

# Ohio Tax

26th Annual

# OhioTax

C O N F E R E N C E

Tuesday & Wednesday, January 24-25, 2017

Hyatt Regency Columbus, Columbus, Ohio

## Workshop N

**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 24, 2017

3:00 p.m. to 4:00 p.m.

## Biographical Information

**Larry Kidd, President and CEO, Reliable Staffing Services, LLC**  
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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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**David D. Ebersole, Associate, McDonald Hopkins, LLC**  
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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. Through his practice Dave also advises clients with respect to federal tax matters, executive compensation, employee benefits, 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 graduated with honors from The Ohio State University Moritz College of Law.

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**James R. Costigan, Tax Examiner Specialist, Audit Division**  
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James is a Tax Examiner Specialist for the Audit Division of the Ohio Department of Taxation. He has over fourteen years of experience in Sales and Use tax. James began his career with the Ohio Department of Taxation in December, 2002 as a sales and use tax auditor in the Akron District Office. He has conducted audits on numerous taxpayers that maintain a presence in Northeast Ohio, working up to his current classification as a Tax Examiner Specialist. James has audited exclusively in Sales and Use tax throughout his career and has experience in various industries including manufacturing, contracting, public utilities, and automobile dealerships. James is a graduate of Duquesne University with a B.S. in Accounting and Business Administration.

## Biographical Information

**Daniel W. Fausey, Assistant Section Chief – Taxation Section  
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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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**Laura M. Stanley, Esq., Legal Counsel – Sales & Use Taxes  
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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 Bachelor's 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:*

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# Taxation of Employment Services

- Overview: Employment Services Industry and Sales Taxation
- Legislative and Policy Update
- Audit Practice and Exclusions From Sales Tax
- Best Practices and Audit Defense

# “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?



# 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 \$131.6 billion
- Average tenure of a temporary worker is 11 weeks
- In Ohio, there are 530,000 employed each year through staffing firms
  - Average annual wage for temporary worker is \$28,000

# 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.”



# 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 the only border states with the tax

# Exclusions from the Tax

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

# Legislative and Policy Update

- House Bill 343, 131st General Assembly (2015)
- Industry suggests that the language was budget neutral, but only the language regarding exemption certificates was enacted during this legislative session. See, later slide on Sub. S.B. 235.
  - *Exemption Certificates*: purchaser of employment services may provide exemption certificate to provider

It is expected that there will be a reintroduction of HB343 (or some version of it) in the new legislative session. What happens with the bill remains to be seen....

# Employment Services 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?

# Employment Services 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.





# 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.

# The 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

# The Medical Services Exclusion

- Test Your Knowledge:
  - Which of the following is considered a taxable employment service?



- Anesthesiologist A is hired by a surgery center to perform anesthesia services on patients; or
- Anesthesiologist B is hired by a surgery center to be the medical director in charge of the facility.

# The Medical Services Exclusion

- Anesthesiologist B is considered to be taxable employment services because the Anesthesiologist is not performing patient care.



# The Medical Services Exclusion

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

# The 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.

# The 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.

# The Contractor Exclusion

- Company B is considered to be taxable employment services.





# The 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.”

# The 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.

# The 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
  - To determine permanency, review (a) the contracts; and (b) the facts and circumstances of the assignment
  - Factors: length of the contract, permanency, seasonal nature, whether to meet short-term work needs

# 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).
- Issue: Does contract language alone satisfy the permanent placement exclusion?
- Held: No, look to “what actually is being done”

# 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*, BTA Case No. 2012-2840 (Jul. 15, 2015), pending appeal at Ohio Supreme Court
- Issue: Were employees 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 turnover in employees during contract?
- Held: Yes, subject to Ohio Supreme Court review



# 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



# Sub. S.B. 235

- New language added to R.C. 5739.03
- Furnishing an exemption certificate to the service provider, if the client claims the transaction is exempt from sales and use tax under R.C. 5739.01(JJ)

amount of the tax shall become a legal charge in favor of the vendor and against the consumer.

(B)(1)(a) If any sale is claimed to be exempt under division (E) of section 5739.01 of the Revised Code or under section 5739.02 of the Revised Code, with the exception of divisions (B)(1) to (11) or (28) of section 5739.02 of the Revised Code, or if the consumer claims the transaction is not a taxable sale due to one or more of the exclusions provided under divisions (JJ)(1) to (5) of section 5739.01 of the Revised Code, the consumer must provide to the vendor, and the vendor must

- This requirement applies to sales of employment services after December 31, 2016.

# 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

# 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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**BAY MECHANICAL & ELECTRICAL CORPORATION, APPELLANT, v. TESTA,  
TAX COMM., 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.

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**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).<sup>1</sup>

{¶ 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.<sup>2</sup> 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.

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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.<sup>3</sup>

{¶ 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

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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,<sup>4</sup> 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.

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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).<sup>5</sup>

*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.

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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.

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#### **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.

SUPREME COURT OF OHIO

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

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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.

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**H.R. OPTIONS, INC., APPELLEE, v. ZAINO, TAX COMM., 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.

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**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.<sup>1</sup>

{¶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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<sup>1</sup> 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.

SUPREME COURT OF OHIO

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

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

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**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.

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**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.

January Term, 2005

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

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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.),

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

Appellant(s),

( SALES AND USE )

vs.

DECISION AND ORDER

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

Appellee(s).

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.



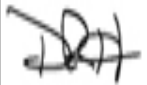
The commissioner argues that "Kal Kan controls the entire manufacturing process and all production lines. \*\*\* The entire production line and employment relationship put Kal Kan firmly in control of all employees engaged in the production line. \*\*\* It is Kal Kan that determines the need for such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

<b>BOARD OF TAX APPEALS</b>		
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.),

CASE NO(S). 2012-2840

Appellant(s),

( USE TAX )

vs.

DECISION AND ORDER

JOSEPH TESTA, (et. al.),

Appellee(s).

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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 Luevers, 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. Luevers 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.



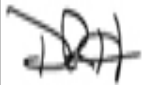
Moreover, Accel argues that the employees provided by Resource Staffing were not "under the supervision or control of another," as is required to meet the definition of "employment service" in R.C. 5739.01(JJ). The testimony of Mr. Luevers indicated that Resource Staffing supplied supervisors, on its 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.



\_\_\_\_\_  
Kathleen M. Crowley, Board Secretary

OHIO BOARD OF TAX APPEALS

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

CASE NO(S). 2013-5851

Appellant(s),

( USE TAX )

vs.

DECISION AND ORDER

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

Appellee(s).

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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**

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**A BILL**

To amend section 5739.01 of the Revised Code to 1  
exempt employment services and employment 2  
placement services from sales and use tax 3  
beginning July 1, 2017. 4

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

**Section 1.** That section 5739.01 of the Revised Code be 5  
amended to read as follows: 6

**Sec. 5739.01.** As used in this chapter: 7

(A) "Person" includes individuals, receivers, assignees, 8  
trustees in bankruptcy, estates, firms, partnerships, 9  
associations, joint-stock companies, joint ventures, clubs, 10  
societies, corporations, the state and its political 11  
subdivisions, and combinations of individuals of any form. 12

(B) "Sale" and "selling" include all of the following 13  
transactions for a consideration in any manner, whether 14  
absolutely or conditionally, whether for a price or rental, in 15  
money or by exchange, and by any means whatsoever: 16

(1) All transactions by which title or possession, or 17  
both, of tangible personal property, is or is to be transferred, 18  
or a license to use or consume tangible personal property is or 19  
is to be granted; 20

(2) All transactions by which lodging by a hotel is or is 21  
to be furnished to transient guests; 22

(3) All transactions by which: 23

(a) An item of tangible personal property is or is to be 24  
repaired, except property, the purchase of which would not be 25  
subject to the tax imposed by section 5739.02 of the Revised 26  
Code; 27

(b) An item of tangible personal property is or is to be 28  
installed, except property, the purchase of which would not be 29  
subject to the tax imposed by section 5739.02 of the Revised 30  
Code or property that is or is to be incorporated into and will 31  
become a part of a production, transmission, transportation, or 32  
distribution system for the delivery of a public utility 33  
service; 34

(c) The service of washing, cleaning, waxing, polishing, 35  
or painting a motor vehicle is or is to be furnished; 36

(d) Until August 1, 2003, industrial laundry cleaning 37  
services are or are to be provided and, on and after August 1, 38  
2003, laundry and dry cleaning services are or are to be 39  
provided; 40

(e) Automatic data processing, computer services, or 41  
electronic information services are or are to be provided for 42  
use in business when the true object of the transaction is the 43  
receipt by the consumer of automatic data processing, computer 44  
services, or electronic information services rather than the 45

receipt of personal or professional services to which automatic 46  
data processing, computer services, or electronic information 47  
services are incidental or supplemental. Notwithstanding any 48  
other provision of this chapter, such transactions that occur 49  
between members of an affiliated group are not sales. An 50  
"affiliated group" means two or more persons related in such a 51  
way that one person owns or controls the business operation of 52  
another member of the group. In the case of corporations with 53  
stock, one corporation owns or controls another if it owns more 54  
than fifty per cent of the other corporation's common stock with 55  
voting rights. 56

(f) Telecommunications service, including prepaid calling 57  
service, prepaid wireless calling service, or ancillary service, 58  
is or is to be provided, but not including coin-operated 59  
telephone service; 60

(g) Landscaping and lawn care service is or is to be 61  
provided; 62

(h) Private investigation and security service is or is to 63  
be provided; 64

(i) Information services or tangible personal property is 65  
provided or ordered by means of a nine hundred telephone call; 66

(j) Building maintenance and janitorial service is or is 67  
to be provided; 68

(k) ~~Employment~~ On and before June 30, 2017, employment 69  
service is or is to be provided; 70

(l) ~~Employment~~ On and before June 30, 2017, employment 71  
placement service is or is to be provided; 72

(m) Exterminating service is or is to be provided; 73

(n) Physical fitness facility service is or is to be provided;	74 75
(o) Recreation and sports club service is or is to be provided;	76 77
(p) On and after August 1, 2003, satellite broadcasting service is or is to be provided;	78 79
(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.	80 81 82 83 84 85 86 87 88
(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;	89 90 91 92 93 94 95 96
(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.	97 98 99 100
(t) On and after August 1, 2003, snow removal service is or is to be provided. As used in this division, "snow removal	101 102

service" means the removal of snow by any mechanized means, but 103  
does not include the providing of such service by a person that 104  
has less than five thousand dollars in sales of such service 105  
during the calendar year. 106

(u) Electronic publishing service is or is to be provided 107  
to a consumer for use in business, except that such transactions 108  
occurring between members of an affiliated group, as defined in 109  
division (B) (3) (e) of this section, are not sales. 110

(4) All transactions by which printed, imprinted, 111  
overprinted, lithographic, multilithic, blueprinted, 112  
photostatic, or other productions or reproductions of written or 113  
graphic matter are or are to be furnished or transferred; 114

(5) The production or fabrication of tangible personal 115  
property for a consideration for consumers who furnish either 116  
directly or indirectly the materials used in the production of 117  
fabrication work; and include the furnishing, preparing, or 118  
serving for a consideration of any tangible personal property 119  
consumed on the premises of the person furnishing, preparing, or 120  
serving such tangible personal property. Except as provided in 121  
section 5739.03 of the Revised Code, a construction contract 122  
pursuant to which tangible personal property is or is to be 123  
incorporated into a structure or improvement on and becoming a 124  
part of real property is not a sale of such tangible personal 125  
property. The construction contractor is the consumer of such 126  
tangible personal property, provided that the sale and 127  
installation of carpeting, the sale and installation of 128  
agricultural land tile, the sale and erection or installation of 129  
portable grain bins, or the provision of landscaping and lawn 130  
care service and the transfer of property as part of such 131  
service is never a construction contract. 132



As used in division (B) (5) of this section:	133
(a) "Agricultural land tile" means fired clay or concrete	134
tile, or flexible or rigid perforated plastic pipe or tubing,	135
incorporated or to be incorporated into a subsurface drainage	136
system appurtenant to land used or to be used primarily in	137
production by farming, agriculture, horticulture, or	138
floriculture. The term does not include such materials when they	139
are or are to be incorporated into a drainage system appurtenant	140
to a building or structure even if the building or structure is	141
used or to be used in such production.	142
(b) "Portable grain bin" means a structure that is used or	143
to be used by a person engaged in farming or agriculture to	144
shelter the person's grain and that is designed to be	145
disassembled without significant damage to its component parts.	146
(6) All transactions in which all of the shares of stock	147
of a closely held corporation are transferred, or an ownership	148
interest in a pass-through entity, as defined in section 5733.04	149
of the Revised Code, is transferred, if the corporation or pass-	150
through entity is not engaging in business and its entire assets	151
consist of boats, planes, motor vehicles, or other tangible	152
personal property operated primarily for the use and enjoyment	153
of the shareholders or owners;	154
(7) All transactions in which a warranty, maintenance or	155
service contract, or similar agreement by which the vendor of	156
the warranty, contract, or agreement agrees to repair or	157
maintain the tangible personal property of the consumer is or is	158
to be provided;	159
(8) The transfer of copyrighted motion picture films used	160
solely for advertising purposes, except that the transfer of	161

such films for exhibition purposes is not a sale; 162

(9) On and after August 1, 2003, all transactions by which 163  
tangible personal property is or is to be stored, except such 164  
property that the consumer of the storage holds for sale in the 165  
regular course of business; 166

(10) All transactions in which "guaranteed auto 167  
protection" is provided whereby a person promises to pay to the 168  
consumer the difference between the amount the consumer receives 169  
from motor vehicle insurance and the amount the consumer owes to 170  
a person holding title to or a lien on the consumer's motor 171  
vehicle in the event the consumer's motor vehicle suffers a 172  
total loss under the terms of the motor vehicle insurance policy 173  
or is stolen and not recovered, if the protection and its price 174  
are included in the purchase or lease agreement; 175

(11) (a) Except as provided in division (B) (11) (b) of this 176  
section, on and after October 1, 2009, all transactions by which 177  
health care services are paid for, reimbursed, provided, 178  
delivered, arranged for, or otherwise made available by a 179  
medicaid health insuring corporation pursuant to the 180  
corporation's contract with the state. 181

(b) If the centers for medicare and medicaid services of 182  
the United States department of health and human services 183  
determines that the taxation of transactions described in 184  
division (B) (11) (a) of this section constitutes an impermissible 185  
health care-related tax under the "Social Security Act," section 186  
1903(w), 42 U.S.C. 1396b(w), and regulations adopted thereunder, 187  
the medicaid director shall notify the tax commissioner of that 188  
determination. Beginning with the first day of the month 189  
following that notification, the transactions described in 190  
division (B) (11) (a) of this section are not sales for the 191

purposes of this chapter or Chapter 5741. of the Revised Code. 192  
The tax commissioner shall order that the collection of taxes 193  
under sections 5739.02, 5739.021, 5739.023, 5739.026, 5741.02, 194  
5741.021, 5741.022, and 5741.023 of the Revised Code shall cease 195  
for transactions occurring on or after that date. 196

(12) All transactions by which a specified digital product 197  
is provided for permanent use or less than permanent use, 198  
regardless of whether continued payment is required. 199

Except as provided in this section, "sale" and "selling" 200  
do not include transfers of interest in leased property where 201  
the original lessee and the terms of the original lease 202  
agreement remain unchanged, or professional, insurance, or 203  
personal service transactions that involve the transfer of 204  
tangible personal property as an inconsequential element, for 205  
which no separate charges are made. 206

(C) "Vendor" means the person providing the service or by 207  
whom the transfer effected or license given by a sale is or is 208  
to be made or given and, for sales described in division (B) (3) 209  
(i) of this section, the telecommunications service vendor that 210  
provides the nine hundred telephone service; if two or more 211  
persons are engaged in business at the same place of business 212  
under a single trade name in which all collections on account of 213  
sales by each are made, such persons shall constitute a single 214  
vendor. 215

Physicians, dentists, hospitals, and veterinarians who are 216  
engaged in selling tangible personal property as received from 217  
others, such as eyeglasses, mouthwashes, dentifrices, or similar 218  
articles, are vendors. Veterinarians who are engaged in 219  
transferring to others for a consideration drugs, the dispensing 220  
of which does not require an order of a licensed veterinarian or 221

physician under federal law, are vendors. 222

(D) (1) "Consumer" means the person for whom the service is 223  
provided, to whom the transfer effected or license given by a 224  
sale is or is to be made or given, to whom the service described 225  
in division (B) (3) (f) or (i) of this section is charged, or to 226  
whom the admission is granted. 227

(2) Physicians, dentists, hospitals, and blood banks 228  
operated by nonprofit institutions and persons licensed to 229  
practice veterinary medicine, surgery, and dentistry are 230  
consumers of all tangible personal property and services 231  
purchased by them in connection with the practice of medicine, 232  
dentistry, the rendition of hospital or blood bank service, or 233  
the practice of veterinary medicine, surgery, and dentistry. In 234  
addition to being consumers of drugs administered by them or by 235  
their assistants according to their direction, veterinarians 236  
also are consumers of drugs that under federal law may be 237  
dispensed only by or upon the order of a licensed veterinarian 238  
or physician, when transferred by them to others for a 239  
consideration to provide treatment to animals as directed by the 240  
veterinarian. 241

(3) A person who performs a facility management, or 242  
similar service contract for a contractee is a consumer of all 243  
tangible personal property and services purchased for use in 244  
connection with the performance of such contract, regardless of 245  
whether title to any such property vests in the contractee. The 246  
purchase of such property and services is not subject to the 247  
exception for resale under division (E) (1) of this section. 248

(4) (a) In the case of a person who purchases printed 249  
matter for the purpose of distributing it or having it 250  
distributed to the public or to a designated segment of the 251

public, free of charge, that person is the consumer of that 252  
printed matter, and the purchase of that printed matter for that 253  
purpose is a sale. 254

(b) In the case of a person who produces, rather than 255  
purchases, printed matter for the purpose of distributing it or 256  
having it distributed to the public or to a designated segment 257  
of the public, free of charge, that person is the consumer of 258  
all tangible personal property and services purchased for use or 259  
consumption in the production of that printed matter. That 260  
person is not entitled to claim exemption under division (B) (42) 261  
(f) of section 5739.02 of the Revised Code for any material 262  
incorporated into the printed matter or any equipment, supplies, 263  
or services primarily used to produce the printed matter. 264

(c) The distribution of printed matter to the public or to 265  
a designated segment of the public, free of charge, is not a 266  
sale to the members of the public to whom the printed matter is 267  
distributed or to any persons who purchase space in the printed 268  
matter for advertising or other purposes. 269

(5) A person who makes sales of any of the services listed 270  
in division (B) (3) of this section is the consumer of any 271  
tangible personal property used in performing the service. The 272  
purchase of that property is not subject to the resale exception 273  
under division (E) (1) of this section. 274

(6) A person who engages in highway transportation for 275  
hire is the consumer of all packaging materials purchased by 276  
that person and used in performing the service, except for 277  
packaging materials sold by such person in a transaction 278  
separate from the service. 279

(7) In the case of a transaction for health care services 280

under division (B) (11) of this section, a medicaid health 281  
insuring corporation is the consumer of such services. The 282  
purchase of such services by a medicaid health insuring 283  
corporation is not subject to the exception for resale under 284  
division (E) (1) of this section or to the exemptions provided 285  
under divisions (B) (12), (18), (19), and (22) of section 5739.02 286  
of the Revised Code. 287

(E) "Retail sale" and "sales at retail" include all sales, 288  
except those in which the purpose of the consumer is to resell 289  
the thing transferred or benefit of the service provided, by a 290  
person engaging in business, in the form in which the same is, 291  
or is to be, received by the person. 292

(F) "Business" includes any activity engaged in by any 293  
person with the object of gain, benefit, or advantage, either 294  
direct or indirect. "Business" does not include the activity of 295  
a person in managing and investing the person's own funds. 296

(G) "Engaging in business" means commencing, conducting, 297  
or continuing in business, and liquidating a business when the 298  
liquidator thereof holds itself out to the public as conducting 299  
such business. Making a casual sale is not engaging in business. 300

(H) (1) (a) "Price," except as provided in divisions (H) (2), 301  
(3), and (4) of this section, means the total amount of 302  
consideration, including cash, credit, property, and services, 303  
for which tangible personal property or services are sold, 304  
leased, or rented, valued in money, whether received in money or 305  
otherwise, without any deduction for any of the following: 306

(i) The vendor's cost of the property sold; 307

(ii) The cost of materials used, labor or service costs, 308  
interest, losses, all costs of transportation to the vendor, all 309

taxes imposed on the vendor, including the tax imposed under	310
Chapter 5751. of the Revised Code, and any other expense of the	311
vendor;	312
(iii) Charges by the vendor for any services necessary to	313
complete the sale;	314
(iv) On and after August 1, 2003, delivery charges. As	315
used in this division, "delivery charges" means charges by the	316
vendor for preparation and delivery to a location designated by	317
the consumer of tangible personal property or a service,	318
including transportation, shipping, postage, handling, crating,	319
and packing.	320
(v) Installation charges;	321
(vi) Credit for any trade-in.	322
(b) "Price" includes consideration received by the vendor	323
from a third party, if the vendor actually receives the	324
consideration from a party other than the consumer, and the	325
consideration is directly related to a price reduction or	326
discount on the sale; the vendor has an obligation to pass the	327
price reduction or discount through to the consumer; the amount	328
of the consideration attributable to the sale is fixed and	329
determinable by the vendor at the time of the sale of the item	330
to the consumer; and one of the following criteria is met:	331
(i) The consumer presents a coupon, certificate, or other	332
document to the vendor to claim a price reduction or discount	333
where the coupon, certificate, or document is authorized,	334
distributed, or granted by a third party with the understanding	335
that the third party will reimburse any vendor to whom the	336
coupon, certificate, or document is presented;	337
(ii) The consumer identifies the consumer's self to the	338

seller as a member of a group or organization entitled to a 339  
price reduction or discount. A preferred customer card that is 340  
available to any patron does not constitute membership in such a 341  
group or organization. 342

(iii) The price reduction or discount is identified as a 343  
third party price reduction or discount on the invoice received 344  
by the consumer, or on a coupon, certificate, or other document 345  
presented by the consumer. 346

(c) "Price" does not include any of the following: 347

(i) Discounts, including cash, term, or coupons that are 348  
not reimbursed by a third party that are allowed by a vendor and 349  
taken by a consumer on a sale; 350

(ii) Interest, financing, and carrying charges from credit 351  
extended on the sale of tangible personal property or services, 352  
if the amount is separately stated on the invoice, bill of sale, 353  
or similar document given to the purchaser; 354

(iii) Any taxes legally imposed directly on the consumer 355  
that are separately stated on the invoice, bill of sale, or 356  
similar document given to the consumer. For the purpose of this 357  
division, the tax imposed under Chapter 5751. of the Revised 358  
Code is not a tax directly on the consumer, even if the tax or a 359  
portion thereof is separately stated. 360

(iv) Notwithstanding divisions (H) (1) (b) (i) to (iii) of 361  
this section, any discount allowed by an automobile manufacturer 362  
to its employee, or to the employee of a supplier, on the 363  
purchase of a new motor vehicle from a new motor vehicle dealer 364  
in this state. 365

(v) The dollar value of a gift card that is not sold by a 366  
vendor or purchased by a consumer and that is redeemed by the 367



consumer in purchasing tangible personal property or services if 368  
the vendor is not reimbursed and does not receive compensation 369  
from a third party to cover all or part of the gift card value. 370  
For the purposes of this division, a gift card is not sold by a 371  
vendor or purchased by a consumer if it is distributed pursuant 372  
to an awards, loyalty, or promotional program. Past and present 373  
purchases of tangible personal property or services by the 374  
consumer shall not be treated as consideration exchanged for a 375  
gift card. 376

(2) In the case of a sale of any new motor vehicle by a 377  
new motor vehicle dealer, as defined in section 4517.01 of the 378  
Revised Code, in which another motor vehicle is accepted by the 379  
dealer as part of the consideration received, "price" has the 380  
same meaning as in division (H) (1) of this section, reduced by 381  
the credit afforded the consumer by the dealer for the motor 382  
vehicle received in trade. 383

(3) In the case of a sale of any watercraft or outboard 384  
motor by a watercraft dealer licensed in accordance with section 385  
1547.543 of the Revised Code, in which another watercraft, 386  
watercraft and trailer, or outboard motor is accepted by the 387  
dealer as part of the consideration received, "price" has the 388  
same meaning as in division (H) (1) of this section, reduced by 389  
the credit afforded the consumer by the dealer for the 390  
watercraft, watercraft and trailer, or outboard motor received 391  
in trade. As used in this division, "watercraft" includes an 392  
outdrive unit attached to the watercraft. 393

(4) In the case of transactions for health care services 394  
under division (B) (11) of this section, "price" means the amount 395  
of managed care premiums received each month by a medicaid 396  
health insuring corporation. 397

(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 428  
where sleeping accommodations are offered to guests, in which 429  
five or more rooms are used for the accommodation of such 430  
guests, whether the rooms are in one or several structures, 431  
except as otherwise provided in division (G) of section 5739.09 432  
of the Revised Code. 433

(N) "Transient guests" means persons occupying a room or 434  
rooms for sleeping accommodations for less than thirty 435  
consecutive days. 436

(O) "Making retail sales" means the effecting of 437  
transactions wherein one party is obligated to pay the price and 438  
the other party is obligated to provide a service or to transfer 439  
title to or possession of the item sold. "Making retail sales" 440  
does not include the preliminary acts of promoting or soliciting 441  
the retail sales, other than the distribution of printed matter 442  
which displays or describes and prices the item offered for 443  
sale, nor does it include delivery of a predetermined quantity 444  
of tangible personal property or transportation of property or 445  
personnel to or from a place where a service is performed. 446

(P) "Used directly in the rendition of a public utility 447  
service" means that property that is to be incorporated into and 448  
will become a part of the consumer's production, transmission, 449  
transportation, or distribution system and that retains its 450  
classification as tangible personal property after such 451  
incorporation; fuel or power used in the production, 452  
transmission, transportation, or distribution system; and 453  
tangible personal property used in the repair and maintenance of 454  
the production, transmission, transportation, or distribution 455  
system, including only such motor vehicles as are specially 456  
designed and equipped for such use. Tangible personal property 457

and services used primarily in providing highway transportation 458  
for hire are not used directly in the rendition of a public 459  
utility service. In this definition, "public utility" includes a 460  
citizen of the United States holding, and required to hold, a 461  
certificate of public convenience and necessity issued under 49 462  
U.S.C. 41102. 463

(Q) "Refining" means removing or separating a desirable 464  
product from raw or contaminated materials by distillation or 465  
physical, mechanical, or chemical processes. 466

(R) "Assembly" and "assembling" mean attaching or fitting 467  
together parts to form a product, but do not include packaging a 468  
product. 469

(S) "Manufacturing operation" means a process in which 470  
materials are changed, converted, or transformed into a 471  
different state or form from which they previously existed and 472  
includes refining materials, assembling parts, and preparing raw 473  
materials and parts by mixing, measuring, blending, or otherwise 474  
committing such materials or parts to the manufacturing process. 475  
"Manufacturing operation" does not include packaging. 476

(T) "Fiscal officer" means, with respect to a regional 477  
transit authority, the secretary-treasurer thereof, and with 478  
respect to a county that is a transit authority, the fiscal 479  
officer of the county transit board if one is appointed pursuant 480  
to section 306.03 of the Revised Code or the county auditor if 481  
the board of county commissioners operates the county transit 482  
system. 483

(U) "Transit authority" means a regional transit authority 484  
created pursuant to section 306.31 of the Revised Code or a 485  
county in which a county transit system is created pursuant to 486

section 306.01 of the Revised Code. For the purposes of this 487  
chapter, a transit authority must extend to at least the entire 488  
area of a single county. A transit authority that includes 489  
territory in more than one county must include all the area of 490  
the most populous county that is a part of such transit 491  
authority. County population shall be measured by the most 492  
recent census taken by the United States census bureau. 493

(V) "Legislative authority" means, with respect to a 494  
regional transit authority, the board of trustees thereof, and 495  
with respect to a county that is a transit authority, the board 496  
of county commissioners. 497

(W) "Territory of the transit authority" means all of the 498  
area included within the territorial boundaries of a transit 499  
authority as they from time to time exist. Such territorial 500  
boundaries must at all times include all the area of a single 501  
county or all the area of the most populous county that is a 502  
part of such transit authority. County population shall be 503  
measured by the most recent census taken by the United States 504  
census bureau. 505

(X) "Providing a service" means providing or furnishing 506  
anything described in division (B) (3) of this section for 507  
consideration. 508

(Y) (1) (a) "Automatic data processing" means processing of 509  
others' data, including keypunching or similar data entry 510  
services together with verification thereof, or providing access 511  
to computer equipment for the purpose of processing data. 512

(b) "Computer services" means providing services 513  
consisting of specifying computer hardware configurations and 514  
evaluating technical processing characteristics, computer 515

programming, and training of computer programmers and operators, 516  
provided in conjunction with and to support the sale, lease, or 517  
operation of taxable computer equipment or systems. 518

(c) "Electronic information services" means providing 519  
access to computer equipment by means of telecommunications 520  
equipment for the purpose of either of the following: 521

(i) Examining or acquiring data stored in or accessible to 522  
the computer equipment; 523

(ii) Placing data into the computer equipment to be 524  
retrieved by designated recipients with access to the computer 525  
equipment. 526

For transactions occurring on or after the effective date 527  
of the amendment of this section by H.B. 157 of the 127th 528  
general assembly, December 21, 2007, "electronic information 529  
services" does not include electronic publishing as defined in 530  
division (LLL) of this section. 531

(d) "Automatic data processing, computer services, or 532  
electronic information services" shall not include personal or 533  
professional services. 534

(2) As used in divisions (B) (3) (e) and (Y) (1) of this 535  
section, "personal and professional services" means all services 536  
other than automatic data processing, computer services, or 537  
electronic information services, including but not limited to: 538

(a) Accounting and legal services such as advice on tax 539  
matters, asset management, budgetary matters, quality control, 540  
information security, and auditing and any other situation where 541  
the service provider receives data or information and studies, 542  
alters, analyzes, interprets, or adjusts such material; 543

(b) Analyzing business policies and procedures;	544
(c) Identifying management information needs;	545
(d) Feasibility studies, including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;	546 547 548
(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;	549 550 551 552 553
(f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;	554 555 556
(g) Testing of business procedures;	557
(h) Training personnel in business procedure applications;	558
(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;	559 560 561 562 563 564 565
(j) Providing debt collection services by any oral, written, graphic, or electronic means.	566 567
The services listed in divisions (Y) (2) (a) to (j) of this section are not automatic data processing or computer services.	568 569
(Z) "Highway transportation for hire" means the	570

transportation of personal property belonging to others for 571  
consideration by any of the following: 572

(1) The holder of a permit or certificate issued by this 573  
state or the United States authorizing the holder to engage in 574  
transportation of personal property belonging to others for 575  
consideration over or on highways, roadways, streets, or any 576  
similar public thoroughfare; 577

(2) A person who engages in the transportation of personal 578  
property belonging to others for consideration over or on 579  
highways, roadways, streets, or any similar public thoroughfare 580  
but who could not have engaged in such transportation on 581  
December 11, 1985, unless the person was the holder of a permit 582  
or certificate of the types described in division (Z)(1) of this 583  
section; 584

(3) A person who leases a motor vehicle to and operates it 585  
for a person described by division (Z)(1) or (2) of this 586  
section. 587

(AA) (1) "Telecommunications service" means the electronic 588  
transmission, conveyance, or routing of voice, data, audio, 589  
video, or any other information or signals to a point, or 590  
between or among points. "Telecommunications service" includes 591  
such transmission, conveyance, or routing in which computer 592  
processing applications are used to act on the form, code, or 593  
protocol of the content for purposes of transmission, 594  
conveyance, or routing without regard to whether the service is 595  
referred to as voice-over internet protocol service or is 596  
classified by the federal communications commission as enhanced 597  
or value-added. "Telecommunications service" does not include 598  
any of the following: 599



(a) Data processing and information services that allow 600  
data to be generated, acquired, stored, processed, or retrieved 601  
and delivered by an electronic transmission to a consumer where 602  
the consumer's primary purpose for the underlying transaction is 603  
the processed data or information; 604

(b) Installation or maintenance of wiring or equipment on 605  
a customer's premises; 606

(c) Tangible personal property; 607

(d) Advertising, including directory advertising; 608

(e) Billing and collection services provided to third 609  
parties; 610

(f) Internet access service; 611

(g) Radio and television audio and video programming 612  
services, regardless of the medium, including the furnishing of 613  
transmission, conveyance, and routing of such services by the 614  
programming service provider. Radio and television audio and 615  
video programming services include, but are not limited to, 616  
cable service, as defined in 47 U.S.C. 522(6), and audio and 617  
video programming services delivered by commercial mobile radio 618  
service providers, as defined in 47 C.F.R. 20.3; 619

(h) Ancillary service; 620

(i) Digital products delivered electronically, including 621  
software, music, video, reading materials, or ring tones. 622

(2) "Ancillary service" means a service that is associated 623  
with or incidental to the provision of telecommunications 624  
service, including conference bridging service, detailed 625  
telecommunications billing service, directory assistance, 626  
vertical service, and voice mail service. As used in this 627

division: 628

(a) "Conference bridging service" means an ancillary 629  
service that links two or more participants of an audio or video 630  
conference call, including providing a telephone number. 631  
"Conference bridging service" does not include 632  
telecommunications services used to reach the conference bridge. 633

(b) "Detailed telecommunications billing service" means an 634  
ancillary service of separately stating information pertaining 635  
to individual calls on a customer's billing statement. 636

(c) "Directory assistance" means an ancillary service of 637  
providing telephone number or address information. 638

(d) "Vertical service" means an ancillary service that is 639  
offered in connection with one or more telecommunications 640  
services, which offers advanced calling features that allow 641  
customers to identify callers and manage multiple calls and call 642  
connections, including conference bridging service. 643

(e) "Voice mail service" means an ancillary service that 644  
enables the customer to store, send, or receive recorded 645  
messages. "Voice mail service" does not include any vertical 646  
services that the customer may be required to have in order to 647  
utilize the voice mail service. 648

(3) "900 service" means an inbound toll telecommunications 649  
service purchased by a subscriber that allows the subscriber's 650  
customers to call in to the subscriber's prerecorded 651  
announcement or live service, and which is typically marketed 652  
under the name "900 service" and any subsequent numbers 653  
designated by the federal communications commission. "900 654  
service" does not include the charge for collection services 655  
provided by the seller of the telecommunications service to the 656

subscriber, or services or products sold by the subscriber to 657  
the subscriber's customer. 658

(4) "Prepaid calling service" means the right to access 659  
exclusively telecommunications services, which must be paid for 660  
in advance and which enables the origination of calls using an 661  
access number or authorization code, whether manually or 662  
electronically dialed, and that is sold in predetermined units 663  
or dollars of which the number declines with use in a known 664  
amount. 665

(5) "Prepaid wireless calling service" means a 666  
telecommunications service that provides the right to utilize 667  
mobile telecommunications service as well as other non- 668  
telecommunications services, including the download of digital 669  
products delivered electronically, and content and ancillary 670  
services, that must be paid for in advance and that is sold in 671  
predetermined units or dollars of which the number declines with 672  
use in a known amount. 673

(6) "Value-added non-voice data service" means a 674  
telecommunications service in which computer processing 675  
applications are used to act on the form, content, code, or 676  
protocol of the information or data primarily for a purpose 677  
other than transmission, conveyance, or routing. 678

(7) "Coin-operated telephone service" means a 679  
telecommunications service paid for by inserting money into a 680  
telephone accepting direct deposits of money to operate. 681

(8) "Customer" has the same meaning as in section 5739.034 682  
of the Revised Code. 683

(BB) "Laundry and dry cleaning services" means removing 684  
soil or dirt from towels, linens, articles of clothing, or other 685

fabric items that belong to others and supplying towels, linens, 686  
articles of clothing, or other fabric items. "Laundry and dry 687  
cleaning services" does not include the provision of self- 688  
service facilities for use by consumers to remove soil or dirt 689  
from towels, linens, articles of clothing, or other fabric 690  
items. 691

(CC) "Magazines distributed as controlled circulation 692  
publications" means magazines containing at least twenty-four 693  
pages, at least twenty-five per cent editorial content, issued 694  
at regular intervals four or more times a year, and circulated 695  
without charge to the recipient, provided that such magazines 696  
are not owned or controlled by individuals or business concerns 697  
which conduct such publications as an auxiliary to, and 698  
essentially for the advancement of the main business or calling 699  
of, those who own or control them. 700

(DD) "Landscaping and lawn care service" means the 701  
services of planting, seeding, sodding, removing, cutting, 702  
trimming, pruning, mulching, aerating, applying chemicals, 703  
watering, fertilizing, and providing similar services to 704  
establish, promote, or control the growth of trees, shrubs, 705  
flowers, grass, ground cover, and other flora, or otherwise 706  
maintaining a lawn or landscape grown or maintained by the owner 707  
for ornamentation or other nonagricultural purpose. However, 708  
"landscaping and lawn care service" does not include the 709  
providing of such services by a person who has less than five 710  
thousand dollars in sales of such services during the calendar 711  
year. 712

(EE) "Private investigation and security service" means 713  
the performance of any activity for which the provider of such 714  
service is required to be licensed pursuant to Chapter 4749. of 715

the Revised Code, or would be required to be so licensed in 716  
performing such services in this state, and also includes the 717  
services of conducting polygraph examinations and of monitoring 718  
or overseeing the activities on or in, or the condition of, the 719  
consumer's home, business, or other facility by means of 720  
electronic or similar monitoring devices. "Private investigation 721  
and security service" does not include special duty services 722  
provided by off-duty police officers, deputy sheriffs, and other 723  
peace officers regularly employed by the state or a political 724  
subdivision. 725

(FF) "Information services" means providing conversation, 726  
giving consultation or advice, playing or making a voice or 727  
other recording, making or keeping a record of the number of 728  
callers, and any other service provided to a consumer by means 729  
of a nine hundred telephone call, except when the nine hundred 730  
telephone call is the means by which the consumer makes a 731  
contribution to a recognized charity. 732

(GG) "Research and development" means designing, creating, 733  
or formulating new or enhanced products, equipment, or 734  
manufacturing processes, and also means conducting scientific or 735  
technological inquiry and experimentation in the physical 736  
sciences with the goal of increasing scientific knowledge which 737  
may reveal the bases for new or enhanced products, equipment, or 738  
manufacturing processes. 739

(HH) "Qualified research and development equipment" means 740  
capitalized tangible personal property, and leased personal 741  
property that would be capitalized if purchased, used by a 742  
person primarily to perform research and development. Tangible 743  
personal property primarily used in testing, as defined in 744  
division (A) (4) of section 5739.011 of the Revised Code, or used 745

for recording or storing test results, is not qualified research 746  
and development equipment unless such property is primarily used 747  
by the consumer in testing the product, equipment, or 748  
manufacturing process being created, designed, or formulated by 749  
the consumer in the research and development activity or in 750  
recording or storing such test results. 751

(II) "Building maintenance and janitorial service" means 752  
cleaning the interior or exterior of a building and any tangible 753  
personal property located therein or thereon, including any 754  
services incidental to such cleaning for which no separate 755  
charge is made. However, "building maintenance and janitorial 756  
service" does not include the providing of such service by a 757  
person who has less than five thousand dollars in sales of such 758  
service during the calendar year. 759

(JJ) "Employment service" means providing or supplying 760  
personnel, on a temporary or long-term basis, to perform work or 761  
labor under the supervision or control of another, when the 762  
personnel so provided or supplied receive their wages, salary, 763  
or other compensation from the provider or supplier of the 764  
employment service or from a third party that provided or 765  
supplied the personnel to the provider or supplier. "Employment 766  
service" does not include: 767

(1) Acting as a contractor or subcontractor, where the 768  
personnel performing the work are not under the direct control 769  
of the purchaser. 770

(2) Medical and health care services. 771

(3) Supplying personnel to a purchaser pursuant to a 772  
contract of at least one year between the service provider and 773  
the purchaser that specifies that each employee covered under 774

the contract is assigned to the purchaser on a permanent basis. 775

(4) Transactions between members of an affiliated group, 776  
as defined in division (B) (3) (e) of this section. 777

(5) Transactions where the personnel so provided or 778  
supplied by a provider or supplier to a purchaser of an 779  
employment service are then provided or supplied by that 780  
purchaser to a third party as an employment service, except 781  
"employment service" does include the transaction between that 782  
purchaser and the third party. 783

(KK) "Employment placement service" means locating or 784  
finding employment for a person or finding or locating an 785  
employee to fill an available position. 786

(LL) "Exterminating service" means eradicating or 787  
attempting to eradicate vermin infestations from a building or 788  
structure, or the area surrounding a building or structure, and 789  
includes activities to inspect, detect, or prevent vermin 790  
infestation of a building or structure. 791

(MM) "Physical fitness facility service" means all 792  
transactions by which a membership is granted, maintained, or 793  
renewed, including initiation fees, membership dues, renewal 794  
fees, monthly minimum fees, and other similar fees and dues, by 795  
a physical fitness facility such as an athletic club, health 796  
spa, or gymnasium, which entitles the member to use the facility 797  
for physical exercise. 798

(NN) "Recreation and sports club service" means all 799  
transactions by which a membership is granted, maintained, or 800  
renewed, including initiation fees, membership dues, renewal 801  
fees, monthly minimum fees, and other similar fees and dues, by 802  
a recreation and sports club, which entitles the member to use 803

the facilities of the organization. "Recreation and sports club" 804  
means an organization that has ownership of, or controls or 805  
leases on a continuing, long-term basis, the facilities used by 806  
its members and includes an aviation club, gun or shooting club, 807  
yacht club, card club, swimming club, tennis club, golf club, 808  
country club, riding club, amateur sports club, or similar 809  
organization. 810

(OO) "Livestock" means farm animals commonly raised for 811  
food, food production, or other agricultural purposes, 812  
including, but not limited to, cattle, sheep, goats, swine, 813  
poultry, and captive deer. "Livestock" does not include 814  
invertebrates, amphibians, reptiles, domestic pets, animals for 815  
use in laboratories or for exhibition, or other animals not 816  
commonly raised for food or food production. 817

(PP) "Livestock structure" means a building or structure 818  
used exclusively for the housing, raising, feeding, or 819  
sheltering of livestock, and includes feed storage or handling 820  
structures and structures for livestock waste handling. 821

(QQ) "Horticulture" means the growing, cultivation, and 822  
production of flowers, fruits, herbs, vegetables, sod, 823  
mushrooms, and nursery stock. As used in this division, "nursery 824  
stock" has the same meaning as in section 927.51 of the Revised 825  
Code. 826

(RR) "Horticulture structure" means a building or 827  
structure used exclusively for the commercial growing, raising, 828  
or overwintering of horticultural products, and includes the 829  
area used for stocking, storing, and packing horticultural 830  
products when done in conjunction with the production of those 831  
products. 832



(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 863  
described in 26 U.S.C. 7701(h) (1) covering motor vehicles and 864  
trailers where the amount of consideration may be increased or 865  
decreased by reference to the amount realized upon the sale or 866  
disposition of the property. "Lease" or "rental" does not 867  
include: 868

(a) A transfer of possession or control of tangible 869  
personal property under a security agreement or a deferred 870  
payment plan that requires the transfer of title upon completion 871  
of the required payments; 872

(b) A transfer of possession or control of tangible 873  
personal property under an agreement that requires the transfer 874  
of title upon completion of required payments and payment of an 875  
option price that does not exceed the greater of one hundred 876  
dollars or one per cent of the total required payments; 877

(c) Providing tangible personal property along with an 878  
operator for a fixed or indefinite period of time, if the 879  
operator is necessary for the property to perform as designed. 880  
For purposes of this division, the operator must do more than 881  
maintain, inspect, or set up the tangible personal property. 882

(2) "Lease" and "rental," as defined in division (UU) of 883  
this section, shall not apply to leases or rentals that exist 884  
before June 26, 2003. 885

(3) "Lease" and "rental" have the same meaning as in 886  
division (UU) (1) of this section regardless of whether a 887  
transaction is characterized as a lease or rental under 888  
generally accepted accounting principles, the Internal Revenue 889  
Code, Title XIII of the Revised Code, or other federal, state, 890  
or local laws. 891

(VV) "Mobile telecommunications service" has the same 892  
meaning as in the "Mobile Telecommunications Sourcing Act," Pub. 893  
L. No. 106-252, 114 Stat. 631 (2000), 4 U.S.C.A. 124(7), as 894  
amended, and, on and after August 1, 2003, includes related fees 895  
and ancillary services, including universal service fees, 896  
detailed billing service, directory assistance, service 897  
initiation, voice mail service, and vertical services, such as 898  
caller ID and three-way calling. 899

(WW) "Certified service provider" has the same meaning as 900  
in section 5740.01 of the Revised Code. 901

(XX) "Satellite broadcasting service" means the 902  
distribution or broadcasting of programming or services by 903  
satellite directly to the subscriber's receiving equipment 904  
without the use of ground receiving or distribution equipment, 905  
except the subscriber's receiving equipment or equipment used in 906  
the uplink process to the satellite, and includes all service 907  
and rental charges, premium channels or other special services, 908  
installation and repair service charges, and any other charges 909  
having any connection with the provision of the satellite 910  
broadcasting service. 911

(YY) "Tangible personal property" means personal property 912  
that can be seen, weighed, measured, felt, or touched, or that 913  
is in any other manner perceptible to the senses. For purposes 914  
of this chapter and Chapter 5741. of the Revised Code, "tangible 915  
personal property" includes motor vehicles, electricity, water, 916  
gas, steam, and prewritten computer software. 917

(ZZ) "Direct mail" means printed material delivered or 918  
distributed by United States mail or other delivery service to a 919  
mass audience or to addressees on a mailing list provided by the 920  
consumer or at the direction of the consumer when the cost of 921

the items are not billed directly to the recipients. "Direct 922  
mail" includes tangible personal property supplied directly or 923  
indirectly by the consumer to the direct mail vendor for 924  
inclusion in the package containing the printed material. 925  
"Direct mail" does not include multiple items of printed 926  
material delivered to a single address. 927

(AAA) "Computer" means an electronic device that accepts 928  
information in digital or similar form and manipulates it for a 929  
result based on a sequence of instructions. 930

(BBB) "Computer software" means a set of coded 931  
instructions designed to cause a computer or automatic data 932  
processing equipment to perform a task. 933

(CCC) "Delivered electronically" means delivery of 934  
computer software from the seller to the purchaser by means 935  
other than tangible storage media. 936

(DDD) "Prewritten computer software" means computer 937  
software, including prewritten upgrades, that is not designed 938  
and developed by the author or other creator to the 939  
specifications of a specific purchaser. The combining of two or 940  
more prewritten computer software programs or prewritten 941  
portions thereof does not cause the combination to be other than 942  
prewritten computer software. "Prewritten computer software" 943  
includes software designed and developed by the author or other 944  
creator to the specifications of a specific purchaser when it is 945  
sold to a person other than the purchaser. If a person modifies 946  
or enhances computer software of which the person is not the 947  
author or creator, the person shall be deemed to be the author 948  
or creator only of such person's modifications or enhancements. 949  
Prewritten computer software or a prewritten portion thereof 950  
that is modified or enhanced to any degree, where such 951

modification or enhancement is designed and developed to the 952  
specifications of a specific purchaser, remains prewritten 953  
computer software; provided, however, that where there is a 954  
reasonable, separately stated charge or an invoice or other 955  
statement of the price given to the purchaser for the 956  
modification or enhancement, the modification or enhancement 957  
shall not constitute prewritten computer software. 958

(EEE) (1) "Food" means substances, whether in liquid, 959  
concentrated, solid, frozen, dried, or dehydrated form, that are 960  
sold for ingestion or chewing by humans and are consumed for 961  
their taste or nutritional value. "Food" does not include 962  
alcoholic beverages, dietary supplements, soft drinks, or 963  
tobacco. 964

(2) As used in division (EEE) (1) of this section: 965

(a) "Alcoholic beverages" means beverages that are 966  
suitable for human consumption and contain one-half of one per 967  
cent or more of alcohol by volume. 968

(b) "Dietary supplements" means any product, other than 969  
tobacco, that is intended to supplement the diet and that is 970  
intended for ingestion in tablet, capsule, powder, softgel, 971  
gelcap, or liquid form, or, if not intended for ingestion in 972  
such a form, is not represented as conventional food for use as 973  
a sole item of a meal or of the diet; that is required to be 974  
labeled as a dietary supplement, identifiable by the "supplement 975  
facts" box found on the label, as required by 21 C.F.R. 101.36; 976  
and that contains one or more of the following dietary 977  
ingredients: 978

(i) A vitamin; 979

(ii) A mineral; 980

(iii) An herb or other botanical;	981
(iv) An amino acid;	982
(v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake;	983 984
(vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in divisions (EEE) (2) (b) (i) to (v) of this section.	985 986 987
(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.	988 989 990 991 992
(d) "Tobacco" means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.	993 994
(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.	995 996 997 998 999 1000 1001 1002 1003
(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.	1004 1005 1006 1007
(HHH) "Durable medical equipment" means equipment,	1008

including repair and replacement parts for such equipment, that 1009  
can withstand repeated use, is primarily and customarily used to 1010  
serve a medical purpose, generally is not useful to a person in 1011  
the absence of illness or injury, and is not worn in or on the 1012  
body. "Durable medical equipment" does not include mobility 1013  
enhancing equipment. 1014

(III) "Mobility enhancing equipment" means equipment, 1015  
including repair and replacement parts for such equipment, that 1016  
is primarily and customarily used to provide or increase the 1017  
ability to move from one place to another and is appropriate for 1018  
use either in a home or a motor vehicle, that is not generally 1019  
used by persons with normal mobility, and that does not include 1020  
any motor vehicle or equipment on a motor vehicle normally 1021  
provided by a motor vehicle manufacturer. "Mobility enhancing 1022  
equipment" does not include durable medical equipment. 1023

(JJJ) "Prosthetic device" means a replacement, corrective, 1024  
or supportive device, including repair and replacement parts for 1025  
the device, worn on or in the human body to artificially replace 1026  
a missing portion of the body, prevent or correct physical 1027  
deformity or malfunction, or support a weak or deformed portion 1028  
of the body. As used in this division, "prosthetic device" does 1029  
not include corrective eyeglasses, contact lenses, or dental 1030  
prosthesis. 1031

(KKK) (1) "Fractional aircraft ownership program" means a 1032  
program in which persons within an affiliated group sell and 1033  
manage fractional ownership program aircraft, provided that at 1034  
least one hundred airworthy aircraft are operated in the program 1035  
and the program meets all of the following criteria: 1036

(a) Management services are provided by at least one 1037  
program manager within an affiliated group on behalf of the 1038

fractional owners. 1039

(b) Each program aircraft is owned or possessed by at 1040  
least one fractional owner. 1041

(c) Each fractional owner owns or possesses at least a 1042  
one-sixteenth interest in at least one fixed-wing program 1043  
aircraft. 1044

(d) A dry-lease aircraft interchange arrangement is in 1045  
effect among all of the fractional owners. 1046

(e) Multi-year program agreements are in effect regarding 1047  
the fractional ownership, management services, and dry-lease 1048  
aircraft interchange arrangement aspects of the program. 1049

(2) As used in division (KKK) (1) of this section: 1050

(a) "Affiliated group" has the same meaning as in division 1051  
(B) (3) (e) of this section. 1052

(b) "Fractional owner" means a person that owns or 1053  
possesses at least a one-sixteenth interest in a program 1054  
aircraft and has entered into the agreements described in 1055  
division (KKK) (1) (e) of this section. 1056

(c) "Fractional ownership program aircraft" or "program 1057  
aircraft" means a turbojet aircraft that is owned or possessed 1058  
by a fractional owner and that has been included in a dry-lease 1059  
aircraft interchange arrangement and agreement under divisions 1060  
(KKK) (1) (d) and (e) of this section, or an aircraft a program 1061  
manager owns or possesses primarily for use in a fractional 1062  
aircraft ownership program. 1063

(d) "Management services" means administrative and 1064  
aviation support services furnished under a fractional aircraft 1065  
ownership program in accordance with a management services 1066



agreement under division (KKK) (1) (e) of this section, and 1067  
offered by the program manager to the fractional owners, 1068  
including, at a minimum, the establishment and implementation of 1069  
safety guidelines; the coordination of the scheduling of the 1070  
program aircraft and crews; program aircraft maintenance; 1071  
program aircraft insurance; crew training for crews employed, 1072  
furnished, or contracted by the program manager or the 1073  
fractional owner; the satisfaction of record-keeping 1074  
requirements; and the development and use of an operations 1075  
manual and a maintenance manual for the fractional aircraft 1076  
ownership program. 1077

(e) "Program manager" means the person that offers 1078  
management services to fractional owners pursuant to a 1079  
management services agreement under division (KKK) (1) (e) of this 1080  
section. 1081

(LLL) "Electronic publishing" means providing access to 1082  
one or more of the following primarily for business customers, 1083  
including the federal government or a state government or a 1084  
political subdivision thereof, to conduct research: news; 1085  
business, financial, legal, consumer, or credit materials; 1086  
editorials, columns, reader commentary, or features; photos or 1087  
images; archival or research material; legal notices, identity 1088  
verification, or public records; scientific, educational, 1089  
instructional, technical, professional, trade, or other literary 1090  
materials; or other similar information which has been gathered 1091  
and made available by the provider to the consumer in an 1092  
electronic format. Providing electronic publishing includes the 1093  
functions necessary for the acquisition, formatting, editing, 1094  
storage, and dissemination of data or information that is the 1095  
subject of a sale. 1096

(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	1126
recognized in the ordinary and usual sense as a book.	1127
(4) "Electronically transferred" means obtained by the	1128
purchaser by means other than tangible storage media.	1129
<b>Section 2.</b> That existing section 5739.01 of the Revised	1130
Code is hereby repealed.	1131