C000000147

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd., • Columbus, OH 43215
(614) 466-6750 Fax (614) 466-7979

FINAL DETERMINATION

Date: JAN 31 2022

Automated Packaging Systems, Inc.,
10175 Phillipp Parkway
Streetsboro, OH 44241

Re: Seven Assessments and Two Refund Claims
Commercial Activity Tax – Multiple Periods

This is the final determination of the Tax Commissioner regarding petitions for reassessment pursuant to R.C. 5751.09 concerning the following commercial activity tax (CAT) assessments:

Assessment No.	Period	Tax	Interest	Penalty	Payment	Total
100001078841	07/01/2016 – 09/30/2016	$8,724.00	$700.55	$1,744.80	$0.00	$11,169.35
100001078842	10/01/2016 – 12/31/2016	$8,441.00	$604.57	$1,688.20	$0.00	$10,733.77
100001079858	01/01/2017 – 03/31/2017	$8,315.00	$368.68	$1,139.82	$2,615.95	$7,207.55
100001079860	04/01/2017 – 06/30/2017	$8,536.00	$442.17	$1,707.20	$0.00	$10,685.37
100001079863	07/01/2017 – 09/30/2017	$7,899.00	$326.99	$1,579.80	$0.00	$9,805.79
100001082700	10/01/2017 – 12/31/2017	$8,735.00	$274.55	$1,747.00	$0.00	$10,756.55
100001090318	01/01/2018 – 03/31/2018	$8,183.00	$124.73	$1,116.60	$2,600.00	$6,826.17

This is also the final determination of the Tax Commissioner regarding applications for CAT refund filed pursuant to R.C. 5751.08:

Refund Claim Number	Reporting Period	Amount
5099530724	01/01/2016 – 03/31/2016	$5,844.00
5099530623	04/01/2016 – 06/30/2016	$7,306.00

I. BACKGROUND

Automated Packaging Systems, Inc. (the "petitioner")[1] manufactures and distributes plastic bagging and sealing systems. It is headquartered in Streetsboro, Ohio. The petitioner engaged Black Line Group to conduct a research and development study for tax year 2015. Based on the results of the study, the petitioner claimed the Ohio Qualified Research Expense (QRE) tax credit on its original CAT returns starting with the third quarter of 2016 through the first quarter of 2018. The Department disallowed the petitioner's QRE credits and denied its refund requests for the periods at issue. Due to the denial of said credits, the petitioner's tax liability increased for the periods at issue and resulted in the above assessments.

[1] Automated Packaging Systems is a "petitioner" relative to its petition for reassessment, and a "claimant" relative to its refund claims. It will be referred to solely as the "petitioner" for the purposes of this final determination.

The petitioner objects to the denial of its refund claims and requests administrative review of the refund denials pursuant to R.C. 5703.70. The petitioner also objects to the assessments and contends that its CAT returns should be accepted as filed. The petitioner requested a hearing but failed to respond to the hearing notices or appear at the designated time.[2] Therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petitions for reassessment and refund claims.

II. The Petitioner's Contentions

The petitioner contends that its QRE credits should be accepted as filed. To support this, the petitioner provided the research and development credit study prepared by Black Line Group for tax year 2015. The petitioner also contends that the research activities described in its 2015 credit study fall within the four-part definition of QRE laid out in 26 U.S.C. 41(d)(1)-(3).[3] Thus, the petitioner reasons its QRE credits were claimed in accordance with R.C. 5751.51, and thus should be accepted as filed. This results in the requested overpayments being issued and cancellation of the assessments.

III. Authority

A. Ohio's QRE Credit under R.C. 5751.51

R.C. 5751.51 provides a nonrefundable credit against the CAT for qualified research expenses. As is mandatory when evaluating all tax reduction statutes, the language of R.C. 5751.51 is strictly construed against the taxpayer, which must demonstrate a clear entitlement to the credit. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶16; *Westinghouse Electric Corp. v. Lindley*, 58 Ohio St.2d 137 (1979); *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102 (1990); *Dana Corp. v. Testa*, 152 Ohio St.3d 602, 2018-Ohio-1561, 99 N.E.3d 393, ¶25.

Division (A) of R.C. 5751.51 states that "qualified research expenses" has the same meaning as in IRC 41. While R.C. 5751.51 adopts the federal definition of qualified research expenses under IRC 41, meeting the federal definition alone is not sufficient to qualify for Ohio's credit. Rather, taxpayers seeking to claim the Ohio QRE credit must do so in the manner laid out in R.C. 5751.51. Importantly, former R.C. 5751.51(B)(1), applicable for the periods in question, laid out the type and amount of Ohio QRE credit available to taxpayers as follows:

> For tax periods beginning on or after January 1, 2008, a nonrefundable credit may be claimed under this chapter equal to seven per cent of the excess of (a) qualified research expenses incurred in this state by the taxpayer in the tax periods for which the credit is claimed over (b) the taxpayer's average annual qualified research expenses incurred in this state for the three preceding tax periods.

To qualify for Ohio's QRE credit, R.C. 5751.51(B)(1) requires the qualified research expenses to be "incurred in this state by the taxpayer." Thus, there is a key jurisdictional and geographical distinction between R.C. 5751.51 and IRC 41. Under R.C. 5751.51(B)(1), only qualified research expenses

[2] The original hearing was scheduled on March 22, 2021. However, due to the petitioner's no-show, the hearing officer scheduled another hearing for April 19, 2021. Once again, the petitioner failed to show up to the hearing. The petitioner was given another opportunity to be heard on August 19, 2021, but to no avail.

[3] Also referred to in R.C. 5751.51 and in this final determination as Internal Revenue Code section 41 or IRC 41.

incurred in Ohio are eligible for the Ohio QRE credit. However, IRC 41 applies to qualified research expenses that are incurred within the United States, the Commonwealth of Puerto Rico, and any other possession of the United States. IRC 41(d)(4)(F).

B. Federal Qualified Research Activities under IRC 41 and the Four Research and Experimentation Tests

IRC 41(a) provides a credit against federal tax for increasing research activities. IRC 41(b)(1) defines "qualified research expense" as the sum of the in-house research expenses and contract research expenses paid or incurred by the taxpayer during the taxable year in carrying on any trade or business of the taxpayer.[4] IRC 41(b)(2)(A)(i) defines in-house research expenses, in part, as any wages paid or incurred to an employee of the taxpayer for qualified services performed by such employee. IRC 41(b)(2)(8) states that the term "qualified services" means: (i) engaging in qualified research, or (ii) engaging in the direct supervision or direct support of research activities which constitute qualified research. The term "engaging in qualified research" means "the actual conduct of qualified research (as in the case of a scientist conducting laboratory experiments)." 26 C.F.R. 1.41-2(c)(1).

IRC 41(d)(1) provides a four-part test that defines "qualified research" as research where:

(1) The expenditures may be treated as expenses under IRC 174 (Section 174 Test);
(2) It is undertaken for the purpose of discovering information which is technological in nature (Technological Information Test);
(3) The application is intended to be useful in the development of a new or improved business component (Business Component Test); and
(4) Substantially all of the activities constitute elements of a process of experimentation (Process of Experimentation Test).

To be considered "qualified research," the taxpayer must be able to establish that the research activity being performed meets *all four of the above tests*. These tests must be applied separately to each business component of the taxpayer. IRC 41(d)(4) also lists excluded activities that are not qualified research, namely: (1) research after commercial production; (2) adaptation or duplication of an existing business component; (3) market research, testing or development; or (4) routine or ordinary testing or inspection for quality control.

IV. Analysis

The petitioner contends that it properly claimed the QRE credit in accordance with R.C. 5751.51. To support its contention, the petitioner provided the Department with a credit study for tax year 2015. However, the petitioner has failed to demonstrate that its activities in Ohio meet the definition of qualified research expenses under R.C. 5751.51 and IRC 41. While it appears that the activities occurred in Ohio, the petitioner has not demonstrated that the activities were qualified research under IRC 41. While R.C. 5751.51 adopts the definition of qualified research used in IRC 41, it does not

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[4] Internal Revenue Service, *Audit Techniques Guide: Credit for Increasing Research Activities (i.e. Research Tax Credit) IRC § 41* - Qualified Research Expenses*, June 2005, available at: https://www.irs.gov/businesses/audit-techniques-guide-credit-for-increasing-research-activities-ie-research-tax-credit-irc-ss-41-qualified-research-expenses (accessed Jan. 19, 2022).

prohibit Ohio from reviewing the facts and circumstances surrounding credits claimed for Ohio CAT purposes.[5] It is also worth noting that the IRS does not audit every taxpayer and does not examine every QRE credit claimed at the federal level.[6]

A. THE PETITIONER HAS NOT DEMONSTRATED THAT ITS ACTIVITIES MEET ALL FOUR OF THE TESTS IN IRC 41

The petitioner contends that its activities outlined in its 2015 research and development credit study met all four of the tests stated in IRC 41. As stated above, the four tests are: (1) the section 174 test, (2) technological information test, (3) the business component test, and (4) the process of experimentation test. IRC 41(d)(1). All four tests *must* be met to qualify for the Ohio QRE credit. Upon review, the petitioner has failed to demonstrate that its activities satisfy the "section 174" test and the "process of experimentation" test for the forgoing reasons.[7]

1. THE SECTION 174 TEST

The petitioner failed to demonstrate that its EMB-Airpouch project satisfied the section 174 test. The section 174 test defines research and experimental expenditures as "expenditures incurred in connection with the taxpayer's trade or business which represent research and development costs in the experimental or laboratory senses." IRC 41(d)(1)(a). For there to be experimental expenditures, the taxpayer must show: (1) that it does not already have information that can address a capability or method for improving the product or design of the product (i.e., uncertainty exists), and (2) its activities were meant to eliminate those uncertainties. *Union Carbide Corp. & Subsidiaries v. C.I.R.*, 97 T.C.M. (CCH) 1207, T.C.M. (RIA) 2009-050, aff'd, 697 F.3d 104. The petitioner contends that it faced uncertainties including: the appropriate design of a smaller machine and the functionality of band sealer on another machine. However, these uncertainties are not the uncertainties as contemplated by IRC 174, as these are common problems for the bagging industry that have common solutions. Thus, this project was not undertaken to combat uncertainty, but instead was done to ensure a high-quality product to compete with its competitors.

Regardless, as stated above, certain activities cannot qualify as research or experimental expenditures at all. 26 C.F.R. 1.174-2(a)(6) states, in part, that "[t]he term research or experimental expenditures

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[5] *See generally Knust v. Wilkins*, 111 Ohio St.3d 331, 2006-Ohio-5791 (An Ohio income tax case where the Supreme Court of Ohio held "[t]he failure of the Internal Revenue Service to insist that the returns be changed to reflect [the Internal Revenue Code] does not prevent the Tax Commissioner or this court from applying the federal statutes as they are written.").

[6] In September 2017, the IRS issued a directive to its Large Business & International ("LB&I") unit regarding the R&D tax credit and what would be considered as acceptable evidence for qualified research expenses ("QREs"). Douglas W. O'Donnell, IRS Commissioner for Large Business & International Division. *Guidance for Allowance of the Credit for Increasing Research Activities under I.R.C §411 for Taxpayers that Expense Research and Development Costs on their Financial Statements pursuant to ASC 730*, Sept. 11, 2017, available at: https://www.irs.gov/businesses/corporations/guidance-for-allowance-of-the-credit-for-increasing-research-activities-under-irc-ss41-for-taxpayers-that-expense-research-and-development-costs-on-their-financial-statements-pursuant-to-asc-730 (accessed Jan. 19, 2022). The directive was intended to provide an efficient manner of determining QREs for certain LB&I taxpayers and to manage LB&I's audit resources more efficiently. *Id.* It also confirms the IRS cannot conceivably review every federal QRE credit.

[7] The Commissioner does not have sufficient information, and thus this final determination does not provide analysis or a decision, on the "technological information" or the "business component" tests. However, since the Commissioner finds the activities do not qualify under the other two tests, this lack of information does not change the outcome of this matter.

does not include expenditures for * * * [t]he ordinary testing or inspection of materials or products for quality control (quality control testing)." The regulations define "quality control testing" as "testing or inspection to determine whether particular units of materials or products conform to specified parameters." 26 C.F.R. 1.174-2(a)(6)(i). The petitioner is a certified member of International Organization for Standardization ("ISO").[8] ISO is an international nongovernment organization that "develops and publishes a wide range of proprietary, industrial, and commercial standards."[9] As a certified member of ISO, the petitioner also satisfied the specific requirements for ISO 9001:2015 certification.[10] ISO 9001:2015 is defined as "the international standard that specifies requirements for a Quality Management Systems ("QMS")."[11] An important feature of ISO 9001:2015 is about quality control – to "enhance customer satisfaction through the effective application system, including processes for improvement of the system and *the assurance of conformity to customer and applicable statutory and regulatory requirements*."[12] (Emphasis added.)

In the present case, the tests performed by the petitioner were standardized, regular, and conducted to ensure the activities conformed to specific metrics and industry standards. As a member of the ISO-9001:2015, the petitioner was simply doing what was required to be done in the normal practice of this industry and the costs are thus ordinary and necessary business expenses. For instance, in the EMB-Airpouch project questionnaire, the petitioner conceded that the purpose of this project was to "*improve the quality of our seals* and make them more robust for our customer shipping applications." (Emphasis added.) The petitioner also stated, "this project was successful and met all of our original goals that were *set for improving our sealing process*." (Emphasis added.) This aligns with the requirements of ISO-9001:2015, which is to enhance and improve the products that meet the customer and applicable statutory and regulatory requirements. Based on the evidence presented, the petitioner's Ohio activities for the EMB-Airpouch project focused on quality control measures rather than qualified research. For these reasons, the petitioner has not affirmatively established the activities were qualified research under the section 174 test.

2. THE PROCESS OF EXPERIMENTATION TEST

The petitioner also failed to demonstrate that substantially all the activities it conducted for the F-22V, Express3-P, and Mini Inflator projects constituted elements of a process of experimentation for the purpose of discovering a new or improved function, performance, reliability, or quality. IRC 41(d)(1)(C). The process of experimentation consists of three elements: (1) the "substantially all" element, (2) the "process of experimentation", and (3) the "qualified purpose" element. IRC 41(d)(1)(C). The "substantially all" element requires that 80% or more of the taxpayer's research activities for each business component, measured on a cost or other consistently applied reasonable basis, constitute a process of experimentation for a qualified purpose. In the present case, the petitioner failed to provide supporting documentations to show that at least 80% of its claimed research activities

[8] Automated Packaging Systems, *Bag Packaging Quality Certifications and Standards*, https://www.autobag.com/about/quality (accessed October 5, 2021).

[9] Investopedia, *International Organization for Standardization*, https://www.investopedia.com/terms/i/international-organization-for-standardization-iso.asp (accessed Jan. 19, 2022).

[10] Automated Packaging Systems, *ISO-Certificate*, https://www.autobag.com/Media/Autobag/Autobag-AirPouch/ISO-Certificates/Quality-Policy.pdf (accessed Jan. 19, 2022).

[11] ASQ, *What is ISO 9001:2015 – Quality Management System?*, https://asq.org/quality-resources/iso-9001, (accessed Jan. 19, 2022).

[12] ISO, ISO 9001:2015 Quality Management Systems – Requirements, https://www.iso.org/standard/62085.html (accessed Jan. 19, 2022).

constituted a process of experimentation for the projects described above. Moreover, the petitioner did not design the F-22V, Express3-P, and Mini Inflator projects from scratch; rather it simply made minor modifications to make it bigger and better than its competitors.

For instance, when the petitioner built and designed F-22V: Autobag 800S Wide Bagging System (the "Autobag 800"), the technology and methodology were readily available in the market. Prior to the Autobag 800 project, the petitioner already had an automatic filling and sealing machine that was capable of 16" wide bags, with a large load area known as Autobag 600 Horizontal Wide Bagging System ("Autobag 600"). The petitioner simply evaluated the Autobag 600 along with other commercially available products that already had 22" bags and made slight modifications to develop its own 22" bagging system – the Autobag 800. The petitioner's approach in developing the Express3-P was also analogous to the Autobag 800. Once again, the petitioner evaluated its former project – Express-3 and other commercially available products to slightly improve its own project. When the petitioner constructed the Express3-P, the petitioner already had all the necessary technology to make those small adjustments. In its questionnaire, the petitioner acknowledged that the Express3-P was undertaken for the purpose to "replace the Express3 with as few obvious, visual modifications as possible." Lastly, the petitioner undertook the Mini Inflator project because it realized that a similar product was already available in the commercial market. Accordingly, the petitioner has not demonstrated that substantially all its activities in developing F-22V, Express3-P, and Mini Inflator projects constituted elements of a process of experimentation.

The petitioner also did not establish that it followed a process of experimentation. A process of experimentation is "a process designed to evaluate one or more alternatives to achieve a result" when the taxpayer is uncertain at the beginning of its research activities of the capability or method of achieving the result or its appropriate design. 26 C.F.R. 1.41-4(a)(5)(i). Uncertainty in the process of experimentation "is essentially the same uncertainty as is required by the section 174 test." *Union Carbide*, *supra,* at 80. Initially, it should be noted that since the petitioner did not face uncertainty under the section 174 test, the petitioner could not face uncertainty for the purpose of the process of experimentation test. As mentioned above, the petitioner's activities regarding the three projects were more akin to the continual improvement of its bagging and packaging system as part of a normal business routine such as quality control. Thus, the petitioner has not affirmatively established the activities were qualified research under the process of experimentation test in IRC 41(d)(1)(C).

B. Adaptation of Existing Business Component Exclusion

The petitioner contends that its qualified research and activities falls under IRC 41(d). As a result, it should be considered qualified research and thus qualify for the Ohio QRE credit. As mentioned above, qualified research does not include any activity that falls under any of the four exclusions. IRC 41(d)(4). The petitioner's activities for the EX-VCI project falls under the adaptation of existing business component exclusion. Pursuant to 26 C.F.R. 1.41-4(c)(3), "activities relating to adapting an existing business component to a *particular customer's requirement* or need are not qualified research." *Id.* (Emphasis added.). Here, the activities and expenses claimed for the EX-VCI project were for a particular customer's [Caterpillar] requirement. In the petitioner's questionnaire, it stated that the primary purpose for undertaking the EX-VCI project was for "cost savings *for Caterpillar*." (Emphasis added.) Moreover, the petitioner also stated that this project specifically failed because "none of the Co-Ex films passed *Caterpillars test methods.*" (Emphasis added.) Although this project failed, it was solely designed to satisfy and meet Caterpillar's requirement and standards. Because the EX-VCI project was only for Caterpillar (a particular customer) and Caterpillar's particular requirements, its activities and expenses are not qualified research under 26 CFR 1.41-4(c)(3) – adaptation of existing business component exclusion.

C. The Petitioner has not sufficiently Demonstrated that it incurred Qualified Research Expenses

Since the petitioner has not demonstrated that its activities were qualified research under IRC 41(d), it cannot treat (1) any of the services provided by its employees or contractors during any of the alleged research activities or (2) the supply cost associated with those activities, as qualified services. As stated above, QREs are (1) "in-house research expenses" and (2) "contract research expenses." Additionally, in-house research expenses are: (1) any "wages" paid or incurred to an employee for "qualified services" performed by such employee; (2) any amount paid or incurred for "supplies" used in the conduct of "qualified research"; (3) under regulations prescribed by the Secretary, any amount paid or incurred to another person for the right to use computers in the conduct of qualified research. IRC 41(b)(2). IRC 41(b)(3) defines "contract research expenses" as 65% of any amount paid or incurred by the taxpayer to any person (other than an employee of the taxpayer) for qualified research. However, "costs of supplies that would be purchased and wages attributable to services that would have been provided regardless of whether research was being conducted are costs associated with the product business component and *are not incurred in the conduct of qualified research.*" *Union Carbide*, *supra,* at 113. (Emphasis added.)

In the present case, the petitioner claims qualified research expenses for its supply expenses, its contractor cost, and wage expenses for many of its employees. However, the petitioner undertook its projects either to make slight modifications to its pre-existing products for quality control purposes, to compete with its competitors, or to meet a customer's specifications. Thus, these costs are not incurred in the conduct of qualified research. Therefore, the petitioner is not entitled to the QRE credit for wages, contractors, or supply costs since the expenses were not incurred from qualified research.

V. Conclusion

The petitioner has not demonstrated that its Ohio activities are qualified research under R.C. 5751.51 and IRC 41. Specifically, the petitioner has not established that its activities meet the section 174 test and process of experimentation test.[13] Construing the credit strictly as is required in this matter, the Ohio QRE credits that the petitioner seeks must therefore be denied.

Accordingly, the refund requests are denied, and the assessments are affirmed.

Other than the payments noted above, current records indicate that no payments have been made on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be

[13] Although not analyzed in this final determination, the petitioner has also not shown its activities meet the business component test and the technological information test. *See* footnote 7, *supra*.

forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

0000000139

FINAL DETERMINATION

Date: JAN 3 1 2022

DriveTime Car Sales Company, LLC
1720 W. Rio Salado Pkwy
Tempe, AZ 85281-6590

Re: Commercial Activity Tax
Assessment No. 100000712672
Reporting Period: 01/01/2013-12/31/2014

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2020-648, dated January 3, 2022. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, the liability has been adjusted and paid in full.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation
Office of the Tax Commissioner
4485 Northland Ridge Blvd.• Columbus, OH 43229

0000000138

FINAL DETERMINATION

Date: JAN 3 1 2022

EnerVest Operating LLC
ATTN: Michael Cheng, Sr. Vice President, Finance & Tax
1001 Fannin Street, Suite 800
Houston, TX 77002

Re: Assessment No. 100000938420 & Refund Claim No. 2020216957
Commercial Activity Tax – 1/1/2013 - 12/31/2017

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

This is also the final determination with regard to an application for refund filed pursuant to R.C. 5751.08 concerning the above-referenced CAT refund claim.

In resolution of these matters, this assessment and this application for CAT refund shall be modified pursuant to terms agreed to by the Tax Commissioner and the petitioner.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 3 1 2022

Fleet Staff, Inc.
118 West Fifth St., Suite 202
Covington, KY 41011

Re: Ohio Tax Account No. 96217889
Tax Type: Commercial Activity
Assessment No. 100001054041
Reporting Period: 01/01/2012 - 12/31/2017

This is the final determination of the tax commissioner on a petition for reassessment filed pursuant to R.C. 5751.09 concerning the following commercial activity tax assessment:

Tax	Interest	Penalty	Total
$374,271.00	$28,727.85	$187,135.50	$590,134.35

I. Background

The petitioner, Fleet Staff, Inc. ("petitioner"), was selected for a commercial activity tax ("CAT") audit after initial research suggested that it was liable for the tax but did not appear to be a registered CAT taxpayer.

On May 10th, 2018, a letter was sent via email to both the petitioner's tax supervisor as well as a tax representative of the petitioner notifying them that the Ohio Department of Taxation ("Department") was conducting a CAT audit of the company. The letter also made an initial request for documents to be reviewed related to the petitioner's potential CAT obligations. The petitioner's tax supervisor acknowledged receipt of this letter that same day by responding to the email and indicating to the tax representative that she thought they had been filing and paying the CAT. The Department informed the tax supervisor that unless the petitioner had been filing under a different name or identification number, there was no record of it filing or paying the CAT. The tax supervisor and tax representative did not provide any of the requested documents and never responded to the Department's requests or correspondence again.

On June 7th, 2018, the Department received an emailed letter from an attorney indicating that the attorney had been engaged by the petitioner to respond to the audit correspondence. The Department advised the attorney that the petitioner must complete a Form TBOR-1, authorizing him to represent the petitioner, before the Department could communicate with the attorney regarding the petitioner or the pending audit. The petitioner's tax supervisor was copied on the Department's response to the attorney. A TBOR-1 was never submitted in this matter authorizing the Department to communicate with the attorney.

On June 20th, 2018, the Department sent an email to the petitioner's tax supervisor and tax representative explaining that the due date for the document submissions had passed and again asking that they submit the requested documents. No response was received. On June 25th, 2018, the Department sent the tax supervisor a final, written request for documents and requested a response within ten days. The Department also notified the petitioner that if no response was received, an estimated assessment would be issued using the best information available to the Department. No response was received.

The Department issued the above assessment on October 10th, 2018. The assessment was estimated based on information available to the Department, including returns filed by the petitioner for other Ohio taxes. In response to the assessment, the attorney mentioned above re-sent the same letter that was received by the Department on June 7th, 2018. No other responses or information were provided. The attorney's letter is comprised of four sentences in total. Other than indicating that the petitioner is not related to Caimen Energy II, Ltd., the letter does not respond to any of the Department's prior requests for information, nor does it offer any substantive response to the assessment. The letter asserts that the petitioner is no longer in business. However, it fails to describe the circumstances of its closure and does not provide a date upon which it ceased doing business.[1] Department research suggests that the petitioner ceased doing business at the end of 2017.

For the periods at issue, Department records and tax filings for other Ohio taxes indicate the petitioner did substantial business in Ohio, but was never registered for, nor filed or paid, the CAT.

The petitioner did not request a hearing in this matter. Therefore, this review and determination is based only on the documents and correspondence submitted by the petitioner and the Department's records related to the matter.

II. Petitioner's Contention

Fleet Staff's petition offers no substantive response to the audit findings and conclusions, or to the amount of CAT assessed. The only portion of the petition that can reasonably be construed as a response to the assessed liability reads: "Fleet Staff, Inc., is no longer operating and is out of business."

III. Analysis and Authority

A. The Petitioner is Liable for the Assessment

The CAT is imposed on the privilege of doing business in Ohio and is measured by a person's gross receipts. The petitioner responded to the assessment asserting that it is out of business. As mentioned above, the petitioner did not provide the date it stopped doing business. Also, the petitioner did not describe the circumstances under which it stopped doing business or the final disposition of the business' assets. In fact, the petitioner has failed to provide any information pursuant to the CAT audit apart from the letter described above.

Information available to the Department indicates that the petitioner earned a significant amount of gross receipts from doing business in Ohio. The petitioner is in the business of providing temporary employment services to other businesses. The petitioner reported Ohio payroll for withholding and sales tax purposes in the millions of dollars annually. Pursuant to R.C. 5751.033(I), gross receipts from providing employment and staffing services to purchasers that receive the benefit of those services in Ohio are sitused to Ohio and are "taxable gross receipts" for purposes of the CAT. The Department estimated the

[1] Pursuant to R.C. 5751.10, the disposition of the petitioner's assets may result in a CAT liability that is due upon the sale of the same and, if not paid, may result in a liability for the purchaser of the assets.

petitioner's taxable gross receipts based on available information from the petitioner's Ohio payroll withholding returns and amounts reported for sales and use taxes. The petitioner offers no arguments, explanation, or evidence to refute the Department's estimated CAT liability. However, the petitioner appears to contend that it is not liable for the CAT for the periods in question because it has since closed. This contention is without merit.

First, no provision of chapter 5751. of the Revised Code provides that the closure of a business absolves it of its unpaid, past liabilities. The CAT is due for each tax period in which a person is liable for the tax. Not being subject to the tax presently does not bear on a person's responsibility for past liabilities. The petitioner became liable for the tax for engaging in substantial commercial activities in Ohio between 2012 and 2017. Those liabilities remain due.

Second, Department research suggests the petitioner remained in business through at least November of 2017. The petitioner did not provide the Department with the date or description of the circumstances surrounding its closure. However, the audit period covers tax periods between January 1, 2012 and December 31, 2017. CAT taxpayers having greater than $1 million in taxable gross receipt in a calendar year are required to report on a calendar quarter basis. R.C. 5751.02. Based on the information available to the Department, the petitioner was doing business in Ohio, and had taxable gross receipts sitused to Ohio, during every tax period included in the assessment.

Third, R.C. 5751.10 states:

> **If any person liable for the tax** imposed under this chapter sells the trade or business, disposes in any manner other than in the regular course of business at least seventy-five per cent of assets of the trade or business, or **quits the trade or business, any tax owed by such person shall become due and payable immediately,** and the person shall pay the tax under this section, including any applicable penalties and interest, within forty-five days after the date of selling or quitting the trade or business. The person's successor shall withhold a sufficient amount of the purchase money to cover the amount due and unpaid until the former owner produces a receipt from the tax commissioner showing that the amounts are paid or a certificate indicating that no taxes are due. If a purchaser fails to withhold purchase money, that person is personally liable up to the purchase money amount, for such amounts that are unpaid during the operation of the business by the former owner.

Id. (emphasis added). This CAT statute specifically provides for immediate payment of "any tax owed" upon quitting or selling the trade or business. The petitioner failed to register for, file, and pay the CAT for the periods at issue. The petitioner has not identified any errors in the assessment. Therefore, it is presumed that the assessment is correct. Accordingly, the amount shown due thereon was "tax owed" at the time the petitioner either sold or quit the business. Going out of business does not shield a person from owing past CAT. Rather, pursuant to R.C. 5751.10, going out of business triggers a requirement to make immediate payment of any CAT due.

Finally, R.C. 5751.10 allows the commissioner to collect an outstanding CAT liability from a purchaser of a business where at least 75% of the assets of the trade or business are sold outside of the regular course of business. The petitioner failed to describe the circumstances surrounding its closure, including whether the assets of the business were sold or otherwise transferred to another person. Based on information currently available to the Department, there is no successor to the business for purposes of R.C. 5751.10. To the extent the petitioner is trying to avoid responsibility for the assessed CAT, it has not provided information related to a possible successor that may also be liable for the tax. To be clear, R.C. 5751.10 provides that a successor is *also* liable for any unpaid CAT. It does not state that a successor is *solely* liable. The statute provides the commissioner with the option to assess either party or both.

B. PENALTY

The petitioner was assessed penalties pursuant to R.C. 5751.06(B) and (D). The petitioner did not request abatement of the penalty. Even if it had, the Commissioner does not find that a penalty reduction is proper in this case.

The petitioner was assessed a penalty of 15% under R.C. 5751.06(B) on the "additional tax found to be due" or on any "delinquent payments of the tax" after notice of an audit or tax discrepancy. Because the petitioner has never registered for or paid the CAT, the amounts assessed were both "additional amounts found to be due" and were delinquent at the time of assessment. Accordingly, the 15% penalty was properly imposed and assessed against the petitioner.

The petitioner was assessed a penalty of 35% of the tax due under R.C. 5751.06(D). That section provides:

> If the tax commissioner notifies a person required to register under section 5751.05 of the Revised Code of such requirement and of the requirement to remit the tax due under this chapter, and the person fails to so register and remit the tax within sixty days after such notice, the tax commissioner may impose an additional penalty of up to thirty-five per cent of the tax due. The penalty imposed under this division is in addition to any other penalties imposed under this section.

The petitioner was notified of its requirement to register for and pay the CAT through the audit and resulting assessment. To date, the petitioner has failed to register for the CAT, file a tax return, or make any payment of any CAT due for any period. The petitioner is not contesting the amount of the assessment or whether they are liable for the CAT. While the petitioner is entitled to petition the assessment prior to paying it, the imposition of this penalty was appropriate at the time of assessment and remains appropriate due to the petitioner's continued failure to register for, file, and pay the CAT for any period during which it was liable for the tax.[2]

The commissioner finds that the imposition of penalty in this matter is justified and appropriate.

IV. Conclusion

The petitioner has failed to demonstrate how the closure of its business is relevant to the CAT assessed for tax periods prior to such closure. The commissioner finds that the assessment is accurate based on the best information available, is properly made against the petitioner, and is not changed by the closure of the petitioner's business. Furthermore, because the petitioner failed to respond to the Department's repeated requests for documents and information, there is nothing in the record to support a modification or cancelation of the assessment.

For the foregoing reasons, the assessment is affirmed.

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[2] Especially because the petitioner has yet to provide a valid reason for its failure to file or pay CAT for the periods at issue.

Current records indicate that no payment has been made on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law**. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, P.O. Box 1090, Columbus, OH 43216-1090.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation
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0000000105

FINAL DETERMINATION

Date:

JAN 21 2022

Incyte Genomics, Inc.
1801 Augustine Cut Off
Wilmington, DE 19803-4404

Re: Assessment No. 100000999203
Commercial Activity Tax: 07/01/2017-09/30/2017

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

Tax	Interest	Penalty	Total
$31,280.00	$698.83	$6,256.00	$38,234.83

I. Background

Incyte Genomics Inc. (the "petitioner") filed a CAT return for the third calendar quarter of 2017 claiming a nonrefundable credit for qualified research expenses ("QRE") of $31,280.00. The return was filed on October 18, 2017. No other information or documentation was provided with the filing of the return. Upon review, the Ohio Department of Taxation disallowed the credit and issued a bill on March 22, 2018 for the resulting unpaid tax. The petitioner did not respond to the bill. The above-referenced assessment was issued on June 5, 2018. Department records indicate that on June 21, 2018, the petitioner's representative called the Department to inquire about the assessment; the representative was informed that the petitioner did not provide supporting documents or the form CAT CS for the claimed credit. On July 27, 2018, the representative sent a form CAT CS for the fourth quarter of 2017, a credit calculation, and a summary spreadsheet purporting to show its QREs by state for several years.

After review of the submissions, the Department emailed the representative listed as the contact on the CAT CS form and advised that a 2016 QRE credit should first be claimed in the fourth quarter of 2016. Department staff also requested specific information and documentation comprising an initial claim for the tax credit and resulting refund of taxes previously paid.[1] The Department requested a new, corrected CAT CS for the fourth quarter of 2016, a form CAT REF to request the refund of taxes paid for that period, petitioner's federal forms 6765 for the years included in the credit calculation, the address where the research was conducted, and a brief description of the qualifying research projects for which the expenses were incurred.

[1] The credit for qualified research expenses authorized by R.C. 5751.51 relies on the definition of "qualified research expenses" in IRC 41. This federal statute and its related regulations are extensive, complex, and contain layers of multi-prong tests, exceptions, and exceptions to the exceptions. Due to the extensive amounts of record-keeping, documentation, and analysis required to substantiate the validity of this credit, the Department processes initial claims for the credit based on nominal documentation, but reserves the right to adjust any initially-approved credit and request additional supporting documentation as needed.

The petitioner did not provide the corrected forms or sufficient supporting documentation. However, because the tax representative made an initial response to the assessment, such response is treated as a petition for reassessment. The petitioner did not request a hearing in this matter. Therefore, this final determination is based only on the documents and correspondence submitted by the petitioner and the Department's records related to the matter.

II. Petitioner's Contention

The petitioner contends that the Commissioner erred in disallowing its nonrefundable QRE credit the third quarter of 2017, and thus contests the resulting assessment of the tax due. In short, it contends its QRE credit as claimed is authorized by R.C. 5751.51 and the Ohio Administrative Code.

III. Analysis and Authority

After the initial disallowance of its credit claim and the subsequent assessment of the unpaid tax, the petitioner responded by providing a CAT CS form for the wrong period and amount, a summary spreadsheet of QREs by state, and an Ohio credit calculation. Because the credit was disallowed based on the petitioner's failure to make a valid initial claim, this administrative review is limited only to ascertaining whether the petitioner has cured the deficiencies in its initial credit claim. To be clear, the Department has not performed a substantive review of the petitioner's records with respect to its claimed Ohio QREs, nor has it performed an audit of the petitioner's CAT returns.[2]

R.C. 5751.51(A) provides that the term "qualified research expenses" has the same meaning as in IRC 41. R.C. 5751.51(B)(1) states that the credit is calculated as follows:

> For tax periods beginning on or after January 1, 2008, a nonrefundable credit may be claimed under this chapter equal to seven per cent of the excess of (a) qualified research expenses incurred in this state by the taxpayer **in the tax period for which the credit is claimed** over (b) the taxpayer's average annual qualified research expenses incurred in the state for the three preceding tax periods.

(Emphasis added).

The petitioner provided a summary spreadsheet and calculation indicating that the credit claimed resulted from QREs incurred during the 2016 calendar year. Pursuant to R.C. 5751.51(B)(1), a QRE credit must be claimed in the tax period for which the expenses were incurred. Although excess credit amounts may be carried forward and used in subsequent tax periods, the credit must *first* be claimed "in the tax period" in which the qualified research expenses were incurred.

Additionally, Ohio Adm.Code 5703-29-22 provides:

> Regardless of a taxpayer's commercial activity tax filing frequency, a taxpayer must compute the credit for qualified research expenses based on expenses incurred during the calendar year (not the taxpayer's federal taxable year or the taxpayer's Ohio corporation franchise taxable year). **Thus, a taxpayer must claim the credit for qualified research expenses on its annual return due in February of each year. Any portion of the**

[2] Pursuant to R.C. 5703.04 and 5703.05, the Commissioner maintains the authority to investigate and, if necessary, adjust the petitioner's CAT liability and review the validity or extent of any credits claimed against such.

nonrefundable credit that remains unused after the taxpayer applies the credit against its commercial activity tax liability for that period may be carried forward to the subsequent return for no more than seven years.

(Emphasis added).

R.C. 5751.051(A)(3) provides, in relevant part, that for calendar quarter CAT taxpayers, "the tax return filed for **the fourth calendar quarter of a calendar year is the annual return** for the privilege tax imposed by this chapter." (Emphasis added).

Taken together, the CAT statutes and administrative code require CAT taxpayers to first claim the QRE credit on the annual return for the year in which the qualifying expenses were incurred[3]; any carry-forward of the credit can only be used after first claiming and applying the credit against CAT liability due on the fourth quarter return for the year in which it is first properly claimed.

The petitioner submitted calculations to support a 2016 QRE credit but tried to first claim the 2016 credit on the return filed for the *third* calendar quarter of *2017*. The Department instructed the petitioner to claim the credit in the *fourth* calendar quarter of *2016*, and was also told what documents and forms were necessary to do so. However, the petitioner responded by submitting a Form CAT CS for the fourth calendar quarter of 2017. In addition to being the wrong period, this CAT CS reflected only the carry-forward amount of the credit based on its erroneous claim for the credit on the third quarter 2017 return.

The petitioner has failed to show that it was entitled to claim a QRE credit on its third quarter 2017 CAT return. Accordingly, the Commissioner finds that the Department properly disallowed the credit claimed on that return. As such, the assessment of the unpaid tax was justified and the petitioner has not shown that the assessment was made in error.

Furthermore, other than a state-by-state summary of expenses and the Ohio calculation, the petitioner failed to provide all requested information; it did not provide a corrected form CAT CS, the address in Ohio at which the qualified research was being conducted, the federal Form 6765 (if available), or a description of the qualifying research projects generating the QREs at issue. Therefore, the petitioner also failed to provide sufficient information to support the incorrectly claimed credit.

IV. Conclusion

The petitioner made an incorrect claim for CAT QRE credit and provided insufficient documentation to support the claim. Based on the information submitted by the petitioner and available for review by the Commissioner, the petitioner is not entitled to the credit claimed for the third quarter of 2017.

For the foregoing reasons, the assessment is affirmed.

Current records indicate that no payment has been made on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law**. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, P.O. Box 1090, Columbus, OH 43216-1090.

[3] For quarterly taxpayers, the CAT annual return is the fourth quarter return due the following February.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 31 2022

J. C. Penney Corporation, Inc.
6501 Legacy Drive
Plano, Texas 75024

Re: Assessment Nos. 100001587113 & 100001636839
Commercial Activity Tax: 1/1/2016 – 12/31/2018 & 1/1/2019 – 5/15/2020

This is the final determination of the Tax Commissioner regarding petitions for reassessment filed pursuant to R.C. 5751.09 concerning the above-referenced commercial activity tax assessments. In resolution of these matters, the Tax Commissioner and the claimant have reached an agreement to a modification of the assessment.

Accordingly, the petitions and assessments are resolved pursuant to the terms of the agreement related thereto.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 21 2022

Lanxess Solutions US, Inc.
Chemtura Corporation
199 Benson Rd.,
Middlebury, CT 06749

Re: Assessment No. 100001012482
Commercial Activity Tax: 07/01/2014 – 12/31/2016

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

Tax	Interest	Penalty	Total
$54,245.00	$5,608.00	$8,137.00	$67,990.00

I. BACKGROUND

Chemtura Corporation and its subsidiaries (hereinafter "the Company") were in the business of providing specialty chemicals for various industries. The Company filed and registered for the CAT as a combined taxpayer.[1] The Department identified that the Company had a use tax account that reported higher gross sales compared to its taxable gross receipts reported for CAT. Based on the evidence available, the Department assessed the Company CAT, interest, and an underpayment penalty pursuant to R.C. 5751.06(B)(1). Lanxess Solutions US, Inc. (hereinafter "the petitioner") subsequently acquired the Company. Because the Company failed to remit its liability for the tax period at issue, the petitioner is now liable for the amount due. R.C. 5751.10; *see also* R.C. 5703.90. The petitioner filed a petition objecting to the assessment but did not request a hearing on this matter; therefore, this matter is now decided based on the evidence currently available to the Tax Commissioner.

II. THE PETITIONER'S CONTENTION

The petitioner disagrees with the assessment and contends that the Department erred in situsing gross receipts pursuant to R.C. 5751.033(E). Specifically, the petitioner claims the title of the products sold to the Company's purchasers passed at its manufacturing plants, which are outside of Ohio.[2] After receiving the products at the manufacturing plants, the Company's purchasers transported the products from the manufacturing plants into Ohio. Thus, the petitioner contends the Company's gross receipts should be sitused outside of Ohio since the sale of the tangible personal property occurred outside of Ohio.

III. AUTHORITY & ANALYSIS

The CAT is imposed on the privilege of doing business in Ohio, is measured by gross receipts, and is imposed on persons receiving the gross receipts, not on the purchaser. R.C. 5751.02(A). "Gross receipts"

[1] The Department identified that the other member that should have been included in the group for purposes of the CAT was Great Lakes Chemical Corporation.

[2] According to the petitioner, the Company's manufacturing plants were in Arkansas, Illinois, New Jersey, and North Carolina.

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

Once a person determines the amount of gross receipts it realized, it must then "situs" those gross receipts to the appropriate location pursuant to R.C. 5751.033. If a gross receipt is sitused to Ohio pursuant to R.C. 5751.033, it is a "taxable gross receipt" and subject to the CAT. R.C. 5751.01(G). Division (E) of R.C. 5751.033 governs the situsing of gross receipts from the sale of tangible personal property. It states, in relevant part:

> Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property. For purposes of this section, the phrase "delivery of tangible personal property by common carrier or by other means of transportation" includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state.

As a preliminary matter, the Company's own business records show that the products had "ship to" addresses located in Ohio- indicating they were received by the purchasers in Ohio. Thus, the petitioner's contention that the products are received elsewhere is not supported by the Company's own business records.

The petitioner's primary contention relates to how the Company's gross receipts should be sitused under R.C. 5751.033(E). The petitioner specifically states that "the sales are deemed to take place where the goods transfer (in the case of Ex-Works transactions this would be [the Company's] plants), not necessarily the ship to or bill to address."

In *Greenscapes Home and Garden Products, Inc. v. Testa*, the Tenth District Court of Appeals affirmed the Board of Tax Appeals's (the "BTA") decision and agreed that the location where the property was ultimately received after all transportation is completed controls where the sales are sitused. *Id.*, 10th Dist. Franklin No. 17AP-593, 2019-Ohio-384. In *Greenscapes,* the appellant was a wholesaler of lawn and garden products, and many of its sales went to warehouses and distribution centers within Ohio. *Id.* at ¶2. Importantly, "the retailer [of Greenscapes] arrange[d] for a carrier *to pick up the product at Greenscapes' facility* [in Georgia]." *Id.* (Emphasis added). The appellant argued that it lacked nexus with Ohio because its transactions with customers occurred outside Ohio, even though its retail customers had a presence in Ohio and purchased goods for delivery to their Ohio distribution centers. *Id.* at ¶27. The court, like the BTA before it, disagreed with the appellant and held that "R.C. 5751.033(E) provides that the situs of the gross receipts from the sale of tangible personal property is the place at which such property is ultimately received after all transportation has been completed. In this case, the evidence established that [the] place is Ohio." *Id.*

In the present case, the petitioner makes similar arguments to those made unsuccessfully in *Greenscapes*.[3] The petitioner asserts that the Company did not arrange for the transportation of the goods from the Company's manufacturing plants to Ohio for its customers. Instead, the petitioner claims the Company's purchasers accepted the delivery of the products at the Company's manufacturing plants. Thus, the petitioner states title to those products passed at the manufacturing plants. As a result, once the Company relinquished ownership and control of the goods at those manufacturing plants, the resulting gross receipts should have been sitused to that location, instead of Ohio. However, like *Greenscapes,* the Company's own records show that its purchasers received the products in Ohio after all transportation was completed. Thus, the Commissioner finds, as the BTA and Tenth District Court of Appeals found in *Greenscapes*, that regardless of where title passed and other terms of the sales, the purchased products were ultimately delivered to Ohio; additionally, the Company knew that its products were destined for Ohio at the time the orders were placed. Therefore, the taxable gross receipts from property transported from the Company's manufacturing plants to Ohio is properly sitused to Ohio because that is where the property is ultimately received.

IV. CONCLUSION

The evidence currently available to the Tax Commissioner reflects that the Company sold tangible personal property that was ultimately received in Ohio. Thus, the amounts assessed are accurate.

Accordingly, the assessment is affirmed.

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

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

[3] Greenscapes argued that its gross receipts from sales should be sitused to Georgia or to the states where the purchasers' retail stores were located. Greenscapes argued that it did not arrange the transportation of goods from Georgia to Ohio. Rather, its customers either arranged for delivery by common carrier or picked up the goods in Georgia. However, Greenscapes shipping documents and invoices indicated that the goods were being shipped to warehouses in Ohio.

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FINAL DETERMINATION

Date: JAN 21 2022

MoneyGram Payment Systems, Inc.
2828 N. Harwood St. 15th Fl.
Dallas, TX 75201

Re: Assessment No. 100000919139
Commercial Activity Tax: 01/01/2014 – 12/31/2016

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

Tax	Interest	Penalty	Total
$36,561.00	$4,288.00	$5,484.00	$46,333.00

MoneyGram Payment Systems, Inc. (hereinafter "MoneyGram" or the "petitioner") moves money around the world through cash transfers and money orders. MoneyGram also offers in-person and electronic bill payment services. The petitioner is a subsidiary of MoneyGram International, Inc. The petitioner is registered and files CAT as a single entity taxpayer.

On March 5, 2018, the Department assessed the petitioner after determining that MoneyGram had unreported taxable gross receipts for the periods at issue based on its federal returns and state apportionment schedule. Specifically, the Department determined the revenue from accounts labelled uncashed money order revenue, miscellaneous MoneyGram orders, and other income were gross receipts pursuant to R.C. 5751.01(F) and situsable to Ohio pursuant to R.C. 5751.033(I).

The petitioner objects to the assessment and requests an abatement of the penalty amount assessed. The petitioner contends that the state apportionment information initially provided included data for Ohio based on where the sender was located rather than where the recipient of the money order or money transfer picked up the payment. The petitioner does concede the revenue from the account uncashed money order should be allocated to Ohio as taxable gross receipts for the periods at issue; the total revenue for the account is $3,772,397. A telephone hearing was held, as requested by the petitioner. This matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

After the assessment, the petitioner submitted revised state apportionment data, including information for Ohio based on where the recipient of the money order or money transfer picked up the payment in accordance with Ohio Adm.Code 5703-29-17(C)(38). *Id.* ("If money order/wire transfer services are delivered to or picked up at a location in Ohio, [100%] of the fee for such services are sitused to Ohio, regardless of where the money order/wire transfer service originates."). Based on the evidence now available to the Tax Commissioner, the petitioner's contention is well taken. MoneyGram's CAT gross receipts have been updated based on the revised state apportionment information reflecting money orders delivered or picked up in Ohio.

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JAN 21 2022

Finally, the petitioner requests an abatement of the assessed penalty. The Tax Commissioner may abate penalties imposed for the failure to pay the full amount of tax due. R.C. 5751.06(F). The evidence and circumstances support a full reduction of the penalty amount assessed.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$10,104.00	$2,409.00	$0.00	$12,513.00

Current records indicate that no payments have been made on this assessment, leaving the adjusted balance due of $12,513.00. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payment to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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0000000141

FINAL DETERMINATION

Date: JAN 31 2022

Orlick Industries Limited
ATTN: Grant Panchyson, General Manager
411 Parkdale Avenue North
Hamilton, Ontario Canada L8H5Y4

Re: Assessment No. 100000887795
Commercial Activity Tax – 1/1/2010 - 12/31/2016

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5751.09 concerning the above-referenced commercial activity tax assessment.

In resolution of this matter, this assessment shall be modified pursuant to terms agreed to by the Tax Commissioner and the petitioner.

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

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

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

Jeffrey A. McClain

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/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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(614) 466-6750 Fax (614) 466-7979

FINAL DETERMINATION

Date: JAN 2 1 2022

Sandridge Food Corporation
133 Commerce Drive
Medina, OH 44256-1333

Re: Three Refund Claims
Commercial Activity Tax – Multiple Periods

The final determination of the Tax Commissioner dated December 9, 2021 is hereby vacated and replaced with the following:

This is the final determination of the Tax Commissioner with respect to three applications for commercial activity tax (CAT) refunds filed pursuant to R.C. 5751.08:

Period	Refund Claim No.	Refund
01/01/2016 – 03/31/2016	4938200510	$16,301.00
04/01/2016 – 06/30/2016	4938200476	$20,642.05
07/01/2016 – 09/30/2016	4938200172	$17,966.00

On August 16, 2018, Sandridge Food Corporation (hereinafter "the claimant") amended its CAT returns for the tax periods in question to claim the qualified research expense ("QRE") credit not claimed on its original return. Thereafter, on August 16, 2018, the claimant applied for refunds contending it overpaid its CAT due to its QRE credit. However, the Department disallowed the claimant's QRE credit claimed for the first three quarters of 2016 because it was improperly claimed. The claimant objects to the denial of its refund claims and requests an administrative review of the initial refund denials in accordance with R.C. 5703.70. The claimant did not request a hearing on these matters. Therefore, these matters are decided upon the information available to the Tax Commissioner and the evidence supplied with the application for refunds.

R.C. 5751.51 allows a nonrefundable research and development credit against the CAT. To qualify, the taxpayer must invest in "qualified research expense" as defined in I.R.C. §41. R.C. 5751.51(A). The credit is available to taxpayers to apply against their CAT liability for purposes of conducting in-house research and contract research. Ohio Adm.Code 5703-29-22(C)(1). However, regardless of a taxpayer's CAT filing frequency, "a taxpayer must compute the credit for qualified research expenses based on expenses incurred during the calendar year." Ohio Adm.Code 5703-29-22(C)(2). Therefore, the credit must be claimed by the taxpayer on its annual return in February of each year. *Id.*

Division (A)(3) of R.C. 5751.051 states in relevant part, "the tax return filed for the *fourth calendar quarter of a calendar year is the annual return* for the privilege tax imposed by this chapter." R.C. 5751.051(A)(3). (Emphasis added.) The credit equals seven percent of the amount of qualified research expenses in excess of the taxpayer's average investment in qualifying research expenses over the three

JAN 2 1 2022

preceding taxable years. R.C. 5751.51(B)(1). Any excess credit not used for the taxable year in which it is earned may be carried forward for up to seven years. R.C. 5751.51(B)(2).

In this matter, the claimant filed its QRE refunds for the first three quarters of its tax year. However, the claimant was required to claim its 2016 QRE credit on its *fourth quarter return for 2017* by February 10, 2017 since it was a quarterly filer. R.C. 5751.51(A)(3). The 2016 QRE credit was only available to the claimant after it had filed and claimed its QRE credit on its fourth quarter return for the 2017 annual return. By definition, the claimant did not have any QRE credit to claim for the first three quarters of 2016 and thus cannot claim any QRE credit for those periods.[1]

Accordingly, the refund claims are denied.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

[1] As noted above, such unused amounts are subject to be carried forward for up to seven years taxable years. R.C. 5751.51(B)(2).

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd. • Columbus, OH 43229

FINAL DETERMINATION

Date: JAN 21 2022

Sol's, Inc.
PO Box 231
Berlin, OH 44610

Re: Assessment No. 100001299474
Commercial Activity Tax: 01/01/2016-12/31/2018

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

Tax	Interest	Penalty	Total
$21,028.00	$1,349.32	$3,154.20	$25,531.52

The Department assessed the petitioner after performing a field audit for the period at issue. The Department increased the petitioner's taxable gross receipts after disallowing the agency exclusion originally reported on the petitioner's CAT returns. R.C. 5751.01(F)(2)(l).

The petitioner objects to the assessment, contending that it is entitled to the agency exclusion and submits evidence to support its contention. The petitioner did not request a hearing on the matter; therefore, the matter is decided upon the evidence available to the Tax Commissioner and the evidence supplied with the petition. Upon further review, the petitioner has shown it is entitled to the agency exclusion pursuant to R.C. 5751.01(F)(2)(l).

Therefore, the assessment is cancelled.

Current records indicate a payment of $25,531.52 has been applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. This amount will be refunded to the taxpayer plus statutory interest.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation
Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: JAN 31 2022

Straub Nissan, LLC
ATTN: Tax/Accounting Department
205 Straub Drive
Triadelphia, WV 26059

Re: Thirteen Assessments
Commercial Activity Tax - Multiple Assessments

This is the final determination of the Tax Commissioner regarding petitions for reassessment pursuant to R.C. 5751.09 concerning the following commercial activity tax (CAT) assessments:

Assessment Number	Period	Tax	Interest	Penalty	Total
100000950377	2010-2016	$249,384.00	$32,660.00	$124,692.00	$406,736.00
100001024409	1Q 2017	$12,600.00	$676.14	$6,930.00	$20,206.14
100001028046	2Q 2017	$10,000.00	$436.97	$5,500.00	$15,936.97
100001028376	3Q 2017	$11,392.88	$379.30	$6,266.09	$18,038.27
100001069590	4Q 2017	$17,136.14	$504.82	$9,424.87	$27,065.83
100001123047	1Q 2018	$27,814.32	$803.40	$15,297.87	$43,915.59
100001222661	3Q 2018	$45,079.56	$847.91	$24,793.77	$70,721.24
100001296982	4Q 2018	$62,061.34	$917.54	$34,133.73	$97,112.61
100001415549	1Q 2019	$85,467.06	$1,462.48	$47,006.89	$133,936.43
100001498772	2Q 2019	$112,535.20	$1,740.80	$61,894.36	$176,170.36
100001564220	3Q 2019	$153,825.60	$2,632.20	$84,604.08	$241,061.88
100001601316	4Q 2019	$208,645.52	$5,855.22	$114,755.03	$329,255.77
100001727370	1Q 2020	$282,068.92	$7,877.08	$155,137.90	$445,083.90

I. BACKGROUND

Highlands Automotive Holdings, LLC is the parent company to a group of dealerships that sells new and used motor vehicles. The group of dealerships includes Straub Nissan, LLC (the reporting person for CAT); Straub Hyundai, Inc.; Straub Automotive Inc. (dba Straub Honda); and Monarch Automotive Inc. (dba Straub Chrysler Dodge Jeep Ram). These dealerships are located near Wheeling, West Virginia; being located geographically near to both Ohio and Pennsylvania, they primarily sell vehicles to customers residing in West Virginia, Ohio, and Pennsylvania.

The Department of Taxation selected the petitioner for audit because the petitioner reported substantial Ohio sales on its Ohio sales tax returns but was not filing CAT returns. Upon audit, the Department found that the petitioner was selling motor vehicles to Ohio buyers, but was not registered for Ohio's CAT and was not filing CAT returns. The Department computed estimated CAT, interest and penalties owed for the above assessment periods using the best information available, because the petitioner was uncooperative during the audit process and refused to provide its sales data for all related entities. A hearing was held on this matter via telephone.

II. Petitioner's Contentions

The petitioner contends that because the cars it sells to Ohio buyers are taken possession of in West Virginia, these gross receipts should be sitused to West Virginia. Next, the petitioner contends that the assessments violate the Dormant Commerce Clause of the U.S. Constitution and the Due Process Clauses of the U.S. and Ohio Constitutions. Further, the petitioner contends that the assessments are based upon estimates to a great extent and greatly overstate the petitioner's actual taxable gross receipts for the periods at issue. The petitioner also requests abatement of the assessed penalties and interest.

This matter is now decided based upon the evidence currently available to the Tax Commissioner, the evidence supplied with the petitions, and materials submitted to during the hearing process.

III. Authority

At the outset, it is important to note that a taxpayer must provide the Tax Commissioner with credible evidence supporting its request for exclusions, refunds, and reductions to assessments, and mere speculation is not sufficient. *See Greenscapes Home and Garden Products, Inc. v. Testa* (July 19, 2017), BTA No. 2026-350, citing *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15. The Tenth Appellate District of the Ohio Court of Appeals affirmed *Greenscapes* on February 7, 2019. See *Greenscapes Home and Garden Products, Inc. v. Testa* (2019), No. 17AP-593.

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

Once a person determines the gross receipts it realized, it must then "situs" those gross receipts to the appropriate location pursuant to R.C. 5751.033. If a gross receipt is sitused to Ohio pursuant to R.C. 5751.033, it is a "taxable gross receipt" that is subject to the CAT. R.C. 5751.01(G).

While the Supreme Court of Ohio has not reviewed R.C. 5751.033 on this topic, it has previously reviewed a substantially similar situsing statute, R.C. 5733.05(B)(2)(c), and found that it provided "ample nexus" for corporation franchise tax. *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97, 271 N.E.2d 827 (1971). The court concluded that pursuant to R.C. 5733.05, "sales of tangible personal property to an Ohio buyer, delivered by the seller to a common carrier outside Ohio and ultimately received in Ohio after all transportation has been completed, are deemed business done in Ohio * * * regardless of whether the buyer or the seller has designated the common carrier." *House of Seagram* at 101. Thereafter, the Supreme Court of Ohio confronted the opposite argument in *Dupps Co. v. Lindley*, 62 Ohio St.2d 305, 405 N.E.2d 716, 717 (1980). Dupps was an Ohio-based manufacturer that argued that goods received by its customers at its facility in Ohio, and then transported outside Ohio, should be sitused outside Ohio. The court agreed, holding that "[s]ince the equipment herein was 'ultimately received' outside of Ohio, such sales should not have been" sitused to Ohio. *Id.* at 308.

The Board of Tax Appeals addressed the situsing of tangible personal property gross receipts in *Mia Shoes, Inc. v. McClain* (August 8, 2019), BTA No. 2016-282. Mia Shoes is a manufacturer and wholesaler of footwear. Some of Mia Shoes' sales were to customers that owned or used distribution centers within Ohio. *Id.* at 1. The Department included receipts from sales to Ohio distribution centers as taxable gross receipts for CAT. *Id.* Mia contended that most of its sales shipped to these Ohio distribution centers were later shipped outside of Ohio by Mia's customers. *Id.* Specifically, Mia argued that the goods shipped to Ohio distribution centers should be apportioned to Ohio based upon the percentage of Mia's customers' retail locations that were located within Ohio during the audit period. *Id.* at 3. The Board of Tax Appeals, however, affirmed the assessment, explaining, "the evidence shows that Mia Shoes shipped its goods to Ohio, knew it was shipping goods to Ohio, and lost visibility of the goods once they were delivered to the customers in Ohio. The sale of these goods resulted in the taxable gross receipts upon which the CAT was assessed, and Mia Shoes did not affirmatively prove that the goods were then ultimately received elsewhere within the meaning of the statute." *Id.*

IV. Analysis

A. Situsing Contentions

The petitioner contends that "[s]ince an Ohio resident who purchases a car in West Virginia plainly does not take possession of the car in Ohio, sales to Ohio residents are not sitused in Ohio under R.C. 5751.033(E), and there is no need to look to the remaining sentences in R.C. 5751.033(E) to determine the point of receipt." The petitioner further explains its contention: "Straub Nissan's possession-based interpretation is consistent with the final sentence of R.C. 5751.033, which provides that, for the purposes of direct delivery, a sale is sitused in the state in which the property is transferred to an agent of the purchaser." The petitioner also writes, "The vehicles sold by Straub Nissan are not "ultimately received" in Ohio because the purchasers do not take possession in Ohio."

Division (G) of R. C. 5751.01 indicates that taxable gross receipts are gross receipts sitused to this state under R.C. 5751.033. Division (E) of R.C. 5751.033, which governs the situsing of taxable gross receipts from the sale of tangible personal property, provides:

> Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. **In the case of delivery of tangible personal property by motor carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property**. For purposes of this section, the phrase "delivery of tangible personal property by motor carrier or by other means of transportation" includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

Id. (emphasis added). In the instant case, the petitioner's vehicles are purchased by Ohio buyers and "ultimately received" in Ohio "after all transportation is completed".

The petitioner contends that because the Ohio buyers take possession of their purchased vehicles in West Virginia, this prevents these vehicles from being "ultimately received" within Ohio. Also, the petitioner argues that an Ohio buyer driving a car he or she purchased in West Virginia into Ohio does not meet the delivery requirement "by other means of transportation" into Ohio. R.C. 5751.033(E). The petitioner is misconstruing R.C. 5751.033(E). As emphasized above, R.C. 5751.033(E) provides that for tangible personal property (such as automobiles), the place where the tangible personal property "is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property." Here, the transportation for the vehicle is not completed until the buyer drives the vehicle to Ohio; it is irrelevant to situsing that the buyer purchased and took possession of the vehicle in West Virginia. For purposes of R.C. 5751.033(E), the phrase "delivery of tangible personal property by motor carrier or by other means of transportation" includes the situation in which a purchaser accepts the property in another state and then transports the property directly or by other means to a location within Ohio.

In *Mia Shoes*, *supra*, the Board of Tax Appeals held that goods the seller knew the buyer was transporting into Ohio should be sitused to Ohio, resulting in taxable gross receipts for Ohio CAT. Likewise, the petitioner knows the address of each vehicle buyer and thus must situs vehicle sales to Ohio when purchased by an Ohio buyer.

In summary, regardless of where title passes, the seller has the responsibility to properly situs a sale to Ohio when knowledge of the destination is understood to be Ohio. In the case at hand, the petitioner knows the addresses of its buyer and thus has a duty under R.C. 5751.033(E) to situs the vehicle gross receipts based upon its best available information. *See also House of Seagram*, *supra*. Pursuant to *Greenscapes*, *supra*, taxpayers must provide the Tax Commissioner with their best information when requesting a reduction in assessments. In the instant case, the petitioner's best information from its own records shows that many of the petitioner's gross receipts were generated by vehicle sales made to buyers who ultimately transported said vehicles to Ohio.

B. Use of Estimated Figures

The petitioner contends the assessments are based upon estimates that overstate the petitioner's actual taxable gross receipts for the periods at issue. The petitioner further contends the assessments contain estimated taxable gross receipts for certain dealerships for periods in which those dealerships did not exist. These contentions are well taken. Taxable gross receipts for many of the periods at issue were estimated by the Department due to the petitioner being uncooperative and refusing to provide records of its gross receipts generated from Ohio customers. During the hearing process, the petitioner provided information regarding its receipts from Ohio customers for the periods at issue. Accordingly, the assessed CAT, preassessment interest and penalty are adjusted to reflect this new information.

C. Constitutional Claims

The petitioner also contends that the assessments violate the Dormant Commerce Clause of the U.S. Constitution and the Due Process Clauses of the U.S. and Ohio Constitutions. However, it is well-established that the Tax Commissioner lacks jurisdiction to determine the constitutionality of a statute. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988). Nevertheless, the legislative enactments of the Ohio General Assembly are entitled to a strong presumption of constitutionality. *N. Ohio Patrolmen's Benevolent Assn. v. Parma*, 61 Ohio St.2d 375, 377, 402 N.E.2d 519 (1980). The Ohio Supreme Court further adheres to the presumption that the Tax Commissioner's application of state tax laws is constitutional. *See State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, *Swetland v. Kinney*, 69 Ohio St.2d 567, 433 N.E.2d 217 (1982). Since these objections are constitutional in nature, the Tax Commissioner lacks jurisdiction to decide on the constitutionality of Ohio's CAT statutes and its assessments.[1]

D. Penalty and Interest Abatement

Finally, the petitioner requests an abatement of the assessed penalties and interest. However, based on the facts of these matters, including the taxpayer's lack of cooperation during the audit, its initial refusal to provide its records, and poor filing, payment, and compliance history with regard to the CAT, penalty abatement is not warranted in this case. Additionally, the imposition of interest is mandatory pursuant to R.C. 5751.06(G) and cannot be abated. However, it should be noted that both the penalty and interest assessed have been decreased proportionately for those assessments for which the CAT assessed has been reduced.

V. Conclusion

Based upon the analysis above, the sale of the petitioner's vehicles to customers located in Ohio resulted in taxable gross receipts that should be sitused to Ohio under R.C. 5751.033(E). However, based upon the updated information of its taxable gross receipts provided during the hearing process, the Department has revised the estimated assessments.

Accordingly, the assessments are adjusted as follows:

Assessment Number	Period	Tax	Interest	Penalty	Total
100000950377	2010-2016	$189,782.16	$26,206.61	$94,891.08	$310,879.85
100001024409	1Q 2017	$11,975.62	$643.07	$6,586.59	$19,205.28
100001028046	2Q 2017	$11,975.62	$523.65	$6,586.59	$19,085.86
100001028376	3Q 2017	$11,975.62	$402.91	$6,586.59	$18,965.12
100001069590	4Q 2017	$11,975.62	$353.03	$6,586.59	$18,915.24
100001123047	1Q 2018	$14,690.29	$426.62	$8,079.66	$23,196.57
100001222661	3Q 2018	$14,690.29	$276.50	$8,079.66	$23,046.45
100001296982	4Q 2018	$14,690.29	$219.35	$8,079.66	$22,989.30
100001415549	1Q 2019	$17,104.88	$295.23	$9,407.69	$26,807.80
100001498772	2Q 2019	$17,104.88	$264.77	$9,407.69	$26,777.34
100001564220	3Q 2019	$17,104.88	$294.74	$9,407.69	$26,807.31
100001601316	4Q 2019	$17,104.88	$481.37	$1,710.49	$19,296.74
100001727370	1Q 2020	$12,243.30	$341.21	$1,224.33	$13,808.84

[1] That said, the Ohio Supreme Court has previously held the Ohio CAT constitutional under the dormant Commerce Clause. *See Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278 (2016). *See also Newegg, Inc. v. Testa*, 149 Ohio St.3d 289 (2016), and *Mason Cos., Inc. v. Testa*, 149 Ohio St.3d 299 (2016). These cases have rejected the need for physical presence and upheld the CAT's standards in R.C. 5751.01(I) as creating substantial nexus.

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

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: JAN 2 1 2022

RLT Contracting LLC
1930 Oak Dr.
Alva, FL 33920

Re: Assessment No. 100001214882
Employer Withholding – 2015

This is the final determination of the Tax Commissioner regarding a petition for reassessment pursuant to R.C. 5747.13:

Tax	Interest	Penalty	Total
$11,479.16	$1,498.20	$1,721.84	$14,699.20

The Ohio Department of Taxation assessed RLT Contracting LLC ("the petitioner") after it failed to file employer withholding returns or pay employer withholding tax in tax year 2015. Specifically, the Department assessed the petitioner after the petitioner failed to provide all the W2s it issued for tax year 2015. The petitioner timely filed a petition for reassessment and included with the petition all the W2s it issued for tax year 2015; however, to date the petitioner has yet to file its 2015 Ohio employer withholding return. The petitioner contends the W2s show it owes $9,448.13 in employer withholding tax for tax year 2015. The petitioner did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

Based on the evidence now available to the Tax Commissioner, the petitioner's contention is well taken. Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$9,448.13	$1,149.00	$1,417.22	$12,014.35

Current records indicate that a payment of $16,829.72 has been applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

JAN 2 1 2022
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THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER.

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JAN 21 2022

Pine Tree Towing & Recovery
11427 E. Pike Road
Cambridge, OH 43725

Re:
Assessment No. 100000904054
International Fuel Tax Agreement: 01/01/2016 – 12/31/2016

This is the final determination of the Tax Commissioner regarding a petition for reassessment filed pursuant to R.C. 5728.10 concerning the following International Fuel Tax Agreement assessment:

Tax	Interest	Penalty	Total
$14,401.19	$1,146.62	$2,160.18	$17,707.99

I. BACKGROUND

Pine Tree Towing and Recovery Inc. ("hereinafter "Pine Tree Towing" or the "petitioner") is a licensee and participant in the Internal Fuel Tax Association (IFTA) as a haul for hire carrier that operated 12 vehicles out of Cambridge, Ohio. The petitioner primarily operates and has its base jurisdiction[1] in Ohio, but also has mileage travelled in Alabama, Illinois, Indiana, Kentucky, Michigan, Montana, Pennsylvania, Tennessee, Virginia, and West Virginia. The Department reviewed the petitioner's IFTA account pursuant to the IFTA Audit[2] and Procedures Manuals.[3] Units #49, #55, #57, and #60 for the first quarter of 2016 were selected as the test vehicles, as it is representative of a typical quarter for the licensee.

The Department assessed the petitioner after determining that the petitioner had an unacceptable milage record system. Specifically, the petitioner did not provide adequate mileage records for the period at issue, and thus the Department applied a standard 4.0 miles per gallon ("MPG"), in accordance with the IFTA Audit Manual, to the records throughout the reporting period to determine the assessed liabilities. A telephone hearing was held on the matter, as requested by the taxpayer. This matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the petition.

[1] For IFTA purposes, "base jurisdiction" means the member jurisdiction where qualified motor vehicles are based for vehicle registration purposes and [w]here the operational control and operational records of the licensee's qualified motor vehicles are maintained or can be made available; and [w]here some travel is accrued by qualified motor vehicles within the fleet. *IFTA Articles of Agreement*, Article II, Definitions.

[2] International Fuel Tax Agreement Audit Manual, effective July 1, 2017, available at https://www.iftach.org/manuals/2016/Audit%20Manual%20-1996%20-%202016.pdf (accessed Jan. 12, 2022)

[3] International Fuel Tax Agreement Procedures Manual, effective August 12, 2020, available at https://www.iftach.org/manuals/2021/PM/Procedures%20Manual%20August%202021.pdf (accessed Jan. 12, 2022)

II. Petitioner's Contentions

First, the petitioner contends that the consultant it retained to assist them with its IFTA reporting had lost their capacity to be of assistance and, thus, the petitioner should be allowed to recommence the audit proceedings. Second, the petitioner states that the "penalty" against it represents a significant percentage of a tax already paid in full. Thus, the petitioner contends that it should receive credit for tax amounts previously paid for fuel that was purchased and consumed in its vehicles. Finally, the petitioner requests a reduction of the penalties assessed.

III. Authority

The IFTA Agreement is a collective agreement among member jurisdictions of the United States and Canada to simplify the payment, collection, and distribution of fuel tax revenue for carriers operating in multiple jurisdictions. *IFTA Articles of Agreement*, Article 1, Agreement Principle, R130 Purpose. A person who applies for and operates under an IFTA license agrees to be bound by the duties and obligations of licensees set forth in the IFTA Agreement. *Id* at R140 Cooperative Administration. The maintenance of mileage and fuel records for all registered or licensed vehicles is a requirement of IFTA Agreement. *Id.* The records are needed to ensure proper tax distribution among member jurisdictions. *Id.* Both the carrier and driver are responsible for the maintenance of vehicle trip reports that record by jurisdiction every mile driven and every gallon of fuel that is put into the licensed power unit. *Id.*

Ohio is a member jurisdiction of IFTA. R.C. 5728.05. The IFTA Agreement requires Ohio to audit three percent of the licenses based in Ohio. *IFTA Audit Manual*, A300 IFTA Auditing Standards, effective Jan. 1, 1996 – Dec. 31, 2016. IFTA audits confirm the distance, fuel, and MPG reported on the fuel tax forms. *Id.* at A600 The Audit Process. The IFTA Audit Manual contains rules for the performance of audits conducted under the IFTA Agreement. *Id.* Licensees liable for Ohio motor fuel tax are required to maintain "detailed distance and fuel records for each commercial car and commercial tractor owned, leased, rented, or otherwise operated by such person." R.C. 5728.07. Such records "shall be preserved for a period of four years from the date the return… was due or filed, whichever is later." *Id.* Ohio Adm.Code 5703-13-03 also delineates the types of records to be maintained as follows: manifests, freight bills, Ohio turnpike receipts, driver's trip reports, vehicle trip reports, daily dispatch sheets and driver's daily logs.

IV. Analysis

The petitioner contends the assessment overstates the tax owed. However, the petitioner has not provided sufficient documentation to support this contention. IFTA requires carriers to maintain monthly and quarterly summaries of miles travelled for each individual unit/vehicle in the fleet. In accordance with the IFTA Audit Manual, a standard 4.0 MPG shall be applied when records provided by the licensee fail to support the miles reported on any quarterly IFTA tax return. Section 540 of the IFTA Procedures Manual lists the following acceptable mileage records: dates of travel; either beginning and ending odometer, hubodometer or engine control module (ECM) readings for the trip; origin and destination points of the trip; routes of travel; total distance traveled per trip; total distance traveled per jurisdiction per trip; and VIN or Vehicle unit number. Although the petitioner provided quarterly summaries, it failed to provide any of the above information as adequate mileage and fuel records.[4]

The petitioner initially reported MPG's of approximately 6.0 on its IFTA quarterly tax returns for the periods at issue. However, since the petitioner did not provide adequate mileage and fuel records to allow distance and fuel testing for the registration year under audit, the petitioner's MPG's were reduced to 4.0 for all quarters at issue. *IFTA Audit Manuel*, Inadequate Licensee Records/Assessment, A550.100. As stated above, since the petitioner was an IFTA licensee, it agreed to maintain its records in accordance with the IFTA recordkeeping requirement. Additionally, R.C. 5728.07 requires the petitioner to keep a "complete and accurate record… showing the total miles traveled on a public highway in this state by each commercial car and commercial tractor owned, leased, rented, or otherwise operated by such person…." However, to date, the petitioner has not provided adequate mileage and fuel records, nor any evidence that the numbers used in the assessment are an unreasonable estimate or contrary to Ohio law or the IFTA Agreement. *See* R.C. 5728.05. Therefore, the petitioner's contention is not well taken.

V. Penalty

A penalty of up to 15% may be added to the amount of the IFTA assessment. R.C. 5728.10(A). However, the Tax Commissioner may abate penalties imposed for the taxpayer's failure to pay the full amount of tax due. *Id.* A review of the record indicates that the petitioner has filed and remitted its fuel taxes for the periods after this assessment. Thus, the evidence and circumstances support a partial reduction of the penalty assessed.

VI. Conclusion

The petitioner did not maintain adequate distance records, as required by R.C. 5728.07. Accordingly, the Department issued this assessment using the best available information. The petitioner has not provided any evidence to challenge the accuracy of the assessment or the methodology used, or to allow for a better estimate of its IFTA liability. The petitioner has established that a partial reduction in the assessed penalty is warranted.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$14,401.19	$1,146.62	$1,080.09	$16,627.90

Current records indicate that no payments have been made on this assessment, leaving an adjusted balance due of $16,627.90. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

[4] While the petitioner requests a reaudit based on its consultant's medical issues, the petitioner must provide the necessary records for the Department to conduct the audit. *Id.* The petitioner has had ample time to provide said records (during both the audit *and* appeal periods), but has not done so.

0000000121

JAN 2 1 2022

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date:

JAN 2 1 2022

Pine Tree Towing & Recovery
11427 E Pike Road
Cambridge, OH 43725

Re: International Registration Plan
Account No. 26720
Fleet No. 001
Registration Year: 2017

This is the final determination of the Tax Commissioner regarding a petition for reassessment filed pursuant to Ohio Adm.Code 5703-13-06 concerning the following International Registration Plan (IRP) registration fee amount:

Audit Fees	Fees Paid	Fees Due
$10,051.83	$8,376.52	$1,675.31

I. Background

Pine Tree Towing and Recovery Inc. ("hereinafter "Pine Tree Towing" or the "petitioner") is a registrant and participant in the IRP as a haul for hire carrier that operated 12 vehicles out of Cambridge, Ohio. The petitioner primarily operates and has its base jurisdiction in Ohio, but also has mileage travelled in Illinois, Indiana, Kentucky, Michigan, Montana, Pennsylvania, Tennessee, Virginia, and West Virginia.

The Department reviewed the petitioner's IRP renewal pursuant to R.C. 5703.12. Units #49, #55, #57, and #60 for the first quarter of 2016 were selected as the test vehicles, as it is representative of a typical quarter for the registrant. The Department, however, was unable to evaluate the movement of the vehicles as the petitioner did not provide adequate records. Pursuant to Section 1015 of the IRP,[1] the Department assessed 20% of the apportionable fees paid by the petitioner on the renewal for the period at issue[2] for failing to maintain and provide adequate records. A telephone hearing which was held on the matter. This matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the petition.

II. Petitioner's Contentions

First, the petitioner contends that the consultant it retained to assist them with its IRP reporting had lost their capacity to be of assistance and, thus, the petitioner should be allowed to

[1] International Registration Plan, Inc., *International Registration Plan with Official Commentary*, (Adopted Sept. 1973) available at: https://cdn.ymaws.com/www.irponline.org/resource/resmgr/jurisdiction_info_2/plan_1_1_22.pdf (accessed Jan. 12, 2022)

[2] The period at issue is January 1, 2016 through January 31, 2016.

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recommence the audit proceedings. The petitioner also states that the assessment against it represents a significant percentage of fees already paid in full. Finally, the petitioner requests a reduction of the fees assessed.

III. Authority

The IRP is a reciprocity agreement among member jurisdictions of the United States and Canada that recognizes the registration of commercial motor vehicles registered by other jurisdictions. *IRP*, Article I, Purpose and Principles, 100 Title - 125 Granting of Reciprocity. Motor carriers register with and pay to one jurisdiction. *Id.* The fee is based on the portion of distance traveled in each jurisdiction according to that jurisdiction's fee schedule. *Id.* These fees are then distributed to the relevant jurisdictions. *Id.* Registered motor carriers receive apportioned plates and can travel through all IRP member jurisdictions. *Id.*

Ohio is a member jurisdiction of the IRP. R.C. 4501.02(A). This agreement requires Ohio[3] to audit three percent of the renewed registrations based in Ohio. *IRP*, Article X, Records and Audits, Section 1025 Frequency of Audits. IRP audits confirm the distance data reported on the annual renewal application. *IRP*, *Audit Procedures Manual*, Article 5 Audit Procedures, effective Jan. 1, 2016. IRP requires distance records be retained for three years after the close of the registration year and made available for audit. *IRP*, Article X, Records and Audits, Section 1000 Retention and Availability of Records. If the registrant fails to provide adequate mileage and fuel documents, the base jurisdiction must impose an assessment in the amount of 20%[4] of the apportionable fees for registration of the fleet being audited for the year at issue. *IRP*, Article X, Records and Audits, Section 1015 Inadequate Records; Assessments.

IV. Analysis

The petitioner contends the assessment overstates the fees owed. Although the petitioner provided quarterly jurisdictional and total miles traveled summaries, these were inadequate mileage records; thus, the Department was unable to complete the audit. The IRP requires the registrant to keep records as necessary to evaluate the accuracy of vehicle movement and to substantiate the registrant's application for apportioned registration. *IRP*, Article X, Section 1005(a), and Section 1010. However, the petitioner did not maintain adequate mileage records for the registration year at issue. The records should include but are not limited to the following: dates of travel (beginning and ending dates); either beginning and ending odometer, hubodometer or engine control module (ECM) readings for the trip; origin and destination points of the trip; routes of travel; total distance traveled per trip; total distance traveled per jurisdiction per trip; and VIN or Vehicle unit number. *IRP*, Article X, Section 1010 Contents of Records. The petitioner did not provide any of these records.[5]

[3] Even though it is not a tax, the Department is tasked with reviewing IRP filings "to determine the authenticity of mileage figures derived from operational records and registrations." R.C. 5703.12(A). These "audits" must be conducted "in accordance with the provisions of the" IRP. *Id.*

[4] Twenty percent is used for a first offense. *IRP*, Article X, Records and Audits, Section 1015 Inadequate Records; Assessments. The percentage increases to 50% for a second offense, and 100% for each additional offense.

[5] While the petitioner requests a reaudit based on its consultant's medical issues, the petitioner must provide the necessary records for the Department to conduct the audit. *Id.* The petitioner has had ample time to provide said records (during both the audit *and* appeal periods), but has not done so.

In accordance with Section 1015 of the IRP, since the petitioner did not provide adequate records to verify the movement of the apportioned vehicles, and this is its first such offense, the base jurisdiction, here Ohio, must impose an assessment in the amount of 20% of the apportioned fees for registration of the fleet for the renewal period to which the records pertain. Although the petitioner seeks a reduction of this 20% audit fee, the petitioner to date has not provided adequate mileage records for the registration year being audited.[6] This 20% audit fee is mandatory under the IRP.[7] *IRP*, Article X, Records and Audits, Section 1015 Inadequate Records; Assessments. Therefore, the petitioner's contention that the assessment overstates the fees owed is not well taken.

V. Conclusion

The petitioner did not maintain adequate mileage records for the registration year at issue; thus, the Department was unable to evaluate the movement of the vehicles. Therefore, the Department issued an assessment in the amount of 20% of the apportionable fees paid by the registrant on the 2016 renewal per Section 1015 of the IRP. To date, the petitioner has not provided adequate mileage records for the registration year at issue.

Accordingly, the assessment is affirmed.

Current records indicate that no payments have been made on this assessment, leaving a balance due of 1,675.31. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

[6] The petitioner, as an IRP registrant, agreed to maintain its records in accordance with the IRP recordkeeping requirements.

[7] Additionally, the audit fee is shared by all states in which the petitioner does hauling; thus, a portion of the assessed amount is owed to jurisdictions other than Ohio.

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FINAL DETERMINATION

Date: JAN 2 1 2022

Stephen J. & Barbara A. Barry
2160 Arbor Loop Apt. 13301
Charlotte, NC 28217

Re: Assessment No. 02202019631303
Individual Income Tax – 2018

This is the final determination of the Tax Commissioner following the decision and order of the Board of Tax Appeals in Case No. 2020-2250, dated December 20, 2021. In this order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

The Ohio Department of Taxation assessed Stephen J. & Barbara A. Barry after adjusting their Ohio individual income tax return for tax year 2018. Specifically, Stephen J. & Barbara A. Barry claimed both a resident credit and a nonresident credit on their return for 2018 using the same income. The taxpayer has submitted documentation including W-2s in support of their claimed nonresident credit. However, the assessment is based on the Department's disallowance of the resident credit that was claimed by the petitioners for the same income amounts used in calculating the nonresident credit. A taxpayer is not permitted to claim both the resident credit and the nonresident credit for the same income. R.C. 5747.05(C).

Accordingly, the assessment is affirmed.

Current records indicate that the assessment has been paid in full.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

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Tax Commissioner

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FINAL DETERMINATION

Date: JAN 2 1 2022

Douglas J. Freeman
501 Washington St., Ste 13
South Point, OH 45680

Re: Assessment No. 02201918613040
Individual Income Tax - 2017

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

Tax	Interest	Penalty	Total
$11,500.00	$750.39	$750.39	$13,000.78

The Ohio Department of Taxation adjusted Douglas J. Freeman's ("the petitioner") 2017 Ohio Individual Income tax return and assessed the petitioner when he did not pay the adjusted tax obligation. The petitioner objects to the assessment, claiming he not only paid his tax obligation for tax year 2017, but is actually entitled to a refund; he further requests an abatement of the interest and late filing penalties assessed. The petitioner requested a hearing which was conducted via telephone.

The petitioner reported a tax obligation of $42,084.00 on his 2017 return. His return reports $4,554.00 in Ohio income tax withholding, and he claims he made eight estimated payments totaling $43,030.00 for tax year 2017. The petitioner believes his claimed withholding and payments, totaling $47,584.00, entitle him to a $5,500.00 refund.

Department records indicate the petitioner made eight payments during the period at issue. However, while all eight checks state they are for tax year 2017 on the memo line, three of the checks were submitted with 2018 Ohio income tax payment vouchers; thus, these three payments were processed as payments towards tax year 2018. The petitioner was granted a refund of $17,000 for tax year 2018, which equals the amount of the three payments submitted with 2018 payment vouchers and 2017 memos. The 2018 refund was then offset towards an IRS obligation of the petitioner.

The petitioner does not dispute the existence of an IRS obligation, but argues the refund should have been offset against the 2017 tax obligation here at issue. The Department is authorized to offset all or a portion of a taxpayer's income tax refund towards any unpaid tax. R.C. 5747.12 and Ohio Adm. Code 5703-7-13. However, the taxpayer's obligation must be final to be eligible to be offset. R.C. 5747.12. Because the petitioner's 2017 tax due was not final at the time the 2018 refund was processed, the 2018 refund could not be offset to tax year 2017.[1] Therefore, the assessed tax for tax year 2017 remains unpaid.

[1] In fact, since the 2017 assessment is the subject of this appeal, it is still not "final debt" as required by R.C. 5747.12. *See* R.C. 5747.13(B) and (C).

Turning to the petitioner's other contentions, the payment of interest is mandatory pursuant to R.C. 5747.08(G), and thus cannot be abated. However, the Tax Commissioner may abate penalties when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the evidence and circumstances support a complete abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$11,500.00	$750.39	$0.00	$12,250.39

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

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

JAN 2 1 2022

Todd E. Gardiner & Ann Marie Intili
2925 Som Center Rd.
Chagrin Falls, OH 44022

Re: Assessment No. 02201904582283
Individual Income Tax – 2017

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

Tax	Interest	Penalty	Total
$49,466.00	$1,555.70	$3,111.40	$54,133.10

The Department assessed Todd E. Gardiner & Ann Marie Intili (the "petitioners") for failing to pay the amount shown due on the refund variance issued by the Department.[1] Upon initial review, the Department determined that the amounts reported on the Schedule D one of Ohio Schedule IT BUS did not qualify as business income, and reduced the amount of business income claimed in tax year 2017 from $4,097,698.00 to $386,440.00. The petitioners assert that their original return is correct as filed and that the business income reported for tax year 2017 is accurate. The petitioners contend the amounts reported on the Schedule D line are capital gains resulting from the partial liquidation of Gardiner Service Company, LLC. The petitioners provided their 2017 federal return and the purchase agreement from the sale generating the capital gain at issue in support of their position. The petitioners did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner.

Ohio's income tax allows a deduction for the taxpayer's first $250,000 of business income (the "business income deduction" or "BID") on Schedule IT BUS. Former R.C. 5747.01(A)(31).[2] Any additional business income is subject to a 3% tax rate. R.C. 5747.02(A)(4). In R.C. 5747.01(B), business income is defined as:

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

[1] The petitioners' 2017 Ohio income tax return as filed requested a $22,079 credit carryforward to tax year 2018.
[2] Subsequently renumbered to R.C. 5747.01(A)(28). *See* Am. Sub. H.B. 197 of the 133rd Ohio General Assembly.

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

JAN 2 1 2022

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

In *Kemppel v. Zaino*, the Ohio Supreme Court reviewed two tests used to classify business income. *Id.* 91 Ohio St.3d 420 (2001). The Court determined that income is classified as business income under the transactional test if "it arises from a transaction or activity that occurs in the regular course of the business in which the taxpayer engages." *Id.* The Court also described the functional test, which classifies income as business income if "use of the property constituted an integral part of the regular course of a trade or business operation." *Id.* at 422-423.

Business income also includes income generated from a "partial or complete liquidation of a business…." R.C. 5747.01 (B).

The petitioners contend the capital gains reported on their Schedule D are business income because they were generated from a partial or complete liquidation.[3] However, the petitioners fail to identify specific documents or provisions of the purchase agreement that support their contention the capital gains come from a partial liquidation. Upon review, nothing in the documents provided indicate the capital gains are related to a partial liquidation. The purchase agreement makes no reference to a liquidation and the transaction appears to be the sale of the ownership interest. In fact, on page two of the petitioner's federal form 8949, the property sold is described as a "partial sale of **interest** in Gardiner Service Company". (Emphasis added.).

Therefore, the documents available to the Commissioner show the capital gain resulted from a partial sale of an ownership interest, not a partial liquidation of a business, and the petitioners fail to provide arguments to support that a partial sale of an ownership interest should be considered a partial liquidation of a business under Ohio law. Thus, the petitioners have not demonstrated the capital gains at issue are business income, subject to the BID and 3% business income tax rate.

Accordingly, the petitioners' contention is not well taken, and the assessment stands as issued.

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

[3] They make no argument that the capital gains satisfy the transactional or functional tests described in *Kemppel*.

JAN 2 1 2022
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THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED, AND THE FILE APPROPRIATELY CLOSED.

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/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 2 1 2022

Caitlin Graham and Michael Bukach
2005 Waltham Rd.
Columbus, OH 43221

Re: Assessment No. 02201828946305
Individual Income Tax – 2017

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

Tax	Interest	Penalty	Total
$14,986.00	$293.97	$587.94	$15,867.91

The Department assessed Caitlin Graham and Michael Bukach ("the petitioners") for failing to pay the amount shown due on the refund variance notice issued by the Department.[1] The petitioners assert their original return is correct as filed and the business income deduction (BID) reported on the return is accurate. Caitlin Graham held an interest in CoverMyMeds, LLC that was sold in tax year 2017. The petitioners contend the income generated from sale of Ms. Graham's interest in CoverMyMeds, LLC is business income because it was a complete liquidation of her interest in the company. To support their contention, the petitioners provided portions of their federal Schedule D, some of the Ohio Department of Taxation's FAQs regarding business income, and a press release on the McKesson Corporation's acquisition of CoverMyMeds, LLC. The petitioners did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner.

For tax year 2017, former R.C. 5747.01(A)(31) allowed the BID for "the portion of the taxpayer's adjusted gross income that is business income reduced by deductions from business income and apportioned or allocated to [Ohio] to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year" on the first $250,000.00 of the taxpayer's business income. Any remaining business income was subject to a 3% tax rate. R.C. 5747.02(A)(4).

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

> [I]ncome, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade or business and includes income, gain, or loss from real property, tangible property, and intangible property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation. "Business income" includes income, including gain or loss, from a

[1] The petitioners' 2017 Ohio income tax return as filed requested a $60,106 refund and a $6,000 credit carryforward to tax year 2018.

partial or complete liquidation of a business, including, but not limited to, gain or loss from the sale or other disposition of goodwill.

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

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

The definition of nonbusiness income necessarily excludes business income, and only "may include" the listed items. The determination of whether income is business or nonbusiness income rests on tests derived from case law.

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

> "Part I: '"Business income" means income arising from transactions, activities, and sources in the regular course of a trade or business,'" and
>
> "Part II: 'includes income from tangible and intangible personal property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation.'" *Kemppel* at 422.

The Court described the transactional test, which "considers the statute as a whole and emphasizes Part I of the definition." *Id.* The Court determined that income is classified as business income under the transactional test if "it arises from a transaction or activity that occurs in the regular course of the business in which the taxpayer engages." *Id.* The Court then described the functional test finding that income is classified as business income if "use of the property constituted an integral part of the regular course of a trade or business operation." *Id.* At 423. Under the functional test, the extraordinary nature or infrequency of the transaction is irrelevant." *Kemppel* at 422-423.

The second sentence of R.C. 5747.01(B) was added after *Kemppel*. It adds that income generated from the "partial or complete liquidation of a business, including, but not limited to, gain or loss from the sale or other disposition of goodwill" is also business income. R.C. 5747.01(B).

The petitioners do not contend that the income from the sale of Ms. Graham's interest in CoverMyMeds, LLC is business income under the transaction or functional test. They instead contend that the income generated from sale of Ms. Graham's interest in CoverMyMeds, LLC is business income because it was a complete liquidation of her interest in the company.

To discern legislative intent, one must consider the … "statutory language, reading all words and phrases in context and in accordance with the rules of grammar and common usage." *Gabbard v. Madison Local School District Board of Education*, 2021-Ohio-2067, ¶13 (2021). One must … "give effect to the words the General Assembly has chosen, and we may neither add to nor delete from the statutory language." *Id.* Unambiguous statutory language must be applied as written. *See id.*

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Ohio law expressly includes gain or loss from the liquidation of a business as business income. R.C. 5747.01(B). However, the statute unambiguously uses the phrase "partial or complete liquidation of a *business*"; nowhere does it indicate liquidation is meant to include liquidation of shares, stock, or an *interest in* a business. *Id.* (Emphasis added). The petitioners have provided no evidence showing the sale of Ms. Graham's interest was part of a liquidation of CoverMyMeds, LLC. In fact, the press release provided by the petitioners indicates CoverMyMeds, LLC was acquired by the McKesson Corporation and did not dissolve or liquidate because of the transaction. Thus, this contention is not well taken.

However, the Tax Commissioner may abate penalties when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). Based on the facts of this case, the petitioners claim that their failure to comply was due to reasonable cause supports abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$14,986.00	$293.97	$0.00	$15,279.97

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

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 31 2022

Douglas C. Holland
202 W. High St.
Lawrenceburg, IN 47025

Re: Assessment No. 02201924759324
Individual Income Tax - 2017

This is the final determination of the Tax Commissioner regarding a petition for reassessment pursuant to R.C. 5747.13 concerning the following corrected individual income tax (PIT) assessment:

Tax	Interest	Penalty	Total
$668.00	$41.43	$41.43	$750.86

The Ohio Department of Taxation assessed the petitioner for failing to report additional income on his 2017 Ohio PIT return. This assessment was calculated using the petitioner's federal adjusted gross income ("FAGI") as reported to Ohio by the Internal Revenue Service under authorization of 26 U.S.C. 6103(d). The petitioner objects to the assessment and requested a hearing, which was conducted via telephone.

I. The Petitioner's Contentions

In tax year 2017, the petitioner won $28,917 in a tournament at the Jack Cincinnati Casino. The petitioner states he is an Indiana resident who works solely in Indiana. The petitioner argues he should not be taxed on this single tournament win because his costs of playing poker exceeds his earnings and he believes he is entitled to reciprocity because of his domicile in Indiana. The petitioner also states that he plays enough poker tournaments to qualify as a professional poker player under the IRS definition.

II. Ohio's Authority to Tax Gaming Income

Division (A) of R.C. 5747.02 levies Ohio's income tax on, among other things, "every individual, trust, and estate earning or receiving winnings on casino gaming…" in Ohio. Specifically, R.C. 5747.20(B)(7) requires a nonresident allocate to Ohio "[a]ll casino gaming winnings paid by any person licensed by the Ohio casino control commission" and included in the computation of adjusted gross income. Additionally, the Supreme Court of Ohio has previously upheld Ohio's ability to tax a nonresident on winnings from the Ohio lottery. *See Couchot v. State Lottery Commission*, 74 Ohio St. 3d 417, 659 N.E.2d 1225 (1996).[1] In so holding, the court found the "benefits, protections, and opportunities afforded

[1] The Commissioner acknowledges that Ohio lottery winnings are not the same as Ohio casino winnings. However, many of the same concepts analyzed by the Supreme Court of Ohio apply to both. In *Couchot*, the Supreme Court of Ohio noted the U.S. Supreme Court has held "[a] state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state…" *Id.* at 422 (internal citations omitted).

by the state in [regard to the those the lottery confers on the nonresident purchaser] are undeniable." *Id.* at 422. In fact, the Court in *Couchot* found it "difficult to imagine a more fundamental exertion of a state's taxing power than where the state taxes income on winnings from its lottery", as the income arose "from participation in… an event exclusively within the power, dominion, and control of Ohio." *Id.*

The petitioner does not explicitly argue Ohio lacks the authority to tax his earnings. However, he mentions in his petition he is a resident of Indiana, does no work in Ohio, and the casino winnings were his only Ohio-sourced income. Nonetheless, casino gambling is subject to Ohio laws and regulations. *See generally* chapter 3722. of the Ohio Revised Code. Nonresidents gambling at Ohio casinos enjoy the protections and benefits of Ohio law while they are engaged in this activity. Additionally, there is a clear connection between Ohio and the petitioner's income because the event that generated the income *occurred in Ohio* in a casino regulated by Ohio. Since the income was generated in Ohio, Ohio has the authority to tax the gambling earnings received by the petitioner, even though he is a nonresident.

III. Professional Gambling Contention

Ohio does not provide a deduction for gambling losses. *See generally* R.C. 5747.01(A). However, a professional gambler, i.e., one who is engaged in the trade or business of gambling, can offset losses and expenses of gambling against income on a federal Schedule C in the computation of FAGI. For gambling to reach the level of a trade or business activity, it must be "pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and * * * not a mere hobby". *Commissioner v. Groetzinger*, 480 U.S. 23, 35, 107 S.Ct. 980, 94 L.Ed.2d 25 (1987).

The petitioner has provided evidence that he plays cards frequently and incurs gambling losses. However, at the hearing and in documentation sent to the Department, the petitioner revealed that playing cards is his hobby and form of entertainment. The petitioner does not play these games as a professional, and he does not mind if his losses outweigh any winnings he might earn (i.e., it's a hobby). The petitioner admits his law practice is his principal business (i.e., his livelihood). The petitioner also confirmed he did not, in fact, offset his winnings with his gambling losses and expenses when computing FAGI for the tax year at issue.[2]

Based on this evidence, the petitioner does not gamble with the intent to earn a living. Furthermore, the petitioner must claim the status as a professional gambler to receive the tax benefits that accompany that status. He cannot just assert that he would be entitled to the benefits *if* he claimed the status as a professional gambler. Thus, the petitioner failed to prove that his gambling reached the level of a trade or business, and that his gambling loss should be excluded from his Ohio adjusted gross income.

IV. Reciprocity Contention

Indiana, the state where the petitioner is domiciled, and Ohio have entered into a reciprocity agreement pursuant to R.C. 5747.05(A)(2). Pursuant to this agreement, Ohio does not tax *compensation* earned in Ohio by Indiana residents, and Indiana does not tax *compensation* earned by Ohio residents in Indiana. *See* R.C. 5747.05(A)(2) (which only allows the Commissioner to enter into reciprocity agreements with other states related to compensation). Compensation "means any form of remuneration paid to an employee for personal services." R.C. 5747.01(D). The petitioner has not shown his earnings were

[2] The starting point for Ohio's individual income tax is FAGI.

received as remuneration for personal services as an employee. In fact, the petitioner stated gambling is a recreational activity for him. Therefore, the reciprocity agreement between Ohio and Indiana does not apply to the petitioner's Ohio casino winnings.

Based on the foregoing, the petitioner's contentions are not well taken. Thus, the assessment stands as issued.

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

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd. • Columbus, OH 43229

FINAL DETERMINATION

Date: JAN 3 1 2022

Troy B. & Jessica N. Kordenbrock
3858 Celtis Ct.
Hamilton, OH 45013

Re: Assessment No: 02201832550830
Individual Income Tax – 2015

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

Tax	Interest	Penalty	Total
$468.43	$45.32	$90.64	$604.39

The Department assessed Troy and Jessica Kordenbrock ("the petitioners") after partially disallowing their business income deduction (BID) because the amounts claimed on Ohio Schedule IT BUS did not match the amounts reported on their federal income tax return. The petitioners object to the assessment and request their 2015 Ohio income tax return be accepted as filed. The petitioners did not request a hearing on the matter; therefore, this matter is decided upon information currently available to the Tax Commissioner.

The petitioners originally reported $301,547 on line 2 of their 2015 Ohio IT BUS (business income from federal Schedule C). However, the Department received information from the IRS indicating the petitioners only reported $49,128 on their 2015 federal Schedule C. The petitioners do not dispute they claimed $49,128 on their federal Schedule C in tax year 2015. Rather, they contend that on their federal return, $301,000 of their §179 depreciation was related to their Schedule C business activity. They then added back 5/6s of the claimed amount and included it as part of their BID calculation. The petitioners claim this amount should be used in the BID calculation as opposed to the federal Schedule C income amount. The petitioners claim this approach is consistent with Ohio tax law.

Ohio's individual income tax is levied on Ohio adjusted gross income ("OAGI"), which is federal adjusted gross income ("FAGI") as adjusted pursuant to R.C. 5747.01(A), less exemptions. One such adjustment in R.C. 5747.01(A) is the BID; it allows a taxpayer to deduct business income "…to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year …" R.C. 5747.01(A)(31).[1] When reviewing deductions, it is important to remember that the Ohio Supreme Court has often held that "taxation is the rule, and exemption is the exception." *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104, (1990). Since an exemption, deduction, or credit "depends on

[1] This section has been amended several times and renumbered since the applicable period.

legislative grace, the statute must clearly express the exemption…and a taxpayer must show his entitlement to it." *Id. (internal citations omitted); Vought Industries v. Tracy*, 72 Ohio St.3d 261, 264 (1995).

In this case, the petitioners' §179 depreciation was "otherwise deducted or excluded in computing federal… adjusted gross income" for taxable year 2015.[2] Therefore, the petitioners may not deduct the §179 depreciation as part of its BID; it was already deducted in computing FAGI. While a portion of the §179 depreciation was added back on their Ohio IT 1040 pursuant to R.C. 5747.01(A)(20), it does not change the fact that the amount was already deducted in computing FAGI. Additionally, the add back is deducted over a period of *subsequent years*- not in the year of the addback. R.C. 5747.01(A)(21)(a).[3] This deduction is expressly related to §179 deprecation. Thus, the petitioners are not entitled to the business income rate on their income from the addback.

This interpretation is consistent with the plain language of the BID, and the language and purposes of Ohio's bonus depreciation addback and deduction statutes. The add back and subsequent deduction of bonus depreciation and expense is done to "smooth" out the fiscal impact to Ohio's general revenue fund from the federally allowed deduction. In contrast, the BID was created to ease the tax burden on businesses operating in Ohio. Therefore, disallowing the inclusion of the §179 depreciation addback in the BID calculation under R.C. 5747.01(A)(31) is consistent with not only the language of the statute, but also the policy goals of both deductions.

Accordingly, the petitioners' contention is not well taken, and the assessment stands as issued.

Current records indicate the taxpayer has not made a payment on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

[2] By its very nature, depreciation is a tax deduction. *See* 26 U.S.C. 179(a) (§179 depreciation "shall be allowed as a deduction for the taxable year in which the section 179 property is placed in service.").

[3] This section has also been updated several times and renumbered since the applicable period.

PC-40000155

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4485 Northland Ridge Blvd. Columbus, Ohio 43229
Phone: (614) 466-6750 Fax: (614) 466-7979

FINAL DETERMINATION

Date: JAN 31 2022

Dale & Pamela Marton
4280 Evans Ave.
Springfield, Ohio 45504

Re: Multiple Assessments
Individual Income Tax – Multiple Periods

This is the final determination of the Tax Commissioner regarding the following individual income tax assessments:

Year	Assessment	Tax	Interest	Penalty	Total
2009	02201919314662	$2,214.00	$722.73	$1,445.46	$4,382.19
2010	02201919314663	$8,286.73	$2,370.90	$4,741.80	$15,399.43

The Department assessed Dale & Pamela Marton ("the petitioners") for tax years 2009 and 2010. The petitioners did not file Ohio Individual Income Tax returns for either tax year.[1] The Department issued the assessments using a married filing jointly filing status. The assessments were based, in part, on information received as part of a criminal investigation regarding Mrs. Marton's embezzlement of funds. The petitioners objected to the assessments but did not request a hearing; therefore, this matter is decided based on information currently available to the Tax Commissioner.

As part of their petition, the petitioners requested that they be assessed as married filing separately.[2] For tax year 2009, based on the information provided neither petitioner owes any Ohio income tax. Accordingly, the 2009 assessment is cancelled and the petitioners' request to reassess separately is moot. For tax year 2010, the Department will not reassess Mr. Marton, as his income and Ohio withholding results in no Ohio tax due.[3] Thus, the 2010 assessment will be adjusted to remove Mr. Marton and reflect Ms. Marton's outstanding liability as a married filing separate taxpayer.

The petitioners submitted proof of Ms. Marton's income. They also claimed a deduction for one-half of the self-employment tax imposed against Ms. Marton's income for 2010. However, the Department is unable to verify that any self-employment tax was ever paid to the Internal Revenue Service, and therefore will not allow the claimed deduction in the computation of Ms. Marton's federal adjusted gross income. Based upon information available, the 2010 assessment is adjusted as follows:

Year	Assessment	Tax	Interest	Penalty	Total
2010	02201919314663	$2,754.00	$788.77	$1,577.54	$5,120.31

[1] The petitioners also did not file federal income tax returns for either year.
[2] Spouses are required to use the same filing status on their Ohio income tax return as used on their federal income tax return. R.C. 5747.08(E). However, since the taxpayers did not file a federal income tax return, this provision does not apply.
[3] Based on the amounts withheld, Mr. Marton is actually due a refund for 2009 and 2010. However, Mr. Marton failed to file a refund claim for either year. Additionally, both the 2009 and 2010 refunds are now out of statute. *See* R.C. 5747.11.

This assessment is now a married filing separately assessment, and thus is only applicable to Ms. Marton.[4]

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

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

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TAX COMMISSIONER

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Tax Commissioner

[4] As noted above, Mr. Marton's income, and thus his liability, is hereby removed from this assessment.

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FINAL DETERMINATION

Date: JAN 21 2022

Montgomery W. & Shannon S. Mills
110 Aster Court SW
Etna, OH 43062

Re: Application for Refund Number: 10531
Individual Income Tax – 2014

This is the final determination of the Tax Commissioner with regard to an application for refund filed pursuant to R.C. 5747.11:

Tax Period	Refund claimed
01/01/2014 – 12/31/2014	$3,715.00

I. BACKGROUND

Montgomery and Shannon Mills (the "claimants") filed a refund application to recover payments in response to a billing based on adjustments to the claimants' individual income tax (PIT) return. Upon initial review, the Department determined the claimants' Ohio PIT return overstated the Small Business Investor Income Deduction ("SBD") available to the claimants. The claimants did not include capital losses from the liquidation of MWM Enterprises, Inc. ("MWM") against the K-1 capital gain the claimants accrued winding up the business. With the information available to the Department, the Department determined the capital losses resulted from the liquidation of MWM. The claimants paid the amount due but disputed the Department's determination and seek a refund of said payments. The claimants requested an administrative review of the refund claim denial in accordance with R.C. 5703.70. A hearing was held in this matter.

II. CLAIMANTS' CONTENTIONS

The claimants contend their original return is correct as filed and the SBD reported on the return is accurate. The claimants held an equity interest in MWM leading up to and during the years at issue. The claimants contend that the gain from the disposition of firm property constituted integral parts of the trade or business operations and should be considered "business income" for the purposes of computing SBD. However, the loss on the disposition of MWM's corporate equity should be considered "nonbusiness income" because it did not represent "corporate business activity"; rather it represented activity between the corporation and its equity owners. They assert that because R.C. 5747.01(B) discusses the liquidation of a business and not an equity interest, the liquidation of an equity interest should not be considered business income. The claimants allege MWM continued its existence after the January 24th, 2014 sale, the dissolution was not simultaneous with the sale of business operations, and the ultimate loss on the stock was not an event that occurred as part of the sale of business operations.

Therefore, the claimants did not report the capital loss resulting from the disposition of MWM in their SBD calculation.

III. AUTHORITY

A. THE OHIO SMALL BUSINESS INVESTOR INCOME DEDUCTION

For tax year 2014, former R.C. 5747.01(A)(31) provided that a taxpayer's SBD income means "the portion of the taxpayer's adjusted gross income that is business income reduced by deductions from business income and apportioned or allocated to [Ohio] to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year." In tax year 2014, the SBD was capped at 75% of the first $250,000 of the taxpayer's Ohio-sourced business income.

B. BUSINESS INCOME - FUNCTIONAL & TRANSACTIONAL TESTS

Ohio's income tax distinguishes between "business income" and "nonbusiness income." In R.C. 5747.01(B), business income is defined as:

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

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

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

In *Kemppel v. Zaino*, 91 Ohio St.3d 420 (2001), the Ohio Supreme Court reviewed two tests used to classify business income:

> "Part I: '"Business income" means income arising from transactions, activities, and sources in the regular course of a trade or business,'" and
>
> "Part II: 'includes income from tangible and intangible personal property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation.'" *Kemppel* at 422.

The Court determined that income is classified as business income under the transactional test if "it arises from a transaction or activity that occurs in the regular course of the business in which the taxpayer engages." *Id.* The Court then described the functional test finding that income is classified as business income if "use of the property constituted an integral part of the regular course of a trade or business operation." *Id.* at 423. Under the functional test, the extraordinary nature or infrequency of the transaction is irrelevant." *Id.* at 422-423. Income is also business income if it is generated from the "partial or complete liquidation of a business…." R.C. 5747.01(B).

IV. Analysis

A. The Department is not applying a Corrigan analysis in this matter

The claimants appear to be under the impression that the Ohio Supreme Court decision *Corrigan v. Testa*[1] was the basis for the Department's determination that the capital losses are business income, as they address *Corrigan* at length in their petition. However, the Department determined the capital losses are business income because they arose from the partial or complete liquidation of MWM. R.C. 5747.01(B). This conclusion is not based on *Corrigan* or any information release tied to *Corrigan*. The Department's position regarding the sale of an entity interest is that generally the resulting gain or loss is *nonbusiness* income. In this case however, the capital losses at issue were tied to the liquidation of MWW. Therefore, whether the capital losses are business income depends on whether the capital losses resulted from MWM's liquidation, not an application of a *Corrigan* analysis.

B. The available evidence shows the capital losses are tied to the liquidation

Income generated from the partial or complete liquidation of a business is business income. *See* R.C. 5747.01(B). A "partial or complete liquidation of a business" requires a complete asset sale followed by the actual cessation of all business operations (a complete liquidation), or the sale of certain assets followed by the actual cessation of the line of business relating to those assets (a partial liquidation). Business income includes both business gains and business losses. *See* R.C. 5747.01(B) and *Gerald Sapadin v. McClain*, BTA No. 2018-1254, 2019 WL 4453430 (Sept. 5, 2019). Thus, if the loss resulted from a complete or partial liquidation of the business, then it is business income and must be netted against the claimants' business gains.

The claimants recognize in their petition that business income (including loss) generated from a partial or complete liquidation is business income. But the claimants argue this sentence "…means the disposition of property that is an integral part used in the course of business income of a business operation is business income even if this results in a partial o[r] complete liquidation of a business." The claimants provide no authority to support this reading. Furthermore, this reading fails to consider R.C. 5747.01(B) as a whole. As previously discussed, income can be classified as business income if "it arises from a transaction or activity that occurs in the regular course of the business in which the taxpayer engages…" or "use of the property constituted an integral part of the regular course of a trade or business operation." R.C. 5747.01 (B). Income that meets these criteria is business income regardless of whether it is involved in a liquidation. There is no indication the liquidation test limits what may be considered business income. In fact, the liquidation test expands upon what may be considered business income.

Based on the claimants' tax return and supporting documentation, the capital losses resulted from the liquidation of MWM Enterprises. The claimants state MWM filed their final S Corp return at the end of 2014. The claimants state they were shareholders in MWM Enterprises and sold substantially all its operating assets to Brakefire, Inc on January 24, 2014. The claimants' Form 8949 describes the property generating the capital losses as "MWM Enterprises, Inc – Dissolution" and the sale is dated 01/24/2014. It is apparent from the documentation submitted by the claimants that the losses reported on Form 8949 were connected to the liquidation of MWM.

[1] *Id.*, 149 Ohio St.3d 18, 2016-Ohio-2805.

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C. <u>THE CLAIMANTS FAILED TO MEET THEIR BURDEN OF PROOF OF SHOWING THE CAPITAL LOSSES WERE NOT BUSINESS INCOME</u>

The Ohio Supreme Court has often held that "taxation is the rule, and exemption is the exception." *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104, (1990). Since an exemption, credit, or as is the case here deduction "depends on legislative grace, the statute must clearly express the exemption…and a taxpayer must show his entitlement to it." *Id.* (internal citations omitted); *Vought Industries v. Tracy*, 72 Ohio St.3d 261, 264 (1995).

The claimants argue the capital losses did not occur because of the sale of business operations. However, the claimants' Form 8949 shows the claimants reported the sale generating the capital loss as occurring on January 24, 2014, and labeled the sale as a dissolution. The claimants fail to address why the sale of capital assets was labeled as a dissolution if the loss related from the later sale of equity in MWM. The claimants do not suggest the form was incorrectly prepared or provide documentation showing the form is incorrect. Nor do the claimants provide documents showing the sale resulting in a loss was not part of the dissolution of MWM. The claimants also do not explain why their Form 8949 ties capital losses to the same date as the sale of business operations if they are unrelated.

The claimants also argue MWM continued its existence despite the sale of the business operations. They claim MWM collected outstanding receivables, paid liabilities and accounts payable. They also allege MWM could have continued as a business entity and set up a new venture. However, the claimants provide no documents to support these claims including either the sales agreement for the sale of business operations or the purchase agreement for the sale that generated the capital losses. Based on the information submitted, MWM Enterprises Inc sold its operating assets followed by a complete dissolution or cessation of business operations. Thus, the gains *and losses* from the sale of assets followed by the dissolution of MWM Enterprises resulted from a complete or partial liquidation of the business rather than the sale of an ownership interest in the business. Accordingly, the capital losses reported from the dissolution of the company are business income per R.C. 5747.01(B).

V. Conclusion

The claimants have not demonstrated that the capital losses did not result from the liquidation of MWM. As a result, the capital losses are business income.

Therefore, the application for refund is denied in full.

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

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Jeffrey A. McClain

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: JAN 21 2022

Bill and Constance Richendollar
2713 Saddle Creek
Avon, OH 44011

Re: Multiple Assessments
Multiple Tax Years

This is the final determination of the Tax Commissioner regarding petitions for reassessment filed pursuant to R.C. 5747.13 concerning the personal income tax amounts:

Assessment No.	Tax Year	Tax	Interest	Penalty	Payment	Total
02201906388764	2015	$2,651.00	$293.34	$586.68	$0.00	$3,531.02
02201832545852	2016	$1,609.00	$104.03	$208.06	$1,572.00	$349.09
02201834562872	2017	$1,536.00	$41.07	$82.14	$0.00	$1,659.21
02201927380309	2018	$659.00	$15.80	$31.60	$0.00	$706.40

I. BACKGROUND:

The Ohio Department of Taxation assessed Bill and Constance Richendollar ("the petitioners") after adjusting their Ohio individual income tax returns for the tax periods in question. Specifically, the Department found both taxpayers were residents of Ohio, and thus disallowed the nonresident credit claimed for these tax years. The petitioners object to the denial of the nonresident credit, contending that Mr. Richendollar was a resident of Georgia during the applicable tax periods. A hearing was conducted via telephone.

II. OHIO DOMICILE UNDER R.C. 5747.24:

A resident of Ohio is always subject to the individual income tax, regardless of where the individual earns or receives income.[1] Division (I) of R.C. 5747.01 defines a "resident" as an individual who is domiciled in this state, subject to R.C. 5747.24. Under R.C. 5747.01(J), a "nonresident" is an individual who is not a resident.

Generally, the burden is on the taxpayer to show that s/he is a nonresident of Ohio. *See generally* R.C. 5747.24.[2] The only way a taxpayer can be presumed to be a nonresident of Ohio is by timely and correctly

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

[2] R.C. 5747.24 was amended for tax years 2018 and forward. *See* Sub. H.B. 292 of the 132nd Ohio General Assembly.

filing the affidavit of non-Ohio domicile.[3] R.C. 5724.24(C)[4] states that an individual who is presumed to be domiciled in Ohio and shows less than 213[5] contact periods with Ohio "can rebut this presumption for any portion of the taxable year only with a preponderance of the evidence to the contrary." *Id.* A contact period occurs if the person is away overnight from their abode located outside Ohio and while away spends at least some portion, however minimal, of each of two consecutive days in Ohio. R.C. 5747.24(A)(1). An individual is presumed to have a contact period for any period the individual fails to prove was not a contact period. R.C. 5747.24(E).

III. COMMON-LAW DOMICILE:

Rebutting the presumption of domicile in Ohio involves proving the substantive elements of domicile under the common law. *Cunningham v. Testa*, 144 Ohio St.3d 40, 2015-Ohio-2744, 40 N.E.3d 1096, ¶19 (2015). "The law ascribes a domicile to every person, and no person can be without one." *Sturgeon v. Korte*, 34 Ohio St. 525, 534 (1878). "A person can have multiple residences but can have only one domicile." *Schill v. Cincinnati Ins. Co.*, 141 Ohio St.3d 382, 2014-Ohio-4527, 24 N.E.3d 1138, ¶25, citing *Grant v. Jones*, 39 Ohio St. 506, 515 (1883). "Domicile is generally defined as a legal relationship between a person and a particular place which contemplates two factors: first, residence, at least for some period of time and, second, the intent to reside in that place permanently or at least indefinitely." *Cunningham,* ¶12 quoting *Shill,* ¶24.

At common law, "the issue of domicile is one of intent determined by the facts of the individual case," including "the acts and declarations of the person" and the totality of "accompanying circumstances." *Davis v. Limbach*, BTA No. 89–C–267, 1992 WL 275694, *4 (Sept. 25, 1992), citing *State ex rel. Kaplan v. Kuhn*, 8 Ohio N.P. 197, 202, 11 Ohio Dec. 321 (1901). Evidence determining domicile consists of formal acts and declarations, such as where an individual files federal income tax returns, votes, registers their vehicles, or the location of their spouse and children. *Cleveland v. Surella*, 61 Ohio App.3d 302, 305-306, 572 N.E.2d 763 (8th Dist. 1989).

"Abandonment of one's domicile is effected only when a person chooses a new domicile, establishes actual residence in the place chosen and shows a clear intent to establish a new principal and permanent residence." *E. Cleveland v. Landingham*, 97 Ohio App.3d 385, 391, 646 N.E.2d 897 (1994). There must be an absence of intent to live anywhere else. *See Schill, supra* at ¶26.

IV. ANALYSIS:

One of the petitioners, Mr. Richendollar, contends he was a resident of Georgia in the applicable tax periods. There is no dispute that Ms. Richendollar was domiciled in Ohio for the applicable tax periods. Additionally, Mr. Richendollar did not file the affidavit of non-Ohio domicile or the Ohio Nonresident Statement for any of the tax years at issue. Thus, he cannot claim the irrebuttable presumption of nonresidency. Finally, the petitioners have provided evidence showing Mr. Richendollar had less than

[3] The petitioners do not content, nor does the evidence suggest, that either petitioner filed the affidavit of non-Ohio domicile/ Ohio Nonresident Statement for any of the tax years in question. *See* R.C. 5747.24(B) and former R.C. 5747.24(B). Thus, Mr. Richendollar is presumed to be an Ohio resident for each of the tax years in question.

[4] R.C. 5747.24(C) was amended in 2018 to include the requirement that the taxpayer have "an abode in this state at any time during that taxable year…." Since the petitioners had an abode in Ohio during all of the tax years in question, this change is inconsequential to the analysis of these assessments.

[5] The Commissioner does not dispute that Mr. Richendollar had less than 213 contact periods with Ohio for each of the tax years in question.

213 contact periods each year for all the applicable tax years. Thus, he must show by a preponderance of the evidence that he was not a resident of Ohio.

The petitioners moved to Georgia in the summer of 2010, although they did not sell their Ohio residence. Mr. Richendollar worked full-time for DeKalb Pathology, PC, in Decatur, Georgia from July 1, 2010, to January 1, 2019. He also obtained a Georgia driver's license in 2010. The petitioners rented homes in Georgia from the summer of 2010 through August of 2013. However, Ms. Richendollar and the couples' son moved to back to Ohio in 2013. Mr. Richendollar continued to live and work in Georgia until he rejoined his family in 2019.

The petitioners have shown that Mr. Richendollar lived and worked in Georgia during the applicable tax years. He consistently identified himself as a Georgia resident in his federal, Ohio, and Georgia tax returns and used his Georgia addresses on his returns during the applicable years. Nevertheless, physical presence is not, in and of itself, a determinative factor for the purpose of determining domicile. Evidence available to the commissioner shows Mr. Richendollar was issued an Ohio driver's license on June 20, 2014. He then renewed his Ohio driver's license on September 20, 2018. Several vehicles were registered in Mr. Richendollar's name beginning June 20, 2014, in Ohio. He also registered to vote in Ohio on July 30, 2016 and admits to voting in Ohio during the 2016 election. Additionally, Mr. Richendollar's wife and child resided in their Ohio residence of which he was a co-owner. The Richendollars also claimed the owner occupancy credit on their Ohio residence in tax years 2017 and 2018 and appear to have claimed the credit in prior tax years as well.[6]

Mr. Richendollar argues that he considered his move to Georgia a permanent one in 2010. He believes the Department should view his presence for eight and half years in Georgia as more indicative of his domicile then the factors discussed above. Nonetheless, this is not a situation where Mr. Richendollar moved to Georgia and forgot to resolve prior residency declarations. Mr. Richendollar re-established connections in Ohio throughout the applicable tax years through his actions, all the while maintaining ownership of the Ohio residence. This reestablishment of connections culminated in Mr. Richendollar ultimately moving back to Ohio.

Moreover, Mr. Richendollar did not live a separate life in Georgia from his family. Indeed, Mr. Richendollar maintained his connections to his family living in Ohio despite living and working in Georgia. Mr. Richendollar states he obtained an Ohio driver's license to stay on the same auto insurance as his wife. He and his wife appear to have jointly filed their federal taxes and state returns for Ohio and Georgia. Furthermore, an Ohio business is listed on several of the couples' tax returns. He also appears to have visited Ohio many times over the years given the records provided.

VI. Resident Credit

R.C. 5747.05(B) provides a credit for Ohio residents for income taxed by or paid to other states; the credit is not available for income taxed by a foreign jurisdiction.[7] Ohio residents are entitled to a resident

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[6] Lorain County Auditor' Office. Real Estate Search for Bill Richendollar, https://www.loraincountyauditor.com/gis/, Printable Property Report (Accessed on January 18, 2022).

[7] The resident credit under R.C. 5747.05(B) is granted in order to comport with the dormant Commerce Clause and avoid an individual's income being subjected to taxation by multiple states, which is often referred to as "double taxation." The U.S. Supreme Court has repeatedly held that a State may not "impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation.'" *Comptroller of Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1790, 191 L.Ed.2d 813 (2015), citing *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959).

credit of a percentage of income not subject to Ohio tax or taxes paid to other states, whichever is less. R.C. 5747.05(B). Records indicate that Mr. Richendollar reported taxable income during all the applicable tax years to the state of Georgia. Therefore, the petitioners are entitled to a resident credit for taxes paid to the state of Georgia.

VII. CONCLUSION:

The totality of the evidence available to the Tax Commissioner show the petitioner's actions during the applicable tax periods are consistent with an intent to regain Ohio domicile. While the petitioner may have lived and worked in Georgia, he took affirmative steps to regain Ohio domicile by obtaining an Ohio driver's license in 2014, registering vehicles in Ohio during the applicable tax years, registering to vote in Ohio and voting in Ohio during 2016, and possessing Ohio real estate during the applicable tax years.

Therefore, the claimant failed to rebut the presumption that he was domiciled in Ohio for the entirety of the applicable tax years with a preponderance of the evidence he was a resident of Georgia as required by R.C. 5747.24(D). However, the petitioners are entitled to a resident credit for taxes paid to Georgia, which effectively remove any tax due for the tax years at issue.

Accordingly, the claimants' contention is not well taken, but the assessments are nonetheless canceled after accounting for the petitioners' resident credit.

Current records indicate the petitioners made a payment of $1,572.00 on assessment no. 02201832545852. This payment will be refunded to the petitioners with applicable statutory interest. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Additionally, based on amended returns filed by the taxpayers, they are entitled to refunds of $156.00 for tax year 2015, $72.00 for tax year 2016, $18.00 for tax year 2017 and $8.00 for tax year 2018. These amounts will be refunded to the petitioners plus applicable statutory interest.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

JAN 21 2022

John & Rita Saneholtz
214 East Washington Street
Napoleon, Ohio 43545

Re: Assessment No: 02201902477119
Individual Income Tax – 2016

This is the final determination of the Tax Commissioner with regard to an individual income tax assessment pursuant to R.C. 5747.13:

Tax	Interest	Penalties	Total
$258.00	$18.44	$36.88	$313.32

The Department assessed John and Rita Saneholtz ("the petitioners") after adjusting their Ohio individual income tax return for tax year 2016. Specifically, the Department adjusted the petitioners' Ohio IT BUS to include losses reported on their federal Schedule E that were not reported on their Ohio return. The petitioners objected to the assessment, but did not request a hearing; therefore, this matter is now decided on the information available to the Tax Commissioner.

For Ohio income tax purposes, the starting tax base is Ohio adjusted gross income ("OAGI") which is federal adjusted gross income ("FAGI") as adjusted pursuant to R.C. 5747.01(A). Under R.C. 5747.01(A)(31)(a) (the business income deduction or "BID") for the period in question, the petitioners are allowed to ". . . deduct from the portion of an individual's adjusted gross income that is business income, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year . . ." The BID was capped at $250,000 for jointly filed IT 1040s. Former R.C. 5747.01(A)(31)(a). "Business income" includes all income "including gain or loss"; thus, the taxpayer must incorporate business gains *and* business losses when calculating the total amount of business income eligible for the BID.

In this case, the petitioners correctly reported the FAGI on their Ohio return. However, in the calculation of total business income on their Ohio IT BUS, the petitioners did not incorporate the losses reported on their federal Schedule E. The petitioners contend their federal Schedule E losses were incorporated in their FAGI and therefore do not need to be reported on their Ohio IT BUS. This argument is not well taken. OAGI and the BID are separate calculations and governed by separate Ohio statutes. The Schedule E losses are factored into OAGI pursuant to R.C. 5747.01(A), as the losses are used to calculate FAGI. The Schedule E losses must also be factored into the calculation of the petitioners' BID pursuant to R.C. 5747.01(B) because the definition of business income expressly includes gains or losses.

The petitioners do not dispute that the Schedule E losses are business income. Failure to incorporate the Schedule E losses when calculating the BID is incorrect based on Ohio's definition of business income and results in the petitioners' BID being overstated. Therefore, the petitioners must report the Schedule

0000000102 JAN 2 1 2022

E losses as part of the calculations of FAGI (and thus OAGI) *and* the Ohio BID on their Ohio return in order to properly compute their Ohio tax liability.

Accordingly, the assessment is affirmed as issued.

Current records indicate that a payment of $313.32 has been applied towards this assessment, leaving no additional balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
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FINAL DETERMINATION

Date: JAN 21 2022

Charles J. Simpson
157 Lammes Lane
New Carlisle, Ohio 45344

Re: Assessment: 02201923230688
Individual Income Tax – 2018

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

Tax	Interest	Penalties	Total
$1,627.00	$27.19	$54.38	$1,708.57

The Department assessed Charles J. Simpson ("the petitioner") after disallowing the claimed Lump Sum Retirement Credit claimed on his 2018 Ohio individual income tax return (form "IT 1040"). The petitioner objected to the assessment and submitted additional documentation. The petitioner did not request a hearing; therefore, this matter is decided upon information currently available to the Tax Commissioner.

Division (A)(1) of R.C. 5747.055 defines "retirement income" as "retirement benefits, annuities, or distributions that are made from or pursuant to a pension, retirement, or profit-sharing plan and that . . . are **received by the individual on account of retirement** and are included in the individual's adjusted gross income. *Id.* (emphasis added).

Since an exemption, deduction, or as is the case here, a credit "depends on legislative grace, the statute must clearly express the exemption . . . and a taxpayer must show his entitlement to it." *Id.* (internal citations omitted); *Vought Industries v. Tracy*, 72 Ohio St.3d 261, 264 (1995). To discern legislative intent, one must consider the ". . . statutory language, reading all words and phrases in context and in accordance with the rules of grammar and common usage." *Gabbard v. Madison Local School District Board of Education*, 2021-Ohio-2067, ¶13 (2021). One must ". . . give effect to the words the General Assembly has chosen, and we may neither add to nor delete from the statutory language." *Id.* Unambiguous statutory language must be applied as written. *See id.*

The income at issue was not received by the petitioner on account of his own retirement. Instead, the petitioner is the beneficiary of an estate, and the estate received a total distribution of income after the passing of the petitioner's brother. The estate then distributed a portion of this income to its beneficiary (i.e., the petitioner). Because the income received by the petitioner was not on account of *his* retirement, it is not "retirement income" as defined by R.C. 5747.055(A). Under the unambiguous language of R.C. 5747.055, the petitioner has not shown he is entitled to the credit. Therefore, the petitioner may not claim the Lump Sum Retirement Credit for this income on his Ohio IT 1040.

Accordingly, the assessment is affirmed as issued.

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

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 3 1 2022

Robert E. & Sonya R. Wray
5095 Long Meadow Dr.
Franklin, OH 45005

Re: Assessment No. 02201902479207
Individual Income Tax – 2016

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

Tax	Interest	Penalty	Total
$2,320.00	$165.76	$331.52	$2,817.28

The Department assessed Robert and Sonya Wray ("the petitioners") for failing to pay the amount owed to the Department after a refund variance. The petitioners objected to the assessment and provided an amended Ohio 2016 IT 1040, the first page of the petitioners' 2016 federal 1040, their 2016 federal Schedule E, a W-2, and a 2016 K-1 in support of their objection. The petitioners did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Commissioner.

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

In the present case, the petitioners claimed a BID of $174,293.00 on their original 2016 IT 1040. However, the Department received information from the IRS indicating the Schedule E income reported on the Ohio Schedule IT BUS did not match the Schedule E income reported on the federal return and adjusted the IT BUS accordingly. The petitioners filed an amended return to claim a BID of $138,936.00. On the amended return, the petitioners accepted the Department's adjustment to their Ohio Schedule E but claimed additional business income based on wages from a pass-through entity. The petitioners have provided sufficient documentation to verify the BID claimed on their amended IT 1040. Therefore, the taxpayer is entitled to the BID reported on their amended return, which is accepted as filed.

Accordingly, the petitioners' contention is well taken, and the assessment is adjusted accordingly.

Tax	Interest	Penalty	Total
$76.00	$4.80	$0.00	$80.80

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Current records indicate a payment of $76.00 was made with the petitioners' amended IT 1040. However, due to payment processing and posting time lags, additional payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

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FINAL DETERMINATION

Date: JAN 21 2022

Mark V. & Elizabeth B. Yanko
2323 Hearth Hill Lane
Wadsworth, OH 44281

Re: Assessment No. 02201900863571
Individual Income Tax – 2017

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

Tax	Interest	Penalty	Total
$37,555.00	$996.98	$1,993.96	$40,545.94

The Department assessed Mark V. and Elizabeth B. Yanko ("the petitioners") for failure to timely pay their reported tax liability. The petitioners objected to the assessment and a hearing on the matter was conducted via telephone.

The petitioners did not advance any arguments or produce any evidence contesting the assessed amount in the petition or at the hearing. Rather, they contend that they filed an amended return with the IRS to correct errors on their previously filed 2017 federal return. The petitioners did not specify what errors were made or how the errors might affect their Ohio individual income tax return. The petitioners argue that they are still waiting for the amended return to be accepted by the IRS. The Department received information from the IRS that the taxpayers filed an amended federal return in May 2019, but no additional action has been taken. Nonetheless, the petitioners have not contended that the assessment, which is based on the only 2017 Ohio income tax return filed to date, was reached in error. Additionally, the petitioners have yet to file any amended Ohio individual income tax returns for tax year 2017.

Accordingly, the assessment stands as issued.

Current records indicate a payment of $34,810.00 has been applied to this assessment. However, due to payment processing and posting time lags, additional payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

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

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FINAL DETERMINATION

Date: JAN 3 1 2022

Robbins Geller Rudman & Dowd LLP
655 W. Broadway Ste. 1900
San Diego, CA 92101-8498

Re: Seven Assessments
Pass-Through Entity – Multiple Periods

This is the final determination of the Tax Commissioner with regard to petitions for reassessment filed pursuant to R.C. 5747.13 concerning the following pass-through entity (PTE) tax assessments:

Assessment No:	Tax Year	Tax	Interest	Penalty	Total
100001010826	2010	$93,199.00	$21,946.00	$43,892.00	$159,037.00
100001010827	2011	$46,553.00	$9,239.00	$18,478.00	$74,270.00
100001010845	2012	$127,817.00	$21,561.00	$43,122.00	$192,500.00
100001010846	2013	$101,012.00	$14,009.00	$28,018.00	$143,039.00
100001010849	2014	$82,076.00	$8,920.00	$17,840.00	$108,836.00
100001010861	2015	$215,201.00	$16,868.00	$33,736.00	$265,805.00
100001010865	2016	$184,054.00	$8,371.00	$16,742.00	$209,167.00

I. BACKGROUND

Robbins Geller Rudman & Dowd LLP (hereinafter "the petitioner" or "the firm" or "Robbins") is a law firm that represents investors and individuals in securities cases alleging corporate malfeasance. The petitioner is headquartered in San Diego, California. The Department assessed the petitioner after adjusting its IT 4708 Annual Composite Income Tax Return for Investors in Pass-Through Entities for the tax periods at issue. The Department identified that the petitioner had nexus with Ohio and apportioned the petitioner's receipts to Ohio based on the legal services it provided to its Ohio clients in accordance with R.C. 5733.05(B)(2)(c)(ii). In response to the assessments, the petitioner filed a timely petition objecting to the assessments and requesting a hearing. The matter is now decided based on the evidence currently available to the Tax Commissioner, including information provided at the hearing.

II. THE PETITIONER'S CONTENTIONS

The petitioner raises four objections to the assessments. First, the petitioner contends that it does not have nexus with Ohio. However, if Ohio holds that the petitioner had nexus with Ohio, the petitioner claims its activity in Ohio would only be *de minimis.* Specifically, the petitioner believes Public Law 86-272 ("P.L. 86-272") protects and precludes Ohio from levying an income tax against the firm when its activity in Ohio was only *de minimis* activity. Second, the petitioner asserts the Department's situsing method is unreasonable and arbitrary and suggests two alternative methods of apportionment: a "zero-apportionment" method or a "cost of performance" method.[1] Third, the petitioner argues that84 the assessments violate its rights under the Commerce Clause, Equal Protection Clause, and the Due Process Clause of the United States Constitution. Finally, the petitioner requests an abatement of the penalty assessed.

III. AUTHORITY & ANALYSIS

A. OHIO'S PASS-THROUGH ENTITY TAX

To "complement and to reinforce" Ohio's individual income tax, Ohio levies a Pass-Through Entity Withholding Tax on "every qualifying pass-through entity having at least one qualifying investor who is an individual…." R.C. 5747.40 and 5747.41. To determine the amount of tax that must be withheld, qualifying pass-through entities, like the petitioner, are required to calculate the "adjusted qualifying amount," for all its qualifying investors (e.g., nonresident, individual investors in the PTE). Compliance with the PTE Withholding Tax can be accomplished by filing either the IT 1140 or IT 4708.[2] *See* R.C. 5747.42 and 5747.08(D).

B. NEXUS

The petitioner first contends it does not have nexus with Ohio. Additionally, the petitioner contends P.L. 86-272 prevents Ohio from levying an income tax due to its *de minimus* activity in Ohio.

As noted above, Ohio's PTE taxes are levied based on adjusted qualifying amount, which is the "sum of each qualifying investor's distributive share of the income, gain, expense, or loss of a qualifying pass-through entity" subject to Ohio apportionment. *See* R.C. 5733.40(A)(1)(a), 5733.41, and 5747.41. Ohio apportionment is measured based on the location of the PTE's real/tangible property (the "property" factor), where its employees perform services (the "payroll" factor), and where the PTE makes sales (the "sales" factor). *See* R.C. 5733.05(B)(2) via R.C. 5733.40(B)(1) and 5747.21(B). Additionally, if a PTE is an investor in another PTE with property, payroll, or sales in Ohio, then the PTE must report those amounts and income from the other PTE. *See* R.C. 5733.057 and 5747.231. These factors (property, payroll, and sales) measure the extent to which a business operates in Ohio. In other words, they measure to what extent the business's activities are connected to Ohio.

Despite the petitioner's first objection, a review of the relevant facts and the documentation provided during the administrative appeal demonstrates that the petitioner had connections, i.e., nexus, with Ohio for the relevant tax periods. Specifically, the record shows the firm's attorneys were physically

[1] In support of the cost-performance method, the petitioner submitted a calculation of hours worked in Ohio compared to the total number of hours worked everywhere to show that the sales apportionment factor should be .046%.

[2] However, if the IT 1140 is filed, the underlying investors are still required to file returns with Ohio, whereas, if the IT 4708 is filed, that fulfills the PTE's underlying investors' Ohio filing requirements. Based on this, the IT 4708 was used for the purposes of this assessment and the underlying audit.

present in Ohio during the relevant tax periods. Thus, the petitioner had payroll in Ohio during these tax years. Additionally, while the firm's attorneys were physically present in Ohio, the attorneys provided legal services to class action members in Ohio. The attorneys also represented various Ohio government agencies who benefitted from its legal services in Ohio. Thus, the petitioner also had sales in Ohio during these tax years, as the benefit of the petitioner's services was ultimately received by individuals and agencies residing in Ohio.[3]

Regarding the petitioner's P.L. 86-272 arguments, P.L. 86-272 does not by its terms, say that those taxpayers protected under its authority *do not have nexus* with a state; instead, it simply exempts certain income of a taxpayer from state taxation, even though the taxpayer may have nexus with that state. *See generally,* 15. U.S.C. 381-384. However, P.L. 86-272 only protects activities related to sale of tangible personal property. *Id.* The petitioner has not contended that providing legal services is the sale of tangible personal property; by definition, providing "services" is not the sale of tangible property. Thus, the activities of the firm's attorneys do not fit within the protected activities of P.L. 86-272, and therefore, the income is not exempt from Ohio tax under P.L. 86-272. Accordingly, the firm through its attorneys have conducted activities in Ohio, and such presence and activity establish Ohio nexus.

C. SALES APPORTIONMENT FACTOR

In its second contention, the petitioner objects to the Department's calculation of the sales factor of its apportionment ratio. Specifically, the petitioner suggests two alternative apportionment methodologies regarding situsing. The first alternative apportionment methodology is zero-apportionment. The second method is cost-performance method. As noted above, Ohio generally uses three-factor apportionment to calculate and impose its pass-through entity tax based on the extent of a taxpayer's business activity in Ohio. Former R.C. 5733.05(B) via 5747.21(B).

That said, Ohio law does allow a taxpayer to request, or the commissioner to require, alternative apportionment. Specifically, R.C. 5747.21(C) provides, in relevant part, that:

> If the allocation and apportionment provisions… do not fairly represent the extent of business activity in this state of a taxpayer or pass-through entity, the taxpayer or pass-through entity may request, which request must be in writing *accompanying the return or amended return,* or the tax commissioner may require, in respect of all or any part of the business activity, if reasonable, any one or more of the following:
>
> *   *   *
>
> (4) The employment of any other method to effectuate an equitable allocation and apportionment of such business in this state. An alternate method will be effective only with approval of the tax commissioner.

[3] The Department does not dispute that the petitioner did not have any property in Ohio for the tax periods at issue.

Id. (Emphasis added). In the present case, although the petitioner requested two alternative apportionment methods, it failed to file a return along with said request. In actuality, the petitioner failed to file an original or amended return for all the relevant tax periods. Thus, pursuant to R.C. 5747.21(C), the petitioner is barred from requesting any form of alternative apportionment. Even if the petitioner did file a timely return with the request for alternative apportionment, the petitioner has failed to demonstrate that either of its proposed methods are reasonable or more fairly represent the extent of its Ohio business activity.[4]

Under Ohio's three-factor apportionment method, the entity's aggregate business income is multiplied by this apportionment factor to determine its taxable income. One of the three factors in the apportionment formula, the "sales factor," is calculated as a ratio of the entity's total sales in Ohio versus the entity's total sales everywhere during the tax year. Former R.C. 5733.05(B)(2)(c). Division (B)(2)(c)(ii) of R.C. 5733.05 sets forth how to situs certain types of receipts that are not specifically excluded from the sales factor. *Id.* Specifically, the statute requires receipts from services to be sitused to Ohio "in proportion to the purchaser's benefit, with respect to the sale, in this state to the purchaser's benefit, with respect to the sale everywhere." *Id.*

The petitioner contends the definition of "the purchaser" under R.C. 5733.05(B)(2)(c)(ii) is narrowly construed and should only include the class representative and not include the remaining class members as purchasers. The petitioner further asserts that the class representative is a nonresident of Ohio; thus, the class representative did not receive the firm's legal services in Ohio. Because of this assumed fact, the petitioner believes the income should not be apportioned to Ohio. However, based on the documentation provided during the administrative appeal, the record demonstrates that the attorneys of the firm specifically came to Ohio during the relevant tax periods to advise and represent clients in federal and state courts *in Ohio*. Since the Ohio class members are also a party to the class action lawsuit and their interests are also being represented by this firm, they would also be considered purchasers for purposes of R.C. 5733.05(B)(2)(c)(ii).[5] Therefore, the petitioner's income should be apportioned to Ohio.

Additionally, the attorneys also represented and advised various Ohio government agencies, during the relevant tax periods, including, but not limited to Ohio Bureau of Workers' Compensation, Ohio Police and Fire Pension Fund, Ohio Public Employees' System, and State Teachers Retirement System of Ohio. Because the principal place of business for all these government agencies are in Ohio, it is appropriate to situs the receipts to Ohio. *Id.* In light and review of the facts, the attorneys for the firm handled all the legal matters for the class members, stakeholders, and Ohio government agencies to represent their legal interests *in Ohio*. Accordingly, it is reasonable, consistent, and uniform to apportion the income for the petitioner's legal services in Ohio to Ohio and not where the income-producing activity was performed.

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[4] The petitioner bears the burden to show its method "more fairly represents the extent of its business activities in Ohio." *See R.H. Macy & Co., Inc. v. Lindley*, 25 Ohio St.3d 218, 495 N.E.2d 948 (1986).

[5] It is also worth noting that attorneys' fees in a class action lawsuit are generally paid either on contingency from the recovery or are ordered to be paid by the adverse party. The named class representative does not pay the costs of litigation, or "purchase" the representation. This furthers the idea that the class itself, and not the named class representative, is actually the purchaser of the legal representation.

The petitioner further contends that the Department's situsing method is unreasonable and erroneous.[6] It must be noted that the Department requested documentation multiple times during the audit and appeal periods to support the petitioner's contentions regarding its apportionments. However, the petitioner failed to provide the requested documentation regarding its Ohio and "everywhere" sales receipts. Since the petitioner failed to provide the requested documentation, the Department used the best information and evidence available to estimate the petitioner's sales receipts to Ohio; the Department used the petitioner's business records – Federal Form 1065 and 1099-MISC – as they existed at the that time or within a reasonable time thereafter the tax years at issue. *See generally* R.C.5703.36 and 5747.13(A).

Accordingly, the Department's method for apportioning the petitioner's sales receipts to Ohio was reasonable given the facts of this case, the services provided by the firm, and the information provided. Therefore, the tax and interest amounts assessed are accurate.

D. Constitutional Claims

The petitioner also raised multiple constitutional objections in its petition for reassessment. However, it is well-established that the Tax Commissioner lacks jurisdiction to determine the constitutionality of a statute. *Cleveland Gear Co. v. Limbach,* 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988). Nevertheless, the legislative enactments of the Ohio General Assembly are entitled to a strong presumption of constitutionality. *N. Ohio Patrolmen's Benevolent Assn. v. Parma,* 61 Ohio St.2d 375, 377, 402 N.E.2d 519 (1980). The Ohio Supreme Court further adheres to the presumption the Tax Commissioner's application of state tax law is constitutional. See *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.,* 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, *Swetland v. Kinney,* 69 Ohio St.2d 567 (1982). As such, the Tax Commissioner cannot decide the petitioner's constitutional challenges.

IV. Penalty Abatement

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

V. Conclusion

For the reasons discussed above, the assessments are adjusted as follows:

Assessment No:	Tax Year	Tax	Interest	Penalty	Total
100001010826	2010	$93,199.00	$21,946.00	$21,946.00	$137,091.00
100001010827	2011	$46,553.00	$9,239.00	$9,239.00	$65,031.00
100001010845	2012	$127,817.00	$21,561.00	$21,561.00	$170,939.00

[6] The Department used Ohio population versus United States population to estimate the percent of the firm's services that were provided to Ohio clients versus all clients.

100001010846	2013	$101,012.00	$14,009.00	$14,009.00	$129,030.00
100001010849	2014	$82,076.00	$8,920.00	$8,920.00	$99,916.00
100001010861	2015	$215,201.00	$16,868.00	$16,868.00	$248,937.00
100001010865	2016	$184,054.00	$8,371.00	$8,371.00	$200,796.00

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation
Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date:

JAN 31 2022

Albion Industries, Inc.
20246 Progress Dr.
Strongsville, OH 44136

RE: Refund Claim No.: 20181441292
Sales Tax
Refund Period: 09/01/14 – 08/31/18

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $81,095.06 of sales tax filed pursuant to R.C. 5739.07 on September 21, 2018. The Department initially denied the claim. The claimant requests reconsideration. A hearing was requested but not needed.

The claimant contends that it erroneously paid sales tax on multiple purchases during the above-listed period. It states that these purchases were professional services not subject to tax under R.C. 5739.01(JJ)(3). It provided supplemental information after denial. The information in the file supports the claimant's request.

Accordingly, the request for refund is allowed in the amount of $81,095.06 plus applicable interest.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd., • Columbus, OH 43215

FINAL DETERMINATION

Date: JAN 3 1 2022

B & N Family Sunoco Inc.
36420 Biltmore Pl., Ste. 4
Willoughby, OH 44094-8232

Re: Assessment No. 100001785842
Sales Tax
Account No. 43-900271
Reporting Period: 01/01/2013 – 06/30/2019

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

Tax	Pre-Assessment Interest	Penalty	Total
$141,624.29	$29,354.48	$70,811.87	$241,790.64

This assessment is the result of an audit of the petitioner's sales for the reporting period shown above. The petitioner operates an auto repair shop in Willoughby, Ohio. A hearing was not requested.

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

The petitioner provided the auditor with sales journals and copies of its form 1099k to review for the audit period. Audit Remarks, p. 3. The auditor compared these figures to the information that was filed on the petitioner's monthly sales tax filings. The audit was conducted only using the provided monthly sales journals which are considered secondary sales records and do not include transactional information. The Department reviewed the sales journals and removed the reported exempt sales from the figures used in the audit calculation. Audit Remarks, p. 8. These exempt sales were not reported as transactional detail, but rather the records were a monthly summary of all exempt sales. The audit tax liability was generated by using the tax collected on the monthly sales journal versus the tax remitted on the monthly tax filing. *Id.*

The petitioner contends that it now has exemption certificates that were not available at the time of the audit. The petitioner submitted six blanket exemption certificates to the Department with its petition for reassessment. The Department reviewed the exemption certificates and found that only four were properly completed for the petitioner. Of the two that were improperly completed, one did not list the petitioner as the vendor for the transaction so it cannot be accepted as being for the petitioner. The other did not have a reason for exemption listed. An exemption certificate must notify the Tax Commissioner as to what exemption is being claimed by the petitioner's customer, and blanks on the form do not give that notice. *Barry Equipment Co v Limbach*, BTA No. 84-C-272, 1987 WL 57770 (Sept. 16, 1987).

Further, the Department already excluded all of the nontaxable sales that were listed on the sales journals provided by the petitioner. The petitioner did not provide transactional details, it only provided the monthly and yearly sales journal for the audit period. This means that even though the petitioner submitted four valid blanket exemption certificates, the Department cannot reduce the assessment due to the lack of transactional details and primary sales records. The Department is unable to verify that the valid exemption certificates match any transactions that the petitioner is appealing and that these transactions have not already been removed from the audit with the reported exempt sales from the sales journals. Therefore, the petitioner has failed to meet its burden and the objection is denied.

Accordingly, the assessment is affirmed as issued.

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

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd., • Columbus, OH 43215

FINAL DETERMINATION

Date: JAN 3 1 2022

Butler Animal Health Supply LLC
400 Metro Place North, Ste. 100
Dublin, OH 43017

RE: Refund Claim No.: 20202022028
Refund Amount Requested: $44,751.59
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $44,751.59 of sales tax filed pursuant to R.C. 5739.07.

The claimant requested a refund of tax paid on a maintenance contract for software used outside of Ohio and non-taxable services. The claim was initially denied. The claimant requested reconsideration of the matter and submitted additional documentation. A review of the additional information resulted in a partial refund of $37,325.25, plus applicable interest. The claimant then withdrew its appeal for the remaining portion of the denied refund claim and waived its hearing request in an email dated January 20, 2022.

Accordingly, the remainder of the refund claim remains denied.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd., • Columbus, OH 43215

FINAL DETERMINATION

Date: JAN 3 1 2022

D And D Classic Cars LLP
62424 Institute Rd.
Lore City, OH 43755-9752

RE: Refund Claim No: 20212887753
Refund Period: 10/01/2019 – 10/31/2019
Refund Amount Requested: $3,238.35
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $3,238.35, in sales tax filed pursuant to R.C. 5739.07. The Department initially denied the claim. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid erroneously to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135 at 143, 311 N.E.2d 1 (1974). The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due, unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. In order for a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid.

The claimant contends that it erroneously included out of state sales in its taxable gross sales for the above-listed period. An agent of the Department of Taxation reviewed the claim and could not reconcile the amounts listed on the claimant's invoice with the returns that were filed. After the initial denial of the refund claim, the agent asked the claimant to provide additional information to support the return as filed.

In response to the letter of denial, the claimant provided the original documentation along with a letter stating that the September return had been filed incorrectly. Based upon the submitted information, it cannot be determined whether the invoice at issue was reported on the return at issue. The claimant has failed to demonstrate that a refund is due.

Accordingly, the request for refund is denied.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd., • Columbus, OH 43215

FINAL DETERMINATION

Date: JAN 3 1 2022

D And D Classic Cars LLP
62424 Institute Rd.
Lore City, OH 43755-9752

RE: Refund Claim No: 20212891154
Refund Period: 7/01/2020 – 7/31/2020
Refund Amount Requested: $3,180.17
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $3,180.17, in sales tax filed pursuant to R.C. 5739.07. The Department initially denied the claim. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid erroneously to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135 at 143, 311 N.E.2d 1 (1974). The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due, unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. In order for a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid.

The claimant contends that it erroneously included out of state sales in its taxable gross sales for the above-listed period. An agent of the Department of Taxation reviewed the claim and could not reconcile the amounts listed on the claimant's invoices with the returns that were filed. After the initial denial of the refund claim, the agent asked the claimant to provide additional information to support the return as filed.

In response to the letter of denial, the claimant provided the original documentation along with clerk of court receipts, cancelled checks, and bank statements. There was no explanation to support the claim that the invoices were part of the return for the period. Based upon the submitted information, it cannot be determined whether the invoices at issue was reported on the return at issue. The claimant has failed to demonstrate that a refund is due.

Accordingly, the request for refund is denied.

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/s/ Jeffrey A. McClain

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Tax Commissioner

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FINAL DETERMINATION

Date: JAN 3 1 2022

D And D Classic Cars LLP
62424 Institute Rd.
Lore City, OH 43755-9752

RE: Refund Claim No: 20212894852
Refund Period: 10/01/2020 – 10/31/2020
Refund Amount Requested: $6,256.33
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $6,256.33, in sales tax filed pursuant to R.C. 5739.07. The Department initially denied the claim. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid erroneously to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135 at 143, 311 N.E.2d 1 (1974). The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due, unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. In order for a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid.

The claimant contends that it erroneously included out of state sales in its taxable gross sales for the above-listed period. An agent of the Department of Taxation reviewed the claim and could not reconcile the amounts listed on the claimant's invoices with the returns that were filed. After the initial denial of the refund claim, the agent asked the claimant to provide additional information to support the return as filed.

In response to the letter of denial, the claimant provided the original documentation along with an additional invoice. There was no explanation to support the claim that the invoices were part of the return for the period. Based upon the submitted information, it cannot be determined whether the invoices at issue was reported on the return at issue. The claimant has failed to demonstrate that a refund is due.

Accordingly, the request for refund is denied.

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Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 3 1 2022

D And D Classic Cars LLP
62424 Institute Rd.
Lore City, OH 43755-9752

RE: Refund Claim No: 20212896152
Refund Period: 8/01/2020 – 8/31/2020
Refund Amount Requested: $3,815.71
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $3,815.71, in sales tax filed pursuant to R.C. 5739.07. The Department initially denied the claim. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid erroneously to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135 at 143, 311 N.E.2d 1 (1974). The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due, unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. In order for a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid.

The claimant contends that it erroneously included out of state sales in its taxable gross sales for the above-listed period. An agent of the Department of Taxation reviewed the claim and could not reconcile the amounts listed on the claimant's invoices with the returns that were filed. After the initial denial of the refund claim, the agent asked the claimant to provide additional information to support the return as filed.

In response to the letter of denial, the claimant provided the original documentation with no explanation as to how the amounts reported on the original return were calculated. Based upon the submitted information, it cannot be determined whether the invoice at issue was reported on the return at issue. The claimant has failed to demonstrate that a refund is due.

Accordingly, the request for refund is denied.

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

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/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd., • Columbus, OH 43215

FINAL DETERMINATION

Date: JAN 3 1 2022

D And D Classic Cars LLP
62424 Institute Rd.
Lore City, OH 43755-9752

RE: Refund Claim No: 20212896955
Refund Period: 4/01/2020 – 4/30/2020
Refund Amount Requested: $2,079.85
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $2,079.85, in sales tax filed pursuant to R.C. 5739.07. The Department initially denied the claim. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid erroneously to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135 at 143, 311 N.E.2d 1 (1974). The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due, unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. In order for a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid.

The claimant contends that it erroneously included out of state sales in its taxable gross sales for the above-listed period. An agent of the Department of Taxation reviewed the claim and could not reconcile the amounts listed on the claimant's invoices with the returns that were filed. After the initial denial of the refund claim, the agent asked the claimant to provide additional information to support the return as filed.

In response to the letter of denial, the claimant provided the original documentation. There was no explanation to support the claim that the invoices were part of the return for the period. Based upon the submitted information, it cannot be determined whether the invoices at issue was reported on the return at issue. The claimant has failed to demonstrate that a refund is due.

Accordingly, the request for refund is denied.

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

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd., • Columbus, OH 43215

FINAL DETERMINATION

Date: JAN 3 1 2022

D And D Classic Cars LLP
62424 Institute Rd.
Lore City, OH 43755-9752

RE: Refund Claim No: 20212896957
Refund Period: 6/01/2020 – 6/31/2020
Refund Amount Requested: $2,750.77
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $2,750.77, in sales tax filed pursuant to R.C. 5739.07. The Department initially denied the claim. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid erroneously to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135 at 143, 311 N.E.2d 1 (1974). The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due, unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. In order for a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid.

The claimant contends that it erroneously included out of state sales in its taxable gross sales for the above-listed period. An agent of the Department of Taxation reviewed the claim and could not reconcile the amounts listed on the claimant's invoices with the returns that were filed. After the initial denial of the refund claim, the agent asked the claimant to provide additional information to support the return as filed.

In response to the letter of denial, the claimant provided the original documentation. There was no explanation to support the claim that the invoices were part of the return for the period. Based upon the submitted information, it cannot be determined whether the invoices at issue was reported on the return at issue. The claimant has failed to demonstrate that a refund is due.

Accordingly, the request for refund is denied.

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

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Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: JAN 31 2022

Drake Monument Co.
524 West McCreight Ave
Springfield, OH 45504

Re: Assessment No.: 100001983966
Sales Tax
Account No.: 12-052358

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

Tax	Pre-Assessment Interest	Penalty	Total
$90,688.63	$16,642.84	$45,344.08	$152,675.55

The petitioner operates as a monument vendor. This assessment is the result of a field audit of the petitioner's sales for the period of June 1, 2013 through May 31, 2020. A hearing was requested on the matter, but the matter can be resolved without a hearing.

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

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$90,688.63	$16,642.84	$0.00	$107,331.47

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

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 2 1 2022

Gidha LLC
1442 Oberlin Ave.
Lorain, OH 44052-3950

Re: Assessment No.: 100002018806
Sales Tax
Account No.: 47-081505

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

Tax	Pre-Assessment Interest	Penalty	Total
$56,230.49	$5,057.54	$14,057.46	$75,345.49

The petitioner owns and operates a convenience store. This assessment is the result of a field audit of the petitioner's sales for the period of November 7, 2017 through September 30, 2020. A hearing was not requested.

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

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$56,230.49	$5,057.54	$0.00	$61,288.03

Current records indicate that the petitioner made payments of $75,345.49 on this assessment. A refund of $14,057.46 plus applicable interest will be issued.

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Tax Commissioner

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FINAL DETERMINATION

Date:

JAN 2 1 2022

Glossy Clean LLC
13500 Pearl Rd., Ste. 139
Strongsville, OH 44136-3428

Re: Assessment No.: 100002023053
Sales Tax
Account No.: 18-819984

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

Tax	Pre-Assessment Interest	Penalty	Total
$65,637.68	$6,460.87	$4,922.55	$72,021.10

The petitioner owns and operates a cleaning service. This assessment is the result of an audit of the petitioner's sales for the period of October 1, 2016 through September 30, 2020. A hearing was not requested.

The petitioner requests a full abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax required under R.C. Chapter 5739. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *See Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67, 461 N.E.2d 897. The petitioner was not registered for an active vendor's license to collect and remit sales tax during the audit period. The petitioner requested penalty abatement at the conclusion of the audit. The Department reduced the penalty to seven and a half percent at that time. The facts and circumstances do not support further abatement of the penalty.

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments of $72,098.55 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

JAN 2 1 2022

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

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FINAL DETERMINATION

Date: JAN 31 2022

Jake's Garage, Inc.
24393 Sprague Rd.
Columbia Station, OH 44028-9604

Re: Assessment No. 100001799028
Sales Tax
Account No. 47-076420
Reporting Period: 01/01/2015 – 12/31/2019

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

Tax	Pre-Assessment Interest	Penalty	Total
$166,863.33	$26,345.79	$25,029.43	$218,238.55

The petitioner operates an automotive repair shop in Colombia Station, Ohio. This assessment is the result of an audit of the petitioner's sales for the reporting period shown above. A hearing was not requested.

The petitioner contends that they have already remitted the amount for this assessment to the Attorney General's Office. This contention is not well met. The petitioner submitted a copy of the check that was issued for the liability. The Tax Commissioner verified that the check was for other certified assessments and not the assessment at hand. The petitioner did not raise any additional objections.

Accordingly, the assessment is affirmed as issued.

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

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(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date:

JAN 3 1 2022

Liverpool Coil Processing Incorporated
880 Steel Dr.
Valley City, OH 44280

Re: Refund Claim No.: 20181441342
Refund Period: August 1, 2014 – July 31, 2017
Sales Tax

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

In resolution of this matter, the request for refund has been adjusted and payment was made to the taxpayer in full.

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

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(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JAN 31 2022

Medina Blanking, Inc.
5580 Wegman Dr.
Valley City, OH 44280

Re: Refund Claim No.: 20181449563
Refund Period: August 1, 2014 – December 31, 2016
Sales Tax

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

In resolution of this matter, the request for refund has been adjusted and payment was made to the taxpayer in full.

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

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FINAL DETERMINATION

Date: JAN 21 2022

Mike's Towing and Repair Inc.
P.O. Box 5
Fredericktown, OH 43019

RE: Refund Claim No.: 20202016705
Sales Tax
Account No. 89-132478

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $2,208.29 of sales tax filed pursuant to R.C. 5739.07. The requested refund amount was increased to $2,684.03 per the supporting documents provided. The claim was initially denied. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid erroneously to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135 at 143, 311 N.E.2d 1 (1974). The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due, unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. In order for a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid.

The claimant is requesting a refund based upon the bad debt exclusion in R.C. 5739.121(B). "Bad debt" means any debt or account receivable arising from the sale of tangible personal property or a taxable service by the vendor upon which sales or use tax has been reported and paid in a prior reporting period which has become worthless or uncollectible during the period between the vendor's preceding tax return and the present return and which has been uncollected for at least six months. R.C. 5739.121(A) and Ohio Adm.Code 5703-9-44(A).

The claimant submitted a refund request form, invoices for the transactions, proof of debts written off, and Ohio Business Gateway screen prints of their original and amended returns. The claim was initially denied. In the letter of denial, the claimant was informed that "[i]f any debts or accounts were sold to a third party for collection, retained by the taxpayer, or the merchandise was repossessed, then the amount cannot be excluded as a bad debt; and, therefore, cannot be included in the amount of refund. If no accounts were sold to a third party, retained by you, or repossessed, the taxpayer must provide a notarized statement attesting to the above."

JAN 2 1 2022

In response to the letter of denial, the claimant provided the requested notarized statement. After the submission of the notarized statement, a partial refund in the amount of $406.61, less the filing discount of $3.07, was granted prior to issuance of this final determination. A final review of the claim resulted in an additional refund in the amount of $413.78, less the filing discount of $3.10, is granted. The remaining refund amount of $1,863.64 is denied. An explanation of the denied amounts is below.

No interest is granted on claims for the bad debt deduction. Pursuant to R.C. 5739.132(B), interest is only allowed on refunds granted under R.C. 128.47, 5739.07, and 5741.10. The present refunds are granted pursuant to the bad debt deduction under R.C. 5739.121. While this deduction states that refunds are to be filed in the manner of R.C. 5739.07, the deduction is not for an illegal or erroneous payment of tax as is required under R.C. 5739.07. Amounts of tax that are legally required to be paid at the time that they are remitted to the state are not illegal or erroneous payments of tax. *Internatl. Business Machines Corp. v. Levin*, 125 Ohio St.3d 347, 2010-Ohio-1861, 928 N.E.2d 440. Therefore, refunds granted under R.C. 5739.121 do not qualify for interest.

Outside the Statute of Limitations

Of the amount denied, $524.14 is denied for being outside the statute of limitations. Pursuant to R.C. 5739.121(D), a request for refund must be made to the Department within four years of the date a bad debt is eligible for write-off. Here, the refund claim was made on March 26, 2020. Under R.C. 5739.121(A), a bad debt is eligible for the bad debt deduction after it has gone uncollected for six months. The Department evaluated each transaction to determine the date six months after the initial invoice date. The Department then used the 23rd of the following month as the date the transaction would be eligible to be considered bad debt. R.C. 5739.121(D). The date the debt was eligible to be considered bad debt was then compared to the statute date, March 26, 2016. This means that any transaction that has an original invoice date prior to August 2015 is out of statute. Therefore, the invoices dated from November 17, 2011 through July 2, 2015 must be denied because they are outside the statute of limitations.

Property Retained

Of the amount denied, $1,236.39 is denied because property was retained by the claimant. R.C. 5739.121(A) provides in relevant part that "“[b]ad debt” does not include…uncollectable amounts on property that remains in the possession of the vendor until the full purchase price is paid". This means that whenever the vendor holds property while a debt is outstanding and then retains that property when the debt is written-off, it does not qualify for the bad debt deduction. On the majority of the transaction invoices, the claimant noted that the property was abandoned, and they retained it. This is further supported in their notarized statement which states that they retained upwards of 75% of the write-offs. Therefore, all invoices where property was retained are denied.

JAN 2 1 2022

Proof of Write-off

Of the amount denied, $90.76 was denied because the claimant failed to provide proof to show that the transaction was written off. Pursuant to Ohio Adm.Code 5703-9-44(A), the vendor must charge-off the uncollectable debt on their books in order to claim the tax return from the bad debt deduction. Several invoices did not have the accompanying proof that the bad debt was written off by the claimant. Because the claimant failed to fulfil all the requirements under the bad debt deduction, these claims are denied.

Previously Refunded

Of the amount denied, $12.35 was denied because it was previously refunded to the claimant. The claimant previously amended their January 2019 return and, as a result, they were issued a refund. Of that refunded amount, $12.35 was from an invoice that was submitted with this claim. Therefore, this invoice was previously refunded, and an additional refund is denied.

Accordingly, an additional partial refund in the amount of $413.78, less the filing discount of $3.10, will be issued and the remainder of this claim for refund is denied.

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FINAL DETERMINATION

Date: JAN 3 1 2022

Mobile Lawn Care, LLC
638 Dewitt Dr.
Highland Heights, OH 44143

Re: Assessment No. 100001610322
Sales Tax
Account No. 89-870890
Reporting Period: 01/01/2012 – 04/30/2018

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

Tax	Pre-Assessment Interest	Penalty	Total
$510,763.24	$111,204.28	$76,613.76	$698,581.28

This assessment is the result of an audit of the petitioner's purchases for the reporting period shown above. The petitioner provides landscaping/lawn care services and construction services. A hearing was held on September 14, 2021.

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

It is also noted that sales are presumed to be taxable. Since all sales are presumed taxable, the exemption provisions of RC 5739.02 must be followed strictly, and any deviation from their requirements will prohibit the taxpayer from questioning the validity of the sales tax. *See Barry Equipment Co v Limbach*, BTA No. 84-C-272, 1987 WL 57770 (Sept. 16, 1987). It is the petitioner's burden to establish that its transaction is exempt. This requires a sufficient explanation of the transaction and probative evidence. It is further noted that when the Tax Commissioner cannot tell what was actually purchased and/or if the evidence does not support what is claimed, the petitioner fails to meet its burden. Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952).

Mobile Lawn Care/Mobile Contracting

The audit was conducted as an estimated audit based upon information that was available to the Tax Commissioner based upon the taxpayer's federally filed returns. After the initial audit findings were proposed to the petitioner, the petitioner's representative was allowed to provide information to reduce the liability based upon possible exempt transactions. The auditor reviewed all of the invoices provided, but had difficulty determining that the presented invoices were part of the petitioner's reported gross receipts. Audit Remarks, p.4.

The petitioner contends that Mobile Lawn Care LLC is a holding company that performs non-taxable services and records the sales of its subsidiaries through its gross revenue. The facts do not support this contention. This issue was raised during the audit, and it was refuted then. Both companies, Mobile Lawn Care LLC and Mobile Contracting LLC had substantial receipts reported on their Federal 1099 forms and both reported substantial tax returns. Audit Remarks, p. 8. The facts at hand show that these two companies operated separately from one another, and the sales of Mobile Contracting LLC were reported under its own name, not Mobile Lawn Care LLC. Therefore, this objection is denied.

Name of Company

The petitioner contends that based on its name, the Department erroneously treated all of its transactions as lawn care services. This is not the case. The Department did find that lawn care related services were being performed by the petitioner in documentation that was provided to the Department. The Department also found that the petitioner was engaged in other types of business, like construction contracts, but the accounting for the petitioner was not properly presented to the Department. The petitioner failed to properly identify which contracts were being billed to Mobile Lawn Care LLC and which contracts were being billed to Mobile Contracting LLC. The petitioner has failed to show the merits of this objection and contrary to its belief that all of its transactions were treated as lawn care services, several transactions were held exempt due to the transactions being for construction contracts. *Id*. Further, in the petitioner's first response to the auditor dated November 16, 2018, the petitioner admits to having $1,669,624.00 in taxable sales during the audit period. Additionally, the petitioner provided federal form 1065 for 2012 – 2016 and on all of these forms "Landscaping" was listed as the petitioner's principal product or service, not construction contracting. The 2018 form 1065 lists the business code as "561730" which means Landscaping Services. Therefore, this objection is denied.

Political Subdivisions, Charities, and Churches

The petitioner contends that the assessment erroneously included sales that should be considered exempt under R.C. 5739.02(B)(2), R.C. 5739.02 (B)(12), and R.C. 5739.02(B)(13). This objection is not well met. As the petitioner properly states, only transactions with the City of Lyndhurst and Notre Dame College were found to be exempt sales of Mobile Lawn Care LLC. The other organizations that the petitioner claimed these exemptions for did not have proof that they engaged in business with Mobile Lawn Care LLC. The Department could not determine if the petitioner's company or if its subsidiary, Mobile Contracting LLC, did business with the organizations. Therefore, adjustments to the assessment could not be made to remove these transactions from the petitioner's reported sales. The Department made many requests of the petitioner to provide sales journals for both companies so that each sale could be attributed to the proper company, but the petitioner failed to provide any sales journals. Therefore, this objection is denied.

Direct Pay Use Tax

The petitioner contends that the Department erred in including revenue from TruGreen as taxable because TruGreen has a direct pay permit and as such, the petitioner was not required to collect sales tax according to R.C. 5739.031. The auditor was not able to identify if the sales that occurred were paid to Mobile Lawn Care LLC or Mobile Contracting LLC. The petitioner provided a multi-jurisdiction exemption certificate for TruGreen, but the seller line was not completed. An exemption certificate must notify the Tax Commissioner as to what exemption is being claimed by the petitioner, and blanks on the form do not give that notice. *Barry Equipment Co v Limbach*, BTA No. 84-C-272, 1987 WL 57770 (Sept. 16, 1987). The petitioner is required to prove that it is entitled to an exemption and because the petitioner has failed to provide evidence showing which of its companies made the sales, it has failed to prove that the transactions were improperly included in the estimated assessment. Therefore, this objection is denied.

Payments to Mr. Roddy and Mr. Nadock

The petitioner contends that payments made to Mr. Roddy and Mr. Nadock by Mobile were income of the two individuals and not subject to sales tax. This contention is not well met. The petitioner did not provide the Department with sufficient information to conclude that the payments to Mr. Roddy and Mr. Nadock were paid through transactions that were taken as expenses by the petitioner. There was no category listing this type of expense on the federal tax return and the petitioner failed to provide the sales journals that would provide an itemized accounting of these transactions. The petitioner failed to provide proof to substantiate their claim. Therefore, this objection is denied.

Construction Contracts

The petitioner contends that sales to Franklin Row, Overlook Pointe, Cast Nylon, Hantz Group, Coakley Real Estate, and 3311 Perkins are all construction contract transactions which are not considered taxable sales of tangible personal property. It contends that the Department erroneously failed to exclude these sales from its gross sales. This contention is without merit. All of the preceding transactions were confirmed to be sales of Mobile Contracting LLC, not Mobile Lawn Care LLC, based on Form 1099s submitted to the Department. As such, the petitioner cannot claim an exemption for sales that were performed by another company and the Department must reject this claim. Therefore, this objection is denied.

The petitioner contends that the sales associated with E&S Services, Pointe East Condos, WomanKind, Willie Beers, Integrated Surgical Solutions, ATC Realty, Buckeye Chiropractic, Dallas Building Historical Renovation, Brickstone, David Coble, Wholesales Builders, Chris Hallum, Mary Crowley, Mike Richardson, and Dave Holtz and Nadock roofs were also construction contract transactions which are not considered taxable sales of tangible personal property. This contention is not well met. The Department agreed that most of these transactions were exempt construction contracts. The petitioner did not receive the credit for these exemptions because it failed to prove that it performed the sales and not Mobile Contracting LLC. In order to prevail on this claim for an exemption, the petitioner would have needed to show that they performed this exempt transaction. However, during the course of the audit and appeal, the petitioner was asked on multiple occasions to provide the complete sales journals for both companies in order to prove their contentions but failed to do so. The petitioner failed to prove that they made the sales and likewise failed to prove that they are entitled to this exemption. Therefore, these contentions are denied.

Mixed Transactions

The petitioner contends that the assessment includes mixed transactions that the Department held as completely taxable and claims that it is improper to not identify the taxable portions of the invoices and exclude the exempt portions. This contention is without merit. The petitioner identifies Integrated Surgical Solutions, Paciugo Gelato, and ATM Business Solutions as companies where mixed transactions occurred. It was determined that the sales to ATM Business Solutions were not included in the petitioner's gross receipts as it was proven that these transactions were paid to Mobile Contracting LLC using the Form 1099s provided by the petitioner. While there were some transactions that the Department identified as mixed transactions that had taxable and exempt items, it was determined that these sales were not made by the petitioner. The invoices for Integrated Surgical Solutions and Paciugo Gelato were not used to reduce the petitioner's liability because the Department could not verify if the sales were made by Mobile Lawn Care LLC or Mobile Contracting LLC. Therefore, this objection is denied.

2018 Sales

The petitioner contends that it had no gross income for the first four months of 2018. This contention is not well met. The Department estimated the sales for the first four months of 2018 because the federal return submitted by the petitioner stated no gross sales, but the petitioner also submitted invoices that showed sales that occurred in this period. Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Because the petitioner submitted contradicting evidence, the Department estimated the sales based on the average gross sales between 2016 and 2017. Therefore, this objection is denied.

Penalty Abatement

The petitioner requests penalty abatement. Information provided during the audit indicates that tax was collected and not remitted. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to remit the tax collected as required. R.C. 5739.133(A)(2). Penalty abatement is within the discretion of the Tax Commissioner. *See Jennings & Churella Constr. Co. v. Lindley,* 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Because a penalty of only fifteen percent was assessed during the audit, the facts and circumstances do not support abatement of the penalty.

Accordingly, the assessment is affirmed as issued.

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

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0000000219

FINAL DETERMINATION

Date: JAN 3 1 2022

Mory Enterprises Inc.
1500 E. 3rd St
Dayton, OH 45403-1821

Re: Assessment No. 100001118263
Sales Tax
Account No. 57-192417
Audit Period: 01/01/2015 – 01/31/2018

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

Tax	Pre-Assessment Interest	Penalty	Total
$14,696.62	$1,361.35	$2,203.94	$18,261.91

The petitioner is a pawnbroker doing business in Dayton, Ohio as Gordon's Jewelry & Loan. The petitioner operates one retail store where it sells new and used jewelry, lawn equipment, tools, guns, and ammo. Audit Remarks, p. 2. The petitioner also pawns items from customers, offers layaway options, does repair work, and sells merchandise on eBay. This assessment is the result of an audit of the petitioner's sales for the period shown above. A telephone hearing was scheduled to discuss the matter, but the petitioner did not call in to the hearing.

Audit Methodology

A comprehensive review was conducted of the petitioner's sales. Audit Remarks, p. 4. However, the petitioner did not provide shipping documentation for its eBay sales for the filing periods of May 2016 and January 2018. Therefore, the auditor calculated the percentage of eBay sales that were taxable to Ohio based on the documentation provided for the remaining audit periods and applied it to those two filing periods. Audit Remarks, p. 5. A bulk credit was given for sales tax collected and remitted and the remaining tax liability was assessed. The petitioner disagreed with the assessment of tax on transactions it contends were purchases made by exempt customers, purchases made by customers who were victims of theft, sales of items shipped out of state, and returns.

Exemption Certificates

The petitioner objects to the assessment on several transactions for which it did not provide a specific reason. However, it appears that the petitioner is objecting to these transactions based on a valid exemption certificate being provided. The petition for reassessment contains several transactions identified by a customer number, a tax-exempt number, and an amount. Additionally, some of the contested transactions also include a purchaser name.

Ohio Adm.Code 5703-9-03(B)(1) provides:

> All sales are presumed to be taxable until the contrary is established. If a purchaser claims that tax does not apply to a transaction, the purchaser must provide a fully completed exemption certificate to the vendor or seller.

A vendor that obtains a fully completed exemption certificate from a consumer is relieved of liability for collecting and remitting any tax on any sale covered by that certificate. In accordance with R.C. 5739.03(B)(2), a vendor shall maintain all exemption certificates and provide them to the Tax Commissioner upon request.

Pursuant to R.C. 5739.03(B)(4), if no certificate is provided or obtained within ninety days after the date on which the sale is consummated, it is presumed taxable. However, once the vendor becomes aware that the Tax Commissioner intends to levy an assessment, the vendor has 120 days to obtain a fully completed exemption certificate or otherwise establish that the sale is not subject to tax. This is typically accomplished by a letter of usage.

Additionally, pursuant to R.C. 5739.03(E), if a vendor fails to provide a valid exemption certificate or letter of usage during the 120 day period at the audit level, that vendor can provide additional evidence on appeal, after filing a petition for reassessment. The additional evidence must be provided within 120 days of receiving the notice of assessment.

The evidence indicates that the petitioner was given 120 days during the audit to provide either an exemption certificate or a sufficient letter of usage. Additionally, the evidence indicates that the petitioner provided some exemption certificates with its petition for reassessment. Those certificates are discussed below.

Customer Numbers 6198001 & 5197001, 5901001, and 6452001

Of the transactions contested by the petitioner, three are not identified by a vendor name and cannot be matched to any of the exemption certificates provided on appeal. The transactions in question are identified with a customer number and an exemption number. However, none of those numbers correspond to the vendor's license numbers on the exemption certificates the petitioner submitted. The petitioner has not provided sufficient evidence to support an exemption for these transactions. Further, the petitioner failed to timely provide exemption certificates in accordance with R.C. 5739.03(B)(4) and 5739.03(E). Therefore, the objection is denied regarding the above-mentioned transactions.

Diamond Company

The petitioner objects to a transaction made by a purchaser it identified as Diamond Company. The petition for reassessment indicates that the petitioner would send the tax number for the purchaser, presumably to support the exemption. However, the petitioner did not provide an exemption certificate or any other supporting evidence for this objection. The petitioner has failed to timely submit an exemption certificate in accordance with R.C. 5739.03(B)(4) and 5739.03(E). The objection is denied.

Hollis Shifflett

The exemption certificate provided for this purchaser is not valid. The exemption certificate provided does not state a valid statutory reason for exemption. As the reason for exemption, the certificate states: "supplies and towing repairs". Additionally, the exemption certificate lists Hollis Shifflett as the purchaser and Hollis Towing as the vendor. This certificate cannot be used to claim an exemption on purchases made from the petitioner. The objection is denied.

Jagger Chase

The exemption certificate provided for this purchaser is not valid. The exemption certificate lists Jagger Chase as the purchaser and Shaka, Inc. as the vendor. This certificate cannot be used to claim an exemption on purchases made from Mory Enterprises. Additionally, the exemption reason provided is resale of watches and diamonds. However, the petitioner did not submit an invoice to prove that those were the items purchased by the buyer in question. The objection is denied.

Money and Jewelry Vault

The exemption certificate provided is not valid. The exemption certificate submitted does not provide a valid statutory reason for exemption. As the reason for exemption, the certificate states: "business use". Additionally, the exemption certificate lists James Dullin as the purchaser and Money and Jewelry Vault as the vendor. This certificate cannot be used to claim an exemption on purchases made from the petitioner. The objection is denied.

Islamic Center of Peace

The exemption certificate provided is not valid. The exemption certificate lists a valid exemption reason, but the vendor and purchaser information are not clear. The Islamic Center of Peace is listed as both the vendor and purchaser on the exemption certificate provided. Therefore, the certificate in question cannot be used to claim an exemption on purchases made from the petitioner. The objection is denied.

Jeffrey Meyerhoeffer

The exemption certificate provided is not valid. The exemption certificate submitted does not provide a valid statutory reason for exemption. As the reason for exemption, the certificate states: "work tools for job". There is no other information regarding the job or to support the exemption of the transactions. Additionally, the exemption certificate lists Jeff Meyerhoeffer Plumbing as the vendor and Jeffrey Meyerhoeffer as the purchaser. This certificate cannot be used to claim an exemption on purchases made from the petitioner. The objection is denied.

NTR Metals

The petitioner objects to the assessment of transactions made to NTR Metals. The exemption reason provided is "tangible personal property to be resold in the form received". The petitioner also provided the invoice and proof of payment documentation. Based on the evidence provided, the objection is allowed.

Sales to Victims of Theft

The petitioner contends that sales tax was erroneously assessed on transactions of sales made to customers who were victims of theft. In support of this contention, the petitioner submitted invoices identifying the transactions in question and law enforcement property release request forms as proof that the items had been stolen.

The petitioner maintains that under the Ohio Pawnbroker Act, sales tax cannot be charged on transactions where customers are retrieving their own stolen items, only the principal can be charged. The taxpayer did not provide a specific statute in support of this contention. However, the Department assumes that the petitioner is referring to R.C. 4727 which is the chapter of the Ohio Revised Code that regulates Pawnbrokers.

A review of chapter 4727 of the Ohio Revised Code does not provide support for the petitioner's objection. No section of the code states that sales tax cannot be assessed on certain transactions or explicitly discuss sales to individuals who were victims of theft. In fact, theft is only referenced in two sections of this chapter. Pursuant to R.C. 4727.10, pawnbrokers are prohibited from purchasing articles from any person who is known or believed by the licensee, or identified in writing to the licensee by the chief of police, to be a thief or a receiver of stolen property. Also, R.C. 4727.15 discusses penalties for pawnbrokers in certain instances including pawnbrokers convicted of theft, receiving stolen property, and money laundering.

Additionally, the law indicates that pawnbrokers should not sell victims of theft their own property, but rather return it free of charge and then pursue the amount of the loan and interest from the seller. Pursuant to R.C. 4727.12(C):

> If the chief or sheriff receives a report that property has been stolen and determines the identity of the person claiming to be the true owner of the allegedly stolen property that has been purchased or pawned and is held by a licensee, and informs the licensee of the claimant's identity, the licensee may restore the allegedly stolen property to the claimant directly. If a licensee fails to restore the allegedly stolen property, the claimant may recover the property from the licensee in an action at law.

Further, R.C. 4727.12(D) states:

> If the licensee returns the allegedly stolen property to the claimant, the licensee may charge the person who pledged or sold the allegedly stolen property to the licensee,

and any person who acted in consort with the pledgor or the seller to defraud the licensee, the amount the licensee paid or loaned for the allegedly stolen property, plus interest and storage charges provided for in section 4727.06 of the Revised Code.

Based on a review of the evidence, it appears that the petitioner should not have transactions such as the ones it describes in this objection. As previously stated, the petitioner did not provide a specific citation to support its objection or the rule it contends prohibits sales tax in this instance. Therefore, the objection is denied.

Out of State Sales

The petitioner contends that tax was erroneously assessed on eBay sales that were shipped to out of state customers. The petitioner identified two transactions contested on this basis. The petitioner's eBay sales were comprehensively reviewed. Audit Remarks, p. 5. On appeal, the petitioner provided invoices for the transactions in question. The contested transactions are identified by a customer number and an amount. The amounts on the invoices provided match the amounts contested by the petitioner, and both invoices list an out of state address. However, the documentation provided by the petitioner is not persuasive. The evidence indicates that some eBay sales were picked up onsite rather than being shipped to the customer. Audit Remarks, p. 2. Further, during the audit the taxpayer provided sales receipts for some of their eBay transactions, but the auditor determined that the receipts did not list the correct customer name and shipping address. Audit Remarks, p. 4. Therefore, the addresses on those invoices cannot be relied upon without additional supporting documentation. The petitioner has not provided sufficient evidence that the transactions in question were shipped out of state. All retail sales made in Ohio are taxable pursuant to R.C. 5739.02. The objection is denied.

The petitioner also contends that a transaction for an item shipped to California was erroneously assessed. The petitioner provided a customer number and amount for this transaction; however, no further evidence was provided in support of this contention. The petitioner did not submit an invoice or any other evidence to identify the transaction or prove that it was shipped out of state. The objection is denied.

Voided Items

The petitioner contends that transactions which represent voided sales and returns were assessed in the audit. The petitioner maintains that the transactions in question are items that were returned by customers. The petitioner did not identify any specific transactions that were allegedly assessed even though they were returns.

If a customer returns or rejects merchandise and the vendor fails to refund or credit the customer's account with the full purchase price and applicable tax, the transaction cannot be treated as a return of merchandise for purposes of reporting sales or use tax. Ohio Adm.Code 5703-9-11. The evidence indicates that transactions with sufficient proof that they were returns were removed from the audit. The audit remarks provide that the "auditor also removed transactions where there were full credits (voids)." Audit Remarks, p. 5. As previously stated, the petitioner did not identify any specific transactions that it contends are returns and did not provide any additional information to refute the original findings. The objection is denied.

Based on the evidence provided, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$14,302.77	$1,307.37	$2,144.88	$17,755.02

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

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Office of the Tax Commissioner
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FINAL DETERMINATION

Date: JAN 2 1 2022

Pattons Medical LLC
3201 South Blvd.
Charlotte, NC 28209

RE: Refund Claim No: 20202034245
Refund Period: February 1, 2020 – March 31, 2020
Sales Tax
Account No.: 99-121220

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $2,157.66, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). When a vendor or consumer has paid taxes to the state or the treasurer of state's agent, or to the tax commissioner or the commissioner's agent, the commissioner can only refund an amount of tax, illegally or erroneously paid to the state. R.C. 5739.07.

The claimant asserts that credits were issued for sales filed on its February 2020 sales tax period. At the time the claimant filed its initial refund request application, no supporting documents or evidence were provided. The Department sent a denial letter to the claimant. In that letter, the Department explained that there was insufficient documentation or evidence provided with the refund application to substantiate that tax was remitted illegally or erroneously to the State of Ohio, by the claimant. According to Ohio Adm.Code 5703-9-07, supporting documentation must be provided to substantiate the refund claim submitted to the department. Further, the Department advised that the types of supporting documentation required are copies of original invoices of sales tax charged, an electronic version of Microsoft Excel or Microsoft compatible spreadsheet to be submitted if (25) or more invoices are offered, the invoices must be in the same order as they appear on the spreadsheet, corroboration that sales tax was refunded to customers, such as copies of customer issued credit memos or copies of canceled checks (front/back) of the refund issued to customers, and sales journals for the refund period being claimed.

In response to the denial letter, the claimant submitted additional information. The Department determined a partial refund was warranted in the amount of $141.54, less $1.06 for early filing

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for a total of $140.48. A check for this amount plus applicable interest was sent to the claimant prior the issuance of this final determination.

The claimant failed to provide an exemption certificate for the transactions with Diversified Anesthesia LLC. Also, in reviewing the Diversified Anesthesia LLC transactions, the requested tax did not agree match the tax displayed on the provided invoices or the tax shown in the sales journal presented. Accordingly, these transactions remain denied.

Accordingly, the remainder of the claim for a refund is denied.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 31 2022

R & R Takhar Operations Inc.
7030 Poe Ave.
Dayton, OH 45414

Re: Assessment No.: 100001875331
Sales Tax
Account No.: 89-038930

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

Tax	Pre-Assessment Interest	Penalty	Total
$133,111.52	$17,875.52	$66,555.51	$217,542.55

The petitioner operated multiple convenience stores. This assessment is the result of a mark-up audit of the petitioner's sales for the stores from May 1, 2017 through November 30, 2019. The petitioner filed a petition for reassessment. A hearing was held on the matter.

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

Audit Methodology

A mark-up analysis was conducted using the petitioner's inventory purchase records and the records supplied by the petitioner's distributors. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco, other alcohol, pop & soft drinks, energy drinks, and other taxable merchandise. Each category was assigned a mark-up percentage based on evidence from the petitioner, industry standards, and state minimum requirements.

Complete and accurate records of net taxable sales and tax collected were not maintained by the taxpayer as required by R.C. 5739.11. A sample period of January 1, 2018 through December 31, 2018 was used as a representation of the entire audit period to calculate taxable sales. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. A twenty-five percent reduction was applied to the pop & soft drinks and energy drinks & other beverages taxable sales as an adjustment for food stamp usage. Taxable inventory purchase amounts derived from distributor summaries or estimates were divided by the number of months in the sample period and recorded as monthly purchase amounts.

The remaining calculated taxable sales from all categories were totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the taxpayer for the entire sample period. The resulting taxable percentage of reported gross sales were multiplied by the reported gross sales for each non-sampled month of the audit period to determine the calculated monthly taxable sales for the audit period. Tax liability for sampled periods was calculated on the actual calculated monthly taxable sales for that sample period. The calculated taxable sales by month were then multiplied by the applicable tax rates in effect throughout the audit period to determine the gross sales tax liability by month for the entire audit period. Credits representing the tax reported and paid through the taxpayer's monthly sales tax returns were subtracted from the gross sales tax liability to determine any unreported sales tax liability by month for the entire audit period.

Ohio law requires that a taxpayer have primary records that delineate between taxable and non-taxable sales. Ohio Adm.Code 5703-9-2(B)(1). The petitioner did not provide any records during the audit despite multiple attempts to obtain the records. Audit Remarks, p. 6. Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

Inaccurate Mark-up Assessment

The petitioner contends that there was an error in its mark-up assessment. The petitioner contends that, based on R.C. 5739.13(A), the assessment issued is invalid since the Tax Commissioner is required to have information in his possession indicating that the amount of sales tax remitted by a vendor is less than the amount remitted. The petitioner further asserts that the auditor lacked possession of the required information to properly audit or assess the petitioner, since the auditor did not have any of the petitioner's records to conduct the audit properly.[1] Although the petitioner provided screen prints of its tax return and receipts from the Ohio Business Gateway, sales journals and monthly z-tapes for the audit period, and calculations in attempts to support the documents or evidence provided with its petition, the petitioner still had not provided complete and accurate primary records to substantiate these contentions. Here, four stores were audited. However, the z-tapes provided were missing intermittent months from two of the four locations being audited, throughout the entire period. Without complete records, the Department was unable to determine the accuracy of the petitioner's calculations to corroborate its contentions.

During the audit, due to the lack of information provided, the auditor was unable to verify the amounts reported on the petitioner's sales tax returns. Audit Remarks, p. 6. The petitioner was unable to provide complete and accurate sales records to verify the accuracy of the figures reflected on its tax returns,

[1] *See* Petition for Reassessment, p. 2.

which is required by R.C. 5739.11 and Ohio Adm.Code 5703-9-02. Further, according to R.C. 5739.13(A), in the absence of complete and accurate records, the Tax Commissioner may use a sampling of the petitioner's business activity for a representative period and for verification of the petitioner's tax returns.

Sufficient, competent, and probative evidence to support allegations of error in the assessment would show in what manner and to what extent the error exists. *See Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999). The petitioner has not provided sufficient evidence to prove error in the assessment. Accordingly, this objection is denied.

Penalty Abatement

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

Therefore, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$133,111.52	$17,875.52	$33,277.56	$166,389.60

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

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JAN 31 2022

Sectional Stamping, Inc.
350 Maple St.
Wellington, OH 44090

Re: Refund Claim No.: 20181441395
Refund Period: August 1, 2014 – December 31, 2016
Sales Tax

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

In resolution of this matter, the request for refund has been adjusted and payment was made to the taxpayer in full.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 21 2022

April C. Smith
1293 Langston Dr.
Columbus, OH 43220

Re: 13 Assessments
Tax Type: Sales (Responsible Party)
Brooke's Bridal, LLC
Vendor's License No.: 09-075642

This is the final determination of the Tax Commissioner following the decision and order of the Board of Tax Appeals in Case No. 2020-2088, dated January 10, 2022. In this order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, assessment numbers 100000725654, 100000725655, 100000725714, and 100000725715 have been cancelled and assessment numbers 100000725656, 100000725657, 100000725658, 100000725716, 100000725717, 100000725718, 100000725719, 100000725729, and 100000725730 have been adjusted and paid in full.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 31 2022

Spot-Lite Entertainment LTD.
1057 Trumbull Ave., Ste. A
Girard, OH 44420-3489

Re: Assessment No.: 100002070267
Sales Tax
Account No.: 78-074446

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

Tax	Pre-Assessment Interest	Penalty	Total
$158,695.14	$14,858.01	$79,347.44	$252,900.59

The petitioner owns and operates a convenience store. This assessment is the result of a field audit of the petitioner's sales for the period of October 1, 2017 through December 31, 2020. A hearing was not requested.

The petitioner requests a full abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax required under R.C. Chapter 5739. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *See Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67, 461 N.E.2d 897. The facts and circumstances do not support abatement of the penalty.

Accordingly, the assessment is affirmed as issued.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 3 1 2022

Vicky AB Inc.
7032 Broad St. SW
Pataskala, OH 43062-7833

RE: Assessment No. 100001874899
Sales Tax
Account No. 45-049021

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

Tax	Pre-Assessment Interest	Penalty	Total
$131,027.41	$12,291.83	$45,859.45	$189,178.69

The petitioner operates a gas station and convenience store. This assessment is the result of an audit of the petitioner's sales from January 09, 2018 through May 31, 2020. A hearing was held on the matter.

The petitioner requested penalty abatement. The surrounding facts and circumstances support full abatement of the penalty.

Accordingly, the assessment is modified as follows:

Tax	Interest	Penalty	Total
$131,027.41	$12,291.83	$0.00	$143,319.24

Current records indicate that payment has been made in full satisfaction of the assessment.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 3 1 2022

YSK Corporation
1 Colomet Rd.
Chillicothe, OH 45601

RE: Refund Claim No.: 20191544132
Sales Tax
Refund Period: 03/01/15 – 09/30/18

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $27,258.31 of sales tax filed pursuant to R.C. 5739.07 on February 5, 2019. The Department initially granted $467.64 of the claim. The claimant requests reconsideration of the partial denial. A hearing was held.

The claimant contends that it erroneously paid sales tax on multiple purchases during the above-listed period. It states that these purchases were professional services not subject to tax under R.C. 5739.01(JJ)(1). The information in the file supports the claimant's request.

Accordingly, the request for refund is further allowed in the amount of $26,790.67 plus applicable interest.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Office of the Tax Commissioner
4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JAN 3 1 2022

American Modern Insurance Group, Inc.
7000 Midland Blvd.
Amelia, OH 45102

RE: Refund Claim No. 20181346955
Refund Amount Requested: $46,857.58
Refund Period: April 1, 2014 – December 31, 2017
Use Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of $46,857.58 in use tax filed pursuant to R.C. 5739.07. The claim was previously partially approved in the amount of $4,394.81, plus applicable interest. The claimant disagreed with the denial of the remaining amount and requested reconsideration of the matter. A hearing was held on the matter.

The claimant is a holding company for nine subsidiary property and casualty insurance companies headquartered in Amelia, Ohio. They contend that tax was erroneously accrued on exempt purchases. Pursuant to R.C. 5739.07, a claimant is allowed to request a refund of tax illegally or erroneously paid. However, the burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). Further, R.C. 5741.02 levies an 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.

<u>Statute of Limitations</u>

An application for refund must be filed within four years from the date of the illegal or erroneous payment of the tax. R.C. 5739.07(D). The refund claim at issue was submitted on June 19, 2018. Therefore, the only transactions that can be considered for refund are those wherein the tax was remitted on June 19, 2014 or later. The evidence indicates that tax was remitted prior to June 19, 2014 on several purchases requested for refund. Therefore, the request for refund for the following transactions is denied: DiCentral invoice #E12172354M, Sun Bear Software invoice #1537, American Educational Institute Inc. invoice #108486, Cincinnati Reds invoice #4038836, Professional Independent Agents Association of Ohio, and Source Media invoice #ADV0243175.

Multiple Points of Use

The claimant contends that they purchased software that was utilized by employees located inside and outside of Ohio. Therefore, any applicable tax should be apportioned based on its usage pursuant to R.C. 5739.033(D)(1). Consumers can apportion taxes for software used in multiple taxing jurisdictions using the multiple points of use (MPU) exemption certificate by paying taxes due directly to the state. R.C. 5739.033(D)(1)(a). In order to support a claim requesting the multiple points of use exemption, the taxpayer must provide sufficient evidence that they are entitled to the exemption. The denial letter explicitly requested that the claimant provide the following information for each MPU claim: a detailed description of the software with a vendor description of the typical use in place of contracts; a list of employee names along with an employee position description and location at the time of purchase for each license; and the location, city and state, where the licenses were used.

Appligent, Inc.

The claimant purchased software from Appligent for which they request to use the multiple points of use (MPU) exemption. The claimant submitted an excel spreadsheet that provides that 26% of the users of this software are exempt. The claimant did not provide any documentation to support this percentage or explain how they arrived at this percentage. The auditor requested user information in order to make a percentage determination. On appeal, the claimant provided the following evidence in support of this claim: the invoice, an excel containing the user information, and a description of the software from the vendor website. The claimant stated that this software is used by software developers to create forms with fillable fields. The user information provides more specific usage percentages. The user information provides that the claimant purchased three different types of software from this vendor. The user information includes percentages for each software transaction.

The first line item on the invoice identifies a purchase of "FDFMerge Lite 7.0 Production License for AIX." The claimant purchased two licenses of this software. However, on the user information submitted, the claimant conceded that all users of this software were located in Ohio. Therefore, the request for refund for this line item is denied.

The second line item is identified as "FDFMerge Lite 7.0 Development License for AIX." The claimant purchased fifteen licenses of this software based on the invoice. The user information submitted identifies the users and provides that thirteen were located outside of Ohio. Therefore, the claimant requests that the tax be exempted at 87% based on the exempt users. Based on the evidence provided by the claimant, the request for refund is approved.

Finally, the third line item is identified as "FDFMerge Lite 7.0 Development License for Windows." The claimant purchased two licenses of this software based on the invoice. The user information submitted identifies the users and provides that one user was located outside of Ohio. Therefore, the claimant requests that the tax be exempted at 50% based on the exempt users. Based on the evidence provided by the claimant, the request for refund is approved.

Insurity, Inc.

The claimant purchased software from Insurity for which they request to use the MPU exemption stating that the software was used in multiple taxing jurisdictions. The auditor requested user information in order to determine where the software was being utilized. The claimant provided an excel that claims that 26% of the users are exempt but did not provide any evidence regarding which specific employees used the software. The claimant did not provide any user information on appeal for this vendor. Therefore, a determination cannot be made regarding the taxability of this transaction. The request for refund is denied.

Softech & Associates, Inc.

The claimant purchased software from Softech Associates for which they request to use the MPU exemption. The claimant submitted an excel spreadsheet that provides that 26% of the users of this software are exempt. The claimant did not provide any documentation to support this percentage or explain how they arrived at this figure. The auditor requested user information in order to make a percentage determination, but the claimant did not provide that documentation. Therefore, a determination cannot be made regarding the taxability of this transaction. The request for refund is denied.

Sun Bear Software

The claimant purchased software from Sun Bear Software for which they request to use the MPU exemption. The claimant submitted an excel spreadsheet that provides that 49% of the users of this software are exempt. The claimant did not provide any documentation to support this percentage or explain how they arrived at this figure. The auditor requested user information in order to make a percentage determination, but the claimant did not provide that documentation. Therefore, a determination cannot be made regarding the taxability of this transaction. The request for refund is denied.

Trivantis

The claimant purchased software from Trivantis for which they request to use the multiple points of use (MPU) exemption. The claimant submitted an excel spreadsheet that provides that 0% of the users of this software are exempt. Additionally, the claimant's "Software Usage Information" spreadsheet contains three tabs for this vendor. The only users identified are listed as Ohio users. The auditor denied the request stating that all of the users are in Ohio. The claimant did not provide any additional evidence on appeal or identify any non-Ohio based users of this software. The request for refund is denied.

WINZIP Computing LLC

The claimant purchased software from WINZIP Computing for which they request to use the MPU exemption. The claimant submitted an excel spreadsheet that provides that 28% of the users of this software are exempt. After review of the evidence, the auditor noted that the invoice for this transaction indicates that twelve licenses were purchased, but the user information provided was not consistent with that amount. On appeal, the claimant provided additional user information that identifies the users of the software and their locations. Additionally, the updated spreadsheet exempts 25% of the software users identifying three of the twelve as outside of Ohio. Finally, the claimant explained that the software in question is used to combine multiple files to make it easier to transport, email, download, and upload the data. Based on the evidence provided by the claimant, the request for refund is approved.

XyberNET

The claimant purchased software from XyberNET for which they request to use the MPU exemption. The claimant submitted an excel spreadsheet that provides that 52% of the users of this software are exempt. The claimant did not provide documentation to support this percentage or explain how they arrived at this figure. The auditor requested user information in order to make a percentage determination. On appeal, the claimant provided the following evidence in support of this claim: the invoice, an excel containing user information, and a description of the software from the vendor website. It is not clear from the invoice provided how many licenses were purchased. However, the user information spreadsheet indicates that 12,623 licenses were purchased. The invoice description notes that the purchase pertained to a "Perpetual License as per Agreement dated September 30, 2016…" The claimant did not provide the contract for review in order to substantiate the number of licenses at issue and contends that there is no contract associated with this transaction. The claimant has not provided sufficient evidence to support its claim for refund. The request for refund is denied as to these transactions.

Transactions Not Subject to Sales Tax

The claimant contends that they accrued tax on services that are not enumerated as taxable. R.C. 5739.01 delineates several services subject to taxation in Ohio. The claimant submitted several transactions for review citing this exemption.

MFX Change

The claimant contends that MFX Change provided services not subject to taxation. The claimant's transaction excel spreadsheet states that this transaction is a royalty fee and the purchase of Quicksolver V3. It is not clear what this purchase is, however, it appears to be related to software. The auditor requested user information in order to determine where this software was being utilized. The claimant submitted an excel entitled "Software Usage Information" that includes a tab for each vendor from which the claimant purchased software. There is not a tab for MFX Change, and the claimant did not provide any additional evidence on appeal. Therefore, a determination cannot be made regarding the taxability of this transaction. The request for refund is denied.

Network Solutions LLC

The claimant contends that Network Solutions provided an exempt service, which they describe as domain name registration. The auditor determined that this transaction was taxable as automatic data processing. All transactions by which automatic data processing are or are to be provided for use in business are taxable unless the true object of the transaction is the receipt of personal or professional services. R.C. 573901(B)(3)(e). Further, automatic data processing means processing others' data, including keypunching or similar data entry services together with verification thereof, or providing access to computer equipment for the purpose of processing data. R.C. 5739.01(Y)(1)(a). The invoice description says, "renewal of domain.com." The invoice does not include any further description of what this service includes, and the claimant did not provide any additional information on appeal to explain this transaction. It is not clear from the evidence submitted what the service provided included. The Tax Commissioner will not speculate, and the claimant has not provided sufficient evidence to refute the auditor's determination that the service provided was taxable automatic data processing. The request for refund is denied.

Based on the evidence provided, a refund of $191.34, plus applicable interest in approved.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

C00000982

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date:

JAN 21 2022

Building Installation Group I, Inc.
P.O. Box 11356
Green Bay, WI 54307-1356

Re: Refund Claim No.: 545170020578
Refund Period: January 1, 2019 – March 31, 2019
Use Tax
Account No.: 97-301180

This is the final determination of the Tax Commissioner on an application for refund in the amount of $53,806.54 of use tax filed pursuant to R.C. 5739.07 and 5741.10. A hearing was not requested.

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

The Department sent a letter to the claimant on August 17, 2020 to notify the claimant of a potential overpayment of use tax. The claimant filed a refund claim but did not include the reason for the refund or any additional information. Upon initial review, the refund claim was denied. In the denial letter, the Department requested proof of the claimant's original and amended figures for the refund period.

In response to the denial of the refund, the claimant sent additional information. The additional information consisted of a list of transactions for the month of January 2020 on document titled Monthly Sales and Use Tax. The list of transactions only covers one month of the refund period and does not correspond with the amounts on their original or amended returns. The claimant failed to explain the reason for their amended filing and why the tax paid was paid in error. The Department has insufficient information to determine that tax was paid in error.

Accordingly, the refund claim is denied.

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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FINAL DETERMINATION

Date:

JAN 21 2022

Building Installation Group I, Inc.
P.O. Box 11356
Green Bay, WI 54307-1356

Re: Refund Claim No.: 545170051467
Refund Period: April 1, 2019 – June 30, 2019
Use Tax
Account No.: 97-301180

This is the final determination of the Tax Commissioner on an application for refund in the amount of $79,135.52 of use tax filed pursuant to R.C. 5739.07 and 5741.10. A hearing was not requested.

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

The Department sent a letter to the claimant on August 17, 2020 to notify the claimant of a potential overpayment of use tax. The claimant filed a refund claim but did not include the reason for the refund or any additional information. Upon initial review, the refund claim was denied. In the denial letter, the Department requested proof of the claimant's original and amended figures for the refund period. In response to the denial letter, the claimant returned a copy of the denial letter with no additional information. The claimant failed to explain the reason for their amended filing and why the tax paid was paid in error. The Department has insufficient information to determine that tax was paid in error.

Accordingly, the refund claim is denied.

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

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Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JAN 2 1 2022

Godfrey & Wing Inc.
220 Campus Dr.
Aurora, OH 44202-6663

Re: Assessment No.: 100001892945
Use Tax
Account No.: 97-309122

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

Tax	Pre-Assessment Interest	Penalty	Total
$18,212.08	$2,902.47	$2,730.86	$23.845.41

The petitioner specializes in vacuum impregnation technologies. This assessment is the result of an audit of the petitioner's purchases for the period of July 1, 2013 through August 31, 2019. A hearing was not requested.

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

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$18,212.08	$2,902.47	$0.00	$21,114.55

Current records indicate that the assessment has been paid in full

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

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: JAN 31 2022

M & B Asphalt Co., Inc.
1525 West Co. Rd. 42
Tiffin, OH 44883

Re: Assessment No. 100000742825
Use Tax
Reporting Period: July 1, 2013 – June 30, 2016
Account No. 97-136352

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

Tax	Pre-Assessment Interest	Penalty	Total
$207,112.23	$16,621.53	$31,066.63	$254,800.39

The assessment is the result of an audit of the petitioner's purchases from July 1, 2013 through June 30, 2016. A hearing was held.

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983). Sales are presumed taxable in the Ohio. R.C. 5739.02(C). Additionally, there is a presumption that any use, storage, or other consumption of tangible personal property in the state is subject to taxation until an exemption or exception is established. R.C. 5741.02(G). Statutes establishing an exemption or exception from taxation are to be strictly construed. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952).

Background

The petitioner, M&B Asphalt Co., Inc., is an asphalt construction company doing business in Ohio. It has two plants in Ohio that produce asphalt. Both plants are drum-based continuous processes which produce hot mix asphalt. It was determined during the audit that 93% of asphalt produced at the petitioner's Maple Grove location and 89% of asphalt produced at its Gencor location was consumed by the petitioner as part of its own construction contracts. Audit Remarks, p. 4. The petitioner paid MGQ Terminal, Inc. ("MGQT") to store its liquid asphalt in tanks until it is needed.

After the conclusion of the audit period, the petitioner split into two separate entities, one of which produced asphalt and one which was responsible for construction contracts.

Audit Methodology

A review of a block sample of the petitioner's accounts payable journal activity for the period from October 1, 2015 through December 31, 2015 was conducted. The petitioner and Department agreed upon this sample period as representative of the petitioner's business activity over the entire audit period. Purchase Audit Letter of Agreement, p. 1. The petitioner and Department agreed the petitioner's business was not seasonal in nature. *Id.* The petitioner is one of several entities owned by the same company. As such, there were some purchases which were paid for, in whole or in part, by one entity but ultimately consumed by another. It was determined the taxability of purchases will be determined based on which entity ultimately consumed the purchased product. Additionally, capitalized fixed asset purchases were reviewed comprehensively. The sum of sampled purchases found to be tax deficient was divided by the sum of total purchase activity in each account during the sample period. This resulted in a tax deficient error percentage for each account. The tax deficient error percentage was applied to the total target population purchases for that account during the audit period. The resulting tax deficient dollar amounts were added to the comprehensively review fixed assets. The appropriate tax rate was then applied. This resulted in the petitioner's assessed tax liability.

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

Storage of Liquid Asphalt

The petitioner contends tax was erroneously assessed on transactions with MGQT described on its invoices as "Storage Services for Liquid Asphalt." The petitioner contends it is paying for a nontaxable service. The petitioner maintains tax liability was assessed because it was perceived as renting the storage tanks. The petitioner contends the service received was different from the rental of property because it did not have the same rights over the storage tanks one is typically granted as part of a rental. This contention is not well taken. The petitioner was not assessed tax liability based on the rental of tangible personal property. The petitioner was assessed tax liability on these transactions because the storage of tangible personal property, such as asphalt, is a taxable service. R.C. 5739.01(B)(9). Providing storage services is defined as "any keeping or holding of anothers tangible personal property or any provision of space that is used to store anothers tangible personal property." Ohio Adm.Code 5703-9-05(A).

To shed light on the nature of the transactions, the petitioner submitted a contract, invoices, and an exemption certificate. It should be noted at the outset the petitioner is not party to the submitted contract and the exemption certificate was not submitted to MGQT by the petitioner. The petitioner maintains the contract was assigned to it after being signed. The petitioner has submitted no evidence of this being the case. Assuming arguendo the terms of the contract reflect the terms of the petitioner's purchases, the contract still does not support an exemption from use tax for the petitioner. Section 3.3 of the contract outlines the services provided. The bulk of the services outlined in this section are offloading, storing, and maintaining the heat of the tangible personal property in storage. The remainder of the services are administrative in nature, such as delivering copies of shipping papers and tracking product in storage. The submitted exemption certificate shows a customer of MGQT claimed an exemption for the storage of goods used in a manufacturing process. The customer claimed the exemption on the certificate is not the petitioner and does not appear to be a related entity of the petitioner.

The petitioner contends that the transactions in question were improperly assessed as taxable rentals. The petitioner maintains the nature of the transaction does not resemble the control typically associated with a rental transaction. The Commissioner agrees that this transaction is not the rental of tangible personal property. The evidence shows the transactions identified by the petitioner were for taxable storage services. Section 3.3 of the contract submitted by the petitioner specifies MGQT will "receive, unload and store up to the limits listed above in static storage tanks designated at the Terminal, all Product delivered to MGQT by rail or truck from time to time." MGQT is holding tangible personal property provided by the petitioner. This falls under the definition of taxable storage services outlined above. Storage services do not require the type of control the petitioner describes when discussing rental transactions. Storage services merely require an entity hold tangible personal property belonging to another or provision space for said tangible personal property. The contract submitted by the petitioner shows MGQT has agreed to hold the tangible personal property of the petitioner and has provisioned space for additional tangible personal property to be stored when it arrives from time to time. While not dispositive, it is also worth noting the transactions were described as "storage" on the invoices. The petitioner purchased a taxable storage service. The objection is denied.

In the alternative, the petitioner maintains it is entitled to a manufacturing exemption received by one of MGQT's other customers. The other entity on the exemption certificate submitted in support of the petitioner's contentions is not described as operating under the same facts and circumstances as the petitioner. The petitioner does not qualify for the manufacturing exemption as it did not manufacture goods for sale during the audit period. The other entity submitted an exemption certificate claiming the purchase is exempt as storage of items used as part of a manufacturing operation. A key component of the manufacturing exemption is that the thing transferred becomes incorporated in a good manufactured for sale. R.C. 5739.02(B)(42)(g). The overwhelming majority of the petitioner's product was not resold during the audit period. The petitioner consumed the asphalt produced on its own construction contracts. The petitioner is not entitled to the manufacturing exemption because the things stored at MGQT's facility were not to be resold. The tangible personal property was, instead, to be consumed by the petitioner. The objection is denied.

Penalty Abatement

The petitioner requests abatement of the penalty. Considering all the surrounding facts and circumstances, abatement of the penalty is appropriate. The request for penalty abatement is granted.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$207,112.23	$16,621.53	$0.00	$223,733.76

Current records indicate that payments of $153,167.42 applied on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post-assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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

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/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner