(JJ)(3) represents an exclusion from taxation, it must be construed most favorably to the taxpayer.[1]

{¶18} Thus, to be excluded from taxation under R.C. 5739.01(JJ)(3), an employment service must prove two elements: (1) a contract of at least one year between the service provider and the purchaser, and (2) a contract that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.

{¶19} The Tax Commissioner does not challenge element one above and the parties agree that the word "permanent" does not need to appear in the contract. However, the Tax Commissioner does challenge the BTA's decision as to element two.

{¶20} The primary dispute between the parties in this case centers on the word "permanent" in R.C. 5739.01(JJ)(3). To fill the void for a definition of "permanent" in R.C. 5739.01(JJ)(3), the BTA found that permanency connotes the expectation that the employees supplied are intended to remain for the contracted-for period. Thus, the BTA determined permanency based on whether the employees are ever reassigned by the service provider.

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[1] Reporter's Note: This paragraph was modified in *H.R. Options, Inc. v. Wilkins*, 102 Ohio St.3d 1214, 2004-Ohio-2085, 807 N.E.2d 363, at ¶ 2.

{¶21} We do not find that such an interpretation represents the plain or workable meaning of the word "permanent" within the context of R.C. 5739.01(JJ)(3). We start with the understanding that an employee assigned on a permanent basis need not be assigned to an employer forever. We believe that in the context of R.C. 5739.01(JJ)(3), assigning an employee on a permanent basis means assigning an employee to a position for an indefinite period, i.e., the employee's contract does not specify an ending date and the employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonal or short-term workload conditions. Thus, both the contract and the facts and circumstances of the employee's assignment are factors that must be reviewed to determine whether the employee is being assigned on a permanent basis.

{¶22} When the Tax Commissioner's agents examine an employment contract, they must be able to determine at that time whether an employee has been assigned on a permanent basis. The contract, along with the facts and circumstances of the assignment, should permit the Tax Commissioner's agent to determine permanency. The actual length of the employee's assignment is only one of the factors to be used. Where the assignment is of a seasonal nature or serves to meet short-term workload conditions, these factors are also relevant.

{¶23} In this case, the contracts between HRO and its clients incorporated a blank, standardized employee contract form. However, a review of the actual employee contracts is required to determine whether the employee was assigned for a definite or an indefinite term. The employee contracts for HRO client Elkem Metals Company set forth a starting date but no ending dates. Three of the 10 contracts for client Henkel Corporation set forth starting and ending dates. The remaining contracts for employees referred by Aris Isotoner, Swarovski American Ltd., and Champion Jogbra set forth starting but no ending dates.

{¶24} The Elkem and Henkel contracts (with the exception of the three with ending dates) provided for assignments "on a permanent basis" within the meaning of R.C. 5739.01(JJ)(3). Thus, these transactions are excluded from taxation.

{¶25} Nearly all of the 30 Iris Isotoner contracts refer to the positions as "seasonal," and the testimony of HRO's president clearly sets forth that employees assigned that client by HRO were seasonal employees. As such, these employees cannot be considered as being assigned on a permanent basis. Whether the employees assigned to Swarovski and Champion Jogbra were seasonal only is not clear.

{¶26} For all of the foregoing reasons, we hold that the decision of the BTA that HRO is not an employment service is unreasonable and unlawful and we reverse it. As regards the application of the R.C. 5739.01(JJ)(3) exclusion to HRO's transactions with Elkem Metals and Henkel (with the exception of the three contracts with starting and ending dates), we conclude that the decision of the BTA is reasonable and lawful, but for reasons different from those stated by the BTA. As regards the application of the R.C. 5739.01(JJ)(3) exclusion to HRO's transactions with Aris Isotoner, and the three Henkel contracts with starting and ending dates, we hold that the decision of the BTA is unreasonable and unlawful and reverse it. Finally, as regards the BTA's decision regarding the Swarovski and Champion Jogbra contracts, we remand that portion of the cause to the BTA for further testimony to determine whether either or both of those contracts were for seasonal employees.

Decision affirmed in part,
reversed in part
and cause remanded in part.

MOYER, C.J., RESNICK, F.E. SWEENEY, PFEIFER, O'CONNOR and O'DONNELL, JJ., concur.

Bricker & Eckler, L.L.P., and Mark A. Engel, for appellee.

Jim Petro, Attorney General, and Robert C. Maier, Assistant Attorney General, for appellant.

CREW 4 YOU, INC., APPELLEE AND CROSS-APPELLANT, *v.* WILKINS, TAX COMMR., APPELLANT AND CROSS-APPELLEE.

[Cite as *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St.3d 356, 2005-Ohio-2167.]

Taxation — Sales tax — R.C. 5739.01(B)(3)(k) and (JJ) — Employment service — "Crewing" company for live broadcasts is provider of employment service subject to sales tax — R.C. 5739.01(E) — Resale exception to sales tax — Exception does not apply to employment service when services are not resold in same form in which they are purchased.

(No. 2003-1960 — Submitted March 1, 2005 — Decided May 18, 2005.)

APPEAL and CROSS-APPEAL from the Board of Tax Appeals, No. 2002-V-958.

O'DONNELL, J.

{¶ 1} The principal issues presented in this appeal concern whether appellee and cross-appellant, Crew 4 You, Inc., sold taxable employment services, and, if so, whether any of those sales are exempt from the state sales tax under the "resale exception" for goods or services resold by the buyer to another purchaser.

{¶ 2} Regarding the first issue, both appellant and cross-appellee, the Tax Commissioner, and the Board of Tax Appeals ("BTA") found that Crew 4 You did in fact sell taxable employment services. Crew 4 You has filed a cross-appeal on that question, but we affirm the decision of the BTA for the reasons explained below.

{¶ 3} Regarding the second issue, the Tax Commissioner found that the resale exception did not apply, but the BTA reached the opposite conclusion, finding that the resale exception did apply, and it therefore determined that Crew 4 You did not owe sales tax on its resale of employment services. The Tax

Commissioner has appealed that issue to our court, and for the reasons explained below, we reverse the decision of the BTA because Crew 4 You has not shown that the employment services were in fact resold by the buyer. The record reveals rather that the buyer did pass on the benefit of the employment services to others, but those employment services were not resold "in the form in which [they had been] received" by the buyer of them, as required by R.C. 5739.01(E), the resale-exception statute.

Facts and Procedural History

{¶ 4} Crew 4 You, Inc., of Spencer Township, Ohio, located in Medina County, is a company that assists in producing live television broadcasts of sporting events. Such broadcasts typically involve the coordinated efforts of three kinds of companies at the site of the sporting event: a broadcasting entity, a "trucking company," and a "crewing company." Crew 4 You falls into the last category.

{¶ 5} These three kinds of companies work together in the following manner. The broadcasting entity owns the right to broadcast games for various teams. An example of a broadcasting entity is WGN in Chicago, which televises Chicago Cubs baseball games. When a sports team like the Cubs travels to another city for a game, however, the broadcasting entity sends its on-air announcer(s), a producer, and a director to the out-of-town venue. A "trucking company" then supplies equipment – cameras, electrical cables, microphones, etc. – to help create the live broadcast. The trucking company, in turn, hires personnel – a crew – to operate the equipment. Crew 4 You is a crewing company that supplies qualified technicians to trucking companies and broadcasting entities involved in the production of live sports broadcasts.

{¶ 6} The Tax Commissioner conducted an audit of the sales reported by Crew 4 You for the period of September 1, 1996, through December 31, 1999, and concluded that the company owed more than $156,000 for unpaid sales taxes,

penalties, and interest charges. Crew 4 You objected to that assessment, and a hearing was held before the Tax Commissioner in March 2001.

{¶ 7} Following that hearing, the Tax Commissioner issued a written decision in which he rejected the objections raised by Crew 4 You. The Tax Commissioner concluded that the company owed sales taxes on employment services it had provided to trucking companies and to broadcasting entities during the audit period and found that the resale exception to the sales tax did not apply to Crew 4 You because the services provided by the company were not resold by the purchasers of those services. The Tax Commissioner, however, made other adjustments not relevant to this appeal, which reduced the company's tax liability to $112,021.11.

{¶ 8} Crew 4 You then appealed to the BTA, which held a hearing on the matter in March 2003. Crew 4 You presented three witnesses, and both parties offered exhibits. The BTA sided with the Tax Commissioner on the question of whether Crew 4 You had provided taxable employment services to its customers but agreed with Crew 4 You that some of the company's services were not taxable under the R.C. 5739.01(E)(1) resale exception for employment services that are resold by the purchaser.

{¶ 9} The Tax Commissioner has appealed from the latter portion of the BTA's decision, and Crew 4 You has cross-appealed from the former.

Standard of Review

{¶ 10} In reviewing a decision of the BTA, this court determines whether it is "reasonable and lawful." *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 498, 739 N.E.2d 783. The court "will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion." *Gahanna-Jefferson Local School Dist Bd. of Edn. v. Zaino* (2001), 93 Ohio St.3d 231, 232, 754 N.E.2d 789. But "[t]he BTA is responsible for determining factual issues and, if the record contains reliable and probative support for these BTA

determinations," this court will affirm them. *Am. Natl. Can Co. v. Tracy* (1995), 72 Ohio St.3d 150, 152, 648 N.E.2d 483.

{¶ 11} As for the burden of proof, it rests on the taxpayer "to show the manner and extent of the error in the Tax Commissioner's final determination." *Standards Testing Laboratories, Inc. v. Zaino*, 100 Ohio St.3d 240, 2003-Ohio-5804, 797 N.E.2d 1278, ¶ 30. The Tax Commissioner's findings "are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful." *Nusseibeh v. Zaino*, 98 Ohio St.3d 292, 2003-Ohio-855, 784 N.E.2d 93, ¶ 10. Any claimed exemption from taxation must be strictly construed, and the taxpayer must affirmatively establish his or her right to the exemption. *Campus Bus Serv. v. Zaino*, 98 Ohio St.3d 463, 2003-Ohio-1915, 786 N.E.2d 889, ¶ 8.

The Tax on Retail Sales

{¶ 12} Under R.C. 5739.02, a tax is levied on "each retail sale made in this state." According to R.C. 5739.02(C), "it is presumed that all sales made in this state are subject" to that tax.

{¶ 13} Ohio has imposed a sales tax on employment services since 1993. Am.Sub.H.B. No. 904, 144 Ohio Laws, Part IV, 6598, 6689, 6797 (Section 131). The terms "sale" and "selling" are defined in R.C. 5739.01(B) to include all transactions in which consideration has been or is to be exchanged and in which "[e]mployment service is or is to be provided." R.C. 5739.01(B)(3)(k). The term "employment service" is in turn defined in R.C. 5739.01(JJ) as follows:

{¶ 14} " 'Employment service' means providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so supplied receive their wages, salary, or other compensation from the provider of the service. 'Employment service' does not include:

{¶ 15} "(1) Acting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser."

The Cross-Appeal Filed by Crew 4 You

{¶ 16} The Tax Commissioner and the BTA both found that Crew 4 You is in the business of providing an "employment service," and that finding is supported by facts in the record before us.

{¶ 17} We have explained that services provided by an individual or other taxable entity must meet three requirements to qualify as "employment services" for purposes of the sales tax statutes in Ohio: (1) the service provider "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." *Moore Personnel Services, Inc. v. Zaino*, 98 Ohio St.3d 337, 2003-Ohio-1089, 784 N.E.2d 1178, ¶ 14.

{¶ 18} All of those criteria – which flow from the text of R.C. 5739.01(JJ) – are satisfied in this case.

{¶ 19} Regarding the first, the president of Crew 4 You testified before the BTA that her company "locate[s] personnel for sports television events." Other testimony before the BTA established that trucking companies supply broadcasting entities with cameras and other video and audio equipment for sporting-event broadcasts, and then crewing companies like Crew 4 You locate the necessary personnel to operate that equipment. As the president of Crew 4 You explained, "we pass on the final crew list to the trucking company" once Crew 4 You has lined up the personnel needed for a particular broadcast or series of broadcasts.

{¶ 20} Crew 4 You, then, is in the business of "providing or supplying personnel, on a temporary or long-term basis," R.C. 5739.01(JJ), and the BTA correctly determined that the first part of the test in *Moore* had been met.

{¶ 21} Regarding the second, as determined by the BTA, the personnel supplied by Crew 4 You "perform work or labor under the supervision or control of another." *Moore*, 98 Ohio St.3d 337, 2003-Ohio-1089, 784 N.E.2d 1178, ¶ 14. The BTA reviewed the record on this point and noted several key statements in the testimony that supported its conclusion. The president of a trucking company that routinely deals with Crew 4 You testified that the producer and director from the broadcasting entity that hires the trucking company "will actually say what time they want the crew call and when the crew will break for lunch. They really control everything at the location where the cameras are placed." That same trucking company official testified before the BTA that the director or the producer from the broadcasting entity decides what needs to be done at the sporting events, and he explained that the director "really calls every shot" during the broadcasts.

{¶ 22} The foregoing, along with substantial documentary evidence, supports the BTA's conclusion that broadcasting entities supervise or control the personnel supplied by crewing companies like Crew 4 You at televised sporting events. Written agreements between broadcasting entities and trucking companies that did business with Crew 4 You during the Tax Commissioner's audit period provide detailed specifications as to the equipment needed at sporting events, the placement of cameras and microphones, and the schedule of preproduction meetings, rehearsals, and game start times. The broadcasting entity determines the equipment it needs, the trucking company provides that equipment, and the crewing company supplies personnel to operate the equipment. The broadcasting entity then deploys that equipment and those persons when and where they are needed at the sporting event.

{¶ 23} To be sure, a provider of personnel does not perform a taxable "employment service" when that provider acts "as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the

purchaser." R.C. 5739.01(JJ)(1). The BTA found, however, that this exception in the sales tax statute did not apply to Crew 4 You, because its personnel work under the control of the broadcasting entity's producer and director, rather than under the control of Crew 4 You itself. In essence, the BTA determined that Crew 4 You is not a contractor or subcontractor, and that finding is supported by the record.

{¶ 24} Broadcasting entities and trucking companies contact crewing companies seeking personnel. Crew 4 You identifies skilled personnel and supplies a list of names to the trucking company and to the broadcasting entity. The crew reports to the site of the sporting event and performs the technical work that the broadcasting entity's producer and director need from them to create the live broadcast in the way that the broadcasting entity desires. Testimony before the BTA established this evidence in the record before us.

{¶ 25} Crew 4 You does not act as a contractor or subcontractor in its dealings with trucking companies and broadcasting entities. Contractors or subcontractors are hired to reach a final result and are generally free to use their own methods in achieving that result. Evidence presented to the BTA showed that Crew 4 You is not hired to broadcast sporting events or to achieve any other final result. It does not dictate what happens during live television broadcasts. Instead, Crew 4 You is in the business of locating skilled technicians and others who are capable of operating technical equipment, and it supplies these personnel to the producers and directors to set up and operate broadcasting equipment on selected days. It is the broadcasting entity – not Crew 4 You – that determines how many crew members are needed, where they will work at the event, which camera shots will be used, and, ultimately, how the broadcast will appear to the viewing public.

{¶ 26} If a broadcasting entity or a trucking company hired audio technicians, video operators, or other similar personnel without using a crewing

company like Crew 4 You, then no taxable "employment service" as defined in R.C. 5739.01(JJ) would be involved. And although the R.C. 5739.01(JJ)(1) contractor/subcontractor exception to the employment service sales tax might apply if Crew 4 You had substantial discretion in actually producing the broadcast, all the evidence presented to the BTA indicates that Crew 4 You simply provides to broadcasting entities and trucking companies the skilled personnel at agreed-upon rates for particular days.

{¶ 27} When a broadcasting entity or a trucking company arranges with a personnel provider like a crewing company to ensure that a trained worker will report to a particular sporting event and do what the broadcasting entity directs there, that crewing company is providing a taxable "employment service" as that term is defined in R.C. 5739.01(JJ). The BTA's factual findings on this issue are supported by the record, and the legal conclusion drawn by the BTA from those findings is reasonable and consistent with the relevant statute. The BTA correctly determined that "the personnel [from Crew 4 You] must perform work or labor under the supervision or control of another," *Moore*, 98 Ohio St.3d 337, 2003-Ohio-1089, 784 N.E.2d 1178, at ¶ 14, and also properly rejected the argument that Crew 4 You is a contractor or subcontractor.

{¶ 28} Regarding the third part of the *Moore* test for determining whether taxable employment services have been provided—"the personnel must receive their wages, salary, or other compensation from the provider of the service"— the BTA's factual findings are undisputed. The *Moore* test's third part mimics the text of R.C. 5739.01(JJ), and the BTA properly concluded that this criterion was satisfied in this case.

{¶ 29} The Tax Commissioner's final determination explains how the workers provided by Crew 4 You to broadcasting entities and trucking companies are paid:

{¶ 30} "Payment is made after the game is broadcast. Crew 4 You invoices the mobile production company [the trucking company] for each technician's time based upon the industry's standard hourly rates in addition to a 'crewing fee.' The mobile production companies pay Crew 4 You. Crew 4 You pays the technicians for their work."

{¶ 31} Crew 4 You does not dispute this finding but argues that the money it pays to the technicians – the crew members – for the work that they perform for broadcasting entities is not "wages, salary, or other compensation." R.C. 5739.01(JJ). That argument is not tenable. The money paid to crew members by Crew 4 You is designed to compensate them for their services, and payment of that money by Crew 4 You falls squarely within the terms of R.C. 5739.01(JJ).

{¶ 32} For the reasons explained above, the BTA properly concluded that Crew 4 You provided an "employment service" as that term is defined in R.C. 5739.01(JJ). Evidence in the record supports the BTA's view that (1) Crew 4 You provided or supplied personnel, (2) the personnel supplied by Crew 4 You performed work under the supervision or control of another, (3) Crew 4 You did not act as a contractor or subcontractor, and (4) the personnel supplied by Crew 4 You received their wages, salary, or other compensation from Crew 4 You itself. Thus, the BTA's conclusion that Crew 4 You provided taxable employment services was reasonable and lawful. We therefore affirm the BTA's decision on the issues raised in the cross-appeal filed by Crew 4 You.

The Appeal Filed by the Tax Commissioner

{¶ 33} The Tax Commissioner concluded that the so-called resale exception in R.C. 5739.01(E) did not apply to the transactions between Crew 4 You and the trucking companies, and the commissioner therefore determined that Crew 4 You owed sales tax on its sales of employment services. The BTA, however, decided that the company did not owe any sales tax on those sales in

which the benefit of the company's personnel was passed on or resold by the trucking companies to the broadcasting entities. The Tax Commissioner has appealed from that decision, and his argument has merit.

{¶ 34} R.C. 5739.01(E) excludes from the definition of "[r]etail sale" – and therefore excludes from the R.C. 5739.02 sales tax on retail sales – any sale "in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person." In other words, when the purchaser's intent in buying a good or service is to resell it to yet another purchaser without changing the good or service in any way, then the original purchase is not considered a "retail sale" and is therefore not subject to the sales tax on retail sales.

{¶ 35} The BTA concluded that the "benefit of Crew 4 You's personnel services (a flexible, temporary workforce) is passed on through the trucking company to the broadcast entity." The resale exception therefore applies to any employment services that trucking companies bought from Crew 4 You and resold to broadcasting entities, the BTA explained.

{¶ 36} As the Tax Commissioner stated in his final determination, however, the trucking companies "do not resell employment services." The trucking companies pay crewing companies like Crew 4 You to supply personnel, and then the trucking companies use those personnel to help the broadcasting entities produce a live broadcast of a sporting event. The personnel services are not resold in the same form in which they are purchased. The Tax Commissioner explained, "The benefit to the broadcast entities is not the labor of the technicians; it is the end product of that labor – staffed equipment ready for use in broadcasting a sporting event." In short, the good or service that the trucking companies received from Crew 4 You was different from the good or service that the broadcasting entities received from the trucking companies.

{¶ 37} The parties do not dispute the fact that the sale of employment services is taxable in Ohio. Because, as we have explained above, Crew 4 You provided an "employment service" as that term is defined in R.C. 5739.01(JJ), the critical question is whether Crew 4 You owes the sales tax or whether instead the trucking companies owe the sales tax on the sale of the employment services that Crew 4 You provided. Under the R.C. 5739.01(E) resale exception, the trucking companies owe the sales tax if they bought the services but then resold them in the same form to the broadcasting entities. Otherwise – as the Tax Commissioner found – Crew 4 You owes the sales tax.

{¶ 38} We agree with the Tax Commissioner's view that the trucking companies did not resell employment services, and therefore Crew 4 You owes sales tax on its retail sale of those services. A seller of an "employment service" as that term is used in Ohio pays the "wages, salary, or other compensation" of the personnel. R.C. 5739.01(JJ). The trucking companies did not pay the personnel supplied by Crew 4 You, so those companies did not sell an employment service. Crew 4 You was the only seller of employment services in the three-way transaction involving Crew 4 You, the trucking companies, and the broadcasting entities. Crew 4 You owes sales taxes on the money it earned for providing those services.

{¶ 39} In a recent case involving the sale of employment services, this court rejected another taxpayer's effort to rely on the resale exception. In that case – *Corporate Staffing Resources, Inc. v. Zaino* (2002), 95 Ohio St.3d 1, 764 N.E.2d 1006 – we determined that a provider of employment services was not entitled to the resale exception when the computer hardware company that hired the temporary employees from the employment-service provider did not resell those services. The computer hardware company had purchased "a temporary and flexible work force of sufficient size and expertise," and the computer company's customers had in turn paid the computer company to keep the customers'

computers up and running. Id. at 3, 764 N.E.2d 1006. The employment services – the temporary workers – were "a means to an end" for the computer company's customers, rather than an end in itself. Id. Those services were not, in other words, resold "in the form in which [they had been] received," as would be required for the R.C. 5739.01(E) resale exception to apply to the initial sale of the employment services. The computer company paid for employment services and used the workers it hired to service computers. As we explained in that case, the company that had provided the temporary workers and had been paid for that service owed taxes on the money it earned in the transaction. Id. at 4-5, 764 N.E.2d 1006.

{¶ 40} The same is true in this case. Trucking companies "go[ ] to the crewing company * * * and ask[ ] them to provide a crew," according to the president of Crew 4 You. As is undisputed from the Tax Commissioner's final determination, trucking companies pay crewing companies like Crew 4 You for providing crew members who can operate audio and video equipment, and the trucking companies in turn provide "staffed equipment ready for use in broadcasting a sporting event."

{¶ 41} As with the computer company in the *Corporate Staffing Resources* case, the trucking companies in this case paid an employment-services provider to find skilled workers for certain jobs and then used those workers to perform a service needed by a third company. The employment services were not resold by the computer company in *Corporate Staffing Resources* or by the trucking companies in this case. The company that did sell an "employment service" as that term is defined in R.C. 5739.01(JJ) was Crew 4 You, and that company now owes taxes, as did the employment-service provider in *Corporate Staffing Resources*.

{¶ 42} Other decisions from this court support that view. In *Hyatt Corp. v. Limbach* (1994), 69 Ohio St.3d 537, 540, 634 N.E.2d 995, we explained that

because a hotel's act of renting rooms to guests for stays of more than 30 consecutive days was exempted from the sales tax by R.C. 5739.01(N), the hotel could not be deemed to have "resold" the use of linens in those rooms that the hotel had paid to have cleaned by a linen-cleaning service. The same principle applies in this case: Because the trucking companies did not sell a taxable "employment service" to the broadcasting entities – because the provider of "employment service" under R.C. 5739.01(JJ) must pay the "wages, salary, or other compensation" of the workers, and Crew 4 You (rather than the trucking companies) paid the workers' wages – the trucking companies cannot be deemed to have resold the employment services that they purchased from Crew 4 You. In other words, if the trucking companies did not *sell* employment services at all, then they certainly did not *resell* them. See, also, *Bellemar Parts Indus., Inc. v. Tracy* (2000), 88 Ohio St.3d 351, 353, 354, 725 N.E.2d 1132 (explaining that "where a taxpayer contracts with a company for a service and receives and resells the benefit of that service in the same form, the [resale] exception [in R.C. 5739.01(E)] applies," and rejecting a taxpayer's effort to claim the resale exception when employment services were not resold in the same form by the buyer of them).

{¶ 43} The BTA went astray by failing to examine whether the trucking companies had acted with "the purpose * * * to resell the thing transferred or benefit of the service provided * * * in the form in which [it had been] received." R.C. 5739.01(E). Those critical requirements of the resale exception in the sales tax statutes were not satisfied in this case. The trucking companies did not sell employment services as those services are defined in R.C. 5739.01(JJ), so those companies certainly cannot be said to have resold the services purchased from Crew 4 You. As we stated in another resale-exception case, a critical question is "whether * * * [the buyer of a good or service] 'sold' the items" when the original seller claims that the resale exception applies. *Gen. Mills Fun Group, Inc.,*

Kenner Products Div. v. Lindley (1982), 1 Ohio St.3d 27, 28, 1 OBR 63, 437 N.E.2d 591 (rejecting a taxpayer's request for application of the resale exception because the buyer to whom the taxpayer sold artwork did not sell – and therefore did not "resell" – the artwork). The BTA did not examine that question.

{¶ 44} The record indicates that crewing companies did not sell or resell employment services, and if there was no resale, then the resale exception cannot apply. Crew 4 You was the only company that sold employment services in the three-way transactions involving Crew 4 You, the trucking companies, and the broadcasting entities. Those sales are taxable, and Crew 4 You – not the trucking companies – owes the sales tax on the money it took in from those sales.

{¶ 45} The BTA's decision granting Crew 4 You an exemption from sales tax under the resale exception is not supported by the law or the facts. Crew 4 You sold employment services, but the trucking companies did not. Instead, the trucking companies provided "staffed equipment ready for use in broadcasting a sporting event." That service is not the same benefit in the same form it was in when the trucking companies purchased it from Crew 4 You, and the trucking companies certainly did not sell an "employment service" as that term is defined in R.C. 5739.01(JJ). Crew 4 You *did* sell employment services, and it has not met its burden of showing that it is entitled to an exemption from the sales tax that R.C. 5739.01(B)(3)(k) imposes on the retail sale of those services.

{¶ 46} In conclusion, the BTA correctly determined that Crew 4 You sold an "employment service" as that term is defined in R.C. 5739.01(JJ) but incorrectly found that the R.C. 5739.01(E) resale exception applies to the sales that Crew 4 You made to trucking companies. The decision of the BTA is affirmed on the former issue and is reversed on the latter.

Decision affirmed in part
and reversed in part.

MOYER, C.J., RESNICK, PFEIFER, LUNDBERG STRATTON, O'CONNOR and LANZINGER, JJ., concur.

Buckingham, Doolittle & Burroughs, L.L.P., Steven A. Dimengo, and David W. Hilkert, for appellee and cross-appellant.

Jim Petro, Attorney General, and Robert C. Maier, Deputy Attorney General, for appellant and cross-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

APPEARANCES:

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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.

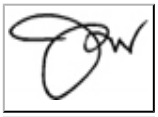
The commissioner argues that "Kal Kan controls the entire manufacturing process and all production lines. *** The entire production line and employment relationship put Kal Kan firmly in control of all employees engaged in the production line. *** It is Kal Kan that determines the need for such employees 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

ACCEL, INC., (et. al.),

Appellant(s),

vs.

JOSEPH TESTA, (et. al.),

Appellee(s).

CASE NO(S). 2012-2840

(USE TAX)

DECISION AND ORDER

APPEARANCES:

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Entered Wednesday, July 15, 2015

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

Appellant appeals a final determination of the Tax Commissioner wherein he largely affirmed a use tax assessment issued as a result of an audit of appellant's purchases from January 1, 2003 through December 31, 2009. This matter is considered upon the notice of appeal, the statutory transcript ("S.T.") certified by the commissioner, the record of this board's hearing ("H.R."), and the parties' briefs. Upon consideration of the commissioner's motion to strike a portion of appellant's post-hearing brief, i.e., footnote 6, said motion is hereby denied.

Appellant ("Accel") described itself in its post-hearing brief as "a unique company that assembles gift sets, consisting primarily of health and beauty products (i.e., shampoos, lotions, shower gels, etc.), for major retailers such as Bath and Body Works and Victoria's Secret." Appellant's Post-Hearing Brief at 1. Following an audit of Accel's purchases, the Tax Commissioner assessed Accel use tax for "packaging materials" used in its operations and its purchased labor. Accel filed a petition for reassessment, which raised numerous objections, including, relevant to this matter: exemption as a manufacturer under R.C. 5739.02(B)(42)(a), double taxation, exemption as a packager under R.C. 5739.02(B)(15), exception for resale transactions under R.C. 57309.01(E), exemption of delivery charges under R.C. 5739.02(B)(11), exception for leased long-term labor under R.C. 5739.01(JJ)(3), statute of limitations, and constitutional objections. Accel also asked that the penalty and interest be abated. The commissioner, for the most part, rejected Accel's objections, and the present appeal ensued.

At this board's hearing, Accel's president and co-CEO, David Abraham, testified about Accel's operations. Although Mr. Abraham acknowledged that Accel markets itself as a "packager," he explained that it does so to distinguish itself from "pick and pack" companies who simply put finished products in shipping boxes. He explained that Accel, in contrast, designs gift sets, in consultation with its clients, and attaches end-user items into a non-disposable "package." H.R. at 28. Accel also presented the testimony of Joe Scott, its cost accounting manager, who explained the steps taken by Accel to create its gift sets, and Dan Harms, CFO, who testified about Accel's labor arrangements with Resource Staffing. Further, Accel called Moises Lluevers, CFO of Resource Staffing to testify regarding Accel's arrangements to purchase labor from Resource Staffing during the period in question.

Both Accel and the commissioner presented expert testimony in support of their respective positions. Accel presented Carol Ptak, its offered expert witness in manufacturing, who testified about the definition of manufacturing used by the American Production and Inventory Control Society ("APICS"), and opined that Accel's operations would meet such definition as a manufacturer. The Tax Commissioner presented Dr. Robert Clarke, professor at the School of Packaging at Michigan State University, who opined that Accel merely packaged products, rather than transformed them into another product. After the hearing, the commissioner moved this board to reconsider the attorney examiner's ruling qualifying Ms. Ptak as an expert witness on the manufacturing process. The motion is hereby overruled; however, the objections are considered in our determination of the weight to be given Ms. Ptak's opinion in our ultimate determination.

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of services provided, with it being the obligation of the user to file a return and remit tax on the purchase of such items when tax was not paid to a seller. R.C. 5741.12. The legislature has also provided numerous exemptions and exceptions to the collection of sales tax, and, through R.C. 5741.02(C)(2), has mandated that if the acquisition of an item within the state would not be subject to tax, then the item's use within the state is correspondingly not subject to tax. However, "[s]tatutes relating to exemption or exception from taxation are to be strictly construed, and one claiming such exemption or exception must affirmatively establish his right thereto." *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, paragraph two of the syllabus. See, also, *Ball Corp. v. Limbach* (1992), 62 Ohio St.3d 474; *Highlights for Children, Inc. v. Collins* (1977), 50 Ohio St.2d 186.

At the outset, we acknowledge Accel's claims that the assessment is unconstitutional under the Supremacy Clause of the U.S. Constitution and the Equal Protection Clauses of the U.S. and Ohio constitutions. The Ohio Supreme Court has authorized this board to accept evidence on constitutional points; however, it has also clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198. Therefore, we acknowledge Accel's constitutional claims, but make no findings in relation thereto.

We further note that Accel failed to make any further argument regarding its stated error regarding the taxation of delivery charges pursuant to R.C. 5739.02(B)(11). Accordingly, we find that Accel has failed to show the error in the commissioner's determination, and hereby affirm the commissioner's final determination as to this issue.

Turning to Accel's main argument, as a threshold matter, this board must determine whether Accel's activities constitute "manufacturing," "assembly," or "packaging." If Accel's operations qualify as manufacturing or assembly, it argues, the purchases at issue in the assessment qualify for exemption under R.C. 5739.02(B)(42)(a) and (g), which exempt from the sales tax, and corresponding use tax, "[s]ales where the purpose of the purchaser is to *** incorporate the thing transferred as a material or a part into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining" or "use the thing transferred *** primarily in a manufacturing operation to produce tangible personal property for sale." If not exempt under R.C. 5739.02(B)(42), Accel argues that it alternatively qualifies for exemption under R.C. 5739.02(B)(15) which exempts sales to those engaged in retail sales. The commissioner, on the other hand, argues that Accel's operations are merely "packaging," for which exemption is only permitted for those engaged in manufacturing and/or retail sales. Accordingly, we must initially determine whether Accel's operations constitute "packaging."

Packaging is defined in R.C. 5739.02(B)(15) as "placing in a package;" that section also defines "packages" to include "bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers." In *Custom Beverage Packers, Inc. v. Kosydar* (1973), 33 Ohio St.2d 68, 73, the Supreme Court added to these definitions by stating that packages "restrain movement of the packaged object in more than one plane of direction." Thereafter, in *Cole Natl. Corp. v. Collins* (1976), 46 Ohio St.2d 336, the court further found that "an item that prevented movement in more than one plane of direction, ***, was not a package if its predominant economic purpose was to facilitate the marketing of the taxpayer's products rather than to package the products." *Newfield Publications, Inc. v. Tracy* (1999), 87 Ohio St.3d 150. The *Newfield* court added that "the function of a package is to contain a product for shipping or handling." Id. at 153.

The evidence presented by Accel indicates that it does more than merely package products. Accel argues that its processes transform individual products, i.e., shampoos, lotions, shower gels, etc., into a distinct new product – a gift set consisting of such products specifically assembled in a re-usable container, e.g., a basket. Mr. Scott testified at this board's hearing that Accel goes through a three-stage process to complete a gift set, including a design phase where Accel works with its client to "brainstorm ideas on how to build that gift set, how that gift set is going to be presented in an aesthetic form so that it is sellable in a retail environment." H.R. at 57. Accel then implements the design through a fill and assembly specification to assemble the individual products into the gift set designed collaboratively by Accel and its customer. H.R. at 63-75. This process is similar to that discussed in *Pretty Products, Inc. v. Limbach*, 5th Dist. Coshocton No. 85-CA-10, 1985 Ohio App. LEXIS 9344 (Nov. 15, 1985), where the court found that the attachment of a cardboard header to car mats created a new, distinct product that constituted manufacturing. Such processes are in stark contrast to, for example, the mere "packaging" performed by the taxpayer in *Fichtel & Sachs Industries, Inc. v. Wilkins*, 108 Ohio St.3d 106, 2006-Ohio-246, where clutch kits were simply taken from inventory bins and put in a single box to fill a customer's order. See, also, *B.J. Alan Co. v. Zaino* (Jan. 26, 2001), BTA No. 1999-J-448, unreported. Compare, *Natl. PharmPak Services, Inc. v. Lawrence* (July 27, 2001), BTA No. 1999-M-1014, 1015, 1016, unreported. While we agree with the commissioner that the federal district court's decision in *United States v. Dean* (C.D. Cal. 2013), 945 F.Supp.2d 1110, is not persuasive on an issue of Ohio tax law, the court's decision and description of a similar gift set operation in the context of federal tax law highlights the unique nature of a gift set as a discrete consumer good. See, also, H.R., Ex. G at 1-2. We therefore find that Accel's activities do not constitute packaging.

Having found that Accel's operations do not meet the definition of "packaging," we turn to whether its operations are "manufacturing" or "assembly." We agree with the commissioner's contention that Accel does not engage in manufacturing as that term is traditionally understood in the sales and use tax context. See *Sauder Woodworking Co. v. Limbach* (1988), 38 Ohio St.3d 175, 176 ("An operation which merely enhances the value of the product without producing a change in state or form does not constitute processing."). However, we do find that Accel engages in assembly for purposes of R.C. 5739.02(B)(42)(a). "Assembly" is defined in R.C. 5739.01(R) as "attaching or fitting together parts to

form a product, but do[es] not include packaging." In *Scholz Homes, Inc. v. Porterfield* (1971), 25 Ohio St.2d 67, 72, the Supreme Court explained that assembly "means more than the mere gathering together of fabricated materials;" rather, assembly is putting together various parts to make an operative whole.

In *Express Packaging, Inc. v. Limbach* (Sept. 18, 1992), BTA No. 1989-K-22, unreported, this board addressed the packaging exemption allowed to manufacturers in the context of a taxpayer that "custom packag[ed] goods which [were] previously manufactured by appellant's customers into 'units'" and which were received by the appellant "in large quantities or bulk form and *** subsequently combined by appellant in different quantities and assortments." In that case, we found that simply placing prepared spices into bottles, and capping and labelling those bottles, did not constitute manufacturing. The Supreme Court similarly found that a "pick and pack" operation did not constitute manufacturing. *Fichtel & Sachs*, supra. Here, the record clearly demonstrates that Accel does more than simply put consumer goods into a carton, as was the case in *Express Packaging*. See, H.R. at 57-75. Indeed, Accel refers to its day-to-day operations as assembly, based on the Fill and Assembly specifications written during its collaborative design process with its customers. See H.R., Ex. S. Based upon the foregoing, we find that Accel engages in assembly for purposes of R.C. 5739.02(B)(42)(a), and, therefore, its purchases of "packaging material" are exempt from use tax.

Having so found, we will not further address Accel's argument regarding the resale exception in R.C. 5739.01(E).

Accel also appealed the commissioner's determination regarding its purchases of leased labor from Resource Staffing and Manpower. Initially, we note the commissioner's objection to exhibits X and Y, an October 6, 2006 amendment to Resource Staffing's contract with Accel and a summary of employees provided by Resource Staffing to Accel and their respective tenures, respectively. The commissioner represents that the documents were subpoenaed by him prior the hearing, but that such documents were not produced until the eve of hearing, and, despite being introduced by Accel at hearing, were not disclosed in accordance with this board's rules. See Ohio Adm. Code 5717-1-15(I). The commissioner further argues that the documents are inadmissible hearsay. Upon review of the arguments and Accel's responses thereto, the objections are well taken and exhibits X and Y are stricken from the record.

Purchases of "employment services," are taxable under R.C. 5739.01(JJ); however, "[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 by the contract is assigned to the purchaser on a permanent basis" is exempt. R.C. 5739.01(JJ)(3). The parties do not dispute that the contract with Resource Staffing was for a period of at least one year. The Supreme Court explained in *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, ¶21, 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. In his final determination, the commissioner found that the number of employees assigned to Accel under its contracts with Resource Staffing and Manpower, which was verbal only, fluctuated with the seasons, based on the dollar amount spent on such labor by Accel. S.T. at 9. The commissioner also noted that the names of specific employees assigned to Accel "changed quite often in a temporary manner." S.T. at 10, quoting Auditor's Remarks, pg. 13. The commissioner further rejected Accel's arguments that its labor purchases were exempt under the resale and manufacturing exemptions.

Accel argues that employees were assigned on a permanent basis. It cites the testimony of Mr. Harms and Mr. Lluevers, who indicated that the intent was to have permanent employees to avoid the need for constant training of new employees and to provide needed continuity. While Accel acknowledged that it occasionally became behind on its bills, resulting in less than its full staffing needs being met, Mr. Lluevers testified that, in such instances, the hours of each employee were proportionately cut back, rather than entire employees being withheld. H.R. at 341-342. Moreover, Accel cites this board's decision in *Excel Temporaries, Inc. v. Tracy* (Oct. 30, 1998), BTA No. 1997-T-257, unreported, where we found that even a

high degree of turnover of individual employees supplied under such a contract does not defeat a claim of exception under R.C. 5739.01(JJ)(3). Id. at 13. In response, the commissioner noted Mr. Scott's testimony that employee needs were determined on a project-by-project basis.

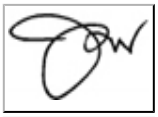
The testimony of Mr. Harms and Mr. Lluevers indicates that Resource Staffing assigned employees permanently to Accel; indeed, doing so was part of Resource Staffing's unique business model. H.R. at 288-290, 307-309. While we acknowledge the existence of some turnover of employees, we agree with Accel that such turnover does not obviate exception under R.C. 5739.01(JJ)(3). *Excel Temporaries*, supra. Further, we find the commissioner's arguments regarding the fluctuating hours required by Accel in conjunction with Accel's production levels to be unavailing. The concept of temporary or seasonal labor implies that employees are assigned for a short time period; the testimony presented at this board's hearing indicates that Accel adjusted its labor needs for each project by decreasing each employees' hours, rather than by accepting a smaller number of employees during less busy time periods. H.R. at 341-342. However, employees were not reassigned elsewhere and remained assigned to Accel for an indefinite period. H.R. at 330. We find nothing in the statute or related case law that requires that employees work a consistent number of hours. Rather, it is only required that the employees be assigned on a permanent basis. Based on the record before us, we find that Resource Staffing supplied personnel to Accel on such a basis during the time period in question.

Moreover, Accel argues that the employees provided by Resource Staffing were not "under the supervision or control of another," as is required to meet the definition of "employment service" in R.C. 5739.01(JJ). The testimony of Mr. Lluevers indicated that Resource Staffing supplied supervisors, on its own payroll, not Accel's, to supervise and direct the employees provided for Accel's production activities. H.R. at 327-238.

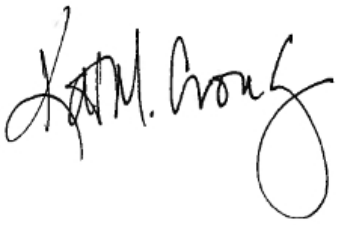
While Accel argues that its relationship with Manpower was similar to its relationship with Resource Staffing, we find the only evidence of Manpower's provision of employment services was the affidavit of David Abraham, previously provided to the commissioner. Given the lack of specific evidence, as was presented with regard to Resource Staffing, we are unable to conclude that the commissioner erred in his determination regarding the employment services provided by Manpower.

Finally, Accel argues that the commissioner erred in failing to abate penalties and pre-assessment interest. It cites to R.C. 5703.58(B), which states that "the commissioner shall not make or issue an assessment against a consumer for any tax due under Chapter 5741 of the Revised Code, or for any penalty, interest, or additional charge on such tax, if the tax was due before January 1, 2008." That section, however, was not enacted and effective until September 29, 2011. As the commissioner correctly notes, the underlying assessment in this matter was made/issued on January 18, 2011. We therefore find that the prohibition in R.C. 5703.58(B) has no bearing in this matter. Although Accel made no further argument beyond its original notice of appeal relating to penalties and interest, specifically under R.C. 5741.99(C), R.C. 5739.133(A)(3), and R.C. 5741.14, we find that the commissioner made no error in his assessment of penalties and interest.

Based upon the foregoing, the final determination of the Tax Commissioner is hereby affirmed in part and reversed in part.

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.



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Kathleen M. Crowley, Board Secretary

OHIO BOARD OF TAX APPEALS

A.M. CASTLE & COMPANY, (et. al.),

Appellant(s),

vs.

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

Appellee(s).

CASE NO(S). 2013-5851

(USE TAX)

DECISION AND ORDER

APPEARANCES:

For the Appellant(s) - A.M. CASTLE & COMPANY
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Entered Monday, March 9, 2015

Mr. Williamson and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon a notice of appeal from a final determination of the Tax Commissioner, filed herein by A.M. Castle & Company ("Castle"). In such determination, the commissioner denied Castle's objections to a use tax assessment that resulted from an audit of Castle's purchases for the period from January 1, 2008 through December 31, 2009. This 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, the evidence and testimony presented at a hearing before the board ("H.R."), and the written argument from the parties. We acknowledge Castle's motion to strike the commissioner's post hearing reply brief; however, as briefs are provided for the assistance of this board in rendering its determination, and are not required to be filed by the parties, nor required to be considered by the board, Castle's motion is hereby overruled.

In reviewing the instant appeal, we recognize 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. *Kern*, supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan*, supra.

Castle "is a provider of specialty metal products in bar, tube, plate and sheet to metal users," with headquarters in Illinois and offices in various locations, including Ohio. S.T. at 1. It contests the portion of the use tax assessment relating "to services that were provided by a third-party, DC Transportation, Incorporated, under a contract pursuant to which DC Transportation employees operate vehicles owned or leased by A.M. Castle," and specifically claims the charges for such services are excludable from taxable employment services, pursuant to R.C. 5739.01(JJ)(3). H.R. at 7-8.

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 supplied receive their wages, salary, or other compensation from the provider of the service." Pertinent to the arguments advanced by appellant, 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."

In *Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, the Supreme Court discussed the statutory provisions relating to employment services:

> "In *H.R. Options*, [*Inc. v. Zaino* (2004)], 100 Ohio St.3d 373, 2004 Ohio 1, ***, ¶ 21, we explained that 'permanent' in the context of (JJ)(3) means that an employee is 'assign[ed] to a position for an indefinite period,' which in turn means that (1) the assignment has no specified ending date and (2) the employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonal or short-term workload conditions. Id. ¶ 21. We also held that R.C. 5739.01(JJ)(3) was to be treated as an exception or exemption from taxation, with the result that it must be strictly construed against the taxpayer's claim for tax relief. H.R. Options, ¶ 17, clarified by *H.R. Options, Inc. v. Wilkins*, 102 Ohio St.3d 1214, 2004 Ohio 2085, ***, ¶ 2.
>
> "*H.R. Options* is additionally significant because we construed the exemption as turning on the facts of each employee's assignment rather than on the presence of 'magic words' in the employment-service agreements themselves. *H.R. Options*, 100 Ohio St.3d 373, 2004 Ohio 1, ***, ¶ 21. Instead of requiring that the contracts recite 'permanent' (or 'indefinite') assignment, we viewed the language of the contracts as one element that, along with the facts and circumstances of the individual assignments, established whether the provider was truly 'supplying personnel' in an exempt manner. Indeed, instead of requiring the commissioner to focus on contract language in *H.R. Options*, we directed that official to look at two types of evidence when auditing a claim of exemption: (1) the employment-services contract itself, to see whether it is consistent with the requirements set forth at (JJ)(3), and (2) the facts and circumstances of the assignment, in order to ascertain whether in actual practice the assignment of the particular employees was 'indefinite'

> in character, or whether the assignments were seasonal, substitutional, or designed to meet short-term workload conditions. Id., ¶ 22." Id. at ¶18-19.

Thus, in order for the services provided by DC Transportation to qualify for the exemption/exception set forth in R.C. 5739.01(JJ)(3), they must meet two criteria: they must be provided subject to a contract of at least one year in duration and DC's employees must be assigned to Castle on a permanent basis. The commissioner, in the final determination, acknowledges that the contract between DC Transportation and Castle meets the durational requirement of at least one year, S.T. at 2; H.R. at 12; accordingly, we need not further address such aspect of its qualification for exemption.

With regard to the second criteria, the commissioner concluded that "[t]he contract does not specify that the employees are assigned on a permanent basis. The contract provides that 'Lessor shall provide Lessee with a sufficient number of drivers to operate the motor vehicles owned or leased by Lessee, as required by Lessee.' This language leaves open the drivers that may be provided indicating that they will be provided on an 'as required' basis." Further, the commissioner determined that contrary to Castle's contentions that the contract in question "assigns employees to AM Castle on a permanent basis," the contract contains no such provision. S.T. at 2.

In support of its argument that, in fact, DC's employees are provided to Castle on a "permanent" basis, Castle offered the testimony of two witnesses before this board. First, Ronald Knopp, the vice president of operations for Castle, testified that in the course of its business, Castle does not employ any truck drivers; it prefers to "use representatives like DC Transportation who have the expertise in the market to secure knowledgeable drivers [to] get us equipment and trucking and trailers to get our material from our facilities to our customers." H.R. at 20. He went on to indicate that the DC drivers are Castle's "connection to our customer. They wear our colors; they drive logo trucks. They are the connection and the representation of Castle to our accounts. They're the ones that knock on the doors, deliver the product, and have the relationship with our customers." H.R. at 21. He elaborated that on average, DC supplies around eleven or twelve drivers, who, under the contract, which is subject to Teamster regulatory requirements, are guaranteed eight hours of work per day, which can include driving and loading/unloading trucks and maintenance of trucks. H.R. at 23-24, 30-31, 40; Ex. 2. The drivers that Castle uses are full-time employees, who work only for Castle; they are neither seasonal, temporary, short-term, nor substitute in nature. H.R. at 25-26.

Next, Castle called Thomas Fink, the president of DC, to testify. He indicated that DC is a "full-time lease provider for transportation personnel," with many clients, including Castle. H.R. at 60. He described the drivers DC provides to Castle as "long-term, full-time employees subject to the collective bargaining agreement with the union." H.R. at 62. He confirmed that the drivers are full-time and permanently assigned to Castle, until Castle no longer needs them, and do not work in a seasonal, substitute, or casual employee capacity. H.R. at 63-64, 66, 80-81. He related that on rare occasions, if a driver was unavailable for work at Castle "at the last moment," e.g., was sick, a "substitute" DC employee would be sent in that driver's stead. H.R. at 64, 69-70.

Castle concedes that in the contract between DC and Castle, the word "permanent," referencing the DC drivers' assignment to Castle, does not appear. H.R. at 36. Further, Castle explained that "casual driver," as referenced in the contract, is a "term *** carried over from the Teamsters as to reflect the junior employee of the full-time employees. *** A casual driver is the one who comes in and does the odd jobs at the low seniority position *** but his benefits, his pay is exactly the same as the remainder of the senior drivers. He's still guaranteed the eight hours, he's full time, he's 40 hours of work." H.R. at 42-43. Mr. Knopp testified that contrary to the reference in the contract for casual/temporary drivers, Castle never had a temporary driver. H.R. at 43. Further, Mr. Knopp indicated that although the contract indicates that when called to work, drivers may not be "put to work," drivers have never not been put to work. H.R. at 47-48.

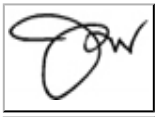
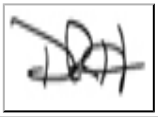
As we review the foregoing, we are mindful that in *Bay Mechanical*, supra, the court reiterated "*H.R.*

Options adopts a consistent theme sounded by the BTA itself when reviewing exemption claims: when "determining whether an exception or exemption to taxation applies, it is not just the form of a contract that is important," but instead, the "crucial inquiry becomes a determination of what the seller is providing and of what the purchaser is paying for in their agreement." *Excel Temporaries, Inc. v. Tracy*, BTA No. 97-T-257, *** (Oct. 30, 1998) (applying the permanent-assignment exception before *H.R. Options*)." Id. at ¶23. The court went on to conclude that "*H.R. Options* teaches that supplying personnel on an exempt basis under R.C. 5739.01(JJ)(3) means that the employees are actually provided to work for an indefinite period—i.e., that they are not serving as seasonal workers, as substitutes for regular employees on leave, or as labor needed to meet a short-term workload. It follows that a contract can contain all the right language, but if a particular employee is seasonal, substitutional, or on a short-term-workload assignment, the provider is not "supplying" that employee "pursuant to" the agreement for purposes of qualifying for exemption under R.C. 5739.01(JJ)(3)." Id. at ¶24.

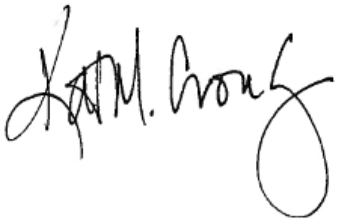
The commissioner argues that "the drivers assigned to AM Castle by DC Transportation were not permanent. AM Castle always retained the ability, and acted on that ability, to adjust to a 'sufficient number of drivers' it had assigned to its fleet, 'as required' at any given time." Commissioner Brief at 8. He goes on to argue that "the Contract provides that drivers will be assigned to AM Castle 'as required,' which indicates that AM Castle requests drivers from DC Transportation only as necessary, and according to AM Castle's business demands. *** The Contract also allows AM Castle to request that DC Transportation 'remove [a] driver from service' upon AM Castle's written request. *** But no reason for the removal request is required. *** Again, this indicates that AM Castle has retained the ability to adjust its fleet of drivers according to business need." Commissioner Brief at 9. Apparently, because the contract does not state, with specificity, how many drivers will ultimately be assigned to Castle, the commissioner concludes that the drivers are not, therefore, assigned "permanently." As further support for that conclusion, the commissioner cites the collective bargaining agreement as giving Castle the right to "refuse to accept, displace, or discharge drivers provided by DC Transportation for 'valid business or economic reasons,' or authorizing the use of 'casual' drivers.

We find no requirement in R.C. 5739.01(JJ)(3), or caselaw interpreting it, that the number of employees, as set out in the contract authorizing employment services, must be a static, specific number, which cannot be varied or adjusted based upon extrinsic factors, such as changes in business/operating conditions or employee performance; such specificity would require a level of certainty, as to the provider's and recipient's future business requirements, that clearly would be difficult, if not impossible, to predict. Instead, we find such provision requires the taxpayer claiming the exemption to have the intent to maintain the employees provided to it, on an ongoing basis, for at least a year, with no particular end in sight to the assignment, beyond the year, as opposed to on a temporary or seasonal basis. Based upon Castle's witnesses' testimony about Castle's and DC's course of action under the contract, as well as the terms of the contract, we conclude that it was both Castle's and DC's intent for DC to provide permanent drivers to Castle, as demonstrated through Castle's ongoing, long-term relationships with many of the same drivers over many years. Ex. 1; H.R. at 26-27, 80-81.

Thus, based upon the foregoing, this board concludes that Castle has met its burden of proof herein, and, as such, we find that the Tax Commissioner’s findings were unreasonable and unlawful as they related to the employment services transactions. It is the decision and order of the Board of Tax Appeals that this matter be remanded to the Tax Commissioner to remove from the subject assessment all tax associated with services provided by DC to Castle, as we find they are excluded, pursuant to R.C. 5739.01(JJ)(3), i.e., $192,909.94, Castle Brief at 9; Commissioner Brief at 4; further, all interest and penalties associated with such tax must also be removed from the assessment.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
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.



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Kathleen M. Crowley, Board Secretary

As Re-Referred by the House Rules and Reference Committee

131st General Assembly
Regular Session
2015-2016

Am. H. B. No. 343

Representatives Young, Romanchuk

Cosponsors: Representatives Antani, Becker, Brenner, Cupp, Hood, LaTourette, Rezabek, Sprague, Thompson, Vitale

A BILL

To amend section 5739.01 of the Revised Code to exempt employment services and employment placement services from sales and use tax beginning July 1, 2017.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 5739.01 of the Revised Code be amended to read as follows:

Sec. 5739.01. As used in this chapter:

(A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.

(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:

(1) All 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;

(2) All transactions by which lodging by a hotel is or is to be furnished to transient guests;

(3) All transactions by which:

(a) An item of tangible personal property is or is to be repaired, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code;

(b) An item of tangible personal property is or is to be installed, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code or property that is or is to be incorporated into and will become a part of a production, transmission, transportation, or distribution system for the delivery of a public utility service;

(c) The service of washing, cleaning, waxing, polishing, or painting a motor vehicle is or is to be furnished;

(d) Until August 1, 2003, industrial laundry cleaning services are or are to be provided and, on and after August 1, 2003, laundry and dry cleaning services are or are to be provided;

(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. Notwithstanding any other provision of this chapter, such transactions that occur between members of an affiliated group are not sales. An "affiliated group" means two or more persons related in such a way that one person owns or controls the business operation of another member of the group. In the case of corporations with stock, one corporation owns or controls another if it owns more than fifty per cent of the other corporation's common stock with voting rights.

(f) Telecommunications service, including prepaid calling service, prepaid wireless calling service, or ancillary service, is or is to be provided, but not including coin-operated telephone service;

(g) Landscaping and lawn care service is or is to be provided;

(h) Private investigation and security service is or is to be provided;

(i) Information services or tangible personal property is provided or ordered by means of a nine hundred telephone call;

(j) Building maintenance and janitorial service is or is to be provided;

(k) ~~Employment~~On and before June 30, 2017, employment service is or is to be provided;

(l) ~~Employment~~On and before June 30, 2017, employment placement service is or is to be provided;

(m) Exterminating service is or is to be provided;

(n) Physical fitness facility service is or is to be provided;

(o) Recreation and sports club service is or is to be provided;

(p) On and after August 1, 2003, satellite broadcasting service is or is to be provided;

(q) On and after August 1, 2003, personal care service is or is to be provided to an individual. As used in this division, "personal care service" includes skin care, the application of cosmetics, manicuring, pedicuring, hair removal, tattooing, body piercing, tanning, massage, and other similar services. "Personal care service" does not include a service provided by or on the order of a licensed physician or licensed chiropractor, or the cutting, coloring, or styling of an individual's hair.

(r) On and after August 1, 2003, the transportation of persons by motor vehicle or aircraft is or is to be provided, when the transportation is entirely within this state, except for transportation provided by an ambulance service, by a transit bus, as defined in section 5735.01 of the Revised Code, and transportation provided by a citizen of the United States holding a certificate of public convenience and necessity issued under 49 U.S.C. 41102;

(s) On and after August 1, 2003, motor vehicle towing service is or is to be provided. As used in this division, "motor vehicle towing service" means the towing or conveyance of a wrecked, disabled, or illegally parked motor vehicle.

(t) On and after August 1, 2003, snow removal service is or is to be provided. As used in this division, "snow removal

service" means the removal of snow by any mechanized means, but does not include the providing of such service by a person that has less than five thousand dollars in sales of such service during the calendar year.

(u) Electronic publishing service is or is to be provided to a consumer for use in business, except that such transactions occurring between members of an affiliated group, as defined in division (B)(3)(e) of this section, are not sales.

(4) All transactions by which printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter are or are to be furnished or transferred;

(5) The production or fabrication of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the production of fabrication work; and include the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. Except as provided in section 5739.03 of the Revised Code, a construction contract pursuant to which tangible personal property is or is to be incorporated into a structure or improvement on and becoming a part of real property is not a sale of such tangible personal property. The construction contractor is the consumer of such tangible personal property, provided that the sale and installation of carpeting, the sale and installation of agricultural land tile, the sale and erection or installation of portable grain bins, or the provision of landscaping and lawn care service and the transfer of property as part of such service is never a construction contract.

As used in division (B)(5) of this section:

(a) "Agricultural land tile" means fired clay or concrete tile, or flexible or rigid perforated plastic pipe or tubing, incorporated or to be incorporated into a subsurface drainage system appurtenant to land used or to be used primarily in production by farming, agriculture, horticulture, or floriculture. The term does not include such materials when they are or are to be incorporated into a drainage system appurtenant to a building or structure even if the building or structure is used or to be used in such production.

(b) "Portable grain bin" means a structure that is used or to be used by a person engaged in farming or agriculture to shelter the person's grain and that is designed to be disassembled without significant damage to its component parts.

(6) All transactions in which all of the shares of stock of a closely held corporation are transferred, or an ownership interest in a pass-through entity, as defined in section 5733.04 of the Revised Code, is transferred, if the corporation or pass-through entity is not engaging in business and its entire assets consist of boats, planes, motor vehicles, or other tangible personal property operated primarily for the use and enjoyment of the shareholders or owners;

(7) All transactions in which a warranty, maintenance or service contract, or similar agreement by which the vendor of the warranty, contract, or agreement agrees to repair or maintain the tangible personal property of the consumer is or is to be provided;

(8) The transfer of copyrighted motion picture films used solely for advertising purposes, except that the transfer of

such films for exhibition purposes is not a sale;

(9) On and after August 1, 2003, all transactions by which tangible personal property is or is to be stored, except such property that the consumer of the storage holds for sale in the regular course of business;

(10) All transactions in which "guaranteed auto protection" is provided whereby a person promises to pay to the consumer the difference between the amount the consumer receives from motor vehicle insurance and the amount the consumer owes to a person holding title to or a lien on the consumer's motor vehicle in the event the consumer's motor vehicle suffers a total loss under the terms of the motor vehicle insurance policy or is stolen and not recovered, if the protection and its price are included in the purchase or lease agreement;

(11)(a) Except as provided in division (B)(11)(b) of this section, on and after October 1, 2009, all transactions by which health care services are paid for, reimbursed, provided, delivered, arranged for, or otherwise made available by a medicaid health insuring corporation pursuant to the corporation's contract with the state.

(b) If the centers for medicare and medicaid services of the United States department of health and human services determines that the taxation of transactions described in division (B)(11)(a) of this section constitutes an impermissible health care-related tax under the "Social Security Act," section 1903(w), 42 U.S.C. 1396b(w), and regulations adopted thereunder, the medicaid director shall notify the tax commissioner of that determination. Beginning with the first day of the month following that notification, the transactions described in division (B)(11)(a) of this section are not sales for the

purposes of this chapter or Chapter 5741. of the Revised Code. The tax commissioner shall order that the collection of taxes under sections 5739.02, 5739.021, 5739.023, 5739.026, 5741.02, 5741.021, 5741.022, and 5741.023 of the Revised Code shall cease for transactions occurring on or after that date.

(12) All transactions by which a specified digital product is provided for permanent use or less than permanent use, regardless of whether continued payment is required.

Except as provided in this section, "sale" and "selling" do not include transfers of interest in leased property where the original lessee and the terms of the original lease agreement remain unchanged, or professional, insurance, or personal service transactions that involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made.

(C) "Vendor" means the person providing the service or by whom the transfer effected or license given by a sale is or is to be made or given and, for sales described in division (B)(3)(i) of this section, the telecommunications service vendor that provides the nine hundred telephone service; if two or more persons are engaged in business at the same place of business under a single trade name in which all collections on account of sales by each are made, such persons shall constitute a single vendor.

Physicians, dentists, hospitals, and veterinarians who are engaged in selling tangible personal property as received from others, such as eyeglasses, mouthwashes, dentifrices, or similar articles, are vendors. Veterinarians who are engaged in transferring to others for a consideration drugs, the dispensing of which does not require an order of a licensed veterinarian or

physician under federal law, are vendors.

(D)(1) "Consumer" means the person for whom the service is provided, to whom the transfer effected or license given by a sale is or is to be made or given, to whom the service described in division (B)(3)(f) or (i) of this section is charged, or to whom the admission is granted.

(2) Physicians, dentists, hospitals, and blood banks operated by nonprofit institutions and persons licensed to practice veterinary medicine, surgery, and dentistry are consumers of all tangible personal property and services purchased by them in connection with the practice of medicine, dentistry, the rendition of hospital or blood bank service, or the practice of veterinary medicine, surgery, and dentistry. In addition to being consumers of drugs administered by them or by their assistants according to their direction, veterinarians also are consumers of drugs that under federal law may be dispensed only by or upon the order of a licensed veterinarian or physician, when transferred by them to others for a consideration to provide treatment to animals as directed by the veterinarian.

(3) A person who performs a facility management, or similar service contract for a contractee is a consumer of all tangible personal property and services purchased for use in connection with the performance of such contract, regardless of whether title to any such property vests in the contractee. The purchase of such property and services is not subject to the exception for resale under division (E)(1) of this section.

(4)(a) In the case of a person who purchases printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the

public, free of charge, that person is the consumer of that printed matter, and the purchase of that printed matter for that purpose is a sale.

(b) In the case of a person who produces, rather than purchases, printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of all tangible personal property and services purchased for use or consumption in the production of that printed matter. That person is not entitled to claim exemption under division (B)(42)(f) of section 5739.02 of the Revised Code for any material incorporated into the printed matter or any equipment, supplies, or services primarily used to produce the printed matter.

(c) The distribution of printed matter to the public or to a designated segment of the public, free of charge, is not a sale to the members of the public to whom the printed matter is distributed or to any persons who purchase space in the printed matter for advertising or other purposes.

(5) A person who makes sales of any of the services listed in division (B)(3) of this section is the consumer of any tangible personal property used in performing the service. The purchase of that property is not subject to the resale exception under division (E)(1) of this section.

(6) A person who engages in highway transportation for hire is the consumer of all packaging materials purchased by that person and used in performing the service, except for packaging materials sold by such person in a transaction separate from the service.

(7) In the case of a transaction for health care services

under division (B)(11) of this section, a medicaid health insuring corporation is the consumer of such services. The purchase of such services by a medicaid health insuring corporation is not subject to the exception for resale under division (E)(1) of this section or to the exemptions provided under divisions (B)(12), (18), (19), and (22) of section 5739.02 of the Revised Code.

(E) "Retail sale" and "sales at retail" include all sales, except those in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person.

(F) "Business" includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect. "Business" does not include the activity of a person in managing and investing the person's own funds.

(G) "Engaging in business" means commencing, conducting, or continuing in business, and liquidating a business when the liquidator thereof holds itself out to the public as conducting such business. Making a casual sale is not engaging in business.

(H)(1)(a) "Price," except as provided in divisions (H)(2), (3), and (4) of this section, means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for any of the following:

(i) The vendor's cost of the property sold;

(ii) The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the vendor, all

taxes imposed on the vendor, including the tax imposed under Chapter 5751. of the Revised Code, and any other expense of the vendor;

(iii) Charges by the vendor for any services necessary to complete the sale;

(iv) On and after August 1, 2003, delivery charges. As used in this division, "delivery charges" means charges by the vendor for preparation and delivery to a location designated by the consumer of tangible personal property or a service, including transportation, shipping, postage, handling, crating, and packing.

(v) Installation charges;

(vi) Credit for any trade-in.

(b) "Price" includes consideration received by the vendor from a third party, if the vendor actually receives the consideration from a party other than the consumer, and the consideration is directly related to a price reduction or discount on the sale; the vendor has an obligation to pass the price reduction or discount through to the consumer; the amount of the consideration attributable to the sale is fixed and determinable by the vendor at the time of the sale of the item to the consumer; and one of the following criteria is met:

(i) The consumer presents a coupon, certificate, or other document to the vendor to claim a price reduction or discount where the coupon, certificate, or document is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any vendor to whom the coupon, certificate, or document is presented;

(ii) The consumer identifies the consumer's self to the

seller as a member of a group or organization entitled to a price reduction or discount. A preferred customer card that is available to any patron does not constitute membership in such a group or organization.

(iii) The price reduction or discount is identified as a third party price reduction or discount on the invoice received by the consumer, or on a coupon, certificate, or other document presented by the consumer.

(c) "Price" does not include any of the following:

(i) Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a vendor and taken by a consumer on a sale;

(ii) Interest, financing, and carrying charges from credit extended on the sale of tangible personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(iii) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer. For the purpose of this division, the tax imposed under Chapter 5751. of the Revised Code is not a tax directly on the consumer, even if the tax or a portion thereof is separately stated.

(iv) Notwithstanding divisions (H)(1)(b)(i) to (iii) of this section, any discount allowed by an automobile manufacturer to its employee, or to the employee of a supplier, on the purchase of a new motor vehicle from a new motor vehicle dealer in this state.

(v) The dollar value of a gift card that is not sold by a vendor or purchased by a consumer and that is redeemed by the

consumer in purchasing tangible personal property or services if the vendor is not reimbursed and does not receive compensation from a third party to cover all or part of the gift card value. For the purposes of this division, a gift card is not sold by a vendor or purchased by a consumer if it is distributed pursuant to an awards, loyalty, or promotional program. Past and present purchases of tangible personal property or services by the consumer shall not be treated as consideration exchanged for a gift card.

(2) In the case of a sale of any new motor vehicle by a new motor vehicle dealer, as defined in section 4517.01 of the Revised Code, in which another motor vehicle is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the motor vehicle received in trade.

(3) In the case of a sale of any watercraft or outboard motor by a watercraft dealer licensed in accordance with section 1547.543 of the Revised Code, in which another watercraft, watercraft and trailer, or outboard motor is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the watercraft, watercraft and trailer, or outboard motor received in trade. As used in this division, "watercraft" includes an outdrive unit attached to the watercraft.

(4) In the case of transactions for health care services under division (B)(11) of this section, "price" means the amount of managed care premiums received each month by a medicaid health insuring corporation.

(I) "Receipts" means the total amount of the prices of the sales of vendors, provided that the dollar value of gift cards distributed pursuant to an awards, loyalty, or promotional program, and cash discounts allowed and taken on sales at the time they are consummated are not included, minus any amount deducted as a bad debt pursuant to section 5739.121 of the Revised Code. "Receipts" does not include the sale price of property returned or services rejected by consumers when the full sale price and tax are refunded either in cash or by credit.

(J) "Place of business" means any location at which a person engages in business.

(K) "Premises" includes any real property or portion thereof upon which any person engages in selling tangible personal property at retail or making retail sales and also includes any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person.

(L) "Casual sale" means a sale of an item of tangible personal property that was obtained by the person making the sale, through purchase or otherwise, for the person's own use and was previously subject to any state's taxing jurisdiction on its sale or use, and includes such items acquired for the seller's use that are sold by an auctioneer employed directly by the person for such purpose, provided the location of such sales is not the auctioneer's permanent place of business. As used in this division, "permanent place of business" includes any location where such auctioneer has conducted more than two auctions during the year.

(M) "Hotel" means every establishment kept, used,

maintained, advertised, or held out to the public to be a place where sleeping accommodations are offered to guests, in which five or more rooms are used for the accommodation of such guests, whether the rooms are in one or several structures, except as otherwise provided in division (G) of section 5739.09 of the Revised Code.

(N) "Transient guests" means persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days.

(O) "Making retail sales" means the effecting of transactions wherein one party is obligated to pay the price and the other party is obligated to provide a service or to transfer title to or possession of the item sold. "Making retail sales" does not include the preliminary acts of promoting or soliciting the retail sales, other than the distribution of printed matter which displays or describes and prices the item offered for sale, nor does it include delivery of a predetermined quantity of tangible personal property or transportation of property or personnel to or from a place where a service is performed.

(P) "Used directly in the rendition of a public utility service" means that property that is to be incorporated into and will become a part of the consumer's production, transmission, transportation, or distribution system and that retains its classification as tangible personal property after such incorporation; fuel or power used in the production, transmission, transportation, or distribution system; and tangible personal property used in the repair and maintenance of the production, transmission, transportation, or distribution system, including only such motor vehicles as are specially designed and equipped for such use. Tangible personal property

and services used primarily in providing highway transportation for hire are not used directly in the rendition of a public utility service. 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.

(Q) "Refining" means removing or separating a desirable product from raw or contaminated materials by distillation or physical, mechanical, or chemical processes.

(R) "Assembly" and "assembling" mean attaching or fitting together parts to form a product, but do not include packaging a product.

(S) "Manufacturing operation" means a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process. "Manufacturing operation" does not include packaging.

(T) "Fiscal officer" means, with respect to a regional transit authority, the secretary-treasurer thereof, and with respect to a county that is a transit authority, the fiscal officer of the county transit board if one is appointed pursuant to section 306.03 of the Revised Code or the county auditor if the board of county commissioners operates the county transit system.

(U) "Transit authority" means a regional transit authority created pursuant to section 306.31 of the Revised Code or a county in which a county transit system is created pursuant to

section 306.01 of the Revised Code. For the purposes of this chapter, a transit authority must extend to at least the entire area of a single county. A transit authority that includes territory in more than one county must include all the area of the most populous county that is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(V) "Legislative authority" means, with respect to a regional transit authority, the board of trustees thereof, and with respect to a county that is a transit authority, the board of county commissioners.

(W) "Territory of the transit authority" means all of the area included within the territorial boundaries of a transit authority as they from time to time exist. Such territorial boundaries must at all times include all the area of a single county or all the area of the most populous county that is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(X) "Providing a service" means providing or furnishing anything described in division (B)(3) of this section for consideration.

(Y)(1)(a) "Automatic data processing" means 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.

(b) "Computer services" means providing services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer

programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.

(c) "Electronic information services" means providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following:

(i) Examining or acquiring data stored in or accessible to the computer equipment;

(ii) Placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.

For transactions occurring on or after the effective date of the amendment of this section by H.B. 157 of the 127th general assembly, December 21, 2007, "electronic information services" does not include electronic publishing as defined in division (LLL) of this section.

(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) Accounting and legal services such as advice on tax matters, asset management, budgetary matters, quality control, information security, and auditing and any other situation where the service provider receives data or information and studies, alters, analyzes, interprets, or adjusts such material;

(b) Analyzing business policies and procedures;

(c) Identifying management information needs;

(d) Feasibility studies, including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;

(e) Designing policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced, formatted, processed, controlled, and reported so that it will be meaningful to management;

(f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;

(g) Testing of business procedures;

(h) Training personnel in business procedure applications;

(i) Providing credit information to users of such information by a consumer reporting agency, as defined in the "Fair Credit Reporting Act," 84 Stat. 1114, 1129 (1970), 15 U.S.C. 1681a(f), or as hereafter amended, including but not limited to gathering, organizing, analyzing, recording, and furnishing such information by any oral, written, graphic, or electronic medium;

(j) Providing debt collection services by any oral, written, graphic, or electronic means.

The services listed in divisions (Y)(2)(a) to (j) of this section are not automatic data processing or computer services.

(Z) "Highway transportation for hire" means the

transportation of personal property belonging to others for consideration by any of the following:

(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;

(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;

(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

(AA)(1) "Telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. "Telecommunications service" includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether the service is referred to as voice-over internet protocol service or is classified by the federal communications commission as enhanced or value-added. "Telecommunications service" does not include any of the following:

(a) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a consumer where the consumer's primary purpose for the underlying transaction is the processed data or information;

(b) Installation or maintenance of wiring or equipment on a customer's premises;

(c) Tangible personal property;

(d) Advertising, including directory advertising;

(e) Billing and collection services provided to third parties;

(f) Internet access service;

(g) Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance, and routing of such services by the programming service provider. Radio and television audio and video programming services include, but are not limited to, cable service, as defined in 47 U.S.C. 522(6), and audio and video programming services delivered by commercial mobile radio service providers, as defined in 47 C.F.R. 20.3;

(h) Ancillary service;

(i) Digital products delivered electronically, including software, music, video, reading materials, or ring tones.

(2) "Ancillary service" means a service that is associated with or incidental to the provision of telecommunications service, including conference bridging service, detailed telecommunications billing service, directory assistance, vertical service, and voice mail service. As used in this

division:

(a) "Conference bridging service" means an ancillary service that links two or more participants of an audio or video conference call, including providing a telephone number. "Conference bridging service" does not include telecommunications services used to reach the conference bridge.

(b) "Detailed telecommunications billing service" means an ancillary service of separately stating information pertaining to individual calls on a customer's billing statement.

(c) "Directory assistance" means an ancillary service of providing telephone number or address information.

(d) "Vertical service" means an ancillary service that is offered in connection with one or more telecommunications services, which offers advanced calling features that allow customers to identify callers and manage multiple calls and call connections, including conference bridging service.

(e) "Voice mail service" means an ancillary service that enables the customer to store, send, or receive recorded messages. "Voice mail service" does not include any vertical services that the customer may be required to have in order to utilize the voice mail service.

(3) "900 service" means an inbound toll telecommunications service purchased by a subscriber that allows the subscriber's customers to call in to the subscriber's prerecorded announcement or live service, and which is typically marketed under the name "900 service" and any subsequent numbers designated by the federal communications commission. "900 service" does not include the charge for collection services provided by the seller of the telecommunications service to the

subscriber, or services or products sold by the subscriber to the subscriber's customer.

(4) "Prepaid calling service" means the right to access exclusively telecommunications services, which must be paid for in advance and which enables the origination of calls using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units or dollars of which the number declines with use in a known amount.

(5) "Prepaid wireless calling service" means a telecommunications service that provides the right to utilize mobile telecommunications service as well as other non-telecommunications services, including the download of digital products delivered electronically, and content and ancillary services, that must be paid for in advance and that is sold in predetermined units or dollars of which the number declines with use in a known amount.

(6) "Value-added non-voice data service" means a telecommunications service in which computer processing applications are used to act on the form, content, code, or protocol of the information or data primarily for a purpose other than transmission, conveyance, or routing.

(7) "Coin-operated telephone service" means a telecommunications service paid for by inserting money into a telephone accepting direct deposits of money to operate.

(8) "Customer" has the same meaning as in section 5739.034 of the Revised Code.

(BB) "Laundry and dry cleaning services" means removing soil or dirt from towels, linens, articles of clothing, or other

fabric items that belong to others and supplying towels, linens, articles of clothing, or other fabric items. "Laundry and dry cleaning services" does not include the provision of self-service facilities for use by consumers to remove soil or dirt from towels, linens, articles of clothing, or other fabric items.

(CC) "Magazines distributed as controlled circulation publications" means magazines containing at least twenty-four pages, at least twenty-five per cent editorial content, issued at regular intervals four or more times a year, and circulated without charge to the recipient, provided that such magazines are not owned or controlled by individuals or business concerns which conduct such publications as an auxiliary to, and essentially for the advancement of the main business or calling of, those who own or control them.

(DD) "Landscaping and lawn care service" means the services of planting, seeding, sodding, removing, cutting, trimming, pruning, mulching, aerating, applying chemicals, watering, fertilizing, and providing similar services to establish, promote, or control the growth of trees, shrubs, flowers, grass, ground cover, and other flora, or otherwise maintaining a lawn or landscape grown or maintained by the owner for ornamentation or other nonagricultural purpose. However, "landscaping and lawn care service" does not include the providing of such services by a person who has less than five thousand dollars in sales of such services during the calendar year.

(EE) "Private investigation and security service" means the performance of any activity for which the provider of such service is required to be licensed pursuant to Chapter 4749. of

the Revised Code, or would be required to be so licensed in performing such services in this state, and also includes the services of conducting polygraph examinations and of monitoring or overseeing the activities on or in, or the condition of, the consumer's home, business, or other facility by means of electronic or similar monitoring devices. "Private investigation and security service" does not include special duty services provided by off-duty police officers, deputy sheriffs, and other peace officers regularly employed by the state or a political subdivision.

(FF) "Information services" means providing conversation, giving consultation or advice, playing or making a voice or other recording, making or keeping a record of the number of callers, and any other service provided to a consumer by means of a nine hundred telephone call, except when the nine hundred telephone call is the means by which the consumer makes a contribution to a recognized charity.

(GG) "Research and development" means designing, creating, or formulating new or enhanced products, equipment, or manufacturing processes, and also means conducting scientific or technological inquiry and experimentation in the physical sciences with the goal of increasing scientific knowledge which may reveal the bases for new or enhanced products, equipment, or manufacturing processes.

(HH) "Qualified research and development equipment" means capitalized tangible personal property, and leased personal property that would be capitalized if purchased, used by a person primarily to perform research and development. Tangible personal property primarily used in testing, as defined in division (A)(4) of section 5739.011 of the Revised Code, or used

for recording or storing test results, is not qualified research and development equipment unless such property is primarily used by the consumer in testing the product, equipment, or manufacturing process being created, designed, or formulated by the consumer in the research and development activity or in recording or storing such test results.

(II) "Building maintenance and janitorial service" means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. However, "building maintenance and janitorial service" does not include the providing of such service by a person who has less than five thousand dollars in sales of such service during the calendar year.

(JJ) "Employment service" means 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. "Employment service" does not include:

(1) Acting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser.

(2) Medical and health care services.

(3) Supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under

the contract is assigned to the purchaser on a permanent basis.

(4) Transactions between members of an affiliated group, as defined in division (B)(3)(e) of this section.

(5) Transactions where the personnel so provided or supplied by a provider or supplier to a purchaser of an employment service are then provided or supplied by that purchaser to a third party as an employment service, except "employment service" does include the transaction between that purchaser and the third party.

(KK) "Employment placement service" means locating or finding employment for a person or finding or locating an employee to fill an available position.

(LL) "Exterminating service" means eradicating or attempting to eradicate vermin infestations from a building or structure, or the area surrounding a building or structure, and includes activities to inspect, detect, or prevent vermin infestation of a building or structure.

(MM) "Physical fitness facility service" means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a physical fitness facility such as an athletic club, health spa, or gymnasium, which entitles the member to use the facility for physical exercise.

(NN) "Recreation and sports club service" means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a recreation and sports club, which entitles the member to use

the facilities of the organization. "Recreation and sports club" means an organization that has ownership of, or controls or leases on a continuing, long-term basis, the facilities used by its members and includes an aviation club, gun or shooting club, yacht club, card club, swimming club, tennis club, golf club, country club, riding club, amateur sports club, or similar organization.

(OO) "Livestock" means farm animals commonly raised for food, food production, or other agricultural purposes, including, but not limited to, cattle, sheep, goats, swine, poultry, and captive deer. "Livestock" does not include invertebrates, amphibians, reptiles, domestic pets, animals for use in laboratories or for exhibition, or other animals not commonly raised for food or food production.

(PP) "Livestock structure" means a building or structure used exclusively for the housing, raising, feeding, or sheltering of livestock, and includes feed storage or handling structures and structures for livestock waste handling.

(QQ) "Horticulture" means the growing, cultivation, and production of flowers, fruits, herbs, vegetables, sod, mushrooms, and nursery stock. As used in this division, "nursery stock" has the same meaning as in section 927.51 of the Revised Code.

(RR) "Horticulture structure" means a building or structure used exclusively for the commercial growing, raising, or overwintering of horticultural products, and includes the area used for stocking, storing, and packing horticultural products when done in conjunction with the production of those products.

(SS) "Newspaper" means an unbound publication bearing a title or name that is regularly published, at least as frequently as biweekly, and distributed from a fixed place of business to the public in a specific geographic area, and that contains a substantial amount of news matter of international, national, or local events of interest to the general public.

(TT) "Professional racing team" means a person that employs at least twenty full-time employees for the purpose of conducting a motor vehicle racing business for profit. The person must conduct the business with the purpose of racing one or more motor racing vehicles in at least ten competitive professional racing events each year that comprise all or part of a motor racing series sanctioned by one or more motor racing sanctioning organizations. A "motor racing vehicle" means a vehicle for which the chassis, engine, and parts are designed exclusively for motor racing, and does not include a stock or production model vehicle that may be modified for use in racing. For the purposes of this division:

(1) A "competitive professional racing event" is a motor vehicle racing event sanctioned by one or more motor racing sanctioning organizations, at which aggregate cash prizes in excess of eight hundred thousand dollars are awarded to the competitors.

(2) "Full-time employee" means an individual who is employed for consideration for thirty-five or more hours a week, or who renders any other standard of service generally accepted by custom or specified by contract as full-time employment.

(UU)(1) "Lease" or "rental" means any transfer of the possession or control of tangible personal property for a fixed or indefinite term, for consideration. "Lease" or "rental"

includes future options to purchase or extend, and agreements described in 26 U.S.C. 7701(h)(1) covering motor vehicles and trailers where the amount of consideration may be increased or decreased by reference to the amount realized upon the sale or disposition of the property. "Lease" or "rental" does not include:

(a) A transfer of possession or control of tangible personal property under a security agreement or a deferred payment plan that requires the transfer of title upon completion of the required payments;

(b) A transfer of possession or control of tangible personal property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars or one per cent of the total required payments;

(c) Providing tangible personal property along with an operator for a fixed or indefinite period of time, if the operator is necessary for the property to perform as designed. For purposes of this division, the operator must do more than maintain, inspect, or set up the tangible personal property.

(2) "Lease" and "rental," as defined in division (UU) of this section, shall not apply to leases or rentals that exist before June 26, 2003.

(3) "Lease" and "rental" have the same meaning as in division (UU)(1) of this section regardless of whether a transaction is characterized as a lease or rental under generally accepted accounting principles, the Internal Revenue Code, Title XIII of the Revised Code, or other federal, state, or local laws.

(VV) "Mobile telecommunications service" has the same meaning as in the "Mobile Telecommunications Sourcing Act," Pub. L. No. 106-252, 114 Stat. 631 (2000), 4 U.S.C.A. 124(7), as amended, and, on and after August 1, 2003, includes related fees and ancillary services, including universal service fees, detailed billing service, directory assistance, service initiation, voice mail service, and vertical services, such as caller ID and three-way calling.

(WW) "Certified service provider" has the same meaning as in section 5740.01 of the Revised Code.

(XX) "Satellite broadcasting service" means the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment without the use of ground receiving or distribution equipment, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite, and includes all service and rental charges, premium channels or other special services, installation and repair service charges, and any other charges having any connection with the provision of the satellite broadcasting service.

(YY) "Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. For purposes of this chapter and Chapter 5741. of the Revised Code, "tangible personal property" includes motor vehicles, electricity, water, gas, steam, and prewritten computer software.

(ZZ) "Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the consumer or at the direction of the consumer when the cost of

the items are not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the consumer to the direct mail vendor for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address.

(AAA) "Computer" means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

(BBB) "Computer software" means a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

(CCC) "Delivered electronically" means delivery of computer software from the seller to the purchaser by means other than tangible storage media.

(DDD) "Prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software. "Prewritten computer software" includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser. If a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person's modifications or enhancements. Prewritten computer software or a prewritten portion thereof that is modified or enhanced to any degree, where such

modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement shall not constitute prewritten computer software.

(EEE)(1) "Food" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. "Food" does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.

(2) As used in division (EEE)(1) of this section:

(a) "Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half of one per cent or more of alcohol by volume.

(b) "Dietary supplements" means any product, other than tobacco, that is intended to supplement the diet and that is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in such a form, is not represented as conventional food for use as a sole item of a meal or of the diet; that is required to be labeled as a dietary supplement, identifiable by the "supplement facts" box found on the label, as required by 21 C.F.R. 101.36; and that contains one or more of the following dietary ingredients:

(i) A vitamin;

(ii) A mineral;

(iii) An herb or other botanical;

(iv) An amino acid;

(v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake;

(vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in divisions (EEE)(2)(b)(i) to (v) of this section.

(c) "Soft drinks" means nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contains greater than fifty per cent vegetable or fruit juice by volume.

(d) "Tobacco" means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

(FFF) "Drug" means a compound, substance, or preparation, and any component of a compound, substance, or preparation, other than food, dietary supplements, or alcoholic beverages that is recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, and supplements to them; is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or is intended to affect the structure or any function of the body.

(GGG) "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to issue a prescription.

(HHH) "Durable medical equipment" means equipment,

including repair and replacement parts for such equipment, that can withstand repeated use, is primarily and customarily used to serve a medical purpose, generally is not useful to a person in the absence of illness or injury, and is not worn in or on the body. "Durable medical equipment" does not include mobility enhancing equipment.

(III) "Mobility enhancing equipment" means equipment, including repair and replacement parts for such equipment, that is primarily and customarily used to provide or increase the ability to move from one place to another and is appropriate for use either in a home or a motor vehicle, that is not generally used by persons with normal mobility, and that does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer. "Mobility enhancing equipment" does not include durable medical equipment.

(JJJ) "Prosthetic device" means a replacement, corrective, or supportive device, including repair and replacement parts for the device, worn on or in the human body to artificially replace a missing portion of the body, prevent or correct physical deformity or malfunction, or support a weak or deformed portion of the body. As used in this division, "prosthetic device" does not include corrective eyeglasses, contact lenses, or dental prosthesis.

(KKK)(1) "Fractional aircraft ownership program" means a program in which persons within an affiliated group sell and manage fractional ownership program aircraft, provided that at least one hundred airworthy aircraft are operated in the program and the program meets all of the following criteria:

(a) Management services are provided by at least one program manager within an affiliated group on behalf of the

fractional owners.

(b) Each program aircraft is owned or possessed by at least one fractional owner.

(c) Each fractional owner owns or possesses at least a one-sixteenth interest in at least one fixed-wing program aircraft.

(d) A dry-lease aircraft interchange arrangement is in effect among all of the fractional owners.

(e) Multi-year program agreements are in effect regarding the fractional ownership, management services, and dry-lease aircraft interchange arrangement aspects of the program.

(2) As used in division (KKK)(1) of this section:

(a) "Affiliated group" has the same meaning as in division (B)(3)(e) of this section.

(b) "Fractional owner" means a person that owns or possesses at least a one-sixteenth interest in a program aircraft and has entered into the agreements described in division (KKK)(1)(e) of this section.

(c) "Fractional ownership program aircraft" or "program aircraft" means a turbojet aircraft that is owned or possessed by a fractional owner and that has been included in a dry-lease aircraft interchange arrangement and agreement under divisions (KKK)(1)(d) and (e) of this section, or an aircraft a program manager owns or possesses primarily for use in a fractional aircraft ownership program.

(d) "Management services" means administrative and aviation support services furnished under a fractional aircraft ownership program in accordance with a management services

agreement under division (KKK)(1)(e) of this section, and offered by the program manager to the fractional owners, including, at a minimum, the establishment and implementation of safety guidelines; the coordination of the scheduling of the program aircraft and crews; program aircraft maintenance; program aircraft insurance; crew training for crews employed, furnished, or contracted by the program manager or the fractional owner; the satisfaction of record-keeping requirements; and the development and use of an operations manual and a maintenance manual for the fractional aircraft ownership program.

(e) "Program manager" means the person that offers management services to fractional owners pursuant to a management services agreement under division (KKK)(1)(e) of this section.

(LLL) "Electronic publishing" means providing access to one or more of the following primarily for business customers, including the federal government or a state government or a political subdivision thereof, to conduct research: news; business, financial, legal, consumer, or credit materials; editorials, columns, reader commentary, or features; photos or images; archival or research material; legal notices, identity verification, or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other similar information which has been gathered and made available by the provider to the consumer in an electronic format. Providing electronic publishing includes the functions necessary for the acquisition, formatting, editing, storage, and dissemination of data or information that is the subject of a sale.

(MMM) "Medicaid health insuring corporation" means a health insuring corporation that holds a certificate of authority under Chapter 1751. of the Revised Code and is under contract with the department of job and family services pursuant to section 5111.17 of the Revised Code.

(NNN) "Managed care premium" means any premium, capitation, or other payment a medicaid health insuring corporation receives for providing or arranging for the provision of health care services to its members or enrollees residing in this state.

(OOO) "Captive deer" means deer and other cervidae that have been legally acquired, or their offspring, that are privately owned for agricultural or farming purposes.

(PPP) "Gift card" means a document, card, certificate, or other record, whether tangible or intangible, that may be redeemed by a consumer for a dollar value when making a purchase of tangible personal property or services.

(QQQ) "Specified digital product" means an electronically transferred digital audiovisual work, digital audio work, or digital book.

As used in division (QQQ) of this section:

(1) "Digital audiovisual work" means a series of related images that, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

(2) "Digital audio work" means a work that results from the fixation of a series of musical, spoken, or other sounds, including digitized sound files that are downloaded onto a device and that may be used to alert the customer with respect to a communication.

(3) "Digital book" means a work that is generally recognized in the ordinary and usual sense as a book.

(4) "Electronically transferred" means obtained by the purchaser by means other than tangible storage media.

Section 2. That existing section 5739.01 of the Revised Code is hereby repealed.