Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: SEP 09 2020

Ability Network Inc.
100 N. 6th St.
Suite 900-A
Minneapolis, MN 55403

Re: CAT Account Number: 93008533
Three Refund Claims
Multiple Reporting Periods

This is the final determination of the Tax Commissioner with respect to applications for commercial activity tax (CAT) refunds filed pursuant to R.C. 5751.08 and 5751.51. The following refund claims are at issue herein:

Refund Claim No.	Reporting Period	Amount
553323034943	10/01/2016 – 12/31/2016	$2,974.00
553323050901	01/01/2017 – 03/31/2017	$2,987.00
553323085169	04/01/2017 – 06/30/2017	$3,276.00

I. BACKGROUND

The claimant, Ability Network Inc. ("ANI"), submitted "CAT CS" credit schedule forms in March of 2018 for a nonrefundable credit for qualified research expenses ("QRE") for the periods listed above. After reviewing these forms, Department staff contacted ANI to inform them of the process for claiming the credit, including the filing of amended returns for each period indicating the amount of the credit claimed. The Department staff also requested specific information and documentation comprising an initial claim for the tax credit and resulting refund of taxes previously paid.[1] On May 2, 2018, ANI submitted three "CAT REF" refund request forms for the periods in which it had attempted to claim the nonrefundable credit. On May 7, 2018, Department staff emailed ANI in an attempt to elicit a complete response to the original request for, among other things, amended returns reflecting the claimed credit and the initial supporting documentation. Receiving no response, the Department denied the refund requests on May 15, 2018.

In response to the refund denial, ANI filed amended quarterly CAT returns on June 11, 2018 for the three periods at issue and provided some of the supporting documentation that was originally

[1] The credit for qualified research expenses authorized by R.C. 5751.51 relies on the definition of "qualified research expenses" in Internal Revenue Code Section 41. This federal statute, and the 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 upon review of the claimant's substantive supporting documentation.

requested. The additional submissions were reviewed to determine whether they were sufficient to support the issuance of the refunds. Based on the documentation submitted during the initial review, the refunds were denied. The claimant objects to the initial denials and requests an administrative review in accordance with R.C. 5703.70. These matters are now decided based on the evidence currently available to the Tax Commissioner.

II. CLAIMANT'S CONTENTION

The claimant contends that the Commissioner erred in denying the refund claims. The claimant further contends that the Commissioner erred in denying its claim for the nonrefundable qualified research expense credit authorized by R.C. 5751.51.

III. ANALYSIS AND AUTHORITY

A. THE INITIAL REFUND CLAIM

R.C. 5751.08(A) governs CAT applications for refund and states, in pertinent part, as follows:

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

The claimant initially failed to meet the minimum requirements for requesting a refund under R.C. 5751.08 in two ways. First, the claimant did not make its claim on a "form prescribed by the commissioner." Second, the claimant did not provide "documentation to support, the issuance of the refund." The claimant, after the original request was denied and during the pendency of this review, submitted the documents that were lacking from its initial claim for the credit and in support of the issuance of the refund.

However as further discussed below, the original supporting documents that the claimant submitted to satisfy the minimal threshold claim for the credit contained unexplained inconsistencies and overt errors.

B. CAT CREDIT FOR INCREASING QUALIFIED RESEARCH EXPENSES

After the initial denial of its refund claims, the claimant responded by providing some of the missing supporting documentation and by requesting an administrative review of the refund denial. Because the credit and refunds were denied based on the claimant's failure to make a valid initial claim for either, this administrative review is limited only to ascertaining whether or not the claimant has cured the deficiencies in its initial request. To be clear, the Department has not performed a substantive

review of the claimant's records with respect to its claimed Ohio QRE nor has it performed an audit of the claimant's CAT returns.[2]

R.C. 5751.51(A) provides that the term "qualified research expenses" has the same meaning as in section 41 of the Internal Revenue Code.

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.

R.C. 5751.51(B)(2) states, in pertinent part, that "[a]ny credit amount in excess of the tax due under section 5751.03 of the Revised Code…may be carried forward for seven tax years…".

The claimant's supporting documentation showed that the QRE used to calculate the three-year average expenses had been claimed at the federal level by entities other than ANI in prior years. Pursuant to R.C. 5751.51(B)(1)(b), a taxpayer claiming this credit must demonstrate its three prior years' Ohio QRE. However, the entities that were apparently entitled to claim these prior QRE were not registered as members of the claimant's CAT account. This discrepancy was pointed out to the claimant by the Department's staff upon initial review of the refund claim and formed part of the basis for the initial refund denial. During the pendency of this review, the claimant was able to demonstrate the various ownership changes that occurred which led to the expenses being attributed for federal tax purposes to various entities that were not included in the CAT group.[3]

Additionally, the claimant provided documentation to support their calculation of the credit. To make an initial claim for the credit, CAT taxpayers must provide the calculation used to determine the current year's credit amount. This calculation must show the amount of qualified research expenses that the taxpayer incurred for each of the three prior years ("base years"). The calculation must also demonstrate the average of the base year QRE. The taxpayer must then show that it incurred more QRE during the credit year when compared to the base year average. This difference, the increase in current qualified research spending over the average, is then multiplied by 7 percent. The result is the amount of the current year's credit.

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

[3] ANI continues to file the CAT as a single entity taxpayer despite submitting evidence acknowledging that it is a commonly-owned entity for purposes of R.C. 5751.012. While ANI has an obligation to correct its registration and possibly its returns in light of this common ownership, the value of the claimed credit can be determined independent of those factors. Therefore, these deficiencies do not prevent the Commissioner from making a determination on the instant claims for refunds.

An example QRE credit calculation might resemble the following:

Base Year 3	Base Year 2	Base Year 1	Base Total	Base Average (Base Total / 3)	Current Year QREs	Difference (Current – Base Average)	Credit (Difference * .07)
$100,000	$120,000	$140,000	$360,000	$120,000	$150,000	$30,000	$2,100

Continuing with the above example; if the taxpayer claimed the credit again the following year, base year 3 is dropped, the current year QRE become the new base year, and the calculation is rerun with the information for the new credit year. The example above might resemble this the following year:

Base Year 3	Base Year 2	Base Year 1	Base Total	Base Average (Base Total / 3)	Current Year	Difference (Current – Base Average)	Credit (Difference *.07)
$120,000	$140,000	$150,000	$410,000	$136,667	$166,667	$30,000	$2,100

Note that two of the base year amounts are identical to the first example. The prior year's QREs become the new "Base Year 1" amount and the base average is recalculated.

The claimant submitted calculations to support its claimed 2016 QRE credit after the initial denial of the refund claims at issue. The claimant also provided calculations to support QRE credits claimed for subsequent years. Viewed together, the calculations revealed that amounts being claimed as qualified research expenses were changing from year to year. For example, the amount of 2016 Ohio QRE used to calculate the credit at issue was $719,707. However, when the calculation for the taxpayer's 2017 credit was submitted for review, the 2016 Ohio QRE used for the base year average were only $384,083. So, the amount of 2016 QRE used to calculate the 2016 credit was nearly double the amount used when 2016 became a base year for calculating subsequent credits. The practical effect of this was two-fold: it greatly increased the 2016 credit amount, and then reduced the impact that such a large increase would have on future base year averages. There were no changes to the relevant laws or accounting standards that explain such a dramatic difference in reporting or recording QRE from 2016 to 2017.

In fact, the claimant could not explain the differences in these amounts when asked to account for the discrepant figures. When questioned by the Department's Hearing Officer about the varying amounts used in their calculations, the claimant acknowledged the errors and resubmitted their calculations. According to the claimant's revised calculations, the 2016 QRE credit available to it was less than one fifth of the original credit claimed.

C. NONREFUNDABLE CREDITS CLAIMED AGAINST THE MINIMUM TAX

Finally, Ohio Adm.Code 5703-29-22(A)(1) states, in pertinent part, that "in no event may a taxpayer claim a nonrefundable credit against its commercial activity tax annual minimum tax liability."

The claimant's refund request for the first quarter of 2017 seeks a refund of the entire amount of CAT paid for that quarter, including the claimant's annual minimum tax of $2,600. As a result, a portion of that refund must be denied as violating the regulation.

SEP 09 2020

However, because the CAT QRE credit provides for a seven-year carryforward period, such denial does not reduce the amount of credit the claimant may be entitled to claim, if any. It merely defers its ability to claim such credit to a later period. In this way, the Commissioner's denial of the credit claimed against the annual minimum tax is not a denial of the underlying credit amount per se. Instead, the amount of credit so denied may be carried forward and claimed against any additional CAT liability incurred by the claimant in later periods.

The claimant appears to acknowledge that it improperly claimed a refund of its annual minimum tax for the first quarter 2017. The revised credit calculation and related documents indicate that the claimant now intends to apply the credit only to the amount of its first quarter 2017 liability that exceeds the annual minimum tax. The Commissioner agrees with the revised credit calculation and allocation in this regard.

IV. CONCLUSION

For purposes of this administrative review, the claimant ultimately submitted a complete request for refund and sufficient documentation to support its initial claim for the CAT QRE credit. Based on the revised credit calculations submitted by the claimant, the value of its CAT QRE credit is less than the amount of refund originally claimed.

Accordingly, the claimant's refunds are granted in part as follows:

Refund Claim No.	Reporting Period	Amount Requested	Amount Denied	Amount Approved
553323034943	10/01/2016 – 12/31/2016	$2,974.00	$0.00	$2,974.00
553323050901	01/01/2017 – 03/31/2017	$2,987.00	$2,600.00	$387.00
553323085169	04/01/2017 – 06/30/2017	$3,276.00	$2,673.00	$603.00

This determination is limited only to the finding that the claimant corrected the deficiencies in their initial refund request and credit claim. The claimant's own revised supporting documentation indicates a reduction to the initial credit claimed is warranted and an adjustment to the refund amounts necessary. This determination is not an endorsement of the validity or accuracy of the information or amounts underlying those claims. However, the claimant's revised documentation supports an initial finding for refund as determined herein.

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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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

Ability Network Inc.
100 N. 6th St.
Suite 900-A
Minneapolis, MN 55403

Re: CAT Account Number: 93008533
Three Refund Claims
Multiple Reporting Periods

This final determination of the Tax Commissioner hereby vacates and replaces the final determination issued on September 9, 2020.

This matter is reconsidered to correct a typographical error that impacted the result of the determination.

This is the final determination of the Tax Commissioner with respect to applications for commercial activity tax (CAT) refunds filed pursuant to R.C. 5751.08 and 5751.51. The following refund claims are at issue herein:

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I. BACKGROUND

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elicit a complete response to the original request for, among other things, amended returns reflecting the claimed credit and the initial supporting documentation. Receiving no response, the Department denied the refund requests on May 15, 2018.

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II. CLAIMANT'S CONTENTION

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either, this administrative review is limited only to ascertaining whether or not the claimant has cured the deficiencies in its initial request. To be clear, the Department has not performed a substantive review of the claimant's records with respect to its claimed Ohio QRE nor has it performed an audit of the claimant's CAT returns.[2]

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

[3] ANI continues to file the CAT as a single entity taxpayer despite submitting evidence acknowledging that it is a commonly-owned entity for purposes of R.C. 5751.012. While ANI has an obligation to correct its registration and possibly its returns in light of this common ownership, the value of the claimed credit can be determined independent of those factors. Therefore, these deficiencies do not prevent the Commissioner from making a determination on the instant claims for refunds.

An example QRE credit calculation might resemble the following:

Base Year 3	Base Year 2	Base Year 1	Base Total	Base Average (Base Total / 3)	Current Year QREs	Difference (Current – Base Average)	Credit (Difference * .07)
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The claimant submitted calculations to support its claimed 2016 QRE credit after the initial denial of the refund claims at issue. The claimant also provided calculations to support QRE credits claimed for subsequent years. Viewed together, the calculations revealed that amounts being claimed as qualified research expenses were changing from year to year. For example, the amount of 2016 Ohio QRE used to calculate the credit at issue was $719,707. However, when the calculation for the taxpayer's 2017 credit was submitted for review, the 2016 Ohio QRE used for the base year average were only $384,083. So, the amount of 2016 QRE used to calculate the 2016 credit was nearly double the amount used when 2016 became a base year for calculating subsequent credits. The practical effect of this was two-fold: it greatly increased the 2016 credit amount, and then reduced the impact that such a large increase would have on future base year averages. There were no changes to the relevant laws or accounting standards that explain such a dramatic difference in reporting or recording QRE from 2016 to 2017.

In fact, the claimant could not explain the differences in these amounts when asked to account for the discrepant figures. When questioned by the Department's Hearing Officer about the varying amounts used in their calculations, the claimant acknowledged the errors and resubmitted their calculations. According to the claimant's revised calculations, the 2016 QRE credit available to it was less than one fifth of the original credit claimed.

C. NONREFUNDABLE CREDITS CLAIMED AGAINST THE MINIMUM TAX

Finally, Ohio Adm.Code 5703-29-22(A)(1) states, in pertinent part, that "in no event may a taxpayer claim a nonrefundable credit against its commercial activity tax annual minimum tax liability."

The claimant's refund request for the first quarter of 2017 seeks a refund of the entire amount of CAT paid for that quarter, including the claimant's annual minimum tax of $2,600. As a result, a portion of that refund must be denied as violating the regulation.

However, because the CAT QRE credit provides for a seven-year carryforward period, such denial does not reduce the amount of credit the claimant may be entitled to claim, if any. It merely defers its ability to claim such credit to a later period. In this way, the Commissioner's denial of the credit claimed against the annual minimum tax is not a denial of the underlying credit amount per se. Instead, the amount of credit so denied may be carried forward and claimed against any additional CAT liability incurred by the claimant in later periods.

The claimant appears to acknowledge that it improperly claimed a refund of its annual minimum tax for the first quarter 2017. The revised credit calculation and related documents indicate that the claimant now intends to apply the credit only to the amount of its first quarter 2017 liability that exceeds the annual minimum tax. The Commissioner agrees with the revised credit calculation and allocation in this regard.

IV. CONCLUSION

For purposes of this administrative review, the claimant ultimately submitted a complete request for refund and sufficient documentation to support its initial claim for the CAT QRE credit. Based on the revised credit calculations submitted by the claimant, the value of its CAT QRE credit is less than the amount of refund originally claimed.

Accordingly, the claimant's refunds are granted in part as follows:

Refund Claim No.	Reporting Period	Amount Requested	Amount Denied	Amount Approved
553323034943	10/01/2016 – 12/31/2016	$2,974.00	$0.00	$2,974.00
553323050901	01/01/2017 – 03/31/2017	$2,987.00	$2,600.00	$387.00
553323085169	04/01/2017 – 06/30/2017	$3,276.00	$603.00	$2,673.00

This determination is limited only to the finding that the claimant corrected the deficiencies in their initial refund request and credit claim. The claimant's own revised supporting documentation indicates a reduction to the initial credit claimed is warranted and an adjustment to the refund amounts necessary. This determination is not an endorsement of the validity or accuracy of the information or amounts underlying those claims. However, the claimant's revised documentation supports an initial finding for refund as determined herein.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

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FINAL DETERMINATION

Date: SEP 3 0 2020

Admiralty Island Fisheries, Inc.
d/b/a Aqua Star
2025 1st Ave, Suite 200
Seattle, WA 98121

Re: Commercial Activity Tax – Multiple Assessments
Tax Period – Multiple Periods

This final determination of the Tax Commissioner hereby vacates the final determination issued on August 31, 2020 pertaining to Assessments 17201607118716, 17201613432787, 100000624276, and 100001222614.

This matter will be reconsidered based upon information received by the Department following the issuance of the original determination.

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

0000000224

FINAL DETERMINATION

Date:

SEP 3 0 2020

Dominion Resources, Inc.
ATTN: Alison Nawrocki, Tax Director
100 Tredegar Street
Richmond, VA 23219

Re: Assessment No. 17201609519081
Commercial Activity Tax – 4/1/2010 - 12/31/2012

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

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: SEP 23 2020

Gatehouse Media Ohio Holdings II, Inc.
DBA The Dispatch Printing Company
175 Sully's Trail
Pittsford, NY 14534

Re: Commercial Activity Tax
Assessment No. 100000939337
Reporting Period: 07/01/2015 – 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) amount:

Tax	Interest	Penalty	Payments	Total
$21,601.00	$1,229.00	$3,240.00	($26,070.00)	$0.00

I. BACKGROUND & PETITIONER'S CONTENTIONS

On July 1, 2015, New Media Investment Group Inc. purchased the newspaper and printing assets for The Columbus Dispatch, organized it as a C Corporation, and named it Gatehouse Media Ohio Holdings II, Inc. (hereinafter "Gatehouse Media" or "petitioner"). Gatehouse Media is in the business of printing newspapers and advertising brochures. Gatehouse Media first registered for the CAT effective July 1, 2015 and elected to filed as a single entity taxpayer. Thereafter, the petitioner changed its election status from single entity status to a combined taxpayer group pursuant to R.C. 5751.012.

The Department assessed the petitioner after performing a field audit for the period at issue. First, during the audit, the Department found that the petitioner was not entitled to the $1 million annual exclusion for the audit period because it shares a common owner with another taxpayer, Copley Ohio Newspapers, Inc. who was filing and claiming the exclusion prior to the common owner's purchase of Gatehouse Media. Subsequently, Gatehouse Media was changed to the combined reporting person and Copley was added as a member of the group. Second, the Department's audit staff identified that an account labeled "Other Operating Gains/Losses" included the amount Gannett Publishing Services, LLC (Gannett Publishing) pays the petitioner as part of a cost sharing agreement. Based on its review, the audit staff concluded that the amounts included in the "Other Operating Gains/Losses" account were gross receipts per R.C. 5751.01(F) and situsable to Ohio per R.C. 5751.033(I).

The petitioner objects to the assessment and requests an abatement of the penalties and interest amounts assessed. Specifically, the petitioner contends that the reimbursement of expenses it receives from Gannett Publishing does not contribute to the production of gross income and, therefore, is not a gross receipt. The petitioner did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the petition.

II. AUTHORITY

A. A TAX MEASURED BY GROSS RECEIPTS

The CAT is imposed on the privilege of doing business in Ohio and is measured by gross receipts, and is imposed on persons receiving the gross receipts, not on the purchaser. R.C. 5751.02(A). "Gross receipts" is defined in R.C. 5751.01(F) as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration." Examples of gross receipts include amounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another, amounts realized from the taxpayer's performance of services for another and amounts realized from another's use or possession of the taxpayer's property or capital. R.C. 5747.01(F)(1)(a)-(c). Under this broad definition, the full identifiable value of a transaction is generally a gross receipt, absent a specified statutory exclusion.

B. SITUSING GROSS RECEIPTS FROM SERVICES – R.C. 5751.033(I)

R. C. 5751.01(G) indicates that "taxable gross receipts" means gross receipts situsedto this state under R.C. 5751.033. Division (I) of R.C. 5751.033 is a catch-all situsing provision which applies to situsing services and all other gross receipts not otherwise situsedunder R.C. 5751.033. R.C. 5751.033(I) provides that:

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

R.C. 5751.033(I) requires an inquiry focused on where the purchaser ultimately received the benefit of its services. *Defender Security v. Testa*, 10th Dist. Franklin No. 18AP-238 (Feb. 28, 2019), *appeal allowed sub nom. Defender Security. v. Testa*, 156 Ohio St.3d 1444, 2019-Ohio-2498, 125 N.E.3d 913, (2019). With respect to the situsing of services for CAT, the importance for the taxpayer to submit documentation supporting its proposed method of situsing is clearly identified in both the relevant statute, R.C. 5751.033(I), and the relevant administrative rule, Ohio Adm.Code 5703-29-17(A). Both provisions identify that a taxpayer's method for situsing services must be supported by their business records as they existed at the time of the performance of the service or within a reasonable time thereafter.

C. NARROW CONSTRUCTION OF EXCLUSIONS

Taxpayers claiming an exemption or exclusion from taxation must affirmatively establish their right thereto. *Dayton Sash & Door Co. v. Glander*, 36 Ohio St.2d 120, 304, 304 N.E.2d 388 (1973). Ohio law in this regard is well-established in that exemptions from taxation are strictly construed against the claim of exemption in favor of the taxing authorities. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952), paragraph two of the syllabus; *Cincinnati College v. State*, 19 Ohio 110, 115 (1850). Thus, in determining whether the petitioner is entitled to the exclusions from CAT that it seeks, the facts must be determined under a strict, narrow reading of the relevant definitions. In addition, the petitioner must provide the Tax Commissioner with concrete evidence supporting its request for exclusions, and mere speculation is insufficient. See, *Greenscapes Home and Garden Products, Inc. v. Testa,* BTA No. 2016-350, (July 19, 2017), citing *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15. In all doubtful cases, exemptions must be denied. *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, 876 N.E.2d 928, ¶ 7.

III. ANALYSIS

The petitioner contends that its "Other Operating Gains/Losses" account is a cost sharing reimbursement that does not meet the definition of a gross receipts because it does not contribute to the production of gross income. The petitioner states that it has a printing service and cost sharing agreement with Gannet Publishing whereby it bills Gannett Publishing for its cost of printing publications, and the gross receipt is booked to the "Other Operating Gains/Losses" account. The petitioner states that there is no markup on the cost incurred by the petitioner. However, as stated above, "gross receipts" means the total amount realized, without deduction for the costs of goods sold or other expenses incurred, that contribute to the production of gross income, except as otherwise specified in the statute. R.C. 5751.01(F). This definition broadly encompasses all receipts in money or remuneration from activities entered into by taxpayers.

Further, R.C. 5751.01(F) provides some examples of what a gross receipt is and provides in pertinent part that a gross receipt is "[a]mounts realized from the taxpayer's performance of service for another." R.C. 5751.01(F)(1)(b). Here, the petitioner is being reimbursed for the performance of services of printing for Gannett Publishing based on the expenses it incurs to provide those printing services. While the petitioner contends that its reimbursement of expenses by Gannett Publishing does not contribute to the production of gross income, the use of the term gross income implies all income unless specifically excluded in R.C. 5751.01(F) and does not state that it is required to be income leading to a profit. Gross income is all income before any expenses or other deduction. Accordingly, the petitioner is receiving an amount for providing printing services to Gannett Publishing which is a gross receipt per R.C. 5751.01(F) and situsable to Ohio per R.C. 5751.033(I).

Lastly, the petitioner states that the petitioner and Gannett Publishing have effectively "operated as a partnership under R.C. 5733.04(o) [sic]" which leads it to believe that the purported reimbursements should not be subject to the CAT. It is not immediately or entirely clear from the record or the petition for reassessment why the claimant believes the fact that it may have operated as a partnership would excuse it from remitting CAT on the reimbursements in question. The petitioner does identify R.C. 5751.01(F)(2)(b) which indicates that gross receipts excludes "(d)ividends and distributions from

corporations, and distributive or proportionate shares of receipts and income from a pass-through entity as defined under section 5733.04 of the Revised Code", but the petitioner has not explained how or why this exclusion would apply to the facts and circumstances presented. Moreover, the petitioner has failed to prove or provide sufficient documentation that common ownership existed between the petitioner and Gannett Publishing or that a 50/50 joint venture was formed for the period in question. Accordingly, based on the evidence currently available, the amounts that the petitioner receives from Gannett Publishing for its cost of printing publications cannot be excluded from the CAT as the petitioner has not affirmatively established that it is entitled to any statutory exclusion.

IV. Penalty Abatement

The petitioner also seeks an abatement of the penalties. The Tax Commissioner may abate penalties imposed for the failure to file a return and the failure to pay the full amount of tax due. R.C. 5751.06(F). The petitioner has remitted the tax, interest, and penalty amounts assessed in this matter and has timely filed and remitted the amounts owed after this assessment. The evidence and circumstances support a full reduction of the penalties. However, the interest imposed is mandatory pursuant to R.C. 5751.06(G), and cannot be abated.

V. Conclusion

In the case at hand, the petitioner has failed to submit evidence or arguments sufficient to refute the accuracy of the Department's situsing of its services or the tax and interest amounts assessed in this matter. Specifically, the petitioner has failed to prove that its "Other Operating Gains/Losses" account is a cost sharing reimbursement that does not meet the definition of a gross receipts per R.C. 5751.01(F). As stated above, the amount Gannett Publishing pays the petitioner as part of a cost sharing agreement is a gross receipts per R.C. 5751.01(F) and situsable to Ohio per R.C. 5751.033(I). Therefore, based on the relevant authority and the evidence currently available to the Tax Commissioner, the tax and interest amounts assessed are accurate.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Payments	Overpayment
$21,601.00	$1,229.00	$0.00	($26,070.00)	($3,240.00)

Current records indicate that $26,070.00 has been made on this assessment, resulting in an overpayment of $3,240.00 which will be refunded to the petitioner. However, due to payment processing and posting time lags, additional payments may have been made that are not reflected in this final determination.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: SEP 09 2020

Honda of America Mfg.
24000 Honda Parkway
Marysville, OH 43040

Re: Assessment No. 100000883694
Commercial Activity Tax
Reporting Period: 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
$0.00	$0.00	$0.00	$0.00

The Department assessed the petitioner after performing a field audit of its CAT account for the period at issue. During the audit, the Department's audit staff adjusted the petitioner's gross receipts per R.C. 5751.01(F) and taxable gross receipts per R.C. 5151.033(E) which resulted in an underpayment of CAT. The Department's audit staff applied $2,869,357.00 of the petitioner's nonrefundable credits against the audit adjustments, which covered all the tax liability identified during the audit. The petitioner requested that the Department issue an assessment so that it could file an administrative appeal objecting to the audit adjustments pursuant to R.C. 5751.09 and 5703.60. The petitioner objects to the assessment and the audit adjustments, and contends that the assessment should be cancelled, and the credit carryforward should be restored. Upon further review, and in light of the Ohio Board of Tax Appeal's decision in *Hyundai Motor Finance Co. v. McClain*, BTA No. 2015-785, 2020 WL 883134 (Feb. 6, 2020), the petitioner's contention is well taken.

Accordingly, the assessment is cancelled, and the petitioner's $2,869,357.00 nonrefundable credit carryforward has been restored.

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.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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0000000187

FINAL DETERMINATION

Date: SEP 2 3 2020

Lindsay Corp.
2411 N. Verity Parkway
Middletown, OH 45042

Re: Commercial Activity Tax
Assessment No. 100000809219
Reporting Period: 01/01/2013 – 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) amount:

Tax	Interest	Penalty	Total
$54,278.00	$3,399.00	$8,142.00	$65,819.00

Lindsay Corporation (hereinafter "Lindsay Corp." or "petitioner") is a retail gas station and convenience store. The Department assessed the petitioner after performing an office audit for the periods at issue. The Department reviewed information received from the Internal Revenue Service ("IRS") which reported higher gross receipts reported to the IRS by the petitioner than what was reported on the petitioner's CAT returns. Due to the petitioner's failure to respond to the Department's requests for information, the petitioner's taxable gross receipts were estimated for each year per R.C. 5703.36 by using the annual gross receipts reported by the petitioner to the IRS. Accordingly, the gross receipts reported to the IRS were determined to be gross receipts per R.C. 5751.01(F) and taxable gross receipts per R.C. 5751.01(G). The annual gross receipts reported to the IRS were also determined to be 100% situsable to Ohio per R.C. 5751.033(E) based on the petitioner's retail gas station being located solely in Ohio. The petitioner objects to the assessment and contends that most of its sales were from motor fuel sales which were exempt from CAT tax for the periods at issue. The petitioner originally requested, and subsequently, waived a request for a telephone hearing. Therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

During the administrative appeal period, the petitioner submitted federal returns and information for its motor fuel sales for the periods at issue. Beginning on July 1, 2014, receipts from the sale, transfer, exchange, or other disposition of motor fuel became excluded from the definition of gross receipts for purposes of the CAT. *See* R.C. 5751.01(F)(2)(r) and Am.Sub. H.B. 59, 130th General Assembly (effective July 1, 2013). Instead, effective July 1, 2014, the first sale of motor fuel in Ohio by refineries, terminals, and other suppliers was reported under the Petroleum Activity Tax ("PAT"). Additionally, effective July 1, 2014, motor fuel refineries and terminals began paying the motor fuel receipts tax ("Rack Tax") instead of the CAT. Therefore, beginning on July 1, 2014, a retailer was no longer required to include the sale of motor fuel to its customers in its taxable gross receipts for purposes of CAT. However, gas stations, like the petitioner's business, are still required to continue to file returns reflecting business activities other than the sales of motor fuel. Based on the additional

information submitted by the petitioner, the petitioner's CAT gross receipts now reflect the information reported on the petitioner's federal returns. Additionally, the petitioner's motor fuel sales after July 1, 2014 have now been excluded from its taxable gross receipts on its CAT returns.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$28,116.00	$2,454.00	$4,217.00	$34,787.00

Current records indicate that no payments have been made on this assessment, leaving the adjusted balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any 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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: SEP 3 0 2020

Nucor Corporation
Nucor Fastener Division
1915 Rexford Rd.
Charlotte, NC 28211-3441

Re: Assessment No. 100000654758
Commercial Activity Tax – 01/01/2012 – 12/31/2014

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

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

Current records reflect that the modified amount 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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

SEP 16 2020

River of Goods, Inc.
946 W Pierce Butler Route
St. Paul, MN 55104

Re: Assessment No. 100001165609
Commercial Activity Tax
Reporting Period: 01/01/2011 – 12/31/2017

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

Tax	Interest	Penalties	Total
$81,985.00	$8,554.02	$6,148.84	$96,687.86

The Ohio Department of Taxation assessed River of Goods, Inc. (hereinafter referred to as "the petitioner"), after conducting an audit of its CAT account for the period in question. The petitioner is an online retailer of home furnishings, lighting, and décor. The petitioner sells its products through online retailers such as Amazon, Walmart, Wayfair, and Bed Bath & Beyond. The petitioner has its principal place of business outside the State of Ohio and does not maintain any locations in Ohio; however, as described below, records reflect that the petitioner conducted business activity in the State. During the audit, the Department's audit staff identified that the petitioner was not registered for the CAT even though it was found that the petitioner had a substantial nexus through bright-line presence in Ohio as per R.C. 5751.01(H) and (I). Subsequently, the petitioner completed a Form CAT 1 Registration Form during the audit process and a CAT account was created for the petitioner.

During the audit, the Department also identified that the petitioner failed to report taxable gross receipts from its online sales in Ohio during the period at issue. The unreported taxable gross receipts were situsedin accordance with R.C. 5751.033(E) and (I). The audit staff made adjustments to reflect TGRs related to sales of tangible personal property and other services in Ohio. The adjustment resulted in an increase of the taxable gross receipts and CAT liability due for the petitioner. The corresponding interest was assessed pursuant to R.C. 5751.06(G). Additionally, the petitioner was assessed penalties pursuant to R.C. 5751.06(B)(1) and (D). In response to the assessment, the petitioner filed a timely petition for reassessment. The petitioner does not contest the CAT liability as assessed and has paid the tax due amount and interest but requests an abatement of the penalties assessed. The petitioner initially requested a hearing on the matter; however, the petitioner later waived the hearing request on a written correspondence submitted to the Department's hearing officer. Therefore, this matter is decided based upon information available to the Tax Commissioner and the evidence supplied with the petition.

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

audit process, and compliance with the Department, support a full reduction of the penalty. However, the interest cannot be abated, as the accrual of interest is mandatory pursuant to R.C. 5751.06(G).

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$81,985.00	$8,554.02	$0.00	$90,539.02

Current records indicate that a payment of $91,526.66 has been made in full satisfaction of the assessment, including $987.64 of accrued post-assessment interest, leaving no balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Additionally, assessments bear post-assessment interest as provided by law, which is in addition to the above total.** Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 1090, Columbus OH 43216-1090.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (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

Ohio Department of Taxation

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

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FINAL DETERMINATION

Date:

SEP 3 0 2020

Icon Solutions Inc
1661 International Dr STE 400
Memphis, TN 38120

Re: Assessment No. 100001188057
Employer Withholding Tax
Reporting Period: 01/01/2014 – 12/31/2014

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5747.13 concerning the following employer withholding tax corrected assessment.

Tax	Interest	Penalty	Total
$7,068.17	$1,106.60	$3,534.08	$11,708.85

The Ohio Department of Taxation assessed Icon Solutions Inc (hereinafter referred to as "the petitioner") because the petitioner failed to timely file and remit its Ohio employer withholding tax for the period at issue. Former R.C. 5747.07, applicable for the period in question, required every employer who is obligated to deduct and withhold an amount under R.C. 5747.06 to pay that amount to the State of Ohio. Former R.C. 5747.07(F)(4) and (5), applicable to the period in question, required the Tax Commissioner to assess interest if remittances of the withheld amounts are not paid to the state in a timely manner. Further, R.C. 5747.15(A)(4)(a) imposes a penalty of up to 50% of the delinquent payment upon an employer if that employer fails to remit the taxes withheld.

In response to the assessment, the petitioner filed a timely petition for reassessment. The petitioner does not contest the employer withholding tax liability assessed and has paid the tax due amount and interest but requests an abatement of the penalties assessed. The petitioner did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

The Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The petitioner contends that the failure to comply was due to reasonable cause. The information available to the Tax Commissioner, including the petitioner's payment of tax and interest assessed and the petitioner's compliance with the Department after this assessment, support a partial reduction of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$7,068.17	$1,106.60	$1,767.04	$9,941.81

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SEP 3 0 2020

Current records indicate that a payment of $11,708.85 has been made on this assessment, resulting in an overpayment of $1,767.04. This overpayment will be refunded to the petitioner. However, if the petitioner has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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

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0000000324

FINAL DETERMINATION

Date: SEP 3 0 2020

Northwest Local Board of Education
Treasurer's Office
3240 Banning Road
Cincinnati, OH 45239

Re: Assessment No. 100001073238
Employer Withholding Tax
Reporting Period: 07/22/2017 – 07/25/2017

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5703.60 concerning the following employer withholding tax corrected assessment.

Tax	Interest	Penalties	Payment	Total
$279,942.42	$8,681.12	$41,193.72	($291,079.49)	$38,737.77

The Ohio Department of Taxation assessed Northwest Local Board of Education (hereinafter referred to as "the petitioner") because a review of its employer withholding tax account revealed that it failed to fully remit its Ohio employer withholding tax for the period at issue. Former R.C. 5747.07, applicable for the period in question, required every employer who is obligated to deduct and withhold an amount under R.C. 5747.06 to pay that amount to the State of Ohio. Former R.C. 5747.07(F)(4) and (5), applicable to the period in question, required the Tax Commissioner to assess interest if remittances of the withheld amounts are not paid to the state in a timely manner. Further, R.C. 5747.15(A)(4)(a) imposes a penalty of up to 50% of the delinquent payment upon an employer if that employer fails to remit the taxes withheld. The petitioner did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

The petitioner contends that all employer withholding tax payments were made on time but asserts that the payments were made and posted to the wrong account. To support its contention that it made the required tax payments, the petitioner submitted documentation, including bank statements and account information, showing that it made payments and fully remitted its Ohio employer withholding tax in a timely manner for the period in question. Therefore, upon further review, the petitioner has presented evidence sufficient to support its contention. The payment of the tax was reflected in the corrected assessment. Moreover, since the petitioner's payment of the required tax was timely, no interest accrued pursuant to R.C. 5747.08(G), and the interest amount assessed shall be removed.

Finally, the Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The evidence and circumstances at hand, including the petitioner's payment of tax amount assessed, total payment of interest assessed, and its compliance with its employer withholding obligation following the assessment warrant a full abatement of the penalty.

Accordingly, the corrected assessment adjusted as follows:

Tax	Interest	Penalties	Payment	Overpayment
$279,942.42	$0.00	$0.00	($291,079.49)	($11,137.07)

Current records indicate that no additional payments were made on this corrected assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Records further reflect that the $11,137.07 was credited towards the petitioner's employer withholding tax account.

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

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Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: SEP 30 2020

Kevin & Adoline Ebeid
4237 Renshaw Run
Lambertville, MI 48144

Re: Assessment No. 02201722268390
Individual Income Tax – 01/01/2013 – 12/31/2013

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

Tax	Interest	Penalty	Total
$2,249.42	$239.48	$478.96	$2,967.86

The Department assessed the petitioners, Kevin and Adoline Ebeid, after making corrections to the individual income tax return that they filed for the tax period in question. Specifically, the Department disallowed a Small Business Investor Income Deduction ("SBD") [1] that the petitioners claimed relating to compensation received and income derived from Mr. Ebeid's interest in Knight Industries Corp. (hereinafter "Knight"), an Ohio S Corporation.[2] Records reflect that the petitioners did not respond to the Department's initial requests for documentation to support the SBD in question. The SBD in question is related to compensation as well as income and loss that Mr. Ebeid received from Knight. The petitioners object to the assessment and contend that they are entitled to the SBD originally claimed on their return for tax year 2013. In addition, the petitioners requested a hearing on the matter, which was conducted via telephone.

To support their contention that the SBD was properly claimed on their return, the petitioners submitted documents during the administrative appeal period including their 2013 federal income tax return and schedules, Form W-2 Wage & Income statements, Schedule K-1s, and other information regarding the activities of Knight and Mr. Ebeid's participation in the company. The evidence now available to the Tax Commissioner indicates that Mr. Ebeid was an officer and investor in Knight, which engages in the manufacture, sale, and distribution of wholesale glass products. He was an equal partner with one other investor and in charge of operations and production, and the remaining difference between their interests is held by a neutral third-party investor. According to his 2013 Schedule K-1, Mr. Ebeid owned a 49.894737% stake in Knight. Upon further review and in light of the evidence currently available to the Tax Commissioner, Mr. Ebeid's compensation was subject to the SBD pursuant to R.C. 5733.40(A)(7) and the income and loss were business income under R.C. 5747.01(B) and the relevant authority.

[1] Authorized by former R.C. 5747.01(A)(31) which was effective for tax year 2013.
[2] Records reflect that the Department issued a refund to the petitioners based on the return filed. However, following a subsequent review of the return, the Department issued this assessment to recapture what appeared to be an errant and unwarranted refund.

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Accordingly, the assessment is cancelled.

SEP 3 0 2020

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.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: SEP 2 3 2020

Eric G. & Deborah L. Johnson
632 Treeside Ln.
Avon Lake, OH 44012

Re: Assessment No. 02201713633844
Individual Income Tax – 2015

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

Tax	Interest	Penalty	Total
$7,873.38	$282.99	$2,755.68	$10,912.05

The Department of Taxation assessed petitioner for failing to file their 2015 individual income tax return. The petitioners object to the assessment and contend that they were not subject to Ohio personal income tax because Mr. Johnson was a nonresident servicemember who received active duty military income during the period in question. They contend further that they were both Florida residents and were not domiciled in the state of Ohio during the tax period at issue. To support their contentions, the petitioners submitted documentation including wage and income statements, standard travel orders from the United States Coast Guard, Ohio Form IT 10 – Ohio Income Tax Information Notice, and information regarding their Florida domicile. The petitioners did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

Upon further review and based on the evidence currently available to the Tax Commissioner, the assessment is cancelled.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000257

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

Brent A. Kohlhepp
2145 Easthill Ave
Cincinnati, OH 45208

Re: Refund Batch No. 1828518476
Individual Income Tax – 2017

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

Tax Year	Refund Claimed
2017	$24,043.00

I. BACKGROUND

Brent A. Kohlhepp (hereinafter referred to as "the claimant") initially filed a timely 2017 Ohio individual income tax return on October 15, 2018.[1] On the initially filed return, the claimant claimed a refund of $33,578.00. Upon initial review, the Department granted a partial refund of $9,535.00 and disallowed the remaining $24,043.00 claimed.[2] The partial denial was due to the Department's partial disallowance of the Ohio Business Income Deduction ("BID") and the Unreimbursed Health Care Expenses credit that the claimant reported on his 2017 return.

The claimant filed a timely objection in response to the partial denial. Specifically, the claimant contends that the Department erroneously disallowed an Ohio Business Income Deduction ("BID") that the claimant indicated was comprised of income and loss which arose from the regular course of the trade or business activities of partnerships that he held interests in and participated in. The claimant further contends that unreimbursed health insurance premiums are not required to exceed 7.5% of the taxpayer's adjusted gross income, as other medical expenses are. The claimant objected to the partial denial of his refund claim and requested an administrative review of the denial in accordance with R.C. 5703.70. The claimant did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the refund claim.

II. RELEVANT AUTHORITY

A. THE OHIO BUSINESS INCOME DEDUCTION ("BID")

R.C. 5747.01(A)(31) allows individuals jointly filing the Ohio IT 1040 to claim a deduction for the taxpayer's Ohio business income up to $250,000.00, to the extent it is included in federal adjusted gross income. Any remaining business income above this amount is then taxed at a flat 3% rate.

[1] Ohio Adm. Code 5703-7-02(A)(1) states that "[a]n application for refund under R.C. 5747.11 of the Revised Code shall include * * * [a]n annual return, or amended annual return, filed pursuant to Chapter 5747 of the Revised Code to the extent that the facts and figures contained on such return result in an overpayment."

[2] The Department credited $9,535.00 to the claimant's 2018 tax liability as he requested.

Additionally, taxpayers are required to complete and file an Ohio Schedule IT BUS ("IT BUS") in order to claim the BID. The IT BUS is used in determining taxable business income and business income tax liability for purposes of completing the Ohio IT-1040 individual income tax return. *See* R.C. 5747.01(A)(31), 5747.01(B), and 5747.01(HH).

B. BUSINESS & NONBUSINESS INCOME

Ohio's income tax distinguishes "business income" from "nonbusiness income." As a general matter, business income is defined as income from "the regular course of a trade or business" and is apportioned to Ohio according to the percentage of the business's property, payroll, and receipts located in Ohio. *See* R.C. 5747.01(B) (definition of business income) and 5747.21(B) (providing for the apportionment of business income by reference to the apportionment statutes of the former corporate franchise tax, R.C. Chapter 5733). *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, ¶ 21 (2016).

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

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

In *Kemppel v. Zaino*, the Supreme Court of Ohio reviewed the "transactional" and "functional" test used to classify income. *Kemppel v. Zaino*, 91 Ohio St.3d 420, 2001-Ohio-92, 746 N.E.2d 1073 (2001). In *Kemppel*, 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.* at ¶ 422. Under the functional test, the Court found 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. In addition to the "transactional" and "functional" tests, Ohio defines business income to also include the liquidation of a business. R.C. 5747.01(B). In general, income, deductions, gains and losses recognized by a sole proprietorship or a pass-through entity are items of business income.

By contrast, nonbusiness income is defined as "all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or intangible personal property, capital gains, interest, dividends, and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards." R.C. 5747.20. Nonbusiness income is allocated to the state depending on the type of income. *See* R.C. 5747.20(B) (allocating, for example, compensation to the place where it is earned, rents to the location of the property, and capital gains from the sale of intangible property to the taxpayer's state of domicile). The definition of nonbusiness income necessarily excludes business income, and only "may include" the listed items. As such, the statute provides potential examples of nonbusiness income, and the examples serve as only a non-exhaustive list of types of nonbusiness income. The determination of whether income is business income or nonbusiness income

rests on the test derived from the case law in addition to whether the income was from a liquidation of a business.

C. DEDUCTION OF UNREIMBURSED MEDICAL & HEALTH CARE EXPENSES

Under Ohio law, taxpayers are allowed to deduct unreimbursed medical and health care expenses from their adjusted gross income ("AGI"). R.C. 5747.01(A)(11)(a) states in relevant part that a taxpayer can "[d]educt… the amount the taxpayer paid during the taxable year for medical care insurance…for the taxpayer, the taxpayer's spouse, and dependents. No deduction under [this section] shall be allowed either to any taxpayer who is eligible [for any employer-paid health care plan] or to any taxpayer who is [eligible for Medicare]." It is important to note that taxpayers who elect to opt out of their employer-paid health care plan and then choose to purchase their own insurance are not eligible for this deduction. Furthermore, this deduction is also not available for taxpayers who take the above-the-line deduction for self-employed health insurance in their Internal Revenue Service ("IRS") return as part of calculating federal AGI. Unreimbursed health care insurance premiums paid when eligible for Medicare or an employer-paid plan can be deducted if those expenses exceed 7.5% of the taxpayer's federal AGI.

Medical care expenses can include prescription medications, copays, and doctor visits. This deduction is available to the taxpayers, taxpayer's spouse, and dependents as long as these expenses are not paid with pre-tax dollars, paid but later reimbursed or refunded, or paid by insurance or another person. Taxpayers claiming this deduction in their Ohio income tax return must also complete the Unreimbursed Medical & Health Care Expenses Worksheet.

III. ANALYSIS

The claimant filed a 2017 Ohio Schedule IT BUS with his individual tax return. On initial review, the Department partially disallowed the BID that he claimed and partially denied his income tax refund request because the claimant did not submit evidence sufficient to show that the income and loss received satisfied the transactional and functional tests from *Kemppel*. The claimant contends that the amounts reported for the BID for the tax year in question were correct as filed, and he submitted documentation with his objection to the partial denial, including individual federal income tax returns and schedules as well federal partnership returns, schedules, and operational information regarding entities and partnerships that he owned and participated in, to support his contention and the accuracy of the BID claimed on his originally filed return. Specifically, the claimant has submitted documentation which demonstrates that, for the period in question, the income and loss that underly the BID he seeks to claim arose from transactions, activities, and sources in the regular course of the trade or business of the partnerships he held interests in and participated in. Moreover, the claimant has shown that activities of the partnerships constituted an integral part of his and the partnerships' operations. Thus, upon further review, the claimant's contentions that income and loss that he reported for purposes of the 2017 BID satisfied the transactional and functional tests under *Kemppel* are well taken.[3]

[3] It should be noted that while Mr. Kohlhepp's ownership, activity, and participation in these partnerships rose to the level necessary to qualify the resulting income and loss as business income in 2017, if his involvement in or the activities of the partnerships changed in future periods, it may not qualify under the functional and transactional tests from *Kemppel*.

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The claimant also claimed a deduction of unreimbursed medical and health care expense with his 2017 Ohio personal income tax return. The Department initially disallowed the claimant's deduction because the reported unreimbursed medical and health care expenses did not exceed 7.5% of the claimant's federal AGI. Subsequently, the claimant submitted to the Tax Commissioner a copy of his Unreimbursed Medical & Health Care Expenses Worksheet showing that the claimant paid health insurance premiums in the amount of $21,139.00 and declaring that those premiums were not reimbursed and did not reduce the claimant's federal AGI in his federal return. Furthermore, the worksheet shows that the claimant checked box 1(c) indicating that he was not eligible for Medicare or a health care plan for which he or his spouse's employer paid any portion of the plan's cost for the tax year in question. As was explained above, medical care expenses exceeding 7.5% of the claimant's federal AGI is a requirement for taxpayers who have unreimbursed health care insurance premiums paid when eligible for Medicare or an employer-paid plan. Records show that the claimant was not eligible for Medicare or an employer-paid plan, therefore, the 7.5% of the claimant's federal AGI threshold did not apply to him. Upon further review, the claimant's contentions regarding the unreimbursed medical and health care expenses deduction are well taken.

IV. CONCLUSION

Upon further review and in light of the information and documentation submitted with the claimant's objection to the partially denied refund request, the claimant's contentions are well-taken.

Accordingly, for the reasons stated above, the remainder of the refund originally claimed is granted.

This refund, plus applicable statutory interest, will be issued to the claimant. However, if the claimant has an existing liability with the State of Ohio or Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000177

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

FINAL DETERMINATION

Date: SEP 23 2020

Luisa M Navarro Dominguez &
Jose R Cerda Arria
8656 Emerald Isle
Mason, OH 45040

Re: Assessment No. 02201800815846
Individual Income Tax – 2013

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

Tax	Interest	Penalty	Payment	Total
$4,840.00	$595.24	$595.24	($5,435.24)	$595.24

I. BACKGROUND

The Department assessed Luisa M. Navarro Dominguez and Jose R. Cerda Arria (hereinafter referred to as "the petitioners") after making adjustments to the individual income tax return that they filed for tax year 2013. Specifically, the Department disallowed the petitioners' Lump-Sum Retirement Credit from distribution income received from the Procter & Gamble profit sharing trust and employee stock ownership plan for tax year 2013. The petitioners did not object to the adjustment but requested for the credit to be applied to their Ohio 2012 personal income tax return. Upon initial review, the Department denied their request, and the petitioners filed a petition for reassessment identifying their disagreement with the Department's disallowance and denial. The petitioners requested a hearing on the matter. The hearing was conducted via telephone with the petitioners on September 15, 2020.

II. RELEVANT AUTHORITY

For Ohio income tax purposes, the starting tax base is Ohio adjusted gross income which is federal adjusted gross income as adjusted pursuant to R.C. 5747.01(A). A resident of Ohio is always subject to the individual income tax, regardless of where the individual earns or receives income. R.C. 5747.02 imposes a tax based on "all the adjusted gross income of resident individuals (minus an exemption), without regard to where that income is earned." *McCann v. Limbach*, 9th Dist. Summit No. 16040, 1993 WL 329958 3 (1993) *citing Brachman v. Limbach*, 52 Ohio St.3d 1, 2 (1990).

R.C. 5747.055(C) provides in relevant part that "[a] taxpayer who received a lump-sum distribution from a pension, retirement, or profit-sharing plan in the taxable year * * * may elect to receive a credit under this division * * *." Ohio 2013 Personal Income Tax filing instructions further clarifies that a "lump sum distribution is one where you receive your entire balance from a qualified pension, retirement or profit-sharing plan during one taxable year." *See* Ohio Department of Taxation, *Ohio*

2013 Instructions for Filing: Personal Income Tax.[1] Receiving an entire balance as a lump-sum from a qualified pension, retirement or profit-sharing plan is evidenced when the taxpayer provides the Department with a copy of their Internal Revenue Service ("IRS") Form 1099-R showing the payer's information and having the "total distribution" box on line 2b checked in addition to having a distribution code listed on line 7 "Distribution code(s)." *See* Internal Revenue Service, *Instructions for Form 1099-R and 5498.*[2]

Notably, the Ohio Board of Tax Appeals ("BTA") in *Vincent v. McClain*, held that the Tax Commissioner correctly disallowed appellant's lump-sum retirement credit when the appellant's IRS 1099-R form showed an unchecked "total distribution" box on line 2b and listed a distribution code "7" on line 7 meaning the distribution was a normal distribution and not a total distribution. *Vincent v. McClain*, BTA Case No. 2019-427 (September 17, 2019). In *Vincent*, the BTA agreed with the Tax Commissioner because the credit is "only available for a total distribution." *Id.*

III. ANALYSIS & CONCLUSION

The Department disallowed the petitioners' Lump-Sum Retirement Credit from distribution income received from the Procter & Gamble profit sharing trust and employee stock ownership plan reported for tax year 2013. The petitioners did not object to the nature of the disallowance for tax year 2013 but instead, the petitioners requested to have their lump-sum distribution credit retroactively applied to their Ohio 2012 personal income tax return and liability.[3] The petitioners were not able to produce evidence to demonstrate that their distribution income received in 2013 was a total distribution received from a qualified pension, retirement, or profit-sharing plan pursuant to R.C. 5747.055(C). Furthermore, records show that the 2013 distribution received by the petitioners was regular income reported on a W-2 and not on IRS 1099-R Form; therefore, the distribution was excluded from any lump-sum retirement distribution credit. As was held by the BTA in *Vincent*, here, the petitioners did not provide an IRS 1099-R Form and the evidence provided shows the distribution received by the petitioners for tax year 2013 was regular income and not a total distribution from a qualified pension, retirement or profit-sharing plan. Consequently, the Department correctly denied the petitioners' Lump-Sum Retirement Credit claimed in their Ohio 2013 personal income tax return.

IV. PENALTY ABATEMENT

Although the interest assessed cannot be abated, as the payment of interest is mandatory pursuant to R.C. 5747.08(G), the Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). The petitioners assert that the failure to comply was due to reasonable cause and the facts and circumstances in this matter support a full abatement of the penalty assessed.

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[1] Retrieved from: https://tax.ohio.gov/static/forms/ohio_individual/individual/2013/pit_it1040_booklet.pdf (last accessed September 22, 2020).

[2] Retrieved from: https://www.irs.gov/pub/irs-pdf/il1099r.pdf (last accessed on September 22, 2020).

[3] The petitioners completed an Ohio application for personal income tax refund (IT AR Form) for tax year 2012 dated May 25, 2018. The refund claim was denied because it was outside the four-year period to file a timely refund claim pursuant to R.C. 5747.11(B). A Final Determination for refund claim number 4004303903 was issued on August 12, 2020. Furthermore, even if the petitioners had demonstrated that they were due a lump sum retirement credit for 2013, the Tax Commissioner lacks the authority to retroactively apply the credit granted under R.C. 5747.055(C) to a previous tax year.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Payment	Total
$4,840.00	$595.24	$0.00	($5,435.24)	$0.00

Current records indicate that an additional payment of $595.24 has been made on this assessment, resulting in an overpayment of that amount. This overpayment will be refunded to the petitioners. However, if the petitioners have an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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

0000000181

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: SEP 23 2020

Steven J. & Kathryn M. Pottschmidt
2546 Wexford Rd.,
Columbus, OH 43221

Re: Assessment No. 02201902476414
Individual Income Tax – 2016

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

Tax	Interest	Penalty	Total
$1,774.00	$126.75	$253.50	$2,154.25

The Ohio Department of Taxation assessed Steven J. and Kathryn M. Pottschmidt (hereinafter referred to as "the petitioners") after making adjustments to their Ohio individual income tax return for the tax period in question. Specifically, the Department disallowed a portion of the Ohio Business Income Deduction ("BID") that the petitioners' reported on their 2016 individual income tax return. The petitioners object to the denial of the BID and request that the Tax Commissioner accept the return was as filed. The petitioner did not request a hearing; therefore, this matter is decided based upon the information available to the Tax Commissioner and the evidence supplied with the petition for reassessment.

Upon verifying the documentation provided by the petitioners, the petitioners' request is well taken. Thus, the petitioners have presented sufficient evidence to support their contention.

Accordingly, the assessment is cancelled.

Current records indicate that a payment of $2,154.25 has been applied to this assessment, resulting in an overpayment of that amount. This overpayment, plus applicable statutory interest, will be refunded to the petitioners. If the petitioners have an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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

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

Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000256

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

Peter Reid
P.O. Box 91
Chauncey, OH 45719

Re: Assessment No. 02201808049444
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
$9,868.00	$361.18	$3,453.80	$13,682.98

The Ohio Department of Taxation assessed the petitioner for failing to file a 2016 individual income tax return. The petitioner contends that since he was not domiciled in Ohio during the 2016 tax year, he should not be subject to Ohio individual income tax. Therefore, the petitioner requests a cancellation of the assessment. Based on the evidence now available to the Tax Commissioner, the petitioner's contention is well taken.

Accordingly, the assessment is cancelled.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 09 2020

Julius J. & Sherry A. Schwarcz
26367 Danville Amity
Danville, OH 43014

Re: Assessment No. 02201902477271
Individual Income Tax – 2017

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

Tax	Interest	Penalty	Total
$1,384.00	$43.53	$87.06	$1,514.59

The Ohio Department of Taxation assessed Julius and Sherry Schwarcz (hereinafter "the petitioners") after making adjustments to their Ohio individual income tax return for the tax period in question. When the petitioners initially filed their Ohio individual income tax return, they requested a refund in the amount of $1,439.00.[1] However, the Department disallowed the petitioners' "Credit for Purchases of Grape Production Property" included on their Ohio Schedule of Credits. Due to the disallowance of the "Credit for Purchases of Grape Production Property," it offset the refund amount to $0.00. The petitioners contend that they should be entitled to the "Credit for Purchases of Grape Production Property" on their Ohio Schedule of Credits for the tax period in question. The petitioners object to the denial of this nonrefundable credit but did not request a hearing. While the petitioners did not request a hearing, they did communicate and provide the Department with additional documentation during the administrative appeal period. This matter is now decided upon the information available to the Tax Commissioner and the evidence supplied with the petition for reassessment.

Upon verifying the additional documentation provided by the petitioners, the petitioners' request is well taken. Thus, the petitioners have presented sufficient evidence to support their contention.

Accordingly, the assessment is cancelled, and the refund claimed on the originally filed return is granted.

Current records indicate that no payments have been applied to this assessment, leaving a refund of $1,439.00 to the petitioners. This overpayment will be refunded to the petitioners. If the taxpayer has an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

[1] Ohio Adm. Code 5703-7-02(A)(1) states that "[a]n application for refund under R.C. 5747.11 of the Revised Code shall include * * * [a]n annual return, or amended annual return, filed pursuant to Chapter 5747 of the Revised Code to the extent that the facts and figures contained on such return result in an overpayment."

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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

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

FINAL DETERMINATION

Date: SEP 09 2020

Karen L. Shuster
35903 Hanamar Dr.,
Avon, OH 44011

Re: Assessment No. 02201828950834
Individual Income Tax – 2016

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

Tax	Interest	Penalty	Total
$2,764.00	$164.78	$329.56	$3,258.34

The Department assessed Karen Shuster (hereinafter referred to as "the petitioner") after making adjustments to the individual income tax return that she filed for the year in question. Subsequently, the petitioner filed a petition for reassessment objecting to the assessment. However, pursuant to R.C. 5747.13(E)(2), an individual filing a petition for reassessment of individual income tax "shall pay the assessed amount, including assessed interest and assessed penalties," on or before the last day a petition for reassessment may be filed, if "[t]he person files a tax return that the tax commissioner determines to be incomplete, false, fraudulent, or frivolous." R.C. 5747.13(E)(2). In the present case, the Tax Commissioner has determined that the petitioner's return was false and frivolous, and the petitioner did not pay the total amount of tax, interest and penalty with the petition. Thus, the petitioner must pay the entire assessed amount prior to consideration of the petition. Unless the taxpayer makes the required payments, the Tax Commissioner must dismiss the petition.

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

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

SEP 09 2020

0000000124

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: SEP 09 2020

Karen L. Shuster
35903 Hanamar Dr.,
Avon, OH 44011

Re: Assessment No. 02201828950835
Individual Income Tax – 2017

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

Tax	Interest	Penalty	Total
$3,980.00	$78.08	$156.16	$4,214.24

The Department assessed Karen Shuster (hereinafter referred to as "the petitioner") after making adjustments to the individual income tax return that she filed for the year in question. Subsequently, the petitioner filed a petition for reassessment objecting to the assessment. However, pursuant to R.C. 5747.13(E)(2), an individual filing a petition for reassessment of individual income tax "shall pay the assessed amount, including assessed interest and assessed penalties," on or before the last day a petition for reassessment may be filed, if "[t]he person files a tax return that the tax commissioner determines to be incomplete, false, fraudulent, or frivolous." R.C. 5747.13(E)(2). In the present case, the Tax Commissioner has determined that the petitioner's return was false and frivolous, and the petitioner did not pay the total amount of tax, interest and penalty with the petition. Thus, the petitioner must pay the entire assessed amount prior to consideration of the petition. Unless the taxpayer makes the required payments, the Tax Commissioner must dismiss the petition.

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

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

SEP 09 2020
0000000122

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: SEP 09 2020

Karen L. Shuster
35903 Hanamar Dr.,
Avon, OH 44011

Re: Assessment No. 02201923230675
Individual Income Tax – 2018

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

Tax	Interest	Penalty	Total
$2,683.00	$44.84	$89.68	$2,817.52

The Department assessed Karen Shuster (hereinafter referred to as "the petitioner") after making adjustments to the individual income tax return that she filed for the year in question. Subsequently, the petitioner filed a petition for reassessment objecting to the assessment. However, pursuant to R.C. 5747.13(E)(2), an individual filing a petition for reassessment of individual income tax "shall pay the assessed amount, including assessed interest and assessed penalties," on or before the last day a petition for reassessment may be filed, if "[t]he person files a tax return that the tax commissioner determines to be incomplete, false, fraudulent, or frivolous." R.C. 5747.13(E)(2). In the present case, the Tax Commissioner has determined that the petitioner's return was false and frivolous, and the petitioner did not pay the total amount of tax, interest and penalty with the petition. Thus, the petitioner must pay the entire assessed amount prior to consideration of the petition. Unless the taxpayer makes the required payments, the Tax Commissioner must dismiss the petition.

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

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

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000283

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

SEP 3 0 2020

Karen L. Shuster
35903 Hanamar Dr.,
Avon, OH 44011

Re: Assessment No. 02202021735202
Individual Income Tax – 2019

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

Tax	Interest	Penalty	Total
$0.00	$0.00	$1,000.00	$1,000.00

The Department assessed Karen Shuster (hereinafter referred to as "the petitioner") as an Ohio resident[1] who made a false claim for refund as contemplated under R.C. 5747.15(A)(7). The petitioner filed a 2019 individual tax return on June 24, 2020 which reported $0.00 of Federal Adjusted Gross Income ("FAGI") and claimed a refund. The amount of income and tax liability reported on the petitioner's return is inconsistent with the evidence currently available to the Tax Commissioner, including information reported to Ohio by the IRS under authorization of Section 6103(d) of the Internal Revenue Code.

The petitioner objects to the assessment and contends the "notice that the alleged debt is fraudulent and you shall cease collection of the debt until you can prove that I am an employee, officer, or have any business dealings with the private company Ohio Dept. of Taxation." However, the petitioner has not submitted any evidence to support this contention. Rather, the evidence currently available to the Tax Commissioner indicates that the petitioner has earned income in the State of Ohio for the tax period in question and therefore was subject to Ohio income tax in accordance with Chapter 5747 of the Ohio Revised Code. The petitioner has failed to comply with Ohio's tax law for multiple years despite repeated assessments issued in response to incomplete or false Ohio income tax returns that she filed.[2] The fact that the petitioner disagrees with established law does not mean she is entitled to ignore her obligation to report income and remit income tax due. On the contrary, the petitioner is still required to comply with the established Ohio tax law.

Pursuant to R.C. 5747.13(E)(2), an individual filing a petition for reassessment of individual income tax "shall pay the assessed amount, including assessed interest and assessed penalties," on or before the last

[1] The petitioner self-reported that she was a resident of the State of Ohio during 2019 and did not identify any non-Ohio sourced income on the return that she filed. The evidence available to the Tax Commissioner also reflects that the petitioner was an Ohio resident for the period in question.

[2] Records reflect that the petitioner failed to correctly file an Ohio income tax return and report income taxable to Ohio for tax years 2016, 2017, and 2018.

day a petition for reassessment may be filed, if "[t]he person files a tax return that the Tax Commissioner determines to be incomplete, false, fraudulent, or frivolous." R.C. 5747.13(E)(2). In the present case, the Tax Commissioner has determined that the petitioner's 2019 return was false and frivolous, and the petitioner did not pay the total amount of tax, interest, and penalty with the petition.[3] Thus, the petitioner must pay the entire assessed amount prior to consideration of the petition. Unless the taxpayer makes the required payments, the Tax Commissioner must dismiss the petition.

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

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

[3] The 2019 tax year is still under review by the Department for potential underreporting of Ohio income tax and may be subject to future assessment.

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 16 2020

C Financial Corporation
c/o First Merchants Corporation
200 E. Jackson St.
Muncie, IN 47308

Re: Assessment No. 14201621158353
Pass-Through Entity Withholding Tax - 01/01/2015 – 12/31/2015

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5747.13 concerning the following pass-through entity withholding tax assessment:

Tax	Interest	Penalty	Total
$39,730.00	$1,203.00	$0.00	$40,933.00

The Ohio Department of Taxation assessed the petitioner, C Financial Corporation, after making adjustments to the Ohio Form IT 1140 Pass-Through Entity Withholding Tax Return ("Form 1140") that it filed for the period in question. The petitioner objects to the assessment and, while conceding that certain mistakes were made on the Form 1140 it filed, claims that it fully reported and remitted its pass-through entity tax required under law. In the alternative, the petitioner contends that certain items of income and deduction representing portions of the adjusted qualifying amount that it originally reported on its Form 1140 were not required to have been allocated or apportion for pass-through entity withholding tax purposes pursuant to R.C. 5747.012, R.C. 5747.221, and R.C. 5733.401. In support of its contentions, the petitioner submitted its Federal Form 1120S U.S. Income Tax Return and schedules and exhibits as well as information pertaining to the sources of its income for the period in question. The petitioner initially requested a hearing on this matter; however, following pre-hearing communications with the Department's Hearing Officer, it waived its hearing request. Therefore, this matter is now decided based on the evidence currently available to the Tax Commissioner.

Upon further review and based on the evidence and information provided during the administrative appeal period, this assessment shall be cancelled.

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

SEP 16 2020
0000000131

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000323

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

SEP 3 0 2020

Goodwin Procter LLP
100 Northern Ave
Boston, MA 02210

Re: Assessment Nos.: 100001012315, 100001012320, 100001012314, 100001012313, 100001012312, 100001012311, 100001012317, 100001012309, 100001012318, and 100001012322
Pass-Through Entity Tax
Reporting Periods Ending: 9/30/2009 through 9/30/2016

This is the final determination of the Tax Commissioner with regard to petitions for reassessment filed pursuant to R.C. 5747.13 concerning the above-referenced pass-through entity tax assessments.

In resolution of these matters, these assessments shall be finalized pursuant to terms agreed to by the Tax Commissioner and the petitioner.

Current records indicate that the assessments at issue herein have been paid in full.

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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000322

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

Rockies Express Pipeline, LLC
c/o Tallgrass Energy, L.P.
ATTN: Michael Callahan, Esq., Executive VP and General Counsel
4200 W. 115TH Street, Suite 350
Leawood, KS 66211-2609

Re: Assessment Nos.: 1700374, 100000825343, 100001056172, and 100001448884
Public Utility Excise Tax
Tax Years: 2016, 2017, 2018, and 2019

This is the final determination of the Tax Commissioner with regard to petitions for reassessment filed pursuant to R.C. 5727.47 concerning the above-referenced public utility excise tax assessments.

In resolution of these matters, these assessments shall be finalized pursuant to terms agreed to by the Tax Commissioner and the petitioner.

Current records indicate that the assessments at issue herein have been paid in full.

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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

0000000229

FINAL DETERMINATION

Date:

SEP 3 0 2020

Northeast Ohio Natural Gas Corporation
f/k/a Orwell-Trumbull Pipeline Co., LLC
ATTN: Accounting / Tax Department
5640 Lancaster-Newark Road NE
Pleasantville, OH 43148

Re: Orwell-Trumbull Pipeline Co., LLC
Case No. 17-00331
Public Utility Property Tax
Geauga, Lake, and Portage Counties
Tax Year: 2016

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5727.47 concerning a public utility property tax assessment.

I. PROCEDURAL BACKGROUND

The Department assessed the petitioner after making adjustments to the public utility property tax report that it filed for tax year 2016. Specifically, the Department identified that the petitioner filed an Ohio Form U-NG Natural Gas Company Annual Report, instead of an Ohio Form U-PL Natural Gas Pipeline Annual Report. Upon initial review, the Department sent a letter to the petitioner seeking an explanation regarding its decision to file as a natural gas company. After reviewing the evidence provided and available at that time, the Department concluded that the petitioner should be classified as a pipe-line company pursuant to R.C. 5727.01(D)(5). This change in classification increased the amount of public utility property tax that the petitioner owed, as natural gas company property is assessed at 25% of true value pursuant to R.C. 5727.111(C), whereas pipe-line company property is assessed at 88% of true value pursuant to R.C. 5727.111(D). In calculating the assessment, the Department also accounted for asset accounts with negative balances reported on the initial Form U-NG Report that that the petition filed.

In response to the assessment, the petitioner filed a timely petition for reassessment. The petitioner also requested a hearing on the matter, which was conducted via teleconference.

II. FACTUAL BACKGROUND

In a March 19, 2019 letter written by the petitioner's authorized representative to the Public Utilities Commission of Ohio (PUCO), the petitioner described the facts surrounding its bankruptcy receivership and proposed sale of assets, including the Orwell-Trumbull Pipeline Company (OTP), as follows:

> **Background**: Orwell-Trumbull Pipeline Co., LLC ("OTP") is an intrastate natural gas company located in Ohio. OTP is a pipeline company under Ohio Revised Code Section ("R.C.") 4905.03(F) and a public utility under R.C. 4905.02(A). OTP obtained approval

from the Public Utilities Commission of Ohio ("PUCO") to operate as a regulated public utility on March 16, 2005, and is currently regulated by the PUCO. OTP operates approximately 141 miles of pipeline, all within the State of Ohio. OTP provides natural gas transportation service to natural gas customers in Portage, Geauga, and Lake Counties in northeastern Ohio. The majority of the pipeline was constructed in the early 2000s.

Receivership proceeding: In *Richard M. Osborne, et al., v. Park View National Savings Bank n/k/a First National Bank of Pennsylvania*, Cuyahoga County Court of Common Pleas, Case No. CV 14-822810 (the "Receivership Case"), the Court appointed Zachary B. Burkons as the receiver ("Receiver") over the property and assets of OTP. On February 21, 2019, the Court (1) authorized the Receiver to sell certain assets of OTP's free and clear of all liens, encumbrances, and other interests; and (2) approved the Receiver's proposed bidding and auction procedures.

Asset Description: The following OTP assets are being sold as part of the process:
Real Property: 3511 Lost Nation Road, Willoughby, Ohio 44094 (Parcel # 27B-044-0-0025)
Pipeline: 141 Miles – 52 miles of 8" coated steel (.312 wall thickness); 34 miles of 4" coated steel (.188 wall thickness); and 55 miles of 2" coated steel (.154 wall thickness)

The evidence available to the Tax Commissioner indicates that the petitioner entered into Chapter 11 bankruptcy in December 2017 and was later sold in 2019 through the bankruptcy receiver to Northeast Ohio Natural Gas Company. Records reflect that the petitioner now operates as part of Northeast Ohio Natural Gas Company.

III. Petitioner's Contentions

The petitioner objects to the Department's classification of it as a pipe-line company pursuant to R.C. 5727.01(D)(5) and contends that it should be classified as a natural gas company pursuant to R.C. 5727.01(D)(4). To support this contention, the petitioner indicates it is a natural gas company because it is engaged in the business of supplying and distributing natural gas for lighting, power and heating purposes wholly within Ohio, as well as arguing that it transports natural gas directly to consumers, including large consumers, and argues that it operates solely within Ohio.

IV. Relevant Authority

A. Statutory Cost Valuation

Pursuant to R.C. Chapter 5727, public utilities must pay property tax on their personal property. *Ohio Bell Tel. Co. v. Levin*, 124 Ohio St.3d 211, 2009-Ohio-6189, 921 N.E.2d 212, ¶ 2 (2009). The property tax is an ad valorem tax and the Tax Commissioner must determine the value of the public utility's property. R.C. 5727.10 provides the process under which the Tax Commissioner assesses the value of public utility property stating, in pertinent part, that:

> Annually, the tax commissioner shall determine, in accordance with section 5727.11 of the Revised Code, the true value in money of all taxable property * * * to be assessed by the commissioner. * * * The commissioner shall be guided by the

> information contained in the report filed by the public utility and such other evidence and rules as will enable him to make these determinations.

The Tax Commissioner's valuation forms the base for the ultimate determination of the amount of the tax. R.C. 319.30, 319.301, 5705.02 –.05, 5705.19.

B. TYPES OF PUBLIC UTILITIES

R.C. 5727.01(A) defines what types of persons qualify as public utilities stating that:

> "Public utility" means each person referred to as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works company, water transportation company, heating company, rural electric company, railroad company, combined company, or energy company.

The type of public utility determines the valuation and assessment process for the taxpayers. Relevant to this matter are definitions included in Divisions (D)(4) and (D)(5) of R.C. 5727.01. R.C. 5727.01(D)(4) defines a "natural gas company" as:

> (D) Any person:
>
> * * *
>
> (4) Is a natural gas company when engaged in the business of supplying or distributing natural gas for lighting, power, or heating purposes to consumers within this state, excluding a person that is a governmental aggregator or retail natural gas supplier as defined in section 4929.01 of the Revised Code;

R.C. 5727.01(D)(5) defines a "pipe-line company" as:

> (D) Any person:
>
> * * *
>
> (5) Is a pipe-line company when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partially within this state;

C. ASSESSING TYPES OF PUBLIC UTILITIES AT SPECIFIED PERCENTAGES OF TRUE VALUE

R.C. 5727.111 instructs the Tax Commissioner to assess certain types of public utilities at specified percentages of true value. For instance, R.C. 5727.111(C) twenty-five percent of true value shall be assessed for a natural gas company. R.C. 5727.111(D) then indicates that eighty-eight percent of true value shall be assessed for a pipe-line company.

V. ANALYSIS OF THE FACTS & CIRCUMSTANCES PRESENTED

The issue presented in this matter is whether the petitioner was a "natural gas company" or a "pipe-line company" for purposes of Ohio's public utility property tax.

A. OTP'S ATTORNEYS FOR THE SALE OF THE COMPANY IN BANKRUPTCY INDICATE THAT OTP IS A PIPE-LINE COMPANY

As noted above, OTP's bankruptcy representative, the law firm of Bricker & Eckler, indicated in its March 19, 2019 letter to the PUCO regarding OTP's notice to sell assets in accordance with the bid procedures approved by the receivership court, that OTP is a pipe-line company, in pertinent part:

> OTP is a pipeline company under Ohio Revised Code Section ("R.C.") 4905.03(F) and a public utility under R.C. 4905.02(A). OTP obtained approval from the Public Utilities Commission of Ohio ("PUCO") to operate as a regulated public utility on March 16, 2005, and is currently regulated by the PUCO. OTP operates approximately 141 miles of pipeline, all within the State of Ohio. OTP provides natural gas transportation service to natural gas customers in Portage, Geauga, and Lake Counties in northeastern Ohio. The majority of the pipeline was constructed in the early 2000s.

The above-quoted language shows that OTP's representative considers OTP to be a pipe-line company.

B. THE PUBLIC UTILITIES COMMISSION OF OHIO (PUCO) HAS DETERMINED THAT OTP IS A PIPE-LINE COMPANY AND NOT A NATURAL GAS COMPANY

Notably, the PUCO regulates both natural gas companies and gas pipe-line companies. The PUCO identifies OTP on its list of regulated pipe-lines.[1] The PUCO website's list of "Gas Pipeline Companies" shows that PUCO has included OTP on its list of regulated "Gas Pipeline Companies", and not on its list of natural gas "Local Distribution Companies". Thus, this is evidence from the governmental entity that regulates both natural gas companies and gas pipe-line companies that the petitioner is a gas pipe-line company.[2] Thus, to accept the petitioner's contention that it was a natural gas company would, in effect, acknowledge that the PUCO has misclassified the petitioner as a pipe-line company or that the petitioner has accepted being misclassified by PUCO. While the classification of the PUCO is not determinative for purposes of Chapter 5727 of the Revised Code, it is, nevertheless,` instructive in that the petitioner has allowed the PUCO to classify it as a gas pipe-line company for regulatory purposes.

C. OTP FITS WITHIN THE REVISED CODE DEFINITIONS OF A "PIPE-LINE COMPANY"

Again, while it is not determinative in this matter, the way in which the petitioner classifies itself and how other regulatory bodies classify it is pertinent. As mentioned, the petitioner identified itself as a pipe-line company pursuant to R.C. 4905.03(F), which provides that an entity is "(a) pipe-line company when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state, but not when engaged in the business of the transport associated with gathering lines, raw natural gas liquids, or finished product natural gas liquids". While not identical, there is a similarity between the definition of a pipe-line company in R.C.

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[1] Public Utility Commission of Ohio. Regulated Company List. Retrieved from: https://puco.ohio.gov/wps/portal/gov/puco/documents-and-rules/list/regulated-company-list-dynamic-landing?company=Orwell-Trumbull%20Pipeline%20Co.,%20LLC&pucoId=301815&referrer=RegulatedList (last accessed September 1, 2020).

[2] PUCO regulates providers of all kinds of utility services, including electric and natural gas companies, local and long distance telephone companies, water and wastewater companies, rail and trucking companies. The list of public utilities that PUCO regulates is identified in Section 4905.03 of the Ohio Revised Code.

4905.03(F) and the definition of a pipe-line company in R.C. 5727.01(D)(5), which states that a person is a "pipe-line company when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing."

More importantly, the March 19, 2019 letter identified above indicates that OTP operates 141 miles of natural gas pipeline within Ohio. This description is consistent with the evidence currently available to the Tax Commissioner regarding the petitioner and its operation of the OTP as a natural gas pipe-line company. Aside from bareboned assertions and a summary valuation calculation based on a 25% assessment of true value included with its petition for reassessment, the petitioner has not submitted evidence affirmatively establishing that it operated as a "natural gas company" as defined in R.C. 5727.01(D)(5) during tax year 2016. Furthermore, the petitioner has not submitted evidence sufficient to refute the Department's classification of it as a "pipe-line company".

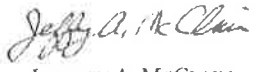
VI. Conclusion

Ultimately, the evidence presented and currently available to the Tax Commissioner reflects that the petitioner was properly assessed as a pipe-line company. Furthermore, the petitioner has not provided any substantive evidence to show that any improper assessment was issued.

For the reasons given above, the petitioner is best characterized as a pipe-line company and the assessment is therefore affirmed.

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 NOTICE WILL BE SENT PURSUANT TO R.C. 5727.47 TO THE APPROPRIATE COUNITY AUDITORS, WHO SHALL PROCEED IN ACCORDANCE WITH R.C. 5727.471.

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

0000000261

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

309 Ryan, Inc.
309 E. Wyoming Ave.
Lockland, OH 45215

Re: Assessment No. 100001253492
Sales Tax
Account No. 31-392844

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
$51,407.01	$4,583.17	$25,703.38	$81,693.56

The petitioner requests abatement of the penalty. Considering the surrounding facts and circumstances, abatement of the penalty is warranted. The request is granted.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$51,407.01	$4,583.17	$0.00	$55,990.18

Current records indicate payments have been made in full satisfaction of this assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000234

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

6101 Third Street Fuel Express
6646 Averell Dr.
Dayton, OH 45424

Re: Assessment No. 100001455867
Sales Tax
Account No. 57-195774

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
$132,456.43	$16,591.45	$66,228.08	$215,275.96

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 January 1, 2015 to December 31, 2017. A hearing was not requested.

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 maintain complete records for the period at issue and failed to provide complete purchase invoices for the audit period. Audit Remarks, p. 6. Therefore, a mark-up analysis was conducted using supplier purchase summaries and the petitioner's purchase invoices. The Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. R.C. 5739.13; *see also Brandy's Inc. v. Zaino*, 3rd Dist. Hancock No. 5-01-43, 2002-Ohio-1923, ¶ 25. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

As an initial matter, 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).

Cigarette Rebates

The petitioner contends that cigarette rebates should be applied to reduce tax liability. In support of this contention, the petitioner submitted IRS Form 1099 Miscellaneous Income Statements and Historical Payment records from tobacco companies. The petitioner provided no further documentation of rebates, nor any information that could be used to verify the purpose of the payments memorialized in these forms.

Without further explanation or verification, the petitioner failed to provide sufficient support for the contention that these records represent cigarette rebates. The Tax Commissioner cannot adjust tax liability without adequate supporting evidence. The objection is denied.

Theft

The petitioner contends that theft by both employees and customers reduced purchased inventory prior to sale, and therefore tax liability should be adjusted to reflect these loses. However, the petitioner is unable to show the amount of loss due to theft or prove error in the assessment. The objection is denied.

Penalty Remission

The petitioner requests a penalty remission. The facts and circumstances support a partial abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$132,456.43	$16,591.45	$46,359.53	$195,407.41

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

0000000236

SEP 3 0 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000172

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: SEP 2 3 2020

A.C. Moore, Inc.
130 AC Moore Dr.
Berlin, NJ 08009

RE: Refund Claim No.: 202000084
Sales Tax

This is the final determination of the Tax Commissioner in regard to an application for refund. The claimant errantly applied and paid for a vendor's license twice. As a result, it submitted this request for a refund of its errantly paid, second $25.00 registration fee.

Pursuant to the R.C. 5739.07, the Tax Commissioner has the authority to refund taxes which were paid illegally or erroneously. The amount at issue is a fee for application for a Transient/County Vendor's License. Therefore, the claimant has not erroneously paid sales tax and the request is denied.

Accordingly, the refund clam is denied.

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

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Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000326

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

Sarah Amofa
4A Camelot Ct., Apt. 510
Fairfield, OH 45014

RE: Refund Claim No: 201902440
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $650.00, 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 claimant purchased a 2016 Honda HRV from Daniel Baiden on January 26, 2019. The claimant states she returned the vehicle to the seller on February 7, 2019 and received a full refund. The evidence in the file supports that contention.

Accordingly, a refund in the amount of $650.00 plus applicable interest is granted.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

Ashland Global Holdings, Inc.
ATTN: Tax Department
P.O. Box 391
50 E. RiverCenter Blvd.
Covington, KY 41012

RE: Refund Claim No.: 201700301
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $1,291,898.36, plus applicable interest in sales tax filed pursuant to R.C. 5739.07. The claim was initially granted in part with a refund of the sales tax paid in the amount of $793,723.98 plus applicable interest. The claimant disagreed with the partial denial and requested reconsideration of the matter. A hearing was scheduled for July 8, 2020, but the claimant did not call at the scheduled time. The claimant submitted additional information via email.

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

The claimant is seeking a refund for an overpayment of sales tax for the period from July 1, 2009 through April 30, 2015. The claimant contends that it erroneously paid sales tax for software purchases exempt pursuant to R.C. 5739.033(D)(1). The claimant contends that Ohio sales tax was paid in error because the purchase order was issued to the claimant's Dublin, Ohio office rather than its headquarters in Covington, Kentucky. The claimant's contention is addressed in detail below.

Multiple Point of Use

The claimant contends that transactions from Salesforce.com concerning software are exempt as purchases accessed from servers located outside the state of Ohio and concurrently available for use by Ashland employees throughout the United States. The claimant contends that its headquarters are located in Covington, Kentucky and its data center was located in Lexington, Kentucky during the time of the audit; however, the purchase order from Salesforce erroneously included its Dublin, Ohio office. As a result, the claimant erroneously paid Ohio sales tax on the purchases.

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R.C. 5739.033(D)(1) provides in relevant part that a business consumer, who is not a holder of a direct payment permit, that purchases software and knows at the time of purchase that such software will be concurrently available for use in more than one taxing jurisdiction and delivers to the vendor an exemption certificate claiming multiple points of use, may use any reasonable, consistent, and uniform method of apportioning the appropriate tax to each jurisdiction where concurrent use occurs. Most notably, the uniform method of apportioning the appropriate tax must be supported by the consumer's business records as they existed at the time of the sale.

The claimant provided sufficient evidence to demonstrate that the claimant's headquarters are in Kentucky and the purchased software licenses were issued to the claimant's Kentucky headquarters and data center. The evidence submitted is sufficient to warrant a refund of the sales tax paid. Accordingly, this objection is granted.

Therefore, the claim for a refund in the amount of $498,265.38 plus applicable interest is granted.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

Automile Inn, Inc.
76 Broadway Ave.
Bedford, OH 44146

Re: Assessment No. 100001012079
Sales Tax
Account No. 18-473892

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
$201,406.98	$19,116.02	$100,703.39	$321,226.39

The petitioner operates a bar. The assessment is the result of an audit of the petitioner's sales from January 1, 2014 through March 31, 2017. A hearing was held on January 17, 2020.

This assessment is the result of a mark-up analysis of the petitioner's purchases of inventory. The petitioner is required to maintain primary and secondary records of sales. R.C. 5739.11 and Ohio Adm.Code 5703-9-02. The petitioner did not provide the requested z-tapes or other primary sales records for the period at issue. Audit Remarks, p. 5. Therefore, a mark-up analysis was conducted using inventory purchase invoices supplied by the taxpayer and its suppliers. The Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. R.C. 5739.13. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

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

Audit Methodology

As noted above, a mark-up analysis was used to calculate taxable sales. The petitioner did not sign the Memorandum of Agreement outlining the audit methodology. A ten-day letter was issued on

January 9, 2018 allowing the petitioner the opportunity to suggest an alternative audit method; however, none was submitted. A mark-up analysis was used to calculate taxable sales based upon a block sample period of January 1, 2015 through December 31, 2015. Inventory purchase invoices maintained by the petitioner were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period. Where complete inventory purchase records were not available, information obtained directly from the distributor was used.

The auditor calculated the taxable sales of beer – bottle/can, beer – draft, liquor – single serving, and wine. The purchases allocated to each category were totaled and multiplied by the applicable mark-up percentage to calculate taxable sales for each inventory category. The resulting calculated taxable sales were then totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the petitioner for the entire sample period. The resulting taxable percentage of reported gross sales (329.74%) was then applied to the reported gross sales for each period of the audit to arrive at a calculated taxable sales figure for each reporting period. The appropriate tax rate was then applied to arrive at the sales tax liability. The petitioner was given credit for sales tax paid with its sales tax returns. The unpaid tax liability was assessed.

Mark-Up Percentages

The petitioner contends that the mark-up percentages employed by the auditor are high, resulting in excessive taxable sales. This contention is not well taken. Where there is an objection that the liability for taxable sales is excessive, the burden is on the petitioner to establish its actual tax liability or any other error in the assessment through competent, probative evidence. *Castle's Gas & Deli LLC v. Testa*, BTA No. 2015-1477, 2016 WL 3577464 at *3 (June 26, 2016). The petitioner refers to the calculated taxable percentage of gross sales as the mark-up percentage. The taxable percentage of gross sales, as explained above, is calculated by dividing the estimated taxable sales from the sample period by the petitioner's reported gross sales from the sample period. The taxable percentage of gross sales is then applied to the petitioner's reported gross sales for each reporting period under audit, not to the petitioner's purchases of inventory.

The petitioner submits alternate sales figures based on an alternate mark-up percentage; however, the petitioner admits that these percentages are based on information from outside the audit period. Petitioner's Letter Dated April 10, 2020, p. 1. The only evidence submitted to support this contention are checkbook records, on which the petitioner bases its calculation of estimated sales. The petitioner attempts to use these checkbook records as a substitute for inventory purchases. The petitioner does not support its mark-up percentages with evidence showing the basis for calculating these percentages and admits some purchases of inventory are not made by check. Petitioner's Letter Dated April 10, 2020, p. 4. The petitioner's alternate percentages could be based on any or no actual sales data. This is insufficient to overcome the petitioner's burden to provide evidence showing error in the assessment. The objection is denied.

Additional Information

The petitioner contends that the audit methodology resulted in an excessive amount of gross sales. The petitioner also contends that the audit was based on unnecessary assumptions due to the additional documentation they have provided since the audit. The petitioner is required to maintain

primary sales records. R.C. 5739.11. Ohio law requires these primary records to delineate between taxable and non-taxable sales. Ohio Adm.Code 5703-9-2(B)(1). The Commissioner is required to perform an estimated audit if these records are not maintained. *Dorsz v. Wilkins*, BTA No. 2007-K-68, 2009 WL 2634238 (August 18, 2009). The petitioner has not provided primary records to show that the mark-up audit methodology was unnecessary. Additionally, the petitioner admits that it does not have sales records from the audit period. Petitioner's Letter Dated April 10, 2020, p. 3. In the absence of primary records, the Commissioner will rely upon the results of the mark-up audit.

The petitioner provided bank records and credit card processing documents. Bank deposit records and credit card processing statements are not primary records of sales and do not allow the Commissioner to ascertain if tax was properly charged on transactions. Bank records are inadequate because they only show funds deposited from the business. Bank records do not necessarily show all of the sales made by a business, just what the business chooses to deposit in one bank account. The credit card processing statements do not show tax charged or individual transactions. Additionally, the credit card processing records do not account for any cash sales made by the petitioner. The petitioner has not met that burden to provide evidence sufficient to show error in the assessment. The objection is denied.

Theft

The petitioner contends significant theft of liquor from the bar occurred during the audit period. Without documentation for theft, the Commissioner cannot establish the amount of loss or see any error in the auditor's methodology. *See Jelly Rolls, Inc. v. Zaino*, BTA No. 2002-N-1910, 2004 WL 1534820 (June 30, 2004). The petitioner submitted court records for a person who was found guilty of stealing from the bar. However, the theft was of lottery tickets which are not the subject of the assessment. The petitioner has not submitted evidence showing a finite amount of theft during the sample period of taxable inventory subject to this assessment. The petitioner attempts to link alcohol purchase amounts to credit card sales trends to estimate theft. Sales and purchases naturally fluctuate in the course of any business. The petitioner admits that it is unable to provide specific estimates of theft using this method. Petitioner's Letter Dated April 10, 2020, p. 5

In addition, the theft alleged by the petitioner should not alter the outcome of the assessment. The petitioner alleges the theft occurred in 2016. As 2016 was not the sample year, the assessment is not based on 2016 purchases. Because theft would not result in merchandise being sold, theft in 2016 should not have been represented in any way on the petitioner's reported gross sales. The audit methodology accounts for this by being based on reported gross sales. Therefore, the petitioner cannot demonstrate an amount by which to adjust the assessment or if any adjustment is warranted. The petitioner has not met their burden to show error in the assessment. The objection is denied.

Reported Gross Sales

The petitioner contends that its returns contain inaccurate information. The petitioner contends that it included lottery sales in their reported gross sales, and the figures used in the audit computation should be reduced. The petitioner submitted information showing its lottery sales and

theft of lottery tickets. However, the petitioner's evidence does not show this information was reported as part of gross sales. As the calculation of the taxable percentage of gross is based on purchases of taxable inventory, the audit methodology inherently accounts for exempt sales or errors in the petitioner's method of reporting gross sales, despite the petitioner's failure to maintain proper records. As the evidence does not show a specific error in the audit, the petitioner has not met its burden. The objection is denied.

Penalty Abatement

The petitioner requests abatement of the penalty. Considering all the surrounding facts and circumstances, the request is granted.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$201,406.98	$19,116.02	$0.00	$220,523.00

Current records indicate that no payments have been applied on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. 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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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000262

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

Domingo P. Badillo
1017 Harvard Ave.
Fairborn, OH 45324

RE: Refund Claim No.: 201903432
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $2,718.02, of sales tax, filed pursuant to R.C. 5739.07.

On or about October 26, 2018, the claimant purchased a 2019 Chevrolet Traverse. The claimant contends that he is entitled to a refund of the sales tax paid due to his status as a disabled veteran. He provided a letter from the Department of Veterans Affairs (the "VA") regarding his VA benefits in support. The claim was received on April 19, 2019. The refund agent denied the application and sent the claimant a later stating that Ohio does not have a vehicle tax exemption for the reason he is claiming. The claimant disagreed with the denial and requested reconsideration of the matter. The claimant also provided an updated letter regarding his VA benefits.

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). All sales made in the state are presumed taxable. R.C. 5739.02(C). If the refund application is filed for a purchase that it believes was exempt, a claimant must show that its purchase was entitled to an exemption. *Rowitz v. McClain*, 2019-Ohio-5438, 138 N.E.3d 1241, ¶ 60 (10th Dist.). Exemptions or exceptions from taxation are to be strictly construed. *Id.* at ¶ 61. Therefore, it is the claimant's burden to prove entitlement to an exemption. *Id.*

There is not an Ohio sales tax exemption for purchases of vehicles by disabled veterans. The claimant has not provided any law or information showing how he is entitled to a refund. Therefore, the evidence submitted is insufficient to warrant a refund.

Accordingly, the claim for a refund is denied.

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SEP 3 0 2020

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

Berhanu Abebe
811 W. 8th St.
Cincinnati, OH 45203

RE: Assessment No.: 100000783265
Sales Tax
Account No.: 89-131646

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
$209,602.62	$16,462.91	$104,801.20	$330,866.73

The petitioner owns and operates two Marathon convenience stores in the Cincinnati area. Both locations were included in the audit since the petitioner ran both locations under one vendor's license. This assessment is the result of a mark-up audit of the petitioner's sales from August 1, 2013 through November 30, 2016. The petitioner filed a petition for reassessment. A hearing was held.

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

Audit Methodology

The auditor determined that the petitioner did not have adequate primary sales records. Audit Remarks, p. 4. The petitioner notes this is at least in part due to errors in the petitioner's point of sale system. Petitioner's Post-Hearing Memorandum, p. 7. As a result, the auditor engaged in a mark-up analysis pursuant to R.C. 5739.13(A).

The mark-up analysis was conducted using the best data available to the auditor. For one location, the auditor used the petitioner's inventory purchase invoices and records provided by the petitioner's suppliers. For the other location, the petitioner could not provide similar

documentation, so distributor records were used. Audit Remarks, p. 4. Two auditors also assembled a product checklist of items at one of the petitioner's stores during a visit. *Id.*, p. 3. The petitioner agreed that this checklist was similar to the mix at both stores and signed it. *Id.*, p. 4.

A sample period of January 1, 2015 through December 31, 2015 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. In instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question which the auditor attempted to reconcile with the petitioner's own purchase records. Utilizing the petitioner's records, the auditor calculated the mark-up percentage for beer, wine, cigarettes, other tobacco, pop & soft drinks, energy drinks & other beverages, phone cards, and taxable merchandise. Each category was assigned a mark-up percentage derived from the petitioner's purchase invoices and inventory purchase summaries obtained directly from distributors, suggested retail mark-up percentages, and state minimum requirements. *Id.*

The auditor used this percentage to determine the audit liability using standard reports. *Id.* The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The totals for each category of taxable merchandise were summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales. The reported gross sales for each non-sampled month of the audit period were multiplied by that percentage to determine the calculated taxable sales for each non-sampled month. The calculated taxable sales for each non-sampled month were multiplied by the applicable tax rate to determine the sales tax liability for each non-sampled month. Sales tax liability for the sampled months was determined by multiplying the actual calculated monthly taxable sales for each sampled month by the applicable tax rate. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability.

After the initial audit results were provided, the taxpayer's representative called the auditor to discuss the results. In the Audit Remarks, the auditor summarized one of the taxpayer's complaints:

> The representative also stated that his client believed that the markup percentages on the pop / energy / and taxable merchandise were too high. The auditor stated that these numbers were based off of averages taken from the categories on the inventory purchases sheet and that *if an adjustment needed to be made, then additional proof of markup calculation would need to be done*. The auditor cautioned that one or two products with a markup of less than 30% would be insufficient as one or two products may have a markup much greater than 30%." *Id.*, p. 6 (emphasis added).

While the auditor provided the 10-day letter and the petitioner did not return it, the audit remarks go to great length of how the auditor told the petitioner that he could still appeal if he was able to

put together the information. *Id.* The petitioner has not provided any specific proof to support the argument that the of markup percentages were too high on specific products.

The auditor sent a memorandum of agreement to the petitioner that specified the methodology of the audit prior to the calculation of the liability on July 7, 2017. The agreement was provided to the petitioner with a ten-day correspondence requesting that if the petitioner disagreed with the audit methodology, an alternative methodology must be submitted in written form within ten days. The auditor confirmed receipt with the petitioner's representative at the time. No additional information was provided. *Id.*

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 does not dispute that its record maintenance did not comply with these requirements. Petitioner's Post-Hearing Memorandum, p. 7. When this occurred, the Commissioner was not only entitled, but was required, to gather information from other sources and estimate the amount of taxes which should have been collected and remitted. R.C. 5739.13; *see also Brandy's Inc. v. Zaino*, 3rd Dist. Hancock No. 5-01-43, 2002-Ohio-1923, ¶ 25. 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).

Evidence in the record reflects that the petitioner may not have accounted for all of its sales. Petitioner's Post-Hearing Memorandum, p. 7. Additionally, the petitioner failed to maintain complete purchase invoices. This necessitated the auditor's approach of calculating the amount of taxable inventory purchases from other records such as the summaries maintained by the taxpayer or directly from the taxpayer's distributors.

Markup Percentages

The petitioner does not contest that it owes tax. The petitioner contests that the tax assessed is excessive. Petitioner's Post-Hearing Memorandum, p. 13. The petitioner objects to its tax liability based upon the tax liability of a separate convenience store owned by the petitioner under a separate limited liability company. This store was subject to its own audit. This different store was subject to different markup calculations. Where there is an objection that the liability for taxable sales is excessive, the burden is on the petitioner to establish its actual tax liability or any other error in the assessment through competent, probative evidence. *Castle's Gas & Deli LLC v. Testa*, BTA No. 2015-1477, 2016 WL 3577464 (June 26, 2016), *3.

The petitioner presents the mark-up analysis from Minoleah as proof the assessment was excessive. In support, it cites its "Combined Financial Statement" ("CFS") and the application of the Minoleah audit rate to that statement. The CFS differs from petitioner's federal tax returns by around $30.11. Petitioner's Post-Hearing Memorandum, p. 10.

This argument has no probative value. The petitioner admits it is not keeping uniform summary records in addition to requiring the Commissioner to perform a sample audit because it did not keep the records as required by law. These types of issues are what made a mark-up audit

necessary. Further, the petitioner observed and signed every page of the product checklist for this audit. While the auditor provided the 10-day letter and the petitioner did not return it, the audit remarks go to great length of how the auditor told the petitioner that he could still appeal if he could put together the supporting information. *Id.* The petitioner has not provided any specific proof that the markup percentages were too high on specific products. It has not shown why its calculations based upon a separate store are probative and show error in the Tax Commissioner's calculations for the assessment at issue.

Further, the petitioner has not provided any legal basis for its argument that an audit on a separate store owned by a separate LLC with the evidence provided is somehow binding on the Tax Commissioner. The Board of Tax Appeals ("BTA") has affirmed the Tax Commissioner in rejecting similar objections regarding product mix at a taxpayer's retail location. *Lotto Express, Inc. and Christine Markho v. Testa,* BTA Nos. 2013-6569, 2013-6570, 2013-6571, 2014 WL 2809205, *2 (May 8, 2014). The petitioner's evidence is not sufficient to meet its burden to show error in the assessment. The objection is denied.

Spoilage and Theft

The petitioner objects to the spoilage allowance in the mark-up calculation. It further argues that a theft allowance should have been included into the mark-up calculation. The petitioner argues for a five percent reduction for theft and spoilage. It did not quantify how it reached this amount, just that it was "reasonable." Petitioner's Post-Hearing Memorandum, p. 12. The Tax Commissioner requested evidence to support the petitioner's contention.

The petitioner provided crime data for the surrounding area. The petitioner also provided a video showing a clerk stopping a theft in progress and photos of allegedly spoiled inventory. It states that this justifies its five percent estimation. *Id.*, pp. 2-6. It did not cite any case law in support.

The BTA has held "a taxpayer cannot simply claim that the 'reality of modern retailing' requires that such types of adjustments be made, as it is incumbent upon a taxpayer to keep records demonstrating the legitimate bases for such claims." *Williard Drive Thru & Carry Out v. Testa*, BTA No. 2016-16, 2017 WL 1443857, *5 (January 19, 2017) (further citations omitted). Without documentation for theft or spillage, the Commissioner cannot establish the amount of loss or see any error in the auditor's methodology. *See Jelly Rolls, Inc. v. Zaino*, BTA No. 2002-N-1910, 2004 WL 1534820 (June 30, 2004). The petitioner provided generalized descriptions of theft and loss without further evidence. This does not meet the petitioner's burden to show error in the assessment. *Williard,* supra, *5, citing *24 Hours, Inc. v. Zaino*, BTA No. 1997-M-1389, (May 21, 1999).

Further, the local statistics, pictures, and video do not prove error in the assessment. The local statistics provided are, "at best, mere supposition, incapable of any meaningful examination." *Wooley Bulley's Inc. v.* Zaino, BTA Nos. 99-M-1362, 99-M-1363, 2001 WL 527945, *4 (May 11, 2001). The pictures and video are not from the sample period. Most importantly, these arguments fail to quantify any spoilage or stolen goods. This objection is denied.

Penalty

SEP 3 0 2020

The petitioner requests penalty abatement. Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The facts and circumstances support partial abatement of the penalty.

Therefore, the assessment shall be modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$209,602.62	$16,462.91	$62,880.57	$288,946.10

Current records indicate that a payment of $16,000.00 has been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000223

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

Briggs Mart, Inc.
2774 Briggs Road
Columbus, Ohio 43204

Re: Assessment No. 100000806689
Sales Tax

This is the final determination of the Tax Commissioner who comes on his own motion pursuant to R.C. 5703.05(H) to amend the assessment. Accordingly, the assessment is amended as follows:

	Total
Tax	$ 113,601.43
Interest	$ 17,648.53
Penalty	$ 0.00
Total	$ 131,249.96

Payments and credits totaling $131,249.96 have been received in complete satisfaction of this assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 09 2020

Buchanan, Jennifer L.
24027 E. Oakland Rd.
Bay Village, OH 44140

Re: 19 Assessments
Tax Type: Sales (Responsible Party)
Girl's Best Trend, LLC

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

Assessment No.	Filing Period	Total
100001272167	6/1/16 - 6/30/16	$114.39
100001272168	2/1/17 - 2/28/17	$3,012.94
100001272169	3/1/17- 3/31/17	$3,026.74
100001272170	4/1/17 - 4/30/17	$3,026.52
100001272171	5/1/17 - 5/31/17	$3,026.08
100001272172	6/1/17 - 6/30/17	$3,025.86
100001272173	7/1/17 - 7/31/17	$3,027.83
100001272174	8/1/17 - 8/31/17	$3,025.86
100001272175	9/1/17 - 9/30/17	$3,025.86
100001272176	11/1/17 - 11/30/17	$3,026.52
100001272177	1/1/17 - 1/31/17	$3,013.81
100001272178	10/1/17 - 10/31/17	$3,025.86
100001272179	3/1/18 - 3/31/18	$3,021.26
100001272180	4/1/18 - 4/30/18	$3,049.29
100001272181	6/1/18 - 6/30/18	$3,037.20
100001272187	12/1/17 - 12/31/17	$3,026.74
100001272189	1/1/18 - 1/31/18	$3,012.94
100001272190	2/1/18 - 2/28/18	$3,026.08
100001272191	5/1/18 - 5/31/18	$3,027.83
	Total	$54,579.61

These are responsible party assessments. Girl's Best Trend, LLC incurred sales tax liability resulting in multiple assessments. These assessments were never fully satisfied by Girl's Best Trend, LLC and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge

of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Girl's Best Trend, LLC has been derivatively assessed against Jennifer L. Buchanan. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was not requested.

Responsible Party

The petitioner objects to the underlying corporate assessments. The petitioner does not challenge her status as the responsible party; however, it is important to note the petitioner is responsible based on the evidence. The evidence indicates that the petitioner is the owner of Girl's Best Trend, LLC and is identified as the authorized representative and agent on the company's Ohio Secretary of State business filings. The evidence indicates that the petitioner is a partner of Girl's Best Trend, LLC and is identified as such on its county vendor's license application. Additionally, the petitioner appeared on a segment for New Day Cleveland in April of 2017 in which she identified herself as the owner of the business.[1] After receiving notice of the responsible party assessments, the petitioner appealed by providing the company's financial records in the form of sales information for the periods at issue. The petitioner has not met her burden to demonstrate the assessments were in error. The objection is denied. Therefore, it is determined that the petitioner was a responsible party of Girl's Best Trend, LLC under R.C. 5739.33.

Underlying Assessments

The petitioner submitted an objection related to the underlying corporate assessments. Since these are responsible party assessments, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Therefore, this objection cannot be considered as it relates to the underlying assessments.

Accordingly, the assessments shall stand as issued.

Any reduction or credit made to the underlying corporate assessment on appeal or in collection will be applied to the corresponding responsible party assessment. Proper credit for any payments will be given at the collection stage. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above referenced total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

[1] Girls Best Trend, New Day Cleveland WJW Television, LLC (April 14, 2017), <https://www.youtube.com/watch?v=zGIJpGN2Vfk> (accessed Sept. 4, 2020).

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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 16 2020

Continental Express, Inc.
10450 S.R. 47 W.
Sidney, OH 45365

RE: Account No. 34-1434240
Refund Amount Requested: $12,539.22
Sales Tax
Refund Period: 04/01/2014 – 06/30/2014

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $12,539.22 of sales tax filed pursuant to R.C. 5739.07. The claimant initially requested a refund of motor fuel tax paid erroneously to the State. When the Department evaluated the request, it determined that the claimant was entitled to a refund of motor fuel tax, however the claimant had also failed to pay sales tax on some of the motor fuel that was the basis of the refund claim. As a result, the Tax Commissioner offset the amount of the refund by the amount of sales tax owed on the motor fuel purchased for use in Ohio. The claimant believes that the motor fuel for which it was taxed qualified for an exemption, and therefore, it is entitled to a refund in the above amount. A hearing was held.

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 at 143, 311 N.E.2d 1 (1974). The Tax Commissioner will not engage in speculation. 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 its purchases of motor fuel were exempt under either R.C. 5739.02(B)(32), the transportation for hire exemption, or R.C. 5739.02(B)(42) and 5739.01(P), the public utility services exemption. Further, the claimant contends that even if its fuel purchases were taxable, only twenty percent of the total fuel it purchases for refrigeration purposes was consumed in Ohio. The claimant contends that, as a result, it should only have been responsible for twenty percent of the sales tax that was collected by the state of Ohio. These contentions are addressed below.

Transportation for Hire

The claimant contends that its purchases of fuel were exempt under R.C. 5739.02(B)(32). The claimant contends that the fuel was incorporated into its motor vehicles, that were engaged in transportation for hire, when the fuel was deposited into the fuel tank and consumed by the refrigeration units. The tax does not apply to the following: * * * the sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire. R.C. 5739.02(B)(32). The Tax Commissioner gave guidance on this issue in Information Release ST 1992-05. "The Department does not consider motor vehicle fuel that is used in an exempt manner for purposes of the Ohio motor fuel tax exemption from Ohio sales and use tax based on R.C. 5739.02(B)(32) (highway transportation for hire exemption) because motor fuel is not incorporated into the vehicle as required by that exemption." Information Release ST 1992-05 Highway Transportation for Hire, Issued August 1992, Updated August 2011, p. 1. Therefore, this contention is denied.

Public Utility Services

The claimant contends that its purchases of fuel were exempt under R.C. 5739.02(B)(42) and 5739.01(P). The claimant contends that commercial transportation companies in Ohio are public utilities under the jurisdiction of the Public Utilities Commission of Ohio (P.U.C.O.). The claimant contends that it was registered with the P.U.C.O., and therefore the motor fuel was used directly in rendering a public utility service. "The tax does not apply to the following: * * * sales where the purpose of the purchaser is to do any of the following: * * * to use or consume the thing transferred * * * directly in the rendition of a public utility service." R.C. 5739.02(B)(42)(a). "Used directly in the rendition of a public utility service" means * * * fuel or power used in the production, transmission, transportation, or distribution system, * * * *tangible personal property and services used primarily in providing highway transportation for hire are not used directly in the rendition of a public utility service*. (Emphasis added.) R.C. 5739.01(P).

The claimant provided a currently suspended P.U.C.O. license number in support of its contentions. However, simply being regulated by the P.U.C.O. does not mean one's activities are used directly in the rendition of a public utility service. "The court has consistently found that one of the most important criteria, if not the most important, for the application of R.C. 5739.01(E)(2) to the rendition of a public utility service is special regulation and control by a governmental regulatory agency. *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420. R.C. 5739.01(E)(2) stated, at the time, that "'retail sale' and 'sales at retail' include all sales except those in which the purpose of the consumer is: * * * to use of consume the thing transferred * * * directly in the rendition of a public utility service." That exception is now codified in R.C. 5739.02(B)(42), as shown above.

In *Castle*, the evidence failed to show that Castle's operations met the criterion of being under special regulation and control by a governmental regulatory agency. *Id.* at *295. Admittedly, Castle Aviation, Inc. applied for and was granted an air carrier certificate to haul newspapers for the New York Times. *Id.* However, the granting of the air carrier certificate was

not shown to have been anything other than a perfunctory administrative function by the Federal Aviation Administration. *Id.*

There was no evidence that any governmental agency set any requirements, other than safety, to govern Castle's business operations. *Id.* The court determined that Castle's operations were similar to many other private business operations in that they must comply with various regulations, e.g., safety or environmental regulations, in order for the business to operate; however, those regulations do not control the relation between the business and the public as its customers. *Id.* The claimant has not shown that it was subject to any requirements set by P.U.C.O. The claimant has provided no additional proof that shows that it was a provider of a public utility service. Furthermore, R.C. 5739.01(P) specifically states that tangible personal property used primarily in providing highway transportation for hire services is not used directly in the rendition of a public utility service. Fuel is tangible personal property that is consumed while providing transportation for hire services by the claimant. Therefore, it fails to qualify for the public utility exemption stated in R.C. 5739.01(P), and these contentions are denied.

Apportionment

The claimant contends that only twenty percent of the total fuel it purchased for refrigeration purposes was consumed in Ohio. Therefore, it should only be responsible for twenty percent of the sales tax that was collected by the state of Ohio. In support of this contention, the claimant submitted its International Fuel Tax Agreement Tax Return for the state of Ohio, for the period of April 1, 2014 through June 30, 2014.

Any person who uses any motor fuel, on which the tax imposed by this chapter has been paid, for the purpose of operating stationary gas engines, * * * or any purpose other than the operation of motor vehicles upon highways or upon waters within the boundaries of this state, shall be reimbursed in the amount of the tax so paid on such motor fuel as provided in this section. R.C. 5735.14(A).

> The tax does not apply to the following: * * * sales of motor fuel upon receipt, use, distribution, or sale of which in this state tax is imposed by the law of this state, but this exemption shall not apply to the sale of motor fuel on which a refund of tax is allowable under division (A) of section 3735.14 of the Revised Code; and the Tax Commissioner may deduct the amount of tax levied by this section applicable to the price of motor fuel when granting a refund of motor fuel tax pursuant to division (A) of section 5735.14 of the Revised Code and shall cause the amount deducted to be paid into the general revenue fund of this State.

R.C. 5739.02(B)(6). Motor fuel that is not used to propel a motor vehicle on the public highways can be the subject of a refund claim. Generally, motor fuel is not subject to sales tax, except when it is the subject of a motor fuel refund claim. A taxpayer can avoid offsetting the motor fuel refund claim with sales tax owed if they qualify for a sales tax exemption. As discussed above, the claimant has failed to prove that it qualified for a sales tax exemption. Additionally, the claimant has failed to provide sufficient detail that shows that the gallons of fuel which are

the subject of the motor fuel refund claim were used outside of Ohio. Therefore, the claimant has failed to prove that it erroneously remitted sales tax to the State, and this contention is denied.

Accordingly, the claim for a refund is denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

Dshamaa LLC
747 Regent Rd.
Cincinnati, OH 45245

RE: Assessment No.: 100001119129
Sales Tax
Account No.: 08-013578

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
$73,585.56	$6,382.72	$36,792.65	$116,760.93

The petitioner operates a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from January 23, 2015 through April 30, 2018. The petitioner filed a petition for reassessment. A hearing was held on July 13, 2020.

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

Audit Methodology

The petitioner failed to maintain primary records as required by R.C. 5739.11. Audit Remarks, p. 5. Accordingly, the Department sent a memorandum of agreement to the petitioner that specified the methodology of the audit. A sample period of January 1, 2017 through December 31, 2017 was used to calculate taxable sales using a markup analysis.

The inventory purchase invoices maintained by the taxpayer were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period. The invoice dates were used to determine which inventory purchase transactions occurred within the

sample period. In instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon the records, summaries, or other information obtained directly from the distributors. In the instances when confirmation of the amount of the taxable inventory purchases could not be obtained from either the taxpayer or the distributors, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor. Taxable inventory purchase amounts derived from distributor summaries or estimates were divided by the number of months in the sample period and recorded as monthly purchase amounts.

Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco products, pop & soft drinks, energy drinks, other alcohol products, and other taxable merchandise. Each category was assigned a mark-up percentage derived from the product checklist completed with the taxpayer's assistance, industry averages, or state minimum requirements. The taxpayer accepted food stamps throughout the entire audit period. It is to be expected that a portion of the taxable merchandise categorized as pop & soft drinks and energy drinks were purchased using those funds. Therefore, the taxable sales calculated from those two categories that were eligible for purchase with food stamps were reduced by twenty-five percent.

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 was 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. The tax liability for sampled periods was calculated based 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.

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).

Sample Period

The petitioner contends that the sample period was not representative of its actual sales. The petitioner failed to maintain complete primary records and did not provide any evidence during the audit that sales made in 2017 were not representative of the audit period. The Tax Commissioner made multiple attempts, via email and phone calls, during the audit to come to an agreement with the petitioner on a sample period, but a response was never received from the petitioner. Audit Remarks, p. 9. Therefore, the Tax Commissioner satisfied his requirement to

make a good faith effort to reach an agreement with the petitioner. R.C. 5739.13(A). As a result, after reviewing all available records, the Tax Commissioner had the authority to determine that 2017, as a one-year block sample period, adequately represented the audit period.

After the hearing, the petitioner submitted PDFs for the years 2015 through 2017 in support of its contention that sales were lower in 2015 and 2016 than they were in 2017. Each PDF lists the petitioner's vendors by name, along with purported purchase prices, mark-up percentages, and total taxable sales for that year. The PDFs also delineate between taxable and non-taxable sales, as well as depict an increase in sales each year, with 2015's sales shown to be significantly lower than 2017's sales. However, the petitioner failed to submit any of the invoices or other primary records used to create these spreadsheets. The information provided does not support the argument that the purchases made in 2017 were not representative of the types of products that were purchased and sold during the entire audit period. The petitioner failed to show that the mix of taxable and non-taxable merchandise sold during the years changed between 2015, 2016, and the sample year, 2017. The fact that the amount of all sales increased in 2017 is accounted for in the markup methodology. A taxable percentage was applied to the petitioner's sales as reported by the petitioner for each period on its sales tax returns. Therefore, the petitioner's contention is denied.

Mark-Up Percentages

The petitioner contends that the mark-up percentages for pop, energy drinks, and wine used during the audit were incorrect. The petitioner contends that its mark-up percentage for wine is actually 35 percent, but this is below the state minimum mark-up percentage. "Retail permit holders and A-1-A permit holders shall sell to consumers at no less than the 'minimum retail selling price [of wine],' which shall be computed by adding a markup of not less than fifty percent to the 'minimum retail invoice cost.'" Ohio Adm.Code 4301:1-1-03(C)(1)(c). The petitioner contends that pop was actually sold at only a 25 to 30 percent mark-up, while energy drinks were also only marked up by 30 percent. However, the petitioner failed to submit any new invoices, receipts, or other records to substantiate its claimed mark-up percentages. Therefore, the petitioner has failed to meet its burden, and these contentions are denied.

Penalty

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 required under R.C. Chapter 5739. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The surrounding facts and circumstances do not warrant an abatement of the penalty.

Accordingly, the assessment is affirmed as issued.

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

SEP 3 0 2020

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.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

Dunning Motor Sales Cambridge, LLC
1051 Southgate Pkwy.
Cambridge, OH 43725

Re: Refund Claim No. 201903297
Refund Amount Requested: $802.94
Refund Period: October 1, 2018
Sales Tax

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

The claimant sold a 2009 Chevrolet Traverse to a customer on October 1, 2018. The customer made a down payment of $1,800.00 and the remaining $10,111.44 was financed by a lender for a total purchase price of $11,911.44. The customer returned the car to the dealership after sales tax had been remitted to the state. The claimant requests a refund in the amount of $802.94 for the amount of sales tax paid on the car.

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

The claimant provided sufficient evidence to prove that the customer's down payment was returned. They also submitted ACH transactions purporting to show that the lender was also fully refunded. However, the ACH transactions show that only $5,522.12 has been returned to the lender. The claimant did not explain the discrepancy in the amount returned to the lender versus the amount the lender provided. The claimant submitted a letter from the lender that indicates that the lender's security interest in the vehicle was terminated. This is not sufficient evidence to prove that the remaining amount of the loan was returned as required. It is possible that the lender terminated their interests without receiving the remaining amount from the claimant. Because the claimant has not provided adequate evidence to prove that they fully refunded the lender, the Department cannot grant the refund claim pursuant to Ohio Adm.Code 5703-9-07(A)(3).

Therefore, the claim for refund is denied.

SEP 3 0 2020 1000000345

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000299

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

Frambes Entertainment LLC
9000 Moors Pl. N.
Dublin, OH 43017

RE: Assessment No.: 100001426227
Sales Tax
Account No.: 25-307303

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
$222,901.79	$20,680.23	$111,450.74	$355,032.76

The petitioner operates as a bar. This assessment is the result of a mark-up audit of the petitioner's sales from October 1, 2015 through March 31, 2019. The petitioner filed a petition for reassessment objecting to the assessment. A hearing was held on May 28, 2020.

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

Audit Methodology

The petitioner failed to maintain primary records as required by R.C. 5739.11. Audit Remarks, p. 6. The auditor noted that he was unable to reconcile taxable sales from the petitioner's filed sales tax returns. *Id.* Accordingly, the Department sent a letter of agreement to the petitioner that specified the methodology of the audit. *Id.* at 4. In response to additional information submitted on behalf of the petitioner, the Department sent out a revised letter of agreement that updated the methodology to be used during the audit. *Id.* A sample period of January 1, 2018 through December 31, 2018 was used to calculated taxable sales using a mark-up analysis. It was agreed that the taxpayer's activity for this sample period is representative of the business activity for the entire audit period. *Id.*

Inventory purchase invoices maintained by the taxpayer and inventory purchase summaries obtained directly from the taxpayer's distributors were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. In the instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon other records such as summaries maintained by the taxpayer or information obtained directly from the taxpayer's distributors.

In instances where the confirmation of the total amount of taxable inventory purchases could not be obtained from either the taxpayer or the distributor, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a comparable distributor. The mark-up percentages for all inventory categories were calculated as weighted averages of a representative sample of the most popular premium, standard, and economy products for each category. The mark-up percentages for each product were determined by calculating a weighted average of the product sales prices, subtracting the product cost per serving, and dividing the difference by the product cost per serving.

The taxpayer's sales prices were derived from its drink price list. The weighted average sales prices used in the calculation accounted for the different pricing structures, such as happy hour pricing. The weights for the various sales prices were determined based upon estimates, since no z-tapes were submitted for review. Serving sizes, including the fluid ounce serving sizes of poured alcoholic drinks, were derived from the Bar and Restaurant Product Workpapers. Resulting individual product mark-up percentages were weighted based upon product sales volume. The product sales volume was determined from an analysis of the total dollar cost of product inventory purchased, which was derived from inventory vendor purchase invoices for the period of November 1, 2018 through November 30, 2018, except for liquor, which was derived from inventory purchases from January 1, 2018 through December 31, 2018. Since wine was purchased, but not listed on the price lists, the mark-up percentage on wine was estimated at 200 percent.

All purchases of liquor, beer, and other alcoholic beverage products that were made during the sample period were listed by category. The taxable sales for each category were determined by marking up the categorical inventory purchase totals by multiplying them by one plus the applicable calculated weighted mark-up percentage. The calculated taxable sales for the audit sample period for the categories of draft beer, blended rate liquor, and wine were reduced to account for potential losses of inventory due to spillage and over-pours. Due to a lack of inventory controls on behalf of the taxpayer, as well as the inconsistent nature of these inventory losses, the exact percentage of inventory losses could not be determined. Therefore, based upon industry averages and prior audit history, the calculated taxable sales for the affected categories were reduced by set allowance percentages.

The petitioner did not maintain detailed records supporting its taxable merchandise sales. Letter of Agreement, p. 2. Therefore, exempt sales claimed during the audit sample period were

disallowed and the exempt sales amount claimed was included in the audit as taxable miscellaneous sales. *Id.*

The calculated taxable sales for the audit sample period from all categories were totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the taxpayer for the entire audit sample period. The resulting taxable percentage of reported gross sales was multiplied by the reported monthly gross sales for the entire audit period to determine the calculated error in tax by month for the entire audit period.

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

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

The petitioner contends that the Supreme Court of Ohio has held that audits "must be conducted under conditions under which the business was operated during the audit period." *Burger Chef Sys., Inc. v Lindley*, 1st Dist. No. C-810137, 1982 WL 4643 at *3 (Feb. 17, 1982) citing *Servomation Corp. v. Kosydar*, 46 Ohio St.2d 67, 346 N.E.2d 290 (Apr. 28, 1976). The petitioner contends that the First District Court of Appeals held that the Department's "failure to adjust price changes, menu additions, and facility changes occurring during the audit period, where the Tax Commissioner admittedly knew of them and expert testimony revealed methods for such adjustments, renders the test check unrepresentative." *Burger Chef Sys., Inc.* at *3.

The petitioner further contends that the Supreme Court of Ohio made clear a long time ago that "a decision of the Board of Tax Appeals affirming a sales tax assessment of the Tax Commissioner is unreasonable and unlawful where the Tax commissioner disregarded the vendor's books and records and determined the amount of such assessment by a partial audit and computations resulting from the application of a so-called 'usual accepted mark-up' to the costs of the vendor's purchases and of the 'usual percentages employed for exempted articles sold and food consumed off the premises,' without evidence supporting the validity or correctness of such mark-up or percentages." *Bloch v. Glander*, 151 Ohio St. 381, 86 N.E.2d 318 (May 11, 1949).

The petitioner cited to *Burger Chef* and *Bloch* to support its contention that the Department erred during the audit by not utilizing the petitioner's records. However, *Burger Chef* is distinguishable from the case at hand in many ways. In *Burger Chef*, the Department had actual knowledge that the data it was relying on might not be entirely representative of the whole audit period. *Burger Chef* at *3. The court noted that R.C. 5739.10 requires that test checks of a vendor's business be for a representative period. *Id.* The court then determined that the record

indicated that price increases and product additions were affected during and after the audit, menu price changes resulted in changes in the effective tax rate, and menu additions of salad bars and rancher platters affected the balance of on-site consumption to off-site consumption. *Id.* at *2. However, no adjustment reflecting such changes was applied to the test period. *Id.* Therefore, the court found that "failing to adjust for the variances in appellant's operation is unreasonable and renders the test check performed by the Tax Commissioner unrepresentative of the audit period." *Id.*

In the instant case, the petitioner has not provided any evidence in support of its contentions. R.C. 5739.11 requires vendors to keep complete and accurate records of sales, as well as records regarding the tax collected on the sales. The petitioner provided incomplete records, so the Department was not able to rely solely on those records while conducting the audit. Audit Remarks, p. 4. Furthermore, the petitioner was asked to track sales data for a two-week period in order to aid the auditor's determination of mark-up percentages and the ratio of dine-in versus carryout orders. Audit Remarks, p. 4. The petitioner failed to provide the auditor with those requested records. *Id.* The petitioner did supply a price list to the auditor which listed happy hour specials and prices. These prices were used to create the mark-up percentages employed during the audit. *Id.* at p. 6. There is no indication in the record that the information relied upon by the Department is inaccurate and the petitioner has failed to provide additional evidence to support its contentions. The petitioner's objections to the audit methodology are denied.

Mark-up Percentages

The petitioner contends that the mark-up percentages were not reflective of the petitioner's actual prices, thereby grossly inflating the assessment. The petitioner further contends that the Department erred in using weighted mark-up procedures and block samples because these procedures are not reflective of the sales that were actually subject to tax during the audit period. The petitioner failed to provide any specific evidence to substantiate its contention. The petitioner failed to show any inaccuracies in the mark-up percentage calculations. Therefore, these contentions are denied.

Shrinkage & Employee Theft

The petitioner contends that the Department did not provide enough of a credit for inventory lost due to shrinkage, over-pours, employee theft, and waste. The Department did provide credits to the petitioner for the potential spillage and over-pours. Audit Remarks, p. 7. The petitioner failed to provide any evidence that shows error in the amount of credit provided. The petitioner provided no evidence of employee theft, and therefore, no credit was provided for theft. A generalized description of losses incurred from theft and spoilage does not meet the appellant's burden to prove error in an assessment. *24 Hours, Inc. v. Tracy*, BTA No. 97-M-1389, 1999 WL 349220 (May 21, 1999). The loss must be quantifiable from the evidence presented by the petitioner. *R & K Entertainment, Inc. v. Zaino*, BTA No. 2003-B-103, 2004 WL 1631689 (July 16, 2004) at *5. Therefore, these contentions are denied.

Food Sales

The petition for reassessment disputes the methodology used to calculate food sales. However, the audit remarks note that this location did not have any food sales. Audit Remarks, p. 8. Accordingly, this objection is denied.

Double Taxation

The petitioner contends that the Department erred by using the total amount for each drink as the foundation for calculating the mark-up percentages because those prices already included sales tax, and therefore, this errantly increased the price of everything by at least another 7.5 per cent. The petitioner supplied a price list that does not state that tax is included in the price. *See* Taxpayer's Pricelist. The petitioner failed to submit records to support its contention. Therefore, this contention is denied.

Penalty

The petitioner seeks abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax required under R.C. Chapter 5739. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The records submitted by the petitioner suggest that the petitioner collected more sales tax than was remitted to the state. Audit Remarks, pp. 5, 8. The surrounding facts and circumstances do not warrant abatement of the penalty.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payments have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any 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.

0000000304

SEP 3 0 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

HD Supply Facilities Maintenance, Ltd.
3100 Cumberland Blvd. SE, Ste. 1700
Atlanta, GA 30339

RE: Refund Claim No.: 201705039
Tax Type: Sales
Refund Period: June 13, 2012 – December 28, 2015

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $69,312.04, plus applicable interest in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was held in this matter on April 9, 2020.

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

The claimant contends that it erroneously paid sales tax on purchases that were exempt as purchases used directly in making retail sales pursuant to R.C. 5739.02(B)(42)(j). The claimant provides that its distribution center in Groveport, Ohio contains inventory in which greater than fifty percent of the inventory is shipped outside of Ohio. The claimant contends that assets at the distribution center which are used primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory are exempt as direct marketing purchases used in a qualified warehouse distribution center in the state under R.C. 5739.02(B)(42)(j).

The Department informed the claimant during the initial denial that the claimant failed to establish a sales tax exemption or exception for the requested refund claim. The claimant submitted evidence in the form of invoices, organizational structure, vehicle registrations and insurance information, driver listings, spreadsheets of shipping logs, shipping details, and asset listings, and lease agreements to support its contention that the transactions as direct marketing pursuant to R.C. 5739.02(B)(42)(j). However, the claimant has not satisfied its burden that the claimant is entitled to a refund as it failed to meet the requirements for the exemption.

It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary is established. R.C. 5739.02(C) and 5741.02(G). 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). R.C. 5739.02(B)(42)(j) excepts from taxation sales where the purpose of the purchaser is:

> [T]o use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility to be distributed outside this state to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or by means of direct marketing.

This warehousing exemption provides that "direct marketing" as used in this division has the same meaning as in division (B)(35). R.C. 5739.02(B)(35) defines direct marketing as:

> [T]he method of selling where consumers order tangible personal property by United States mail, delivery service, or telecommunication and the vendor delivers or ships the tangible personal property sold to the consumer from a warehouse, catalogue distribution center, or similar fulfillment facility *by means of the United States mail, delivery service, or common carrier*. (Emphasis added.)

To meet the requirements of "direct marketing" the taxpayer must ship items through United States mail, delivery service, or common carrier. The claimant provides that it utilizes trucks of a separate legal entity, HD Supply, Inc. to ship its inventory out of state and therefore HD Supply, Inc. is a common carrier. The petitioner provided evidence of the corporate structure of itself and other related entities tied to HD Supply Holdings, Inc, which the claimant contends are separate legal entities.

During the review of the refund claim, it was noted that the claimant's website suggests that it ships inventory using its own fleet of trucks. Audit Remarks, p. 5. Additionally, during an audit of the tax[ayer, the claimant confirmed that it did not ship through United States mail or delivery services. *Id.* However, the claimant currently contends that HD Supply, Inc. is the claimant's common carrier vendor for the transactions at issue.

The term "common carrier" is not defined by the Ohio Revised Code; however, the Merriam Webster Dictionary provides the following definition of common carrier, "A business or agency that is *available to the public* for transportation of persons, goods, or messages." (Emphasis added.) Further Black's Law Dictionary defines common carrier as a commercial enterprise that *holds itself out to the public* as offering to transport freight or passengers *for a fee*. *Black's Law Dictionary* 98 (4th Pocket Ed.2011). The term "common carrier" is a term of art. Both definitions require a business to offer its transportation services to the public. Additionally, both definitions contemplate that a common carrier, as a business enterprise, offers services for a fee.

The claimant does not dispute the definition of common carrier or elaborate on how HD Supply, Inc. offers its services to the public. The claimant merely contends that HD Supply, Inc. qualifies as a common carrier because it is qualified under R.C. 5739.01(Z) for transportation for hire, and provides documentation relating to HD Supply, Inc. to prove that it is a common carrier based on

its insurance and regulatory registrations. However, the claimant failed to provide evidence that HD Supply, Inc. was the claimant's common carrier for the transactions at issue. Further, the evidence provided by the claimant failed to include documentation that HD Supply, Inc. is eligible for hire to the public as a common carrier.

The claimant provided sample sales invoices identifying purchases from consumers which included sales tax and freight fees. The claimant stated that the invoices do not distinguish between non-related carriers and HD Supply, Inc. as the same freight is charged regardless of the carrier. However, the claimant failed to provide invoices or agreements between the claimant and its carrier vendors identifying a fee for transporting the claimant's inventory.

The claimant submitted secondary support, such as spreadsheets of shipping logs, shipping details, and asset listings; however, this evidence lacked any designation of a carrier for each transaction. The claimant specifically noted that there are no formal agreements between HD Supply, Inc. and the claimant because they maintain a consistent use of journal entry transfers between the companies. The claimant states in relevant part, "[c]ash sweeps and bundled payables occur on regular basis between the entities to fund or pay operation activities. The company utilizes a centralized treasury function as a business model." HD Supply Post Appeal Write Up Support June 30, 2020. The claimant further stated that the journal entries are not transaction specific because of bundled payables. Therefore, the claimant is unable to provide evidence of a fee from HD Supply, Inc. to the claimant for transporting the claimant's inventory. The evidence fails to show consideration to establish a common carrier relationship between the claimant and HD Supply, Inc.

The claimant did not provide shipping information related to the transactions to verify that HD Supply, Inc. was a common carrier for the claimant. Based on the fixed asset sheet provided by the claimant during an audit, the transactions were transported by the claimant's fleet. The claimant contends that this distinction is not well received as Ohio has no requirement on where or who owns the vehicles or assets, only that they qualify under R.C. 5739.01(Z) as a qualified highway transportation for hire, i.e. qualified common carrier. However, the claimant is contending that sales tax was erroneously paid on warehouse equipment, racking and other storage items. This contention is not based on the highway transportation for hire exemption, but rather the direct marketing exemption pursuant to R.C. 57399.02(B)(35). The exemption in R.C. 5739.02(B)(35) is not automatic to persons that qualify for exemption as highway transportation for hire. Additionally, R.C. 5739.02(B)(35) specifically states that this division does not apply to motor vehicles registered for operation on the public highways. The exemption for highway transportation for hire and the exemption for direct marketing have similarities, such as requiring transportation of personal property belonging to others for consideration, but a common carrier maintains an additional requirement that the commercial enterprise *holds itself out to the public* for transportation of freight or passengers. (Emphasis added.)

Ohio has extensively addressed additional requirements for common carriers, most notably in the context of public utility services. *Epic Aviation, LLC v. Testa*, 149 Ohio St.3d 203, 2016-Ohio-3392, 74 N.E.3d 358; *Castle Aviation, Inc. v. Zaino,* BTA No. 2003-M-146, 2005 WL 176679 (Jan. 14, 2005). Unlike R.C. 5739.02(B)(35), Ohio's public utility exemption in R.C. 5739.02(B)

(42)(a) does not include the term common carrier. However, Ohio case law has interpreted public utility service to imply a public use and service and to qualify as a public utility, one must operate as a common carrier. *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638.

In *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420, the Board of Tax Appeals reiterated the distinctive characteristic of a common carrier is that it undertakes to carry for all people indifferently, as opposed to private carriers who are not bound to carry for any reason unless the obligation to do so is voluntarily assumed by a specific contract. This requirement separates a common carrier from private carriers. The Court in *Castle* affirmed the denial of the exemption for an entity that held a certificate authorizing common carriage but conducted its business as a charter service engaged in contract carriage. The actual operation of a business determines its legal status, not its certification. *Manfredi Motor Transit Co. v. Limbach*, 35 Ohio St.3d 73, 518 N.E.2d 936 (1988).

In *Epic Aviation, L.L.C. v. Testa*, the Court held that the criteria for common-carrier service that qualifies for exemption is the shipping of cargo at a time and to a place announced to the public in advance and doing so at a reasonable and nondiscriminatory charge. *Epic Aviation, L.L.C. v. Testa*, 149 Ohio St.3d 203, 2016-Ohio-3392, 74 N.E.3d 358. The Court further clarified that a certificate of public convenience and necessity was not a prerequisite to the public-utility-service exemption and remanded the case to the Tax Commissioner to determine the exempt portion of jet fuel sales pursuant to the common-carrier standard. *Id.* The distinction drawn by Ohio case law is between common carriage, which is exempt, and chartered service, which is not. *Id.* The extensive case law on the meaning of common carrier mirrors the Merriam Webster Dictionary and Black's Law Dictionary definitions used by the Department in determining that the claimant's transactions do not qualify for exemption.

The claimant contends that where vehicles or assets reside on one's books does not discount or invalidate a claim for exemption on the basis of highway transportation for hire as defined in R.C. 5739.01(Z). The claimant contends that the ownership of the vehicles is not determinative for R.C. 5739.01(Z); however, the claimant is not contesting the transactions under R.C. 5739.01(Z), but rather R.C. 5739.02(B)(35). Additionally, it is not clear that the claimant and HD Supply, Inc. are separate legal entities for tax exemption purposes under R.C. 5739.02(B)(35), as both companies share a centralized treasury, fleet, and book and record keeping. The driver list provided by the claimant also includes a company name of HD Supply Management, Inc. Therefore, it is not clear whether HD Supply, Inc. is transporting tangible personal property belonging to others, i.e. the claimant, for consideration as the claimant is unable to provide transaction specific records regarding the contested transactions. The ownership of the inventory and the transporter is determinative. Additionally, the claimant notes that HD Supply, Inc. only maintains affiliated entities as its customers. Therefore, this information is insufficient to establish that HD Supply, Inc. is a common carrier. Alternatively, even if the claimant raised the exemption of highway transportation for hire, it would similarly fail to provide evidence that HD Supply, Inc. was primarily transporting *personal property belonging to others for consideration* as provided by R.C. 5739.01(Z). (Emphasis added.)

The claimant included information from the Public Utilities Commission of Ohio and United States Department of Transportation Federal Motor Carrier Safety Administration regarding the US DOT number and Motor Carrier number of HD Supply, Inc. The claimant contends that this information supports that HD Supply, Inc. is registered for hire as a common carrier. The claimant also provided a vehicle lease agreement and registration Card for HD Supply, Inc. The claimant contends that this information supports that HD Supply, Inc. is qualified "for hire" as a common carrier to transport tangible personal property belonging to others for payment.

The claimant provided insurance history information from the Federal Motor Carrier Safety Administration for HD Supply, Inc. and a driver listing from HD Supply Management Inc. in support of its contention that HD Supply, Inc. is a common carrier. However, the insurance information was a historical snapshot that did not cover the audit period. Additionally, the information did not certify that HD Supply, Inc. was a common carrier, but rather a motor carrier. The fact that HD Supply, Inc. has insurance coverage for its fleet does not in itself verify that HD Supply, Inc. is a common carrier, as the Federal Motor Carrier Safety Administration requires all applicants for motor carrier to maintain specific insurance on file before it will issue operating authority.[1] The driver listing appears to be in the name of the claimant and establishes that the claimant is transporting its inventory with its own drivers rather than utilizing a carrier. This information does not support the claimant's contention that HD Supply, Inc. is a common carrier or that HD Supply, Inc. is transporting the claimant's inventory.

Most notably, the claimant provided Federal Motor Carrier Safety Administration information, such as historical insurance snapshots and operating authority numbers for HD Supply, Inc. to contend that HD Supply, Inc. is registered as a common carrier. However, since January 2007, the Federal Motor Carrier Safety Administration is required by law to issue Motor Carrier Certificates of Registration which no longer classify companies as common or contract carriers.[2] The Federal Motor Carrier Safety Administration does not distinguish between common and contract carriers, as they were previously defined. *Id.* All registrations are identified as motor carriers.[3] Therefore, the evidence provided by the claimant alone does not establish that HD Supply, Inc. is a common carrier as this agency does not distinguish between common and contract carriers or register companies as common carriers. The claimant failed to provide evidence that HD Supply, Inc. is primarily engaged as a common carrier.

In *Midwest Haulers, Inc. v. Glander*, 150 Ohio St. 402, 83 N.E.2d 53 (1948), the Court found that despite a motor carrier's permit to act as a common carrier for hire throughout the entire audit period, its claim for exception from taxation was granted only for the time period when it was actually operating as a common carrier. The authorization to act as a common carrier does not in and of itself conclusively establish that there is such operation, but rather the actual operation of the business defines its legal status. *Id.* While HD Supply, Inc. is qualified for hire as a common carrier, it only has its affiliated entities as its customers. Based on the claimant's

[1] "Insurance Filing Requirements," Federal Motor Carrier Safety Administration. <https://www.fmcsa.dot.gov/registration/insurance-filing-requirements > (accessed April 15, 2020).
[2] "Answers," Federal Motor Carrier Safety Administration. <https://ask.fmcsa.dot.gov/app/answers/detail/a_id/417/~/i-have-common-carrier-authority.-how-can-i-change-it-to%2Fadd-contract-carrier> (accessed April 15, 2020).
[3] "Unified Carrier Registration Act of 2005," 49 U.S.C. 13902. <https://www.govinfo.gov/content/pkg/PLAW-109publ59/pdf/PLAW-109publ59.pdf> (accessed April 15, 2020).

own admission, HD Supply, Inc. is actually operating as a contract carrier, regardless of whether it is qualified as a common carrier.

The claimant submitted a lease agreement and vehicle registration card. In relation to these attachments, the claimant states, "[a]dditionally, the vehicle lease agreements and Registration Card, for the transporter of goods, present HD Supply, Inc. as the common carrier for this service." HD Supply Post Appeal Write Up Support June 30, 2020. The vehicle registration card does not provide any information to verify that HD Supply, Inc. is a common carrier or that the claimant hired HD Supply, Inc. as a common carrier for the transactions. The lease agreement provided by the claimant does not support the claimant's contentions as the lease agreement appears to be a one-page vehicle lease service agreement between PENSKE Truck Leasing and HD Supply, Inc., in which HD Supply Inc. leased a vehicle in California in 2014. This lease did not specify that HD Supply, Inc. was leasing the vehicle to transport the claimant's inventory. No other information related to this lease was provided to demonstrate that it was used for the claimant.

The claimant also included a one-page vehicle lease and service agreement from Idealease. The agreement contains a printed customer identification of HD Supply, Inc. Facilities Maintenance; however, the customer signature line contains a customer identification of HD Supply, Inc. The Department is unable to verify whether the claimant and HD Supply, Inc. operate as separate legal entities for tax exemption purposes under R.C. 5739.02(B)(42)(j) and 5739.02(B)(35) as they interchangeably use each company's name and signature authority for contracts.

The claimant affirmed that there are no formal written agreements between HD Supply, Inc. and HD Supply Facilities Maintenance, Ltd; however, it contends that they are separate legal entities that maintain a business model in which HD Supply, Inc. controls functions across all business lines such as treasury and fleet registration. The claimant fails to provide evidence of consideration provided to HD Supply, Inc. or that HD Supply, Inc. is operating as a common carrier. Based on this information, the Department is unable to verify that HD Supply, Inc. is transporting personal property belonging to the claimant for consideration. The claimant has a burden to do more than merely state an unsubstantiated assertion that HD Supply, Inc. is a common carrier.

In addition to the documents provided by the claimant related to HD Supply, Inc., the claimant cited a Board of Tax Appeals case and a Department of Taxation Commissioner opinion to support its contention that HD Supply, Inc. is a common carrier. The claimant cites *Freudenberg NOK General Partnership v. Wilkins*, BTA No. 2006-K-1556, unreported (April 13, 2010). The claimant's recitation of the main issue is correct that the Board of Tax Appeals addressed whether the business activities of the taxpayer qualified as direct marketing even though it did not engage in making retail sales. The claimant contends that the case clarifies the direct marketing exemption and intention, "...This is not to lose focus that requirements for exemption need to be factored, but not construed to eliminate the intent of exemption, which is for companies to build/maintain warehouse in Ohio, which could otherwise be maintained and built in other states." However, the claimant's inclusion of this case is not relevant to the current assessment. The Board in *Freudenburg* addressed the intention of the direct marketing

exemption in determining the end consumer in a retail sale. The Board did not address whether the taxpayer shipped through US Mail, a delivery service, or common carrier as it was an undisputed fact that all parties agreed the taxpayer distributed inventory outside Ohio by a common carrier. The taxpayer in *Freudenburg* specifically used Conway, UPS, and Federal Express – all of which the Department acknowledged as a common carrier. Since the means of distribution was not an issue in this case, the relevance to the claimant's contention is misplaced.

The claimant also includes the following quotation to support the contention above from Tax Commissioner Opinion 07-0005, "*[s]ince Taxpayer is engaged in storing, transporting, mailing, or otherwise handling its clients' purchased sales inventory that is being distributed primarily outside Ohio by means of direct marketing, it is entitled to claim exemption under R.C. 5739.02(B)(42)(j) for equipment used primarily in those storage, transportation, mailing, and handling functions*…." Ohio Department of Taxation, Opinion of the Tax Commissioner No. 07-0005, issued on November 15, 2007. For the same reason provided above, the claimant's citation is misplaced because the facts relevant to that Opinion were not as such to contest the taxpayer's distribution through U.S. mail, delivery service, or common carrier.

The claimant failed to provide evidence that it utilized HD Supply, Inc. for consideration. Additionally, the claimant failed to provide evidence that HD Supply, Inc. was operating as a common carrier for the transactions at issue. This information does not show error in the sales tax remitted by the claimant. The claimant has not satisfied its burden that the claimant is entitled to a refund as required by R.C. 5739.07. The evidence submitted is insufficient to warrant a refund of the sales tax. Accordingly, this objection is denied.

Therefore, the claim for a refund is denied.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

0000000225

FINAL DETERMINATION

Date: SEP 30 2020

Lakeland Blvd. Inc.
24310 Lakeland Blvd.
Euclid, OH 44119

Re: Assessment #: 100000950959
Sales Tax
Account No. 18-506414

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2019-2758, dated June 16, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, the assessment is modified as follows:

	Total
Tax	$73,527.96
Interest	$11,999.20
Penalty	$11,029.19
Total	$96,556.35

Payments and credits totaling $96,556.35 have been made in full satisfaction of this assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000264

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

William R. McCutcheon
P.O. Box 156
Blacklick, OH 43004

RE: Assessment No.: 100001108177
Sales Tax
Account No.: 89-074966

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:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$18,673.64	$2,581.70	$2,800.56	$24,055.90

The petitioner operates a landscaping and lawn care services company. This assessment is the result of an audit of the petitioner's sales from January 1, 2012 through December 31, 2017. The petitioner filed a petition for reassessment. A hearing was held on August 25, 2020.

The petitioner previously held a vendor's license to collect sales tax from August 1, 1991 through December 31, 2011. Audit Remarks, p. 4. His account was closed by the Department for having a bad address on file. *Id.* The petitioner had been issued multiple delinquency assessments for failure to file sales tax returns while that account was active. *Id.* Per Department records, prior to the audit, the petitioner had not filed a return since September 2009. *Id.*

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).

An excise tax is levied on each retail sale made in this state. R.C. 5739.02. "Retail sale" and "sales at retail" include all sales, except those in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person. R.C. 5739.01(E). "Business"

includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect. "Business" does not include the activity of a person in managing and investing the person's own funds. R.C. 5739.01(F). "Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally. Whether for a price or rental, in money or by exchange, and by any means whatsoever: * * * all transactions by which: * * * landscaping and lawn care services are or are to be provided. R.C. 5739.01(B)(3)(g).

The tax imposed by or pursuant to section 5739.02, 5739.021, 5739.023, or 5739.026 of the Revised Code shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as a trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale. R.C. 5739.03(A). If any sale is claimed to be exempt under division (E) of section 5739.01 of the Revised Code or under section 5739.02 of the Revised Code, the consumer must provide to the vendor, and the vendor must obtain from the consumer, a certificate specifying the reason that the sale is not legally subject to the tax. The certificate shall be in such form and shall be provided either in a hard copy form or electronic form, as the tax commissioner prescribes. R.C. 5739.03(B)(1)(a).

Audit Methodology

Upon request, the petitioner provided partial records along with sales calculations for its exempt clients. The records reviewed during the audit included internal databases, federal tax forms, written statements, and invoices. Audit Remarks, p. 3.

2012

Using the information found on the petitioner's 2012 Schedule C, the amount of exempt sales reported by the petitioner was subtracted from the amount of reported gross receipts. This was the basis for the calculation of the taxable sales for January 1, 2012 through December 31, 2012. The amount of calculated taxable sales was then divided by twelve to devise the average taxable monthly sales. The average taxable monthly sales amount was then multiplied by the applicable tax rate for Licking County, where the services were provided, to compute the average monthly sales tax liability for 2012. The average monthly sales tax due was then multiplied by twelve to come up with the total amount of sales tax due for 2012.

2013

Using information found on the petitioner's 2013 Schedule C, the amount of exempt sales reported by the petitioner was subtracted from the amount of reported gross receipts. This was the basis for the calculation of the taxable sales for January 1, 2013 through December 31, 2013. The amount of calculated taxable sales was then divided by twelve to devise the average taxable monthly sales. The sales tax rate increased for Licking County, where the services were provided, on September 1, 2013. As a result, the average taxable monthly sales amount was first multiplied by the applicable tax rate for January 1, 2013 through August 31, 2013 to compute the average monthly sales tax liability for that period.

Next, the average taxable monthly sales amount was multiplied by the applicable tax rate for September 1, 2013 through December 31, 2013 to compute the average monthly sales tax liability for that period. The estimated monthly sales tax amount due for January through August was multiplied by eight to determine the total sales tax amount due for that period. The estimated monthly sales tax amount due for September through December was multiplied by four to determine the total sales tax amount due for that period. Those two totals were summed to determine the petitioner's total amount of sales tax due for 2013.

2014 & 2015

Using information found on the petitioner's 2014 and 2015 Schedules C, the amount of exempt sales reported by the petitioner was subtracted from the amount of reported gross receipts for each year. This was the basis for the calculation of the taxable sales for January 1, 2014 through December 31, 2014 and January 1, 2015 through December 31, 2015. The petitioner reported sales in two counties, Franklin and Licking County for both years.

The petitioner submitted gross sales for services provided to Brooksedge Southwest Homeowners Association, which is located in Franklin County. The petitioner had reported these sales as exempt; however, no exemption certificate was submitted, and Brooksedge is not a non-profit organization. The amount of annual sales made to Brooksedge was divided by twelve to determine the average monthly sales amount. The monthly average sales amount was then multiplied by the applicable tax rate in Franklin County to determine the average monthly amount of tax due.

The total amount of Franklin County taxable sales was subtracted from the amount of annual taxable sales to derive the total amount of Licking County taxable sales for 2014 and 2015. The amount of taxable sales for Licking County was then divided by twelve to determine the average monthly amount of taxable sales for each year. The average amount of monthly taxable sales was then multiplied by the applicable tax rate for Licking County in 2014 to derive the average monthly amount of sales tax due. The total amounts of sales tax due from Franklin and Licking County were added together to determine the petitioner's total amount of sales tax due for 2014 and 2015.

2016 & 2017

Using information found on the petitioner's 2016 and 2017 Schedule C, the amount of exempt sales reported by the petitioner was subtracted from the amount of reported gross receipts. This was the basis for the calculation of the taxable sales for January 1, 2016 through December 31, 2016 and January 1, 2017 through December 31, 2017. The amount of calculated taxable sales was then divided by twelve to devise the average amount of taxable monthly sales for each year. The average amount of taxable monthly sales was then multiplied by the applicable tax rate for Licking County, where the services were provided, to compute the average monthly sales tax liability for 2016 and 2017.

Statute of Limitations

The petitioner contends that tax years 2012 and 2013 are beyond the four-year limitation period for assessments prescribed in R.C. 5739.16 and should be removed from the assessment. The statute does not bar an assessment when the vendor assessed failed to file a return as required by section 5739.12 of the Revised Code. R.C. 5739.16(A)(2). Each person *who has or is required to have a vendor's license*, on or before the twenty-third day of each month, shall make and file a return for the preceding month in the form prescribed by the tax commissioner, and shall pay the tax shown on the return to be due. The return shall be filed electronically using the Ohio business gateway, as defined in section 718.01 of the Revised Code, the Ohio telefile system, or any other electronic means prescribed by the commissioner. (Emphasis added.) R.C. 5739.12(A)(1). Each person who has or is required to have a vendor's license must remit the sales tax collected to the state along with vendor's sales tax returns, under R.C. 5739.12. *Jacobson Home Furnishings, Inc v. Limbach*, BTA No. 88-H-168, 1989 WL 163143 (Dec. 22, 1989).

The petitioner had a vendor's license that was valid from August 1, 1991 until December 31, 2011, when the Department cancelled the license for failing to have a valid address on file. Audit Remarks, p. 2. When the audit was initiated, Department records show that the petitioner had not filed a sales tax return since August 2009. *Id.* However, tax records show that the petitioner continued to submit federal tax forms for the provision of landscaping services after his vendor's license was cancelled on December 31, 2011. *Id.* The petitioner was still engaging in retail sales without having a license, meaning that the petitioner failed to comply with R.C. 5739.12. As a result, R.C. 5739.16 waives the Tax Commissioner's four-year window to assess a vendor. Therefore, this contention is denied.

Brooksedge Southwest HOA

The petitioner contends that services provided to Brooksedge Southwest Homeowners Association are exempt from taxation because Brooksedge is a non-profit organization and the services provided consisted of mowing public parks. The petitioner contends that his services provided to Brooksedge are exempted by R.C. 5739.02(B)(12).

> The tax does not apply to the following: * * * sales of tangible personal property or services to churches, to organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, and to any other nonprofit organizations operated exclusively for charitable purposes in this state, no part of the net income of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which consists of carrying on propaganda or otherwise attempting to influence legislation. * * * Nothing in this division shall be deemed to exempt sales to any organization for use in the operation or carrying on of a trade or business.

R.C. 5739.02(B)(12). That section also defines what "charitable purposes" means, and the petitioner has failed to prove that Brooksedge's operations met any of the possible definitions.

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The petitioner has provided no evidence that Brooksedge is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986. The petitioner has failed to demonstrate that Brooksedge is operated exclusively for any of the charitable purposes listed in R.C. 5739.02(B)(12). The petitioner has failed to provide evidence that his services consisted of mowing public parks. Furthermore, the petitioner also failed to provide a valid exemption certificate from Brooksedge that states the reason it qualifies for exemption from paying sales tax pursuant to R.C. 5739.03(B)(1)(a). Therefore, this contention is denied.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payments have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any 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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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0000000275

FINAL DETERMINATION

Date: SEP 3 0 2020

Jordan McFarland
The Poutine Machine
1414 Graymont Court
Cincinnati, Ohio 45240

Re: Assessment No. 100001250700
Sales Tax

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2020-14, dated May 26, 2020. In that order, the Board of Tax Appeals remanded the matter to the Tax Commissioner for further proceedings.

In resolution of this matter, assessment number 100001250700 is cancelled.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: SEP 30 2020

Nessley's Lawn Care LLC
207 S. Elm St.
Sugar Grove, OH 43155

Re: Assessment No. 100001252127
Sales Tax
Account No. 23-310383
Reporting Period: 01/14/2013 – 05/31/2018

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	Interest	Penalty	Total
$78,475.97	$8,366.53	$27,465.90	$114,308.40

This assessment is the result of an audit of the petitioner's records for the period shown above. The petitioner operates a lawn care and landscaping business in Sugar Grove, Ohio. A hearing was not requested.

The petitioner requests full abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A)(1). Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984).

In support of this position, the petitioner states that they have made timely payments for each filing period since the audit. The petitioner also notes that they have fully paid the amount assessed including interest and penalty. However, the evidence indicates that the claimant collected more sales tax than they remitted to the state. Audit Remarks, p. 8. Additionally, the penalty was already reduced from 50% to 35%. Audit Remarks, p. 9. Based on the facts and circumstances, additional penalty abatement is not warranted. The objection is denied.

Therefore, the assessment is affirmed as issued.

Current records indicate that payments totaling $114,308.40 have been made in full satisfaction of the assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: SEP 23 2020

Prakash Inc.
14910 Lorain Ave.
Cleveland, OH 44111

RE: Assessment No.: 100001308388
Sales Tax
Account No.: 18-502678

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:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$39,103.74	$4,042.53	$19,551.66	$62,697.93

The petitioner operates a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from March 1, 2015 through June 30, 2018. The petitioner filed a petition for reassessment seeking penalty abatement. No hearing was requested.

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

Accordingly, the assessment is amended as follows:

	Pre-Assessment	Post-Assessment	
Tax	Interest	Interest	Total
$39,103.74	$4,042.53	$13,686.12	$56,832.39

Current records indicate that payments in the amount of $42,000.00 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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FINAL DETERMINATION

Date: SEP 09 2020

Ahmad M. Rasoul
DBA McCartney Drive Thru
6659 McCartney Rd.
Lowellville, OH 44436

Re: Assessment No. 100001520864
Sales Tax
Account No. 50-079207
Period: 04/01/2016 – 03/31/2019

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
$28,403.76	$2,752.98	$9,941.17	$41,097.91

This assessment is the result of an audit of the petitioner's purchases for the period shown above. The petitioner operates a convenience store. A hearing was held on July 21, 2020.

Audit Methodology

A mark-up analysis was conducted using the petitioner's inventory purchase records and the records supplied by the petitioner's suppliers. The mark-up was conducted after the petitioner indicated that he did not have primary records for the auditor to review. Audit Remarks, p. 4. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco, other alcohol, pop & soft drinks, energy drinks, and other taxable merchandise. Each category was assigned a mark-up percentage based on evidence from the petitioner, industry standards, and state minimum requirements.

A sample period of January 1, 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. 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 summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales (155.3444%).

The reported gross sales for each non-sampled month of the audit period were multiplied by that percentage to determine the calculated taxable sales for each non-sampled month. The calculated taxable sales for each non-sampled month were multiplied by the applicable tax rate to determine the sales tax liability for each non-sampled month. Sales tax liability for sampled months was determined by multiplying the actual calculated monthly taxable sales for each sampled month by the applicable tax rate. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability.

Cigarette Rebates

The petitioner contends that the audit did not properly account for cigarette and tobacco rebates. The auditor discussed cigarette rebates with the petitioner several times during the audit. The auditor contacted the petitioner regarding cigarette rebates on June 11, 2019. Audit Remarks, p. 4. The auditor again discussed the importance of submitting an itemized cigarette rebate list from the distributors during a call on September 24, 2019 regarding the Preliminary Proposal. *Id.* The petitioner submitted cigarette rebates, but they were deemed to be inadequate because they were not itemized, and the auditor was not able to determine if the rebates were for cigarettes or other tobacco. *Id.* The auditor called the petitioner on November 7, 2019 and explained the need for itemized cigarette rebates in order to receive credit for them. *Id.* While the petitioner indicated that he would get an itemized list from the distributor, no further records were submitted. The petitioner has not submitted sufficient evidence to support this contention. The objection is denied.

Theft

The petitioner contends that theft was not taken into account when determining the tax liability. The petitioner stated during the audit that he has had to rely on employees because of health reasons, which led to theft and mishandling of inventory. Audit Remarks, p. 7. The petitioner does not state what inventory was stolen, or provide any evidence to support this contention, such as police reports or insurance claims. The petitioner has a burden to do more than merely state a conclusion. The objection is denied.

Spoilage

The petitioner contends that the audit did not properly account for spoilage. The petitioner did not explain this contention or provide any supporting evidence. No further evidence was provided during or after the hearing to explain this contention. The objection is denied.

Penalty Abatement

The petitioner requests full abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *See Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The taxpayer previously requested penalty abatement after discussing the preliminary results of the audit with the auditor. The penalty was reduced from 50% to 35% by the Penalty Imposition Group. Audit Remarks, p. 4. Based on the facts and circumstances, an additional reduction of the penalty to 25% is warranted.

Therefore, the assessment is modified as follows:

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Tax	Pre-Assessment Interest	Penalty	Total
$28,403.76	$2,752.98	$7,100.83	$38,257.57

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.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: SEP 23 2020

Shannon's Carryout, LLC
330 West National Drive
Newark, OH 43055

Re: Assessment No. 100001304107
Sales Tax
Account No. 45-048331

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
$30,925.95	$2,376.79	$4,638.66	$36,941.40

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 January 26, 2016 to December 31, 2018. A hearing was not requested.

The petitioner requests penalty remission. This was the petitioner's first audit and the petitioner was cooperative. Based on a consideration of all factors, a penalty remission is appropriate.

Accordingly, the assessment has been adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$30,925.95	$2,376.79	$0.00	$33,302.74

Current records indicate that payments in the amount of $32,000 have been applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

SEP 3 0 2020

Sium LLC
1820 Vine St.
Cincinnati, OH 45202

Re: Assessment No. 100001292381
Sales Tax
Account No. 31-394125

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
$34,554.59	$2,178.64	$17,277.19	$54,010.42

The petitioner requests abatement of the penalty. Considering the surrounding facts and circumstances, abatement of the penalty is warranted. The request is granted.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$34,554.59	$2,178.64	$0.00	$36,733.23

Current records indicate payments have been made in full satisfaction of this assessment.

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

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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: SEP 3 0 2020

Sleep Tight… Don't Let The Bugs Bite, LLC
10464 Coss Rd.
Hillsboro, OH 45133

RE: Assessment No.: 100001588490
Tax Type: Sales

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
$117,302.92	$11,888.77	$29,323.91	$158,515.60

The petitioner operates an exterminating service. This assessment is the result of an audit of the petitioner's sales for the period October 1, 2015 through September 30, 2019. The petitioner filed a petition for reassessment. A hearing was requested but waived via email on September 2, 2020.

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 required under R.C. Chapter 5739. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Based on the facts and circumstances, a penalty abatement is warranted.

Therefore, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$117,302.92	$11,888.77	$0.00	$129,191.69

Current records indicate that payments of $129,191.69 have been made in full satisfaction of the assessment.

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SEP 3 0 2020

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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FINAL DETERMINATION

Date: SEP 16 2020

Steinbrick LLC
302 W. Main St. Bsmt.
Marblehead, OH 43440

Re: Assessment No. 100001572628
Sales Tax
Account No. 62-016288
Reporting Period: 04/01/2016 – 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	Interest	Penalty	Total
$22,622.54	$2,354.21	$7,917.65	$32,894.40

Based upon the information contained in the file, the assessment has been adjusted as follows:

Tax	Interest	Penalty	Total
$10,000.00	$1,000.00	$0.00	$11,000.00

Current records indicate that a payment of $11,000.00 has been made in full satisfaction of the assessment.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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

FINAL DETERMINATION

Date: SEP 23 2020

Technibus, Inc.
1501 Raff Rd. SW
Canton, OH 44710

RE: Refund Claim No.: 20181282278
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $63,152.31, plus applicable interest in sales tax filed pursuant to R.C. 5739.07. The claim was initially. The claimant disagreed with the partial denial and requested reconsideration of the matter. A hearing was not requested.

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

The claimant is seeking a refund for an overpayment of sales tax paid during the period from November 1, 2013 through October 31, 2017. The claimant contends that it erroneously paid sales tax for exempt purchases.

The Department informed the claimant during the initial denial that the Department required additional evidence to support the sales tax exemptions claimed on the refund application, including a copy of all invoices and proof of payment for each transaction. The Department informed the claimant that transactions in which tax was erroneously paid more than four years prior to the filing of the refund claim were denied pursuant to R.C. 5739.07(D).

The claimant submitted an updated spreadsheet, invoices, proof of payments, a plant layout, a description of the business, and pictures of the painting area and packaging area. Based on this information, the Department provided a partial refund of sales tax erroneously paid in the amount of $52,305.75 plus applicable interest. The claimant's contentions concerning the remaining transactions are addressed in detail below.

Statute of Limitations

The claimant contends that it erroneously paid sales tax in the amount of $2,221.93 on 52 transactions from Amada America, Inc., APO Pumps and Compressors, Inc., ARC & Engine Service Inc., Automotive Supply & Equipment, GEXPRO, GLT Enviro, Nordson Corp., Praxair Distribution Inc., Rexel, The ESAB Group Inc., and The Massillon Plague Company. However,

the claimant provided information concerning these transactions to demonstrate that the sales tax payments occurred more than four years prior to the filing of the refund claim pursuant to R.C. 5739.07(D). Accordingly, objections related to these transactions lack merit and are denied.

Partial Payment

The claimant failed to provide sufficient proof of payment for 19 transactions from Praxair Distribution Inc. The Department granted a refund in the amount of $457.50 for partial sales tax payments concerning these transactions. However, the claimant failed to provide proof of payment for the remaining sales tax obligations in the amount of $26.76. Therefore, no further refund is granted. Accordingly, this objection is denied.

Packaging

The claimant contends that the transactions concerning packaging material for resale are exempt pursuant to R.C. 5739.02(B)(15). The evidence in file supports their contention.

Therefore, the claim for a refund is granted in part in the amount of $8,597.87 plus applicable interest.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

Build-A-Bear Management Inc.
1954 Innerbelt Business Center Dr.
Saint Louis, MO 63114

RE: Refund Claim No: 20181339412
Refund Period: 11/01/2014 – 11/30/2014
Use Tax
Account No.: 97-800598

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $3,179.09, of use tax filed pursuant to R.C. 5739.07 and 5741.10. The Department initially denied the claim. The Department advised the claimant to provide the records used to create its original and amended use tax accrual returns. The claimant submitted the required documentation and sought reconsideration of the matter. After a review of the newly submitted evidence, the claimant was granted a partial refund in the amount of $2,921.21.

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 at 143, 311 N.E.2d 1 (1974). 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 must first show tax was remitted to the State of Ohio. Ohio Adm.Code 5703-9-07(A)(3). If the claim is due to an amended return, proof must be provided of the original and amended figures for the periods claimed on the refund application. The proof may consist of sales journals, cash register receipts, summary reports or any other document used to prepare the tax return. Ohio Adm.Code 5703-9-07(A)(3)(e).

The claimant provided the Department with its general ledger for Ohio use tax and a spreadsheet that listed a transaction for the purchase of needle hand darners, needle keepers, and snip scissors. The claimant contends that these items are used in its manufacturing processes and are thereby exempt. However, the claimant failed to provide evidence that it is engaged in manufacturing, failed to state which specific exemption(s) applied to its purchase, and failed to submit evidence that proves its purchase qualified for exemption. Therefore, the claimant has failed to prove it is entitled to an additional refund for tax paid erroneously to the state.

Accordingly, the remaining refund claim is denied.

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SEP 3 0 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

Build-A-Bear Management Inc.
1954 Innerbelt Business Center Dr.
Saint Louis, MO 63114

RE: Refund Claim No: 20181339413
Refund Period: 12/01/2014 – 12/31/2014
Use Tax
Account No.: 97-800598

This is the final determination of the Tax Commissioner with regard to an application for refund, in the amount of $1,447.11 of use tax filed pursuant to R.C. 5739.07 and 5741.10. The Department initially denied the claim. The Department advised the claimant to provide the records used to create its original and amended use tax accrual returns. The claimant submitted the required documentation and sought reconsideration of the matter. After a review of the newly submitted evidence, the claimant was granted a partial refund in the amount of $172.38.

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 at 143, 311 N.E.2d 1 (1974). 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 must first show tax was remitted to the State of Ohio. Ohio Adm.Code 5703-9-07(A)(3). If the claim is due to an amended return, proof must be provided of the original and amended figures for the periods claimed on the refund application. The proof may consist of sales journals, cash register receipts, summary reports or any other document used to prepare the tax return. Ohio Adm.Code 5703-9-07(A)(3)(e).

The information provided shows that the original return was filed at an incorrect tax rate of 6.75% for Franklin County. During the review of this claim, the return was amended to the correct rate of 7.5%.

The claimant provided the Department with its general ledger for Ohio use tax and a spreadsheet that listed a transaction for the purchase of snip scissors. The claimant contends that these scissors are used in its manufacturing processes and are thereby exempt. However, the claimant failed to provide evidence that it is engaged in manufacturing, failed to state which specific exemption(s) applied to its purchase, and failed to submit evidence that proves its purchase qualified for exemption. Therefore, the claimant has failed to prove it is entitled to an additional refund for tax paid erroneously to the state.

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SEP 3 0 2020

Accordingly, the remaining refund claim is denied.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000314

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

HD Supply Facilities Maintenance Ltd.
3100 Cumberland Blvd. SE, Ste. 1700
Atlanta, GA 30339

RE: Assessment No.: 100000610357
Use Tax
Account No.: 97-173587

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$156,848.78	$14,775.10	$23,527.18	$195,151.06

The petitioner operates as an industrial distributor in North America. The petitioner is a supplier of maintenance services, repair services, and products to owners of commercial properties, multifamily residences, healthcare facilities, and government facilities. This assessment is the result of a field audit of the petitioner's purchases and expenses from January 1, 2012 through December 31, 2015. The petitioner filed a petition for reassessment. A hearing was held on April 9, 2020.

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

Audit Methodology

It was agreed that capital assets would be reviewed on a comprehensive basis and a projection method would be used to review expense invoices. The petitioner indicated that their purchases were not seasonal in nature, so the months of April, May, and June of 2014 were chosen as the sample period. It was agreed that the sample period months were representative of the petitioner's business activity. Tax deficient expenses were projected over the entire audit period

based upon the test period findings. The total tax deficient expense purchases for each account were divided by the total purchase activity in the same accounts for the sample period to determine the percentage of error on untaxed purchases. Each percentage of error was then applied to the corresponding account's total audit period purchases to determine untaxed taxable purchases for the audit period. The appropriate tax rate was then applied to the untaxed purchases for the audit period to determine the amount of tax due. Tax rate changes that occurred during the audit period were prorated by the number of months that each rate was in effect.

The petitioner contends that the Department erred in assessing use tax on transactions that were exempt from use tax pursuant to R.C. 5739.02(B)(42)(j). The petitioner provides that its distribution center in Groveport, Ohio contains inventory in which greater than fifty percent of the inventory is shipped outside of Ohio. The petitioner contends that assets at the distribution center which are used primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory are exempt as direct marketing purchases used in a qualified warehouse distribution center in the state under R.C. 5739.02(B)(42)(j). The petitioner submitted an Excel file identifying each transaction.

R.C. 5739.02 levies "an excise tax" on any retail sale made in this state. Additionally, R.C. 5741.02(A) levies an excise tax on any storage, use or consumption of tangible personal property or receipt of the benefit of a taxable service in Ohio. R.C. 5739.02(B)(42)(j) excepts sales from taxation where the purpose of the purchaser is:

> [T]o use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility to be distributed outside this state to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or by means of direct marketing.

This warehousing exemption provides that "direct marketing" as used in this division has the same meaning as in division (B)(35) of that section. R.C. 5739.02(B)(35) defines direct marketing as:

> [T]he method of selling where consumers order tangible personal property by United States mail, delivery service, or telecommunication and the vendor delivers or ships the tangible personal property sold to the consumer from a warehouse, catalogue distribution center, or similar fulfillment facility *by means of the United States mail, delivery service, or common carrier*. (Emphasis added.)

During the audit, it was discovered that the contested items included mostly warehouse equipment and storage racking. Audit Remarks, p. 5. It was also noted during the audit that the petitioner's website suggests that it ships inventory using its own fleet of trucks. *Id.* This was further corroborated by the fixed asset sheet provided by the petitioner during the audit, which listed the petitioner's purchases of a fleet of delivery trucks utilized during the audit period. *Id.* The petitioner affirmed that it did not use the United States Mail or a delivery service. *Id.*

To meet the requirements of "direct marketing" the taxpayer must ship items through United States mail, delivery service, or common carrier. The petitioner provides that it utilizes trucks of a separate legal entity, HD Supply, Inc. to ship its inventory out of state and therefore HD Supply, Inc. is a common carrier. The petitioner provided evidence of the corporate structure of itself and other related entities tied to HD Supply Holdings, Inc, which the petitioner contends are separate legal entities.

The term "common carrier" is not defined by the Ohio Revised Code; however, the Merriam Webster Dictionary provides the following definition of "common carrier": "A business or agency that is *available to the public* for transportation of persons, goods, or messages." (Emphasis added.) Further Black's Law Dictionary defines "common carrier" as a commercial enterprise that *holds itself out to the public* as offering to transport freight or passengers *for a fee*. *Black's Law Dictionary* 98 (4th Pocket Ed.2011). The term "common carrier" is a term of art. Both definitions require a business to offer its transportation services to the public. Additionally, both definitions contemplate that a common carrier as a business enterprise offers the services for a fee.

The petitioner does not dispute the definition of common carrier or elaborate on how HD Supply, Inc. offers its services to the public. The petitioner merely contends that HD Supply, Inc. qualifies as a common carrier because it is qualified under R.C. 5739.01(Z) for transportation for hire and provides documentation relating to HD Supply, Inc. to prove that it is a common carrier based on its insurance and regulatory registrations. During the hearing, the petitioner stated that it occasionally used its own vehicles to transport local (Ohio) inventory. In this instance, the petitioner is primarily moving its own goods. The petitioner contends that the out of state inventory was transported by HD Supply, Inc. However, the petitioner failed to provide evidence that HD Supply, Inc. was used by the petitioner to transport the out of state inventory. Further, the evidence provided by the petitioner failed to include documentation that HD Supply, Inc. is eligible for hire to the public as a common carrier.

The petitioner provided ten sample sales invoices identifying purchases from consumers that included sales tax and freight fees. The petitioner contends that the invoices do not distinguish between non-related carriers and HD Supply, Inc., as the same freight is charged regardless of the carrier. However, the petitioner failed to provide invoices or agreements between the petitioner and its carrier identifying a fee for transporting the petitioner's inventory.

The petitioner submitted secondary support, such as spreadsheets of shipping logs, shipping details, and asset listings; however, this evidence lacked any designation of a carrier for each transaction. The petitioner specifically noted that there are no formal agreements between HD Supply, Inc. and the petitioner because they maintain a consistent use of journal entry transfers between the companies. The petitioner states in relevant part, "[c]ash sweeps and bundled payables occur on a regular basis between the entities to fund or pay operation activities. The company utilizes a centralized treasury function as a business model." HD Supply Post Appeal Write Up Support June 30, 2020. The petitioner further stated that the journal entries are not transaction specific because of bundled payables. Therefore, the petitioner is unable to provide

evidence of a fee from HD Supply, Inc. to the petitioner for transporting the petitioner's inventory. The evidence fails to show consideration to establish a common carrier relationship between the petitioner and HD Supply, Inc.

The petitioner did not provide shipping information related to the assessed transactions to verify that HD Supply, Inc. was a common carrier. Based on the fixed asset sheet provided by the petitioner during the audit, the assessed transactions were transported by the petitioner's fleet. The petitioner contends that this distinction is not well received, as Ohio has no requirement on where or who owns the vehicles or assets, only that they qualify under R.C. 5739.01(Z) as a qualified highway transportation for hire, i.e., qualified common carrier. However, the petitioner is contesting the warehouse equipment, racking and other storage items that were included in the assessment. This argument is not based on the highway transportation for hire exemption, but rather the direct marketing exemption pursuant to R.C. 5739.02(B)(35). The exemption in R.C. 5739.02(B)(35) is not automatic to persons that qualify for exemption as highway transportation for hire. Additionally, R.C. 5739.02(B)(35) specifically states that this division does not apply to motor vehicles registered for operation on the public highways. The exemption for highway transportation for hire and the exemption for direct marketing have similarities, such as requiring transportation of personal property belonging to others for consideration, but a common carrier maintains an additional requirement that the commercial enterprise *holds itself out to the public* for transportation of freight or passengers. (Emphasis added.)

Ohio has extensively addressed the additional requirements for common carriers, most notably in the context of public utility services. *Epic Aviation, LLC v. Testa*, 149 Ohio St.3d 203, 2016-Ohio-3392, 74 N.E.3d 358; *Castle Aviation, Inc. v. Zaino,* BTA No. 2003-M-146, 2005 WL 176679 (Jan. 14, 2005). Unlike R.C. 5739.02(B)(35), Ohio's public utility exemption in R.C. 5739.02(B)(42)(a) does not include the term "common carrier". However, Ohio case law has interpreted public utility service to require that one must operate as a common carrier. *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638.

In *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420, the Board of Tax Appeals reiterated that the distinctive characteristic of a common carrier is that it undertakes to carry for all people indifferently, as opposed to private carriers who are not bound to carry for any reason unless the obligation to do so is voluntarily assumed by a specific contract. This requirement separates a common carrier from private carriers. The Court in *Castle* affirmed the denial of the exemption for an entity that held a certificate authorizing common carriage but conducted its business as a charter service engaged in contract carriage. The actual operation of a business determines its legal status, not its certification. *Manfredi Motor Transit Co. v. Limbach*, 35 Ohio St.3d 73, 518 N.E.2d 936 (1988).

In *Epic Aviation, L.L.C. v. Testa*, the Court held that the criteria for common-carrier service that qualifies for exemption is the shipping of cargo at a time and to a place announced to the public in advance and doing so at a reasonable and nondiscriminatory charge. *Epic Aviation, L.L.C. v. Testa*, 149 Ohio St.3d 203, 2016-Ohio-3392, 74 N.E.3d 358. The Court further clarified that a certificate of public convenience and necessity was not a prerequisite to the public-utility-service exemption and remanded the case to the Tax Commissioner to determine the exempt portion of

jet fuel sales pursuant to the common-carrier standard. *Id.* The distinction drawn by Ohio case law is between common carriage, which is exempt, and chartered service, which is not. *Id.* The extensive case law on the meaning of common carrier mirrors the Merriam Webster Dictionary and Black's Law Dictionary definitions used by the auditor during the audit in determining that the petitioner's transactions do not qualify for exemption. Audit Remarks, p. 5.

The petitioner contends that where vehicles or assets reside on a company's books does not discount or invalidate a claim for exemption on the basis of highway transportation for hire as defined in R.C. 5739.01(Z). The petitioner contends that the ownership of the vehicles is not determinative for R.C. 5739.01(Z); however, the petitioner is not contesting the transactions under R.C. 5739.01(Z), but rather R.C. 5739.02(B)(35). Additionally, it is not clear that the petitioner and HD Supply, Inc. are separate legal entities for tax exemption purposes under R.C. 5739.02(B)(35), as both companies share a centralized treasury, fleet, and book and record keeping. The driver list provided by the petitioner also includes a company name of HD Supply Management, Inc. Therefore, it is not clear whether HD Supply, Inc. is transporting tangible personal property belonging to others (in this case, the petitioner, itself) for consideration, and the petitioner is unable to provide transaction-specific records regarding the contested transactions. The ownership of the inventory and the transporter is determinative. Additionally, the petitioner notes that HD Supply, Inc. only maintains affiliated entities as its customers. Therefore, this information is insufficient to establish that HD Supply, Inc. is a common carrier. Alternatively, even if the petitioner raised the exemption of highway transportation for hire, it would similarly fail to provide evidence that HD Supply, Inc. was primarily transporting *personal property belonging to others for consideration* as provided by R.C. 5739.01(Z). (Emphasis added.)

The petitioner included information from the Public Utilities Commission of Ohio and United States Department of Transportation Federal Motor Carrier Safety Administration regarding the US DOT number and Motor Carrier number of HD Supply, Inc. The petitioner contends that this information supports that HD Supply, Inc. is registered for hire as a common carrier. The petitioner also provided a vehicle lease agreement and registration Card for HD Supply, Inc. The petitioner contends that this information supports that HD Supply, Inc. is qualified "for hire" as a common carrier to transport tangible personal property belonging to others for payment.

The petitioner provided insurance history information from the Federal Motor Carrier Safety Administration for HD Supply, Inc. and a driver listing from HD Supply Management Inc. in support of its contention that HD Supply, Inc. is a common carrier. However, the insurance information was a historical snapshot that did not cover the audit period. Additionally, the information did not certify that HD Supply, Inc. was a common carrier, but rather a motor carrier. The fact that HD Supply, Inc. has insurance coverage for its fleet does not in itself verify that HD Supply, Inc. is a common carrier, as the Federal Motor Carrier Safety Administration requires all applicants for motor carrier to maintain specific insurance on file before it will issue operating authority.[1] The driver listing appears to be in the name of the petitioner and establishes that the petitioner is transporting its inventory with its own drivers rather than utilizing a carrier.

[1] "Insurance Filing Requirements," Federal Motor Carrier Safety Administration. <https://www.fmcsa.dot.gov/registration/insurance-filing-requirements > (accessed April 15, 2020).

This information does not support the petitioner's contention that HD Supply, Inc. is a common carrier or that HD Supply, Inc. is transporting the petitioner's inventory.

Most notably, the petitioner provided Federal Motor Carrier Safety Administration information, such as historical insurance snapshots and operating authority numbers for HD Supply, Inc. to contend that HD Supply, Inc. is registered as a common carrier. However, since January 2007, the Federal Motor Carrier Safety Administration is required by law to issue Motor Carrier Certificates of Registration, which no longer classify companies as common or contract carriers.[2] The Federal Motor Carrier Safety Administration does not distinguish between common and contract carriers, as they were previously defined. *Id.* All registrations are identified as motor carriers.[3] Therefore, the evidence provided by the petitioner alone does not establish that HD Supply, Inc. is a common carrier as this agency does not distinguish between common and contract carriers or register companies as common carriers. The petitioner failed to provide evidence that HD Supply, Inc. is primarily engaged as a common carrier.

In *Midwest Haulers, Inc. v. Glander*, 150 Ohio St. 402, 83 N.E.2d 53 (1948), the Court found that, despite a motor carrier's permit to act as a common carrier for hire throughout the entire audit period, its claim for exception from taxation was granted only for the time period when it was actually operating as a common carrier. The authorization to act as a common carrier does not in and of itself conclusively establish that there is such operation, but rather the actual operation of the business defines its legal status. *Id.* While HD Supply, Inc. is qualified for hire as a common carrier, it only has its affiliated entities as its customers. Based on the petitioner's own admission, HD Supply, Inc. is actually operating as a contract carrier, regardless of whether it is qualified as a common carrier.

The petitioner submitted a lease agreement and vehicle registration card. In relation to these attachments, the petitioner states, "[a]dditionally, the vehicle lease agreements and Registration Card, for the transporter of goods, present HD Supply, Inc. as the common carrier for this service." HD Supply Post Appeal Write Up Support June 30, 2020. The vehicle registration card does not provide any information to verify that HD Supply, Inc. is a common carrier or that the petitioner hired HD Supply, Inc. as a common carrier for the assessed transactions. The lease agreement provided by the petitioner does not support the petitioner's contentions as the lease agreement appears to be a one-page vehicle lease service agreement between PENSKE Truck Leasing and HD Supply, Inc., in which HD Supply, Inc. leased a vehicle in California in 2014. This lease did not specify that HD Supply, Inc. was leasing the vehicle to transport the petitioner's inventory. No other information related to this lease was provided to demonstrate that it was used for the petitioner.

The petitioner also included a one-page vehicle lease and service agreement from Idealease. The agreement contains a printed customer identification of HD Supply, Inc. Facilities Maintenance; however, the customer signature line contains a customer identification of HD Supply, Inc. The

[2] "Answers," Federal Motor Carrier Safety Administration. <https://ask.fmcsa.dot.gov/app/answers/detail/a_id/417/~/i-have-common-carrier-authority.-how-can-i-change-it-to%2Fadd-contract-carrier> (accessed April 15, 2020).
[3] "Unified Carrier Registration Act of 2005," 49 U.S.C. 13902. <https://www.govinfo.gov/content/pkg/PLAW-109publ59/pdf/PLAW-109publ59.pdf> (accessed April 15, 2020).

Department is unable to verify whether the petitioner and HD Supply, Inc. operate as separate legal entities for tax exemption purposes under R.C. 5739.02(B)(42)(j) and 5739.02(B)(35) as they interchangeably use each company's name and signature authority for contracts.

The petitioner affirmed that there are no formal written agreements between HD Supply, Inc. and HD Supply Facilities Maintenance, Ltd; however, it contends that they are separate legal entities that maintain a business model in which HD Supply, Inc. controls functions across all business lines such as treasury and fleet registration. The petitioner fails to provide evidence of consideration provided to HD Supply, Inc. or that HD Supply, Inc. is operating as a common carrier. Based on this information, the Department is unable to verify that HD Supply, Inc. is transporting personal property belonging to the petitioner for consideration. The petitioner has a burden to do more than merely state an unsubstantiated assertion that HD Supply, Inc. is a common carrier.

In addition to the documents provided by the petitioner related to HD Supply, Inc., the petitioner cited a Board of Tax Appeals case and a Tax Commissioner Opinion to support its contention that HD Supply, Inc. is a common carrier. The petitioner cites *Freudenberg NOK General Partnership v. Wilkins*, BTA No. 2006-K-1556, unreported (April 13, 2010). The petitioner's recitation of the main issue is correct that the Board of Tax Appeals addressed whether the business activities of the taxpayer qualified as direct marketing even though it did not engage in making retail sales. The petitioner contends that the case clarifies the direct marketing exemption and intention, "...This is not to lose focus that requirements for exemption need to be factored, but not construed to eliminate the intent of exemption, which is for companies to build/maintain warehouse[s] in Ohio, which could otherwise be maintained and built in other states." However, the petitioner's inclusion of this case is not relevant to the current assessment. The Board in *Freudenburg* addressed the intention of the direct marketing exemption in determining the end consumer in a retail sale. The Board did not address whether the taxpayer shipped through US Mail, a delivery service, or common carrier as it was an undisputed fact that all parties agreed the taxpayer distributed inventory outside Ohio by a common carrier. The taxpayer in *Freudenburg* specifically used Conway, UPS, and Federal Express – all of which the Department acknowledged as common carriers. Since the means of distribution was not an issue in this case, the relevance to the petitioner's contention is misplaced.

The petitioner also includes the following quotation to support the contention above from Tax Commissioner Opinion 07-0005, "*[s]ince Taxpayer is engaged in storing, transporting, mailing, or otherwise handling its clients' purchased sales inventory that is being distributed primarily outside Ohio by means of direct marketing, it is entitled to claim exemption under R.C. 5739.02(B)(42)(j) for equipment used primarily in those storage, transportation, mailing, and handling functions....*" Ohio Department of Taxation, Opinion of the Tax Commissioner No. 07-0005, issued on November 15, 2007. For the same reason provided above, the petitioner's citation is misplaced because the facts relevant to that Opinion were not as such to contest the taxpayer's distribution through U.S. Mail, delivery service, or common carrier.

The petitioner failed to provide evidence that HD Supply, Inc. was operating as a common carrier for the assessed transactions. Alternatively, if the petitioner submitted evidence of its

vendor's status as an authorized common carrier rather than a contract carrier, the petitioner failed to provide evidence that it utilized that vendor, HD Supply, Inc., for consideration for the assessed transactions. Therefore, the petitioner's objections lack merit. Accordingly, the objections are denied.

Penalty

The petitioner seeks remission of the penalty associated with the assessment. The evidence and circumstances support a partial abatement of the penalty. The request for a penalty abatement is granted in part.

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$156,848.78	$14,775.10	$7,842.34	$179,466.22

Current records indicate that $39,712.94 of payments have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

Law General Contracting, Inc.
9128 Mount Vernon Rd.
St. Louisville, OH 43071

RE: Assessment No. 100001264272
Use Tax
Account No. 97-306115

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 and R.C. 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$60,507.04	$8,719.21	$4,536.34	$73,762.59

The petitioner is a company that offers services including excavation, site utilities, demolition, paving, and heat welds. Its headquarters are in St. Louisville, Ohio. This assessment is the result of an audit of the petitioner's purchases from July 1, 2012 through December 31, 2017. A hearing was not requested. The petitioner filed a timely petition for reassessment and requested a penalty abatement. Based upon the surrounding facts and circumstances, penalty abatement is warranted.

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$60,507.04	$8,719.21	$0.00	$69,226.25

Current records indicate that payment of $69,226.25 has been received in full 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 post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

M & A Equipment Holdings, LLC
218 W. Ash St.
Piqua, OH 45356

Re: Assessment No.: 100000432760
Use Tax

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5739.13 and R.C. 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$74,250.00	$7,135.32	$11,137.50	$92,522.82

This assessment was based upon the petitioner's failure to pay tax on the purchase of an aircraft. A hearing was held on this matter.

Background

The petitioner is a limited liability company and a wholly owned subsidiary of Scott M & A Corporation with a registered agent of Benjamin P. Scott, Jr. in Piqua, Ohio. Mr. Scott is a licensed pilot and the president, owner, incorporator, treasurer, and statutory agent of Scott M & A Corporation ("Scott M & A"), which is headquartered in Piqua, Ohio. Scott M & A operates McDonald's franchises in the Ohio cities of Piqua, Troy, Sidney, Tipp City, Greenville, Fairborn, Huber Heights, and Beavercreek. The main Scott M & A McDonald's office location is 218 W. Ash St., Piqua, Ohio. The petitioner is registered at the same address. An affidavit executed by Mr. Scott on July 5, 2018 indicates that he is also the president of Scott M & A, the sole member of the petitioner.[1] It is in this capacity that Mr. Scott signed the petitioner's operating agreement.[2] The operating agreement notes that Scott M & A provided an initial capital contribution to the petitioner of $1,000.[3]

On April 19, 2013, H.S. Aviation LLC ("H.S. Aviation") purchased a 1986 Cessna Conquest II (the "aircraft") from AE Aviation Leasing, LLC for $1,100,000.00.[4] The members of H.S. Aviation were Benjamin P. Scott, Jr. and Jeffrey C. Hemm. The agreement notes that H.S.

[1] Petitioner's Ex. 3.
[2] Petitioner's Ex. 5.
[3] *Id.*
[4] The aircraft held one seat for a crew and ten seats for passengers. Petitioner's Ex. 20, p. 6.

Aviation is located at 218 W. Ash St., Piqua, Ohio. Mr. Scott signed the original agreement on behalf of H.S. Aviation. Per the petitioner, the members of H.S. Aviation were advised against operating a joint venture or partnership due to liability issues. As a result, the contract was amended.

A "Second Addendum to Aircraft Sales Agreement" was executed on May 15, 2013. It deleted H.S. Aviation from the contract and amended that the "Purchaser" in the original agreement, "jointly and severally," were the petitioner and "Little h Holdings, LLC." This addendum was signed by Benjamin P. Scott, Jr. on behalf of both H.S. Aviation, LLC and the petitioner, M & A Equipment Holdings, LLC ("M & A Holdings"). Little h Holdings, LLC ("Little h") is registered with Jeff Hemm at 514 S. Main St., Piqua, Ohio. As of 2018, Mr. Hemm was the president of R. C. Hemm Glass Shops, Inc. ("Hemm's Glass") located in Piqua at 514 South Main Street. [5] Mr. Hemm signed the addendum on behalf of Little h. Per M & A Holdings's flight logs, Mr. Hemm (and ostensibly Hemm's Glass) is a glass supplier for Scott M & A's McDonald's stores.[6]

Lease Arrangement

Per M & A Holdings, both it and Little h were formed as distinct leasing companies to engage in separate independent lease transactions. Each has a separate vendor's license and M & A Holdings has no employees. The process of leasing is simple: M & A Holdings and Little h used a shared calendar to book the aircraft. If the aircraft was not reserved by Little h, M & A Holdings could lease the aircraft through the shared calendar. The petitioner has not identified how Little h and M & A Holdings would handle a scheduling dispute or that any ever occurred. Despite storing the aircraft in a hangar at the Piqua Airport (located at 5465 W. State Road 185), the petitioner registered its address at the same office address listed on Scott M & A's website: 218 W. Ash St., Piqua, Ohio. The record does not reflect any signage or other type of public posting to indicate that it was engaged in the business of aircraft leasing.[7] The record further does not reflect the petitioner ever filled out an exemption certificate reflecting this purchase was for resale.

Per M & A Holdings, though its lease agreement was "non-exclusive," it only leased the aircraft to one entity: Scott M & A. (Similarly, Little h only leased the aircraft to Hemm Glass.) The rate of M & A Holdings' lease with Scott M & A was $150.00 per hour. The arrangement required that Scott M & A, the lessee, assume responsibility for all fixed and variable operating expenses for the operation of the aircraft. The agreement required the company to provide a $2,500.00

[5] Hemm Glass Secretary of State Filings.

[6] Petitioner, in its Response to Document Request 7, states that Mr. Hemm and Mr. Scott do not share any business interests, despite this apparent contradiction from petitioner's own flight logs which refer to Mr. Hemm and Hemm Glass as a supplier. Petitioner's Ex. 9, p. 9; Ex. 10, pp. 1, 2-3, 6; Ex. 11, pp. 8, 11. The flight logs also reflect, on top of several personal flights between the two, Mr. Hemm and Mr. Scott used the aircraft to review an investment opportunity together. Petitioner's Ex. 8, p. 6.

[7] The Commissioner requested all advertising and marketing materials for the petitioner's alleged leasing enterprise. None were provided. Further, the Google street view from 2015 does not reflect any signage for the petitioner. <https://www.google.com/maps/place/218+W+Ash+St,+Piqua,+OH+45356/@40.149704,-84.2417139,3a,75y,348.65h,90t/data=!3m6!1e1!3m4!1shZcVK6N5Q6NxW0jd9sSfUw!2e0!7i13312!8i6656!4m5!3m4!1s0x883f753c6f9689df:0x21e68d259007ba0a!8m2!3d40.1498969!4d-84.2417669> (accessed September 14, 2020)

contribution to be credited toward future rent.[8] The agreement further required that Scott M & A pay for its own pilot and crew, hangar, maintenance, and fuel. This arrangement resulted in yearly related purchases in the mid-to-high five figures for Scott M & A.[9]

The rental agreement between M & A Holdings and Scott M & A was signed by Benjamin P. Scott, Jr. Mr. Scott signed as "President" of Scott M & A and "President of Member" for M & A Holdings. The rental agreement is undated but its cover page and Exhibit C to the agreement is dated May 17, 2013. The rental agreement notes the hull value of the aircraft as $1,300,000.00.[10] The petitioner did not provide any listings, storage, advertisements, or similar documents showing that M & A Holdings' single asset, the aircraft, or any other planes were available for lease. The petitioner's registration with the Federal Aviation Administration ("FAA") indicates that it answered "no" as to whether it was a dealer.

The lease agreement contains some unique provisions. First, the lease does not cover a fixed period of time. Instead, the contract states that the lease period means each lease period commences with delivery of the plane to the lessee and concludes with the return of the plane to the lessor. The lease is also not exclusive. The aircraft may be subject to use by the lessor, and/or additional non-exclusive leases to other parties during the term. Third, the agreement may be terminated at the will of either party at any time. Fourth, the lease seems to provide no right to use the aircraft. Instead it states that while the agreement "provides a framework for future use of the [a]ircraft by [l]essee, it does not confer upon [l]essee any recurring or continuous right to use the [a]ircraft." Despite having no right to use or possess the aircraft, as previously noted, the lease agreement requires that the lessee pay all costs associated with its operation. Fifth, the contract requires that the lessee is responsible for insurance on the aircraft.

The petitioner provided rental invoices for each year of leasing. These forms are summary and unaddressed – unusual for a company that claims its business is leasing. Per the petitioner: for a calendar year beginning November 2012 through October 2013, it received $5,272.50 before sales tax. For November 2013 through October 2014, it received $16,485.00 before sales tax. For November 2014 through October 2015, it received $18,030.00 before sales tax. For November 2015 through October 2016, it received $13,155.00 before sales tax. For November 2016 through October 2017, it received $18,600.00 before sales tax.[11] In total, per the petitioner, it received $71,542.50 over the four-year course of leasing its aircraft with a $1.1 million purchase price. This arrangement resulted in the petitioner's remission of $4,908.50 in sales tax to the state.[12]

Financing of Aircraft and the Petitioner's Accounting

The peculiarities continue with the financing of the aircraft. Mr. Scott provided a sworn affidavit attesting that the petitioner paid $550,000.00 toward the purchase of the aircraft.[13] He further stated that $360,000.00 of those funds were funded by a loan from Scope Leasing, Inc. ("Scope

[8] Petitioner's Lease Agreement, Ex. B.
[9] Petitioner's Ex. 21.
[10] A separate insurance agreement with XL Specialty Leasing in 2013 states the insured value was $1,350,000.00. In 2014, the insured value was $1,450,000.00.
[11] Petitioner's Exs. 14-18.
[12] *Id.*
[13] Petitioner's Ex. 3.

Leasing").[14] The balance was "funded by a capital contribution from Scott M & A Corporation."[15] However, the Aircraft Installment Note and Security Agreement ("Note") grants a loan of $250,000.00 to "Borrower[.]" ("Borrower" is defined under the agreement as the petitioner and Little h Holdings.) An addendum to the Note then states that another loan in the amount of $780,000.00 between the companies is cross-collateralized and secured by the aircraft.[16] The record does not reflect an explanation for the discrepancy in loan amounts between the Note, the addendum, and Mr. Scott's affidavit. The Note further does not reflect any division of loan payments between the petitioner and Little h. It also does not appear to match the handwritten trial balance sheet provided by the petitioner. However, as will be discussed below, it is difficult to account for the deposit schedule and payments received by the petitioner.

The inflow and outflow of funds with the petitioner is irreconcilable. Bank records indicate that the petitioner deposited $15,000.00 into its bank account in the period between June 12 and June 30, 2013.[17] The bank records further reflect that the petitioner made monthly deposits in the amount of $8,000.00 through November of 2014. It began making monthly deposits in the amount of $8,000.00 again in March of 2015. There were twice-monthly withdrawals for payments to Scope Leasing on the loan. There was a one-off deposit of $5,000.00. Petitioner always ended the month with less than $1,000.00 in its bank account until December of 2014. It ended the periods of March 2015 through 2017 in the same manner. Further, the petitioner's own accounting reflects that the amount due and owing from leasing in the first year of ownership alone (2013 to 2014) was $16,485.00. This is far less than the monthly $8,000.00 that was deposited. The petitioner did not provide any explanation for this discrepancy. It is clear, at very least, the business generated consistent losses and a significant amount of its funding came from another source.

The peculiarities persist with the aircraft's original $250,000.00 financing from Scope Leasing, Inc. ("Scope"). The addendum to the Note requires that leasing to any entity other than Scott M & A and Hemm Glass requires prior written approval from Scope.[18] Additionally, the loan becomes immediately due and owing after 6 months of regular payments. A stamp on the loan documents state it was fully paid on September 27, 2013, about four months and two weeks from the agreement's execution. However, the petitioner's bank accounts reflect that Scope was withdrawing funds from its account well into 2017. The petitioner's provided invoices indicated that it only received around $71,000 in revenue over the four-year course of the lease. No explanation was provided for this discrepancy. Mr. Scott signed all provided loan documents on behalf of Scott M & A.

The insurance agreement specifically notes the approved pilots for the aircraft were Benjamin P. Scott, Jr., Gregg D. Anderson, and Scott D. Williams. Records available to the Tax Commissioner indicate that Mr. Anderson is the "owner/pilot" at "Miami Valley Aero

[14] *Id.*
[15] *Id.*
[16] Petitioner's Ex. 19.
[17] Petitioner's Ex. 24.
[18] Petitioner's Ex. 19.

Services."[19] The record does not reflect the relationship Mr. Williams has with the petitioner and his name does not appear on any flight logs.

Petitioner Solely Rented to Its Parent Company's Owner and President

The petitioner presented a summary of the use of the plane. Each flight reflects use by either Scott M & A or Hemm Glass. No other individuals or entities leased the aircraft. The only leasing was by the parent companies of both the petitioner and its co-owner. The petitioner also presented its flight logs. The petitioner's logs reflect 378 flights from 2013-2017. Every single flight had Scott M & A as the primary operator. Every flight with a passenger listed indicates that Mr. Scott or a member of his family used the aircraft. Additionally, Mr. Scott appears to have only used the plane in any "business" capacity for his position as a representative with McDonald's Operator's National Advertising Fund ("OPNAD"), a voluntary cooperative of different McDonald's owners and operators that was organized with the goal of pooling advertising funds. It is unclear how an advertising cooperative is related to Scott M & A's business purpose of operating several franchises in the Dayton area. A significant amount of the flights appear to have been for personal use. For example, several flights reflect Mr. Scott and his family's visits to Michigan to visit his father. Mr. Scott notes in his bio on Scott M & A's website there is a family cottage at that location that Mr. Scott enjoys visiting.[20] Finally, several entries reflect Mr. Scott's use of the aircraft for trips to Aspen and his own pilot training. The petitioner solely rented to Scott M & A for the benefit of Mr. Scott.

Law and Analysis

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

Sale for Resale

A taxpayer's purchase is not taxable if "the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person." R.C. 5739.01(E); *see also* R.C. 5741.02(C)(2) (property used or consumed in Ohio is not taxable where, had that property been purchased in Ohio, it would not have been a taxable sale). This provision is known as the ''sale-for-resale exception.'' *Standards Testing Laboratories, Inc. v. Zaino*, 100 Ohio St.3d 240, 2003-Ohio-5804, 797 N.E.2d 1278, ¶ 14. As with any claimed exemption from taxation, it must be

[19] Gregg Anderson, "LinkedIn" <https://www.linkedin.com/gregg-anderson-966ab696> (accessed June 12, 2020).
[20] "Profiles," <http://www.scottmcdonalds.com/profiles> (accessed June 5, 2017). Examples of the listed use: "Visit dad on the way back" – Petitioner's Ex. 8 p. 3. "OPNAD meeting – golf with operations prior." Petitioner's Ex. 9, p. 3. "Training 11/9 and 11/10/16" – Petitioner's Ex. 11, p. 12.

strictly construed. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 15. Testimonial evidence without corroborating documentary evidence is insufficient to establish exempt use. *R.L. Best Co. v. Testa,* 7th Dist. Mahoning No. 18 MA 0001, 2018-Ohio-5400, ¶ 40.[21]

As noted by the Tax Commissioner previously and affirmed by the BTA:

> [N]ot all leases of aircraft qualify for the resale exception. If the owner of an aircraft furnishes both the aircraft and the operator, the owner remains in possession and control of the aircraft and no 'sale' of the aircraft occurs. *See Fliteways, Inc. v. Lindley*, (1981), 65 Ohio St.2d 21; *Laurel Transportation, Inc. v. Zaino* (2001), 92 Ohio St. 3d 220. If, on the other hand, the owner of an aircraft furnishes only the aircraft (via a dry lease), the aircraft is considered to be resold when leased and the purchase of the aircraft qualifies for exemption from taxation under R.C. 5739.01(E)(1), *as long as the owner of the aircraft is engaged in business*.

Pi in the Sky v. Testa, BTA No. 2015-2005, 2017 WL 1443843, *3 (January 19, 2017) (emphasis added). The relevant question is whether the petitioner "purchase[d] the subject aircraft for purposes of leasing it to others, as part of a business enterprise." *Id.* at *5. "Thus, we must look to the record before us to determine the nature of the relationship between [petitioner] and [Scott M & A], the primary/only lessee of the aircraft." *Id.* at *3; see also *Pi in the Sky v. Testa*, 155 Ohio St.3d 113, 2018-Ohio-4812, 119 N.E.3d 417, ¶ 15.

The petitioner makes a similar argument using the sale-for-resale exemption as the one rejected by the BTA in *Pi in the Sky.* In *Pi in the Sky*, the BTA upheld the Commissioner's denial of a sale-for-resale exemption where an aircraft was purchased then leased between a parent and a wholly owned subsidiary. Specifically, the BTA found where a wholly owned subsidiary purchased a single aircraft for sole leasing to its parent with a "Non-Exclusive Lease Agreement" which is nearly identical to the one here, the lease agreement lacks "both factual and economic substance" and the purchaser is not engaged in the business of leasing to others. *Id.* at *3-4. Notably, the same facts establishing the lack of a sale-for-resale in *Pi in the Sky's* holding are present here: the lease agreement has no defined lease term; the lease is non-exclusive; the lessor can approve or deny flight-scheduling at its sole discretion because it does not confer any recurring or continuous right to use the aircraft; the aircraft was leased for an hourly rate but the lessee was responsible for all operation costs, including fuel, maintenance service plans, storage, insurance, and retention of qualified mechanics and pilot services; and, finally, the lease was signed by Mr. Scott on behalf of both the lessor and the lessee. *Id.* On appeal, the Supreme Court of Ohio upheld the BTA's "extensive findings of fact" and affirmed that *Pi in the Sky* was not engaging in business. *Pi in the Sky,* 2018-Ohio-4812, ¶ 16.

The BTA noted the "[m]ost telling" of its lease considerations was the fact that the same individual signed on behalf of the lessor and lessee. *Id.* Here, as Mr. Scott was acting in a dual capacity, "the arm's-length nature of the transaction is called into question * * *[.]" *Id.* "Further, the non-exclusive lease terms and the taxpayer's reservation of right to deny any flight

[21] As a general note, several of petitioner's responses to documentary requests from the petitioner are testimonial in the form of "see written analysis." *See* Petitioner's Responses to Document Request 2, 3, 4, 5, 6, 7, 22.

scheduling request, for example, are only feasible between two entities that are, practically speaking, one and the same, i.e., ['Jalthough the lease gives the lessee no defined right to use the aircraft, the lease places full responsibility for all the costs of operating and storing the aircraft on the lessee.[']" *Id.* Mr. Scott signed every agreement on behalf of Scott M & A, H.S. Aviation (the original "Purchaser"), and the petitioner. As there was no actual difference between Scott M & A, its owner Mr. Scott, and its subsidiary M & A Holdings, it was not possible for petitioner to be engaged in the business enterprise of leasing aircraft.

In determining whether an item qualifies for exemption under R.C. 5739.01(E), the Supreme Court of Ohio "has often relied upon the purchaser's primary use of the property as indicative of his purpose." *Fliteways, Inc. v. Lindley*, 65 Ohio St.2d 21, 25, 417 N.E.2d 1371, 1374 (1981). Accordingly, the BTA concluded that Pi in the Sky, based on the same fact pattern, "did not purchase the [aircraft] for purposes of leasing it to others, as part of a business enterprise." 2017 WL 1443843 at *4. The record does not reflect any listings, storage, advertisements, or similar documents showing that M & A Holdings' single asset, the aircraft, or any other planes were available for lease. There, as here, "the record fails to demonstrate any desire or attempt to lease the [aircraft] to 'others."' *Id.*. Accordingly, the petitioner has failed to meet its burden to show the aircraft was purchased by M & A Holdings with the intent to resell.

The petitioner devotes significant analysis to *Ace Doran Hauling & Rigging Co. v. Tracy*, BTA No. 92-R-213, 1995 WL 436055 (July 21, 1995). Put simply, *Ace Doran* does not involve a sale-for-resale claim. The issue in that case was whether payments made pursuant to an oral lease agreement involving several motor vehicles between two related companies were taxable. The Tax Commissioner agrees that lease payments are generally taxable. However: the sale-for-resale exemption, not taxability of lease payments, is at issue here. *Ace Doran* also dealt with significantly more vehicles, a taxpayer that contended its own transactions lacked economic substance, and a lessor that "operated at a five to ten percent profit margin." *Ace Doran* at *3. Therefore, *Ace Doran* is distinguishable.

Petitioner further cites to *North v. Higbee Co.*, 131 Ohio St. 507, 3 N.E.2d 391 (1936) and *The Barth Co., L.P. v. Tracy,* BTA No. 92-A-1014, 1994 WL 468129 (August 26, 1994) in support of its claim that a sale-for-resale exemption is not unavailable because a parent company leases to a subsidiary. As an initial matter, this assessment did not arise merely because the petitioner was leasing to its parent company. This assessment arose because of the questionable nature surrounding the petitioner, the aircraft's purchase, and the lease. The petitioner also fails to note that the holding in *North v. Higbee Co.*, a case involving back rents and taxes owed from one company to another, was completely abrogated by *Belvedere Condominium Unit Owners' Association v. R.E. Roark Companies, Inc.*, 67 Ohio St.3d 274, 1993-Ohio-119, 617 N.E.2d 1075, a case which was further expanded upon by *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538. *Barth Co.* involves a sale-for-resale claim where three corporations, as a joint venture, chartered a yacht to multiple unrelated parties. Barth further engaged an unrelated firm to advertise and promote the vessel, locate potential charters, and manage the vessel. The unrelated firm further provided crew services to an affiliated, not parent, company to Barth. *Barth* can easily be contrasted with *Pi in the Sky*. *Barth* represents how one can potentially be engaged in the business of leasing despite the presence of related companies; due to the lack of any facts reflecting a business enterprise engaged in leasing, *Pi in the Sky* does

not. *See Pi in the Sky v. Testa,* BTA No. 2015-2005, 2017 WL 1443843, *4 (January 19, 2017) (distinguishing *Barth* and rejecting its application in this context).

Finally, the petitioner states that it meets the requirements for the exemption because it holds an Ohio vendor's license, derives a benefit from the lease revenue received from the aircraft, and provides an "indirect benefit or advantage to its owner by facilitating flexible and efficient business travel in an airline market with limited schedules at *increased prices*." Petitioner's Post-Hearing Brief, p. 4 (emphasis added) (further citations omitted). The petitioner cited no statute or case law in support of these facts being relevant to the sale-for-resale exemption. Further, the petitioner's own records reflect an ongoing operating loss in its course of leasing the aircraft, and significant funding from its parent company in pursuit of this loss. Indeed, all that is left is the cost-saving and time benefit to Scott M & A and Mr. Scott of the use of on-demand private air travel for personal purposes.

Here, as in *Pi in the Sky,* there is no evidence in the record to indicate that M & A Holdings purchased the aircraft for the purpose of leasing it to others as a business enterprise. In fact, the only individual involved in both sides of the two rental agreements was Benjamin P. Scott, Jr. The petitioner did not assert that it was in the business of leasing or renting aircraft to anyone or any entity that was not Mr. Scott or managed by Mr. Scott. And the petitioner itself is owned by Scott M & A, which is owned by Mr. Scott. The only signature on the rental agreements between the two entities was Mr. Scott. The record does not reflect an intent to resell an airplane. The record reflects an airplane purchase with extra steps. Therefore, the Commissioner cannot conclude that the petitioner has met its burden to show the purchase of the aircraft was with the intent to resell.

At hearing, the Tax Commissioner's requested all information that the petitioner used in determining that a $150.00/hour dry lease rate for a $1.1 million aircraft (or $1.3 million per the rental agreement) was reasonable. The petitioner provided a printout of charter rates for other Cessna jets and a 2018 estimation sheet from a company for expected operating costs. The petitioner also provided an undated analysis from its representative about the reasonableness of this lease rate. Notably, the petitioner provided no contemporaneous documentation from the initial purchase, lease, or over the course of years of leasing for how it determined that $150.00/hour was a reasonable dry lease rate for its parent company's rental of the seven figure Cessna. This is contrary to the best practices recommended by the NBAA: "Lease payments should be made at an arms-length rate, and the entire structure must be properly documented. Special attention should be paid to the lease rate, and it may be helpful to have an appraisal of the aircraft's value to support the amount of the lease payment."[22] The petitioner has advanced no argument for how these items equate to proper documentation of an arm's-length transaction. Testimonial evidence is not sufficient to meet petitioner's burden of proof of exemption. *R.L. Best Co. v. Testa,* 2018-Ohio-5400, ¶ 40.

Appellant presented no evidence showing that the rental rates charged for use of the aircraft were based on the going market rates charged by an unrelated party. The Tax Commissioner received

[22] National Business Aviation Association, "What You Need to Know About Aircraft Leases," <https://nbaa.org/flight-department-administration/aircraft-operating-ownership-options/aircraft-leasing/what-you-need-to-know-about-aircraft-leases/> (accessed June 11, 2020).

only testimonial evidence in the forms of printouts and estimations. These numbers further appear to have been determined well after the leasing activity of the petitioner had ceased – contrary to the best practices of normal airline leasing companies.[23] This further shows that the rental rate determined by the petitioner to its parent company was illusory at best. The Commissioner therefore finds the rentals were not arm's-length transactions, and that appellant failed to carry its burden of proof in this regard. Because appellant has failed to show that there was an expectation of profit other than obtaining tax benefits, these rentals should be disregarded as shams, under the authority of R.C. 5703.56(B).

The facts supporting the Commissioner's determination are that: (1) M & A Holdings did not lease the aircraft to others; (2) the putative rental agreements between M & A Holdings and the owner of its parent company, Benjamin Scott Jr., did not arise from arm's-length transactions; (3) there is no effectual separation between M & A Holdings, Scott M & A, and Mr. Scott; and (4) because M & A Holdings had no intent to operate an actual leasing/rental business, it had no legitimate business purpose. Therefore, the petitioner was not engaged in the business of resale and the exemption is not available.

Sham Transaction

A "sham transaction" is a transaction "without economic substance because there is no business purpose or expectation of profit other than obtaining tax benefits." R.C. 5703.56(A)(1). When ascertaining a taxpayer's tax liability, the Commissioner "may disregard any sham transaction." R.C. 5703.56(B). Generally, the Commissioner "shall bear the burden of establishing by a preponderance of the evidence that a transaction or series of transactions was a sham transaction." *Id.*; see also R.C. 5703.56(C) (authorizing Commissioner to employ "economic reality," "substance over form," and "step transaction" doctrines to administer tax).

The sham transaction doctrine is well-established in the federal tax realm. *See Gregory v. Helvering*, 293 U.S. 465, 469 (1935) (disregarding corporate reorganization, as it "was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else"). This doctrine "seeks to identify a certain type of transaction that [legislators] presumptively would not have intended to accord beneficial tax treatment." *Horn v. Commissioner*, 968 F.2d 1229, 1237 (D.C. Cir. 1992). Ohio courts also have recognized this doctrine. *See Macior v. Limbach*, 86 Ohio App.3d 204, 207 (9th Dist. 1993) (discussing when to "disregard a transaction in the name of economic reality").

As discussed above, the BTA determined in *Pi in the Sky* that: (1) Pi in the Sky was not leasing the Aircraft to "others"; (2) the putative lease agreement between Pi in the Sky and Mitchell's failed to arise from an arm's length-transaction; (3) there is no effectual separation between Pi in the Sky and Mitchell's; and (4) Pi in the Sky had no "legitimate business purpose." BTA Decision at 3-4; see also S.T. at 6-7 (Pi in the Sky had "no intent to operate an actual leasing business" and "no reasonable possibility of a profit"). Thus, the BTA correctly concluded that the putative lease agreement was, in fact, a sham transaction. *Pi in the Sky v. Testa,* BTA No. 2015-2005, 2017 WL 1443843, *4. For these reasons, the Commissioner finds that the petitioner is liable for the tax due to the sham transaction.

[23] *Id.*

Taxable Value

In its original petition, M & A Holdings argued that it should only be liable for the portion of the purchase of the aircraft it claims to have paid. This argument fails for several reasons. R.C. 5741.02(A) levies "an excise tax * * * on the storage, use, or other consumption in the state of tangible personal property or the benefit realized in this state of any service provided." R.C. 5741.04 requires the consumer to pay the tax to the vendor based on the purchase price. In *Gen. Motors Corp. v. Lindley*, 67 Ohio St.2d 331, 333, 423 N.E.2d 479, 481 (1981), the Supreme Court of Ohio stated:

> The use tax levied under R.C. Chapter 5741 is an excise tax, not an ad valorem tax. As such, it is imposed 'neither on the ownership of property, nor is it with respect to such ownership. It is not a tax 'laid directly on persons or property.' * * * It is a tax assessed for some special privilege or immunity. * * * ' (Citations omitted.) *Howell Air, Inc. v. Porterfield* (1970), 22 Ohio St.2d 32, 34 [51 O.O.2d 62, 63, 257 N.E.2d 742, 743]. The use tax, therefore, is not a tax laid upon the property, itself, but, rather, 'is a tax upon the privilege of use of property * * *.' *Federal Paper Bd. Co. v. Kosydar* (1974), 37 Ohio St.2d 28, at 32 [66 O.O.2d 82, 85, 306 N.E.2d 416, 419]. Under the statutes in question, 'use' means and includes the exercise of any right or power incidental to the ownership of the thing used. R.C. 5741.01(C).

The privilege of this use for each consumer is measured by the price of the property. R.C. 5741.01(G)(1); R.C. 5739.01(H)(1); R.C. 5741.02(A)(1); R.C. 5741.02(B); R.C. 5741.04. The petitioner, in its questionnaire, stated that the purchase price of the plane was $1,100,000.00. The auditor lawfully assessed the petitioner for this amount. The petitioner is liable for its use of the plane and has failed to show error in the assessment. This objection is denied.

Penalty

The petitioner also requests an abatement of the penalty. Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Based upon the surrounding facts and circumstances in this matter, the Commissioner finds that the penalty is reasonable. Therefore, the request is denied.

Therefore, 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 days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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SEP 3 0 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000252

Ohio Department of Taxation

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

FINAL DETERMINATION

Date:

SEP 3 0 2020

Nations Lending Corporation
4 Summit Park Dr., Ste. 200
Independence, OH 44131

RE: Assessment No.: 100001226291
Use Tax
Account No.: 97-305501

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$386,527.56	$59,623.86	$57,977.95	$504,129.37

The petitioner operates as a home mortgage financial services firm. This assessment is the result of an audit of the petitioner's sales for the period July 1, 2011 through June 30, 2017. The petitioner filed a petition for reassessment. A hearing was initially requested but waived via email on September 16, 2020.

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 required under R.C. Chapter 5739. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Based on the facts and circumstances, a penalty abatement is warranted.

Therefore, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$386,527.56	$59,623.86	$0.00	$446,151.42

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SEP 3 0 2020

Current records indicate that payments of $446,151.42 have been made in full satisfaction of the assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000228

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

Nickolas M. Savko & Sons, Inc.
4636 Shuster Rd.
Columbus, OH 43214

Re: Assessment No. 100001542951
Use Tax
Account No. 97-307085
Period: 04/01/2013 – 04/30/2018

This is the final determination of the Tax Commissioner on a petition for reassessment filed pursuant to R.C. 5739.13 and 5741.14.

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

Current records reflect that the modified 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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

FINAL DETERMINATION

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

Date: SEP 3 0 2020

Mark W. Norris
4764 Dusty's Rd.
Akron, OH 44319

Re: Assessment No. 100000916685
Use Tax

This is the final determination of the Tax Commissioner with regard to a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the following assessment:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$6,175.00	$1,308.04	$926.25	$8,409.29

This assessment was issued based upon the conduct of a special audit of a registered watercraft. On August 4, 2011, Mark Norris purchased a 2003 48' Sunseeker Superhawk. No sales tax was paid during the transaction, as the petitioner claimed the "sale-for-resale" exception. 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 his objections. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

The petitioner contends that the Department erred in assessing use tax due on the purchase of the Sunseeker. The petitioner contends that his business bought the boat as an investment project in 2011 to work on during the winter months, and, as soon as it was saleable in 2013, he enlisted the help of a broker to try to sell the boat. The petitioner contends that he did not realize there was a limitation on how long a boat could be kept in inventory before it becomes taxable. These contentions are not well taken.

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of services provided, with it being the obligation of the user to file a return and remit tax on the purchase of such items when tax was not paid to a seller. For the purpose of the proper administration of sections 5741.01 to 5741.22 of the Revised Code, and to prevent the evasion of the tax hereby levied, it

shall be presumed that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established. R.C. 5741.02(E). "Retail sale" and "sales at retail" include all sales, except those in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person. R.C. 5739.01(E). "Engaging in business" means commencing, conducting, or continuing in business, and liquidating a business when the liquidator thereof holds itself out to the public as conducting such business. Making a casual sale is not engaging in business. R.C. 5739.01(G).

Therefore, in order to qualify for the "sale-for-resale" exception, the property must be proven to be resold by a person, engaging in business, in the same form in which it was received by that person. An analogous argument to the one advanced by the petitioner was settled by the Board of Tax Appeals. *B.M.V. Services, Inc. v. Tracy*, BTA No. 91-R-1332, 1993 WL 355636 (Sept. 3, 1993). In that case, the Board affirmed the Tax Commissioner's denial of a sale-for-resale exception claim on the purchase of a 1989 38' Carver boat. The Board found that the facts and circumstances surrounding B.M.V. Services' initial purchase and attempts to resell the Carver were inconsistent with an intention that the boat had been purchased for resale. *Id.* at *5.

B.M.V. Services was a dealer in new boats and repossessed cars, who also claimed to deal used boats. *Id.* at *1. It possessed a vendor's license for a car business, a vendor's license for a boat brokerage business, and a watercraft dealer's license. *Id.* The Board determined that B.M.V. Services obtained a vendor's license for used boat sales specifically after acquiring the Carver, and that no used boat sales had been recorded under that vendor's license prior to the issuance of the assessment notice. *Id.* at *5. In fact, B.M.V. Services had only sold several significantly smaller boats before acquiring the Carver in question. *Id.* B.M.V. Services had conducted little external advertising for the sale of the Carver, running newspaper ads only twice. *Id.* Although it claimed that it regularly advertised the boat in question at its place of business along with other boats it had available for sale, B.M.V. Services had not advertised the Carver in a newspaper of general circulation until after the initiation of an investigation by the Tax Department. *Id.*

B.M.V. Services docked and stored the Carver in Sandusky, Ohio, rather than in Cleveland, Ohio at its place of business. The Board found this to be odd because the Cleveland area has a considerable watercraft market. The loan for the boat was originated in the names of B.M.V. Services and David and Karen Skinner, who were principals of B.M.V. Services. However, the boat was purchased using a consumer loan, rather than a commercial loan. That was the final piece of evidence that caused the Board to determine that the appellant did not qualify for the sale-for-resale exception.

Here, the petitioner contends that he operates a small inland marina with a service department and dockage, and its is only in the winter months that he works on investment projects, such as the boat. Petition for Reassessment, p. 1. The evidence shows that no sales tax was collected when the petitioner bought the boat from the United States Marshalls in Miami, Florida. An Ohio title, claiming exemption from tax for the purpose of resale, was obtained for this boat on August 4, 2011, with the owner listed as Dusty's Landing. Audit Remarks, p. 4; Ohio Certificate of Title. The taxpayer gave the Clerk of Courts his vendor's license as #77-186842 and his Ohio Watercraft Dealer's License #OH-0150-ZZ. *Id.* Vendor's license #77-186842 was registered to Mark W.

Norris, with an effective date of July 1, 2003. *Id.* However, the taxpayer had no business location or vendor's license to sell tangible personal property in Erie County, where the marina used to store the boat is located.

After the initial purchase, the boat was shipped to Akron, Ohio. Petition for Reassessment, p. 9. The petitioner admits that the boat was neither immediately listed for resale, nor was it resold in the same form in which the petitioner received the boat. *Id.* at p. 1. The petitioner stated that it took two years to work on the boat after he purchased it. Audit Remarks, p. 5. The petitioner stated that he would ferry the boat from the Sandusky marina to his business location in Akron. *Id.* The boat was docked at Castaway Bay Marina in Sandusky, Ohio during the summer months in 2015 through 2017 at dock #B-31. *Id.* at p. 4. A copy of the 2017 dock contract was executed in the name of Mark Norris and the dockage rental paid was $2,850.00. *Id*; *See* Dock Contract (2017). Included with the dock contract, obtained from the marina, was a copy of the declaration page of the insurance policy for the boat. Audit Remarks, p. 4. A review of that document indicated the insured was Mark Norris. *Id.* The boat was insured for $230,000.00 and was a normal consumer policy, not a watercraft dealer policy. *Id.* This is analogous to *B.M.V. Services*, where the Board found that the fact that the boat was bought with a consumer, rather a commercial loan, evidenced that the boat was not truly intended for resale at the time of its purchase.

It was explained to the petitioner that simply having an active watercraft dealer's license with the Ohio Department of Natural Resources – Watercraft Division, does not automatically allow one an exemption from the Ohio sales or use tax for "resale" purposes. *See* VP Offer Letter; *B.M.V. Services, Inc. v. Tracy*. Furthermore, the articles of organization filed with the State show that Dusty's Landing LLC and Dusty's Landing II LLC were incorporated in November 2016 and such filings do not list "the sale of boats" as part of the business purposes for which the companies were organized. *See* Articles of Organization – Dusty's Landing LLC; Articles of Organization – Dusty's Landing II LLC.

Any item that is purchased for "resale" and used for any purpose other than for "resale," voids the "resale" claim for exemption. A person who takes articles of tangible personal property from a stock of merchandise which has been purchased under a certificate of exemption, and uses or consumes the same in a manner which defeats exemption, shall pay the tax at the time he takes such article from stock. Ohio Adm.Code 5703-9-04(A). The petitioner submitted evidence that shows extensive work was performed on the boat before it was listed for sale; admittedly, it was not sold in the same form as when the petitioner purchased the boat. Petition for Reassessment, p. 9. Additionally, the petitioner possessed the boat for approximately seven years before it was finally sold. Audit Remarks p. 5.

The petitioner admitted to hiring a broker who specialized in Sunseeker boats in order to list the boat for sale. *Id.*; Petition for Reassessment, p. 1. To qualify for the sale-for-resale exception, a person must be "engaging in business,' meaning commencing, conducting, or continuing in business, making a casual sale is not engaging in business pursuant to R.C. 5739.01(G). The use of a broker in order to list the boat and solicit potential buyers suggests that the petitioner is not actively engaging in the business of selling boats.

The petitioner has failed to prove that it is engaged in the business of selling boats as required to meet the sale-for-resale exception to sales tax in R.C. 5739.01(E). Therefore, the petitioner's contentions are denied.

Accordingly, the assessment is affirmed as issued.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000227

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 3 0 2020

Paccar Inc.
65 Kenworth Drive
Chillicothe, OH 45601-8829

Re: Ohio Tax Account #: 97114535
Tax Type: Use
Assessment #: 813040050
Reporting Period: 06/01/2009-05/31/2012

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2018-906, dated August 3, 2020. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, the assessment is modified as follows:

	Total
Tax	$89,785.00
Interest	$30,919.18
Penalty	$0.00
Total	$120,704.18

Payments and credits totaling $120,704.18 have been made in full satisfaction of this assessment.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

Range Columbus LLC
4140 Tuller Rd., Ste. 131
Dublin, OH 43017

RE: Assessment No.: 100001083548
Use Tax
Account No.: 97-306403

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$25,000.05	$1,177.89	$3,750.00	$29,927.94

The petitioner operates as an indoor golfing facility. This assessment is the result of a use tax audit of the petitioner's records from January 1, 2017 through March 31, 2018. The petitioner filed a petition for reassessment that failed to state any objections. 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., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

On June 15, 2018, a use tax audit was initiated into the taxpayer's records. Audit Remarks, p. 3. An audit commencement letter was issued to the taxpayer that same day, requesting that the taxpayer provide business records to be reviewed during the audit by July 16, 2018. Audit Commencement Letter. Multiple attempts were made to reach the taxpayer. Audit Remarks, p. 3. After not receiving any responses, a ten-day letter was sent to the taxpayer on July 30, 2018, via certified mail. *Id.* This letter once again requested the taxpayer to supply business records to be reviewed for the audit, and informed the taxpayer that failure to cooperate and respond within a ten-day period of time would result in the completion of the audit with the best available information and may require estimation of tax due.

The Ten-Day letter was signed for and received on August 2, 2018. No response was received from the taxpayer. Accordingly, the tax liability for the audit period was estimated based upon the information available to the Tax Commissioner. Audit Remarks, p. 3. An estimated preliminary proposal was issued to the taxpayer on August 27, 2018. *Id.* at p. 4. The proposal explained that no documentation had been provided by the taxpayer, so the audit consisted of an estimation of untaxed tangible personal property consumed by the taxpayer for which no exception or exemption had been established.

This letter also informed the taxpayer that the attached preliminary audit results were not yet finalized, and the taxpayer had thirty more days to submit additional documentation or requests for penalty abatement. *Id.* The letter ended by stating that if no response was received within that thirty-day period, the audit would be finalized as proposed. *Id.* No timely response was received. Audit Remarks, p. 4. As a result, the audit was finalized, and the underlying assessment was issued on November 27, 2018.

After the issuance of the assessment, the petitioner responded to the Tax Commissioner. On January 23, 2019, the petitioner provided a copy of the Department's Audit Commencement letter, dated June 15, 2018, and a counter-signed copy of the Department's Email Communications waiver, signed by the Department on June 15, 2018. Taxpayer's Response dated January 23, 2019. In addition, the petitioner submitted an account list, a "fixed asset additions" list, and trial balance sheets for 2017 and 2018. *Id.* The petitioner provided no checks, invoices, bank statements, or primary records that were used to create the documents it submitted.

On August 5, 2020, the Department issued another request for information to the petitioner seeking written objections to the audit and supporting documentation. The petitioner failed to respond to the Tax Commissioner's request by its stated deadline of September 20, 2020. Pursuant to R.C. 5739.13(A), the Tax Commissioner has issued an assessment based on the information in his possession. The petitioner has failed to state any objections regarding the assessment. The petitioner has failed to present evidence to rebut the presumptive validity of the assessment.

Accordingly, the assessment is affirmed as issued.

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

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SEP 3 0 2020

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date:

SEP 09 2020

The Hertz Corporation
8501 Williams Rd.
Estero, FL 33928

Re: Assessment No. 100000899982
Use Tax
Account No.: 97-154517

This is the final determination of the Tax Commissioner regarding a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$436,868.90	$65,119.40	$65,530.13	$567,518.43

This assessment was issued based upon an audit of a car rental services corporation. This assessment is the result of an audit of the petitioner's purchases from January 1, 2011 through December 31, 2015. A hearing was not requested.

An audit plan was drafted by the auditor and signed by the petitioner. Audit Remarks, p. 6. A comprehensive review of the petitioner's purchases and expense accounts led to the auditor finding tax liability for purchases related to business fixtures and supplies, security services, storage, landscaping and lawncare, building maintenance, as well as missing or incomplete purchase documentation. The auditor found most of the tax liability was related to these incomplete records.

The petitioner contends they found additional documentation that will lower their tax liability. The petition for reassessment references a thumb drive of additional documentation that was not received with the petition. Upon review of the petition and file, the hearing officer twice requested a copy of the thumb drive or information referenced therein, once via email and once via regular mail to the petitioner's corporate office. The petitioner failed to provide the requested documentation, respond to these inquiries, or provide any other supporting information.

Throughout the audit and appeal, the petitioner failed to provide the evidence necessary to support their contentions. The Tax Commissioner cannot evaluate a petitioner's contentions without verified supporting documentation. The objections are denied.

Accordingly, the assessment is affirmed as issued.

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

SEP 09 2020

this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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

Jeffrey A. McClain

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

FINAL DETERMINATION

Date: SEP 23 2020

TL Worldwide Transportation
1210 Massillon Rd.
Akron, OH 44315

Re: Assessment No. 100001412337
Use Tax

This is the final determination of the Tax Commissioner regarding a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$3,356.10	$73.97	$503.42	$3,933.49

This assessment was issued based upon the conduct of a special audit of the purchase of a motor vehicle. The petitioner purchased the vehicle without the payment of tax. The Ohio Department of Taxation was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. A hearing was deemed unnecessary in this matter.

The petitioner contends the vehicle is exempt under R.C. 5739.02(B)(41). The evidence in file supports the petitioner's contention.

Accordingly, the assessment is cancelled.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000285

Ohio Department of Taxation

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

FINAL DETERMINATION

Date: SEP 30 2020

Rollin D. Tomlin
735 N. Curry Rd.
Wilmington, OH 45177

Re: Assessment No. 100001056215
Use Tax

This is the final determination of the Tax Commissioner with regard to a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$3,081.25	$274.60	$462.19	$3,818.04

This assessment was issued based upon the conduct of a special audit of registered aircraft. Rollin Tomlin purchased a 1947 North American NA-145 Navion, aircraft No. "8521H," for use in Ohio. The petitioner contends that he purchased parts for the maintenance of an aircraft, not a complete aircraft, so his purchase was exempt under R.C. 5739.02(B)(49). The Ohio Department of Taxation was unable to verify this exemption. Accordingly, this assessment was issued. 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 his objections. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of any service provided. R.C. 5741.02(A)(1). For the purpose of the proper administration of sections 5741.01 to 5741.22 of the Revised Code, and to prevent the evasion of the tax hereby levied, it shall be presumed that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established. R.C. 5741.02(G). As a result of the basic presumption that every sale or use of tangible personal property in this state is taxable, it is well settled that the laws relating to exemption from taxation are to be strictly construed. *Parbro Air, Inc. v. McAndrew*, BTA No. 2004-M-134, 2005 WL 2176497 (Aug. 26, 2005), citing *Ball Corp v.*

Limbach, 62 Ohio St.3d 474, 584 N.E.2d 679 (1992); *Highlights for Children, Inc. v. Collins*, 50 Ohio St.2d 186, 34 N.E.2d 13 (1977).

"Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever: all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted. R.C. 5739.01(B)(1). The tax does not apply to the following: * * * sales of materials, parts, equipment, or engines used in the repair or maintenance of aircraft or avionics systems of such aircraft, and sales of repair, remodeling, replacement, or maintenance services in this state performed on aircraft or on an aircraft's avionics, engine, or component materials or parts. As used in division (B)(49) of this section, "aircraft" means aircraft of more than six thousand pounds maximum certified takeoff weight or used exclusively in general aviation. R.C. 5739.02(B)(49).

The petitioner contends that the Department erred in assessing use tax due on the purchase of his aircraft. The petitioner contends that he is a certified aviation mechanic inspector. The petitioner contends that, at the time of purchase, the aircraft was not able to fly and was missing an engine, a propeller, instruments, an interior, and seats. The petitioner contends that the number of missing parts disqualifies his purchase from being considered the purchase of an aircraft and instead brings his purchase within the scope of R.C. 5739.02(B)(49). The petitioner claims that the examples in Information Release ST 2008-04 give guidance regarding his exact situation. *See* Information Release ST 2008-04-Sales and Use Tax: Aircraft Parts and Repair – Issued August 2008, Revised January 2009. These contentions are not well taken.

This assessment concerns the purchase and use of an aircraft in Ohio without the proper remittance of sales or use tax, not the purchase of parts for plane reparation services by an aviation mechanics inspector. The information release simply addresses the taxability of the purchases of repair parts for the provision of aircraft reparation or maintenance services by the service providers, it does not address the taxability of the purchase of actual aircraft. Since an assessment is presumptively valid, the petitioner must prove his allegations of error in the assessment. The only evidence submitted by the petitioner in support of his contention that he did not purchase an actual aircraft has been written descriptions of the condition of the aircraft at the time of purchase, grainy, black-and-white photographs of the aircraft, and his response to the Department's aircraft questionnaire.

The petitioner's response to the questionnaire stated that he is the owner of the aircraft in question, the aircraft was purchased in Ohio, and the aircraft is stored in Ohio. The Department sent a request for more information to the petitioner, seeking clearer copies of the photographs and further documentation regarding the purchase of the aircraft. The petitioner failed to respond to this request.

The petitioner failed to submit sufficient evidence to demonstrate his purchase qualified for exemption from sales or use tax under R.C. 5739.01 or 5739.02. Therefore, the petitioner has failed to meet his burden, and these contentions are denied.

Accordingly, this assessment is affirmed as issued.

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

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

FINAL DETERMINATION

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

Date: SEP 3 0 2020

Rollin D. Tomlin
735 N. Curry Rd.
Wilmington, OH 45177

Re: Assessment No. 100001056226
Use Tax

This is the final determination of the Tax Commissioner with regard to a petition for reassessment pursuant to R.C. 5739.13 and 5741.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$2,868.75	$122.84	$430.31	$3,421.90

This assessment was issued based upon the conduct of a special audit of registered aircraft. Rollin Tomlin purchased a 1946 North American NA-145 Navion, aircraft No. "8979H," for use in Ohio. It is the petitioner's contention that he purchased parts for the maintenance of an aircraft, not a complete aircraft, so his purchase was exempt under R.C. 5739.02(B)(49). The Ohio Department of Taxation was unable to verify this exemption. Accordingly, this assessment was issued. 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 his objections. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of any service provided. R.C. 5741.02(A)(1). For the purpose of the proper administration of sections 5741.01 to 5741.22 of the Revised Code, and to prevent the evasion of the tax hereby levied, it shall be presumed that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established. R.C. 5741.02(G). As a result of the basic presumption that every sale or use of tangible personal property in this state is taxable, it is well settled that the laws relating to exemption from taxation are to be strictly construed. *Parbro Air, Inc. v. McAndrew*, BTA No. 2004-M-134, 2005 WL 2176497 (Aug. 26, 2005), citing *Ball Corp v.*

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"Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever: all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted. R.C. 5739.01(B)(1). The tax does not apply to the following: * * * sales of materials, parts, equipment, or engines used in the repair or maintenance of aircraft or avionics systems of such aircraft, and sales of repair, remodeling, replacement, or maintenance services in this state performed on aircraft or on an aircraft's avionics, engine, or component materials or parts. As used in division (B)(49) of this section, "aircraft" means aircraft of more than six thousand pounds maximum certified takeoff weight or used exclusively in general aviation. R.C. 5739.02(B)(49).

The petitioner contends that the Department erred in assessing use tax due on the purchase of his aircraft. The petitioner contends that he is a certified aviation mechanic inspector. The petitioner contends that, at the time of purchase, the aircraft was not able to fly and was missing an engine, a propeller, instruments, an interior, and seats. The petitioner contends that the number of missing parts disqualifies his purchase from being considered the purchase of an aircraft and instead brings his purchase within the scope of R.C. 5739.02(B)(49). The petitioner claims that the examples in Information Release ST 2008-04 give guidance regarding his exact situation. *See* Information Release ST 2008-04-Sales and Use Tax: Aircraft Parts and Repair – Issued August 2008, Revised January 2009. These contentions are not well taken.

This assessment concerns the purchase and use of an aircraft in Ohio without the proper remittance of sales or use tax, not the purchase of parts for plane reparation services by an aviation mechanics inspector. The information release simply addresses the taxability of the purchases of repair parts for the provision of aircraft reparation or maintenance services by the service providers, it does not address the taxability of the purchase of actual aircraft. Since an assessment is presumptively valid, the petitioner must prove his allegations of error in the assessment. The only evidence submitted by the petitioner in support of his contention that he did not purchase an actual aircraft has been written descriptions of the condition of the aircraft at the time of purchase, grainy, black-and-white photographs of the aircraft, and his response to the Department's aircraft questionnaire.

The petitioner's response to the questionnaire stated that he is the owner of the aircraft in question, the aircraft was purchased in Ohio, and the aircraft is stored in Ohio. The Department sent a request for more information to the petitioner, seeking clearer copies of the photographs and further documentation regarding the purchase of the aircraft. The petitioner failed to respond to this request.

The petitioner failed to submit sufficient evidence to demonstrate his purchase qualified for exemption from sales or use tax under R.C. 5739.01 or 5739.02. Therefore, the petitioner has failed to meet his burden, and these contentions are denied.

Accordingly, this assessment is affirmed as issued.

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SEP 3 0 2020

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

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

FINAL DETERMINATION

Date: SEP 3 0 2020

Universal Exports, LLC
7626 77th Pl. NE
Marysville, WA 98270-6509

Re: Assessment No. 100000495780
Use Tax

This is the final determination of the Tax Commissioner following a decision and order of the Ohio Board of Tax Appeals in Case No. 2019-2013, dated September 22, 2020. In that order, the Board remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, the assessment is modified as follows:

	Total
Tax	$ 22,750.00
Pre-Assessment Interest	$ 2,731.87
Post-Assessment Interest	$ 3,707.75
Penalty	$ 0.00
Total	$ 29,189.62

A payments in the amount of $29,189.62 has been received in complete satisfaction of this assessment.

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
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Tax Commissioner