

In the
Supreme Court of Ohio

THE CINCINNATI REDS, LLC,	:	
	:	
Appellant,	:	Case No. 2017-1707
	:	
v.	:	On appeal from the
	:	Ohio Board of Tax Appeals
JOSEPH W. TESTA,	:	
TAX COMMISSIONER OF OHIO,	:	BTA Case No. 2015-1707
	:	
Appellee.	:	

APPELLEE TAX COMMISSIONER'S MERIT BRIEF

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INTRODUCTION

As explained by their CFO, the Cincinnati Reds are a major league baseball club in the business of selling tickets *not* free promotional items. BTA Hearing Transcript (Tr.) at 17-18; 21-22. As he explained, in order to boost ticket sales for certain games, the Reds give away free promotional items, like bobble heads, jerseys, t-shirts, wall posters, and baseball cards. The same free promotional items are not given at each game (or even to all fans). The Reds target specific games to boost ticket sales and provide the promotional items at those games.

Under the plain language of Ohio's sales and use tax statutes, all purchases are subject to tax, unless specifically exempted. R.C. 5741.02. And, even more specifically, an item is subject to use tax when a person "*gives or otherwise distributes it, without charge, to recipients in this state.*" (Emphasis added.) R.C. 5741.01. Not surprisingly, therefore, Ohio's tax tribunals and courts have long recognized that promotional items are taxable. *See, e.g., International Thomson Pub. v. Tracy*, 79 Ohio St. 3d 415 (1997); *Midwest Foundation Indep. Physicians Assn. v. Tracy*, 74 Ohio St. 3d 221 (1996); *Elambeau Prod. Corp. v. Limbach*, BTA Case No. 88-G-1106, 1992 Ohio Tax LEXIS 385 (Apr. 3, 1992); *Sea Lakes v. Tracy*, BTA Case No. 92-N-1429 (Nov. 4, 1994). Accordingly, under Ohio's tax statutes, and the precedent applying those statutes, the Reds should have remitted use tax on their purchases of these promotional items.

To avoid the clear application of these principles, the Reds ask this Court to hold that the free promotional items are actually incorporated into the price of the game ticket.¹ The Reds' argument rests solely on R.C. 5139.01(E)—the "resale exemption." *See* Reds' Brief at 3. The resale exemption says a purchaser does not pay sales or use tax when the purchaser intends to resell the item. That makes sense because tax will be collected *later* in the distribution line when

¹ As a consequence, if the Reds are correct, these promotional items would *never* be subject to tax because their ticket sales are not taxable.

the item reaches the final consumer. But that is not what happens here for several reasons, as explained in this brief.

First, this theory ignores the definition of taxable “sales” in R.C. 5739.01(B), and the exclusion for “resale” of items under R.C. 5739.01(E). In order to constitute a “sale,” there must be a “transaction[] for a consideration.” R.C. 5739.01(B). This Court has held that the mere expectation of a giveaway does *not* equate to consideration paid for that item. *See Coca-Cola Bottling Corp. v. Kosydar*, 43 Ohio St. 2d 186, 193, 331 N.E.2d 440, 444 (1975) (“The uttering of promises does not supply the actual consideration for the bargain. It is the content of the promise or the actual anticipated performance which supplies consideration for the bargain.”). The Reds own evidence proves lack of consideration, primarily because the purchaser has no right to the promotional item, which there would be if the free promotional item was sold in a transaction for consideration.

Second, the resale exemption does not apply by its own terms, because it is intended to avoid duplicative taxation, and does not apply when the “resold” item is not actually “sold.” In other words, there must be a subsequent “sale” of the item under consideration for the “resale” exclusion to apply. *See Hyatt Corp. v. Limbach*, 69 Ohio St.3d 537, 540, (1994) (because a hotel's act of renting rooms to guests for stays of more than 30 consecutive days was exempted from the sales tax by R.C. 5739.01(N), the hotel could not be deemed to have “resold” the use of linens in those rooms that the hotel had paid to have cleaned by a linen-cleaning service); *see also Crew 4 You, Inc. v. Wilkins*, 105 Ohio St.3d 356, ¶ 42 (2005). Because the admission fees for Reds’ tickets are not taxable “sales” as the term is defined in R.C.5739.01(B), the exclusion for resale cannot apply.

Third, the Reds' interpretation would nullify R.C. 5739.02(B)(35)(a), which pertains directly property used in the process of making a retail sale. Ohio sale and use tax law provides an express exemption for only a certain, very limited sub-class of purchases of promotional items. Namely, Ohio law only exempts advertising material or other printed matter. Because these promotional items do not fit within Ohio's narrow exemption for promotional items, the Reds' claim would vastly enlarge the scope of exempt purchases beyond the General Assembly's intent.

On a larger scale, the Court must recognize that the Reds' arguments have no limiting principle. The practice of dispensing free promotional items to bolster ticket sales is not unique to the Cincinnati Reds. It is a widespread practice across the country and not limited to professional sports teams (or even limited to sports teams). If the Reds wish such promotional items to be exempt, they should ask the General Assembly for an exemption. The Commissioner asks the Court to affirm the BTA, which simply held that the free promotional items are, in fact, free promotional items.

STATEMENT OF THE CASE AND FACTS

The Reds are a major league baseball club operating in Cincinnati. BTA Decision at 2. The Reds were selected for audit on purchases made between January 1, 2008 and December 31, 2010. Statutory Transcript (ST) at 1.² The audit was performed to verify that the Reds paid appropriate sales or use tax on any taxable purchases. *Id.* In terms of dollars and cents, the promotional items were a relatively minor issue compared to the Reds scoreboard equipment and displays. *See* FD at 2-3. The Reds appealed many of the disputed issues; however, most were settled by the Commissioner prior to hearing. Tr. at 1-6. At hearing, the Reds only proceeded on

² The Statutory Transcript refers to the transcript of proceedings certified by the Commissioner to the BTA in accordance with R.C. 5717.02.

the taxability of the free promotional items. *Id.* The Reds presented the following facts at hearing.

Ticket sales are the primary source of revenue. Tr. at 9. The Reds use marketing, advertising, and free promotional materials to “drive” ticket sales. In fact, the only reason for the existence of the free promotional items is to promote ticket sales. Tr. at 20-21. A list of free promotional items can be found on Reds’ Exhibit 3 from the BTA. The same items are not offered at every game. Some games offer no free promotional items. The items vary from reusable grocery bags to framed pictures of Great American Ballpark. *See id.* at 2; Tr. at 12-14. The Reds will sometimes advertise the free promotional items through various mediums to entice ticket sales. Tr. at 13-15. The Reds do not sell the exact promotional item at the team shop or outside the stadium. Tr. at 34. The Reds’ CFO gave this example to highlight the promotional strategy:

Depending on the type of game, you know, Mother’s Day, Father’s Day, Sundays where we – or family days, kids days, we will layer in a promotional item specific to drive incremental attendance. So what I mean by that is – in this example here, a child obviously can’t come to a ball game by themselves. We’re not allowing nine year olds in unsupervised. So the thought is when we advertise the fact that promotional items available to children, mom, dad, maybe a sibling will come as well. So there is an incremental ticket lift to us because, again, we are in the business of selling tickets. As I stated earlier, ticket revenues is a primary driver for us, and these items help drive ticket sales specifically in this case with giving a promotional item to children.

Tr. at 17-18; 21-22.

Ticket prices do not change based upon the specific promotional item being offered, as would be expected if a more valuable promotional item was offered (or a less valuable one). To be sure, the Reds consider all of their business costs when setting ticket prices. Tr. at 24-25. But, that does not mean the promotional item is built in to the price of the ticket. All else being

equal, ticket prices do not change based upon the promotional item offered. *See* questioning at Tr. 42-44.

There are no express contractual or property rights to a specific free promotional item (or any promotional item). That is true of season ticket holders. Tr. at 43-44. That is true of single-game ticket holders. Tr. at 44-45. No contract or agreement guarantees the item. There are no guarantees on the ticket itself. Tr. at 45. The Reds have never been subjected to litigation for failing to provide a promotional item. Tr. at 46. The Reds explained that a qualifying attendee who did not receive a promotional item will only *sometimes* receive the item after the fact. For example, many promotional items are offered to a set number of individuals, e.g., first 200 ticketholders. If one of those eligible ticketholders does not receive an item, there is no guarantee to that specific item. Tr. at 47-48. As a good business practice, the Reds may offer a different item to satisfy the annoyance of a ticketholder. Tr. at 46-48. The Reds testified that it would be too costly to replace the *same* item in some circumstances because of cost. Tr. at 48.

The Reds sell comparable items in their gift shop and license their products to outside vendors. Tr. at 55-56. The Reds (and outside vendors) collect and remit sales tax on those items when sold to purchasers. *Id.* No such taxes are collected on ticket sales. *Id.*

The BTA held that the free promotional items were not incorporated into the price of the ticket. Thus, the BTA held, the promotional items are not incorporated into the price of the ticket. The Reds appealed to this Court challenging the BTA's decision. The Reds missed their briefing deadline. On a request for rehearing, this Court gave the Reds extra time to file a brief.

LAW AND ARGUMENT

Appellee Tax Commissioner's Proposition of Law:

All property used or consumed in Ohio is taxable, unless some exemption applies. R.C. 5741.02. No exemption applies when free tangible personal property is offered to induce

a sale. Instead, the free tangible personal property is “used” by the seller and such property is not “resold” for consideration pursuant to the exemption in R.C. 5739.01(E).

A. The Reds are the “consumer” of the promotional items in this case, and must remit use tax on the purchase of those items.

A consumer who has purchased tangible personal property for use or other consumption in Ohio must pay “use” tax under R.C. 5741.02 when “sales” tax under R.C. 5739.02 has not been remitted.³ A “consumer” is “any person who has purchased tangible personal property or has been provided a service for storage, use, or other consumption or benefit in [Ohio]. R.C. 5741.01(F).

Ohio law is clear that an item is “used” when a taxpayer “*gives or otherwise distributes it, without charge, to recipients in this state.*” (Emphasis added.) R.C. 5741.01. This includes “promotional items,” which are subject to use tax by the seller. *See, e.g., Flambeau Prod. Corp. v. Limbach*, BTA Case No. 88-G-1106 (Apr. 3, 1992); *Sea Lakes v. Tracy*, BTA Case No. 92-N-1429 (Nov. 4, 1994). Accordingly, the Reds are the “consumer” of the promotional items that they “use” to induce ticket sales.

B. The Reds do not “resell” the promotional items in this case, because the promotional items are not “resold” pursuant to R.C. 5739.01(E).

Ticket sales are the primary source of revenue for the Reds. The Reds use marketing, advertising, and free promotional materials to “drive” ticket sales. Thus, the free *promotional* materials are used to *promote* ticket sales. *See Webster’s New College Dictionary* 885 (1995) (promote means “to contribute to the progress or growth of”).

³ R.C. 5741.01(D) defines a purchase as “acquired or received for a consideration, whether such acquisition or receipt was effected by a transfer of title, or of possession, or of both *** and whether the consideration was money, credit, barter, or exchange.” Under R.C. 5741.01(G)(1) and R.C. 5739.01(H)(1)(a), “price” means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold ***.” The use tax rate is applied to the purchase price of the tangible personal property to determine the use tax owed. R.C. 5741.02.

The Red's theory is that, because the promotional items are occasionally included in the ticket price, and because ticket sales are not taxable, the promotional items are not taxable. This theory ignores the definition of taxable "sales" in R.C. 5739.01(B), and the exclusion for "resale" of items under R.C. 5739.01(E).

R.C. 5739.01(E), the resale exemption, reads:

(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.

(Emphasis added). Under this statute, if a purchaser's intent is to resell the goods in essentially the same way, the purchaser owes no sales/use tax. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 26.

In other words, there must be a subsequent taxable "sale" of the item under consideration for the "resale" exclusion to apply. *See Hyatt Corp. v. Limbach*, 69 Ohio St.3d 537, 540, (1994) (because a hotel's act of renting rooms to guests for stays of more than 30 consecutive days was exempted from the sales tax by R.C. 5739.01(N), the hotel could not be deemed to have "resold" the use of linens in those rooms that the hotel had paid to have cleaned by a linen-cleaning service); *see also Crew 4 You, Inc. v. Wilkins*, 105 Ohio St.3d 356, ¶ 42 (2005). Because the admission fees for Reds' tickets are not taxable "sales" as the term is defined in R.C.5739.01(B), the exclusion for resale cannot apply.

In order to constitute a "sale," there must be a "transaction[] for a consideration." R.C. 5739.01(B). In this case, there is no consideration paid for the promotional items. Instead, a customer only pays the ticket price, and the promotional items are giveaways to boost those ticket sales. And, contrary to the Reds' supposition, an expectation of a giveaway does not equate to *consideration paid* for that item. *See Coca-Cola Bottling Corp. v. Kosydar*, 43 Ohio St.

2d 186, 193, 331 N.E.2d 440, 444 (1975) (“The uttering of promises does not supply the actual consideration for the bargain. It is the content of the promise or the actual anticipated performance which supplies consideration for the bargain.”).

At least two other courts of last resort agree with the BTA’s holding in this appeal. Indeed, the Supreme Court of Wisconsin and the Supreme Court of Minnesota have explicitly rejected the Reds’ exact argument. Wisconsin has a similar “use” definition as Ohio. *See Wisconsin Dept. of Rev. v. Milwaukee Brewers*, 111 Wis.2d 571, 577 (1983) (use of free items defined as “distributed *gratis* apart from the sale of other tangible personal property or service”). In that case the Milwaukee Brewers argued their “promotional items are tied to the price of admission.” *Id.* The Wisconsin Supreme Court found that promotional items were not resold to ticketholders (explicitly rejecting the Reds’ argument). *Id.*

The Supreme Court of Minnesota has likewise rejected the Reds’ resale argument. In *Minnesota Twins Partnership v. Commissioner of Revenue*, 587 N.W.2d 287 (Minn. 1998), the Supreme Court of Minnesota held:

Similarly, game attendees did not pay consideration to receive the novelty items. *** At many games, not all attendees received a novelty item, and those who did receive novelty items paid no more consideration for admission to the game than those who did not receive the novelty items. We conclude that the subsequent transfer of these novelty items to game attendees was not a resale. The game attendees made no payment for these items. Instead, the novelty items were free tokens of goodwill, not unlike the promotional gifts or premiums in *Midwest Fed. Sav. & Loan Ass’n*, 259 N.W.2d at 599. They were distributed to game attendees as part of the service of admission to the baseball games.

Id. at 288. While since codified elsewhere in the Minnesota Statutes Annotated, Minnesota also has a similar definition of “use.” M.S.A. 297A.61 Subd. 6 (“Use” includes the exercise of a right or power incident to the ownership of any interest in tangible personal property, or services, purchased from a retailer, other than the sale of that property in the regular course of business”).

The *Kansas City Royals* case does not help the Reds. First, *Kansas City Royals* dealt with the unique situation where sporting event tickets were taxable under Missouri law. *Kansas City Royals v. Director of Revenue*, 32 S.W.3d 560, 562 (Mo. 2000) (en banc). Thus, the Missouri Supreme Court prevented double taxation of the Royals' items. *Id.* ("the [team] charges for admission to Royals games and collects and remits Missouri sales tax on the admission receipts"). Under Ohio law, there is no double taxation law because such tickets are not taxable. Several years later, the Missouri Supreme Court cited *Kansas City Royals* for the proposition that the primary purpose of Missouri's resale exemption is to prevent double taxation. *See President Casino, Inc. v. Director of Revenue*, 219 S.W.3d 235, 243; fn. 14, citing *Royals* at 561-63 (both en banc). Again, that is not a problem in this case.

Indeed, these promotional items are not "sold" under any definition of the word. Instead, they are provided for free as an inducement to enhance ticket sales. Accordingly, the provisions of R.C. 5741.01 regarding "giveaways" apply, and the Reds must pay use tax on these items.

Further, the Reds do not resell these items for consideration for several reasons admitted by the Reds CFO. First, ticket prices are inelastic with regard to the promotional materials. And the promotional items have no effect on ticket prices. Ticket prices are not increased when a premium, infielder bobble head is offered; ticket prices are not lowered when no promotional items are offered. Tr. at 42. Instead, as the testimony established, the Reds distribute free *promotional* items to *promote* ticket sales. That is the only reason the promotional items exist in the first place. Tr. at 20-21. The same promotional items are not offered at every game. Some games offer no promotional items. Even when they are offered, they vary significantly in value and quantity available to fans. Tr. at 64. There is no change in ticket price that would be expected. A fan could attend a Tuesday night game against the Washington Nationals, receive

no promotional item, and pay \$50 for her ticket. Another fan could sit in that same seat for the Thursday night game against the Washington Nationals, receive a free jersey, and pay \$50 for her ticket. Tr. at 42. Again, these are free items.

Second, fans also have no legal or contractual rights to the promotional items, which would be so if there was consideration paid. While a fan who did not receive her promotional item may be annoyed, she has no contractual right or property right to that item simply by virtue of being a ticket holder. Nothing on the ticket guarantees one promotional item for one ticket. There is no guarantee to season ticket holders (in a contract or otherwise). Tr. at 43-44. There is no guarantee to single-game ticket holders (in a contract or otherwise). Tr. at 43-44. At best, the promotional items are incentive items, which are held out to potential ticket buyers to entice them to purchase tickets. The Reds testimony confirmed this: “[i]f a fan complains *enough*, we will refund them. *It’s not something that we do often*, but if the person complains enough we will refund the full ticket price.” Tr. at 49-52. That arrangement speaks of a good business practice of an organization that is “fan first, fan friendly.” Tr. at 47. It does not signal a *quid pro quo* sale involving contractual and property rights to an item. In fact, arguably, if the Reds are successful here, future litigants could use this case *against* the Reds in arguing that the fans have a contractual right to the promotional item.

Third, exemption of the promotional items is inconsistent with how the Reds view taxability of other items they sell. The Reds sell comparable items in their gift shop and license their products to outside vendors. Tr. at 55-56. The Reds (and outside vendors) collect and remit sales tax on those items when sold to purchasers. *Id.* No such taxes are collected on ticket sales. *Id.* The Reds ask this Board to hold that the *promotional* items offered to *promote* ticket sales are actually incorporated into the price of the ticket. As a good business practice, the Reds

sometimes give the fan a free *substitute* promotional item or refund a ticket. TR. at 49-52 (Testimony of the Reds' CFO: "[i]f a fan complains enough, we will refund them. It's not something that we do often, but if the person complains enough we will refund the full ticket price"). If the Reds are successful, these promotional items will *never* be subject to sales tax because tickets are not subject to sales tax.

The resale exemption is intended to avoid duplicative taxation, whereby tax would be charged twice – one upon the seller (use tax" and one on the purchaser (sales tax). But here, no such pyramiding exists, because there is no taxable resale of the promotional items.

C. Ohio provides a tax exemption in R.C. 5739.02(B)(35) for certain “promotional items” and the Reds purchases in this case do not fit the terms of that exemption.

Under R.C. 5739.02(B)(35)(a), the Ohio sale and use tax law provides an express exemption for only a certain, very limited sub-class of purchases of promotional items. Namely, pursuant to R.C. 5739.01(B)(35)(a), the purchase of a promotional item may qualify for exemption as a purchase of tangible personal property “used in making retail sales,” but only if the promotional item constitutes advertising material or other printed matter (e.g., that both “describes and prices tangible personal property for retail sale.” *See also* R.C. 5739.01(o) (defining the activity of “making retail sales” as not included the acts of “promoting or soliciting the retail sales other than the distribution of printed matter which displays or describes and prices the Reds purchases of these promotional items are for the purpose of inducing sales of tickets,

The Reds' argument that its promotional items qualify as purchases for resale would nullify R.C. 5739.02(B)(35)(a), which exempts items used for purposes of making retail sales such as newspaper inserts and catalogues. However, the Reds' promotional items are not included in that list. R.C. 5739.01(O). The General Assembly has chosen to exempt some marketing-like materials but not others. *See id.* The Reds' argument flies in the face of the sale

for resale exemption and the exemption for items used in making retail sales. *See id.* The Reds also include a table cases the Reds believe on point. The BTA already addressed those arguments to an extent. *See* BTA Decision at 3 (discussing *Electrolert*). As the BTA noted, in *Electrolert* the item induced the purchaser to buy additional units of the same product in order to qualify to all customers. *Id.* The BTA correctly found that fact pattern inapplicable here. The BTA rightly stated the Reds case is similar, for one thing, because many games have no promotional giveaway—even the games that do often only provide promotional materials to a small number of ticketholders.

The other BTA cases in that table are equally distinguishable on similar facts. Nearly every case involves renting of equipment in an ongoing business relationship. For example in *G & J Pepsi Cola Bottling*, 48 Ohio St.3d 31 (1990), Pepsi freely leases soda vending machines to stores that sell Pepsi. The stores agree to keep the vending machine stocked, and the store assumes all liability for loss or destruction of vending machines. This Court said the assumption of liability coupled with this distribution setup qualified as consideration. There is *quid pro quo*. None of those facts are present here. There is no recurring distribution of promotional items. Neither the Reds nor ticketholders are assuming a contractual liability, as the BTA already found.

Heidman, the Happy Meal case, is also inapplicable. *Heidman* has no probative value here because that case dealt with Happy Meal toys and other promotional items sold as part of birthday party packages. *Id.* at 3. Thus, the items were incorporated into a resold item (the birthday packages), which would have been taxed. Here, there is no showing of the ultimate taxable sale. The Reds cite no other relevant Ohio cases on this point. Again, if the customer is

paying consideration for a promotional item, then the Reds would have to collect sales tax on that sale. R.C. 5739.01(B); *Emory Indust., Inc. v. Limbach*, 43 Ohio St.3d 134 (1989).

The Board of Tax Appeals—the BTA—issued a sound opinion consistent with this Court’s use tax precedents. The BTA made specific findings of fact, which this Court has said time and again it will not disrupt unless “there is no sound reasoning process that would support that” finding. *See* Reds’ Brief at 4, citing *AAA Enterprises, Inc. v. River Place Cmty. Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990). The BTA properly applied the factors this Court has looked to before in these types of cases such as: ongoing business relationship (*G & J Pepsi Cola Bottling*); assuming liability (same); or additional nonmonetary consideration (*General Motors v. Kosydar*, 37 Ohio St.2d 138 (1974)); *see also* *General Mills Fun Group, Inc. v. Lindley*, 1 Ohio St.3d 27 (1982); *San-A-Pure Dairy Co. v. Bowers*, 173 Ohio St. 469 (1962).

These are free promotional items. In Ohio, that means they are subject to use tax, which the Reds must pay since the Reds use them. If the Reds are successful, these promotional items will never be subject to sales or use. On a much larger scale, the Court must recognize that the Reds’ arguments have no limiting principle. The practice of dispensing free promotional items to bolster ticket sales is not unique to the Cincinnati Reds. It is a widespread practice across the country and limited to sports teams (or even professional sports teams). If the Reds wish such promotional items to be exempt, they should ask the General Assembly for an exemption. The Commissioner asks the Court to affirm the BTA, which simply says free promotional items are in fact free promotional items.

CONCLUSION

For the foregoing reasons, the Commissioner moves this Court to affirm the BTA.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served upon the following by electronic mail on

December 1, 2017:

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In the
Supreme Court of Ohio

THE CINCINNATI REDS, LLC,	:	
	:	
Appellant,	:	Case No. 2017-1707
	:	
v.	:	On appeal from the
	:	Ohio Board of Tax Appeals
JOSEPH W. TESTA,	:	
TAX COMMISSIONER OF OHIO,	:	BTA Case No. 2015-1707
	:	
Appellee.	:	

APPENDIX TO APPELLEE TAX COMMISSIONER'S MERIT BRIEF

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BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

The Cincinnati Reds, LLC, :

:
Appellant, :

vs. : Case No. 2015-1707

:
Joseph W. Testa, Tax :
Commissioner of Ohio, :

:
Appellee. :

PROCEEDINGS

before Carrie C. Young, Hearing Examiner, at the
Board of Tax Appeals, 30 East Broad Street, 24th
Floor, Hearing Room B, Columbus, Ohio, called at
9:00 a.m. on Tuesday, December 20, 2016.

ARMSTRONG & OKEY, INC.
222 East Town Street, Second Floor
Columbus, Ohio 43215-4620
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1 APPEARANCES:

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On behalf of the Appellant.

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On behalf of the Appellee.

1 Tuesday Morning Session,
2 December 20, 2016.
3 ---

4 EXAMINER YOUNG: This is a hearing
5 before the Board of Tax Appeals, State of Ohio,
6 relative to an appeal styled The Cincinnati Reds,
7 LLC, versus Joseph W. Testa, Tax Commissioner of
8 Ohio, BTA Case No. 2015-1707.

9 This case is being heard in Hearing Room
10 B, in the offices of the Board of Tax Appeals, 30
11 East Broad Street, 24th Floor, on December 20, 2016,
12 at approximately 9:00 o'clock a.m., pursuant to
13 assignment before Carrie C. Young, Attorney-Examiner
14 for the Board of Tax Appeals.

15 The subject case is an appeal from a
16 final determination of the Tax Commissioner relating
17 to a use tax assessment.

18 At this time, will Appellant's counsel
19 please enter an appearance?

20 MR. DIMENGO: Yes. Steven A. Dimengo
21 with Buckingham, Doolittle & Burroughs, 3800 Embassy
22 Parkway, (330) 258-6460 is my telephone number.

23 EXAMINER YOUNG: Thank you. Cocounsel.

24 MR. FRY: Yeah. Richard B. Fry, III,
25 Buckingham, Doolittle & Burroughs, 3800 Embassy

<p style="text-align: right;">Page 5</p> <p>1 Parkway, Suite 300, Akron, Ohio 44333, 2 (330) 258-6423. 3 EXAMINER YOUNG: Thank you. 4 And will the Commissioner's counsel 5 please enter an appearance? 6 MR. TEAFORD: Thank you. Kody Teaford, 7 Assistant Attorney General for the Tax Commissioner, 8 30 East Broad Street, 25th Floor, Columbus, Ohio 9 43215. 10 EXAMINER YOUNG: And your telephone? 11 MR. TEAFORD: (614) 644-8909. 12 EXAMINER YOUNG: Thank you. 13 At this time, Mr. Dimengo, do you have 14 an opening statement you'd like to make? 15 MR. DIMENGO: Yes, I do, Your Honor. 16 Appellant, The Cincinnati Reds, LLC, 17 owns a professional major league baseball team that 18 plays its games at Great American Ballpark in 19 Cincinnati. The evidence being presented today 20 supports Appellant's position that it purchased 21 promotional -- that its purchased promotional items 22 are resold to attending fans as part of the price of 23 an admission ticket to the baseball game, thereby 24 making them nontaxable upon their purchase, and we 25 will be calling one witness.</p>	<p style="text-align: right;">Page 7</p> <p>1 Healy. 2 EXAMINER YOUNG: Okay. Sir, I would 3 just ask before you're seated if you would raise your 4 right hand. 5 MR. HEALY: Absolutely. 6 (Witness placed under oath.) 7 EXAMINER YOUNG: Thank you. Please be 8 seated. 9 THE WITNESS: Thank you. 10 --- 11 DOUG HEALY, 12 being first duly sworn, as hereinafter certified, 13 deposes and says as follows: 14 DIRECT EXAMINATION 15 BY MR. DIMENGO: 16 Q. Please state your name. 17 A. Doug Healy. 18 Q. Can you spell that? 19 A. Sure. D-o-u-g H-e-a-l-y. 20 Q. Okay. Doug, unless I state otherwise, 21 my questions relate to the audit period which is 22 January 1st, 2008, through December 31st, 2010, and I 23 will refer to the taxpayer that is subject of this 24 appeal, that is The Cincinnati Reds, LLC, as the 25 company. When I say "you," I mean the company unless</p>
<p style="text-align: right;">Page 6</p> <p>1 EXAMINER YOUNG: Okay. Thank you. 2 Mr. Teaford, an opening statement? 3 MR. TEAFORD: Nothing specifically. 4 Just for purposes of the record, I do want to make 5 clear that a decent amount of the Notice of Appeal 6 has been settled. So it's my understanding we're 7 only going forward on 5, 7, and 8, Specifications 5, 8 7, and 8; is that correct? 9 MR. DIMENGO: Actually, we are 10 dismissing our objections with respect to the 11 advertising materials and our objection pertaining to 12 the amnesty program and consumer use tax with respect 13 to qualification. 14 MR. TEAFORD: So we've got 5 and 8, 15 those are the two going forward? 16 MR. DIMENGO: Our sole objection 17 pertains to the promotional items. 18 EXAMINER YOUNG: Okay. And nothing 19 else, okay. So nothing with regard to the 20 scoreboard? 21 MR. DIMENGO: Correct. 22 EXAMINER YOUNG: Okay. All right. 23 Thank you very much. Mr. Dimengo, you may call your 24 witness. 25 MR. DIMENGO: I'd like to call Doug</p>	<p style="text-align: right;">Page 8</p> <p>1 the context is clear otherwise; that is, you in your 2 individual capacity. Okay? 3 A. Okay. 4 Q. Are you employed by the company? 5 A. I am. 6 Q. And how long have you been employed by 7 the company? 8 A. Since March of 2006 in my current 9 capacity. 10 Q. What have been your responsibilities 11 with the company? 12 A. As CFO I directly oversee financial 13 matters, all the risk management portion of 14 administration, in addition to getting involved in 15 other aspects of the business, including advertising, 16 marketing, ballpark operations, and some baseball 17 operations. 18 Q. And what is the nature of the company's 19 business? 20 A. We are a major league baseball team that 21 plays 81 home games a year; God willing, some 22 post-season games beyond 81 at Great American 23 Ballpark. 24 Q. And what is the ballpark's capacity? 25 A. It's approximately 42,300 seats.</p>

<p style="text-align: right;">Page 9</p> <p>1 Q. And so that's how many it holds to view 2 a game? 3 A. Correct. 4 Q. Does the company keep the revenue from 5 the ticket sales? 6 A. We do. 7 Q. And are you familiar with -- familiar 8 and involved with how ticket sales are promoted? 9 A. Yes, I am. As I mentioned earlier, I'm 10 intimately involved in the day-to-day, which includes 11 the structuring, the setting of the pricing, the 12 ultimate recordkeeping for ticket sales, and the 13 delivery of financial statements, financial reports 14 to the ownership of the club. 15 Q. And the previous question I asked you, 16 you answered yes, that the company keeps the revenue 17 from the ticket sales. Is that the company's primary 18 source of revenue? 19 A. Yes. It's one of our single biggest 20 drivers of revenue. 21 Q. Okay. Is tangible personal property 22 purchased by the company and used for promotional 23 purposes? 24 A. Yes, it is. We purchase bobbles, we 25 purchase hats.</p>	<p style="text-align: right;">Page 11</p> <p>1 A. It's a nice size. It's a nice 2 promotional item. 3 Q. Uh-huh. Okay. And how about the player 4 cards? 5 A. Player cards are typically the full 6 roster, including manager, coaches, and players. 7 They're what you expect in a player card, they list 8 stats, which is, you know, the statistics of the 9 player's history; so, you know, fielding, batting 10 average, et cetera, and those items are also another 11 promotional item that -- 12 Q. So the attendee would get one player 13 card or would it be a separate? 14 A. It's a set, it's about yay thick 15 (indicating), if you assume 25 men plus coaches and 16 some other players on the DL, it's probably in the 17 range of 30 to 35 cards. 18 Q. So the attending fan that paid for the 19 ticket would get the whole set of player cards -- 20 A. Correct. 21 Q. -- for that team for the particular 22 year? 23 A. Correct, yeah, they get a set of the 24 Reds, yes. 25 Q. Were any of the promotional items you've</p>
<p style="text-align: right;">Page 10</p> <p>1 Q. Bobbles? 2 A. Bobbleheads. 3 Q. Okay. 4 A. We purchase hats, we purchase T-shirts, 5 mini bats, and other Reds type of paraphernalia. 6 Q. Uh-huh. Including player cards? 7 A. Player cards is in that as well, yes. 8 Q. And can you describe what a bobblehead 9 would be? 10 A. Sure. It's a likeness of a player. For 11 example, former player Ken Griffey, Junior, where we 12 will order a quantity of bobbleheads in advance of 13 the game and those bobbleheads are promotional items 14 that are part of the admission. So as a fan buys a 15 ticket, renders the ticket when they show up for the 16 game, they receive a promotional item, in that case 17 would be a bobblehead. 18 Q. How big is a bobblehead? 19 A. It depends. They range in size probably 20 from a few inches up to six, seven inches. 21 Q. Uh-huh. 22 A. And they are what they sound like, it's 23 a caricature, figurine, whatever the right phrase is, 24 that head bobbles. 25 Q. So it's a nice size?</p>	<p style="text-align: right;">Page 12</p> <p>1 described purchased during the audit period in the 2 subject of this appeal? 3 A. Yes. All the promotional items 4 described were purchased during the three-year 5 period. 6 Q. And that would include the player cards, 7 as well as books, helmets? 8 A. Yes. 9 Q. Tote bags? 10 A. Bobbleheads. 11 Q. Okay. And stadium grass kits? 12 A. Correct. 13 Q. Magnet schedules? 14 A. Correct. 15 Q. Photographs? 16 A. Correct. 17 Q. Bats? 18 A. Yep. 19 Q. And other what tend to be Reds-themed 20 items? 21 A. All tend to be Reds-themed items, yes. 22 MR. DIMENGO: May I approach the 23 witness? 24 EXAMINER YOUNG: Certainly. 25 MR. DIMENGO: Okay.</p>

<p style="text-align: right;">Page 13</p> <p>1 BY MR. DIMENGO:</p> <p>2 Q. I'm handing you Exhibit 1.</p> <p>3 A. Yes.</p> <p>4 Q. And that is the -- our response to the</p> <p>5 interrogatories that you signed off on?</p> <p>6 A. Yes.</p> <p>7 Q. Question No. 28.</p> <p>8 MR. TEAFORD: I'm sorry, which question?</p> <p>9 MR. DIMENGO: 28.</p> <p>10 BY MR. DIMENGO:</p> <p>11 Q. Are all of the transactions identified</p> <p>12 in this answer on 28, as cross-referenced in the Tax</p> <p>13 Commissioner's comprehensive transaction detail</p> <p>14 report that's included in the audit workpapers and</p> <p>15 that's provided to you at the conclusion of the</p> <p>16 audit, are all of those items that are referenced on</p> <p>17 the answer to 28, are those promotional items resold</p> <p>18 to game attendees in the same form as the company had</p> <p>19 purchased?</p> <p>20 A. Yes.</p> <p>21 Q. Unless I state otherwise, all of my</p> <p>22 questions are going to relate to the promotional</p> <p>23 items that are the subject of this appeal.</p> <p>24 A. Okay.</p> <p>25 Q. Okay. How do the Reds advertise the</p>	<p style="text-align: right;">Page 15</p> <p>1 items are what you would see during a game broadcast.</p> <p>2 Q. And when would these be used?</p> <p>3 A. Well, it depends. The first page here</p> <p>4 with this magnetic schedule, that's what we refer to</p> <p>5 as a bottom third. That's what it sounds like, you</p> <p>6 know, takes up a portion of the screen and it</p> <p>7 periodically --</p> <p>8 Q. The screen of what?</p> <p>9 A. I'm sorry, your television viewing</p> <p>10 screen. So as you're watching a broadcast, we will</p> <p>11 display an image that promotes an upcoming game. In</p> <p>12 this example here we're promoting the magnetic</p> <p>13 schedule/car magnet to simplify it for our fans. We</p> <p>14 do say free to 30,000 fans, but there's a real cost</p> <p>15 associated with these items; so it's not free. It</p> <p>16 may be perceived free to the fans, but it's part of</p> <p>17 the admission, then in certain situations we give</p> <p>18 thanks to, you know, a sponsor of an item.</p> <p>19 Q. Okay. Let's just page through this.</p> <p>20 A. Sure.</p> <p>21 Q. So the first one you described is the</p> <p>22 bottom third of the screen.</p> <p>23 A. Yep.</p> <p>24 Q. With a magnetic schedule that would be a</p> <p>25 promotional item, and then on page -- let's see,</p>
<p style="text-align: right;">Page 14</p> <p>1 games where the promotional items are distributed?</p> <p>2 A. Through various mediums; we do it</p> <p>3 through traditional print, so it would be fliers,</p> <p>4 newspaper, online, Reds.com, online through other</p> <p>5 mediums, we also do it on radio, and billboards,</p> <p>6 digital boards, those really are the primary areas.</p> <p>7 Q. Okay.</p> <p>8 MR. DIMENGO: May I approach the</p> <p>9 witness, Your Honor?</p> <p>10 EXAMINER YOUNG: Yes.</p> <p>11 BY MR. DIMENGO:</p> <p>12 Q. I'm handing you what's marked as</p> <p>13 Exhibit 2.</p> <p>14 A. Yep.</p> <p>15 MR. DIMENGO: Kody, you should have all</p> <p>16 the exhibits.</p> <p>17 MR. TEAFORD: I do.</p> <p>18 BY MR. DIMENGO:</p> <p>19 Q. Are these materials as reflected in</p> <p>20 Exhibit 2 representative of those written materials</p> <p>21 used during the audit period to advertise games where</p> <p>22 promotional items were distributed to ticket</p> <p>23 purchasers?</p> <p>24 A. They are. And one item that I did not</p> <p>25 mention earlier is television, and some of these</p>	<p style="text-align: right;">Page 16</p> <p>1 Page 2 it's kind of faint print there, this</p> <p>2 Exhibit 2.</p> <p>3 A. Yeah.</p> <p>4 Q. It looks like there's a reference to</p> <p>5 also a magnetic schedule.</p> <p>6 A. Correct.</p> <p>7 Q. 20,000 fans.</p> <p>8 A. Correct. This is an example of what you</p> <p>9 would see on a digital board or billboard where we're</p> <p>10 promoting specific --</p> <p>11 Q. And well before the game at issue?</p> <p>12 A. Absolutely. You know, this is a great</p> <p>13 example of -- due to the size of our market, you</p> <p>14 know, we are a smaller market, we're quite possibly</p> <p>15 the smallest in baseball except for the Bay between</p> <p>16 us in Milwaukee. Indy Day, since we are such a small</p> <p>17 market, we do go to the regional markets, which would</p> <p>18 be Indianapolis, Columbus, Dayton, and we promote</p> <p>19 specifically different days, and highlight the fact</p> <p>20 that there is a promotional item tied into those days</p> <p>21 to drive additional ticket attendance.</p> <p>22 Q. Uh-huh. And then turning to the third</p> <p>23 page, looks like a calendar.</p> <p>24 A. Yeah. That would be a bottom third; so</p> <p>25 that would be what you would see on a television</p>

<p style="text-align: right;">Page 17</p> <p>1 broadcast.</p> <p>2 Q. And then the next page, reference to a</p> <p>3 Jay Bruce bobblehead.</p> <p>4 A. That's a great example of what a</p> <p>5 bobblehead looks like. You can see here specifically</p> <p>6 there is -- you know, we're stating that -- the date</p> <p>7 in which and the type of promotional item that is</p> <p>8 associated with that game.</p> <p>9 Q. Okay. Then turning to Page 2, to Jay</p> <p>10 Bruce, this one references only the first 10,000 kids</p> <p>11 in attendance.</p> <p>12 A. Well, there's some strategy that's</p> <p>13 involved; so if I may for a second explain.</p> <p>14 Q. Sure.</p> <p>15 A. Depending on the type of game, you know,</p> <p>16 Mother's Day, Father's Day, Sundays where we -- or</p> <p>17 family days, kids days, we will layer in a</p> <p>18 promotional item specific to drive incremental</p> <p>19 attendance. So what I mean by that is -- in this</p> <p>20 example here, a child obviously can't come to a ball</p> <p>21 game by themselves. We're not allowing nine year</p> <p>22 olds in unsupervised. So the thought is when we</p> <p>23 advertise the fact that promotional items available</p> <p>24 to children, mom, dad, maybe a sibling will come as</p> <p>25 well. So there is an incremental ticket lift to us</p>	<p style="text-align: right;">Page 19</p> <p>1 Reds Fest. Reds Fest is usually the first weekend in</p> <p>2 December. The majority of season ticket holders have</p> <p>3 put deposits on account prior to that; however, they</p> <p>4 know through history and time that promotional items</p> <p>5 will be layered in. It's questions we do get,</p> <p>6 there's expectations that they will receive their</p> <p>7 promotional items. So they are renewing prior to the</p> <p>8 schedule being set, but the schedule is set typically</p> <p>9 after our budget cycle. Again, we are a 10-31 fiscal</p> <p>10 year; so once approved by our ownership is when we go</p> <p>11 and we finalize our upcoming season.</p> <p>12 Q. Can you expand on your statement that</p> <p>13 they expect to receive them?</p> <p>14 A. One of the single biggest complaints we</p> <p>15 get from season ticket holders historically was</p> <p>16 access to promotional items. So we started -- we</p> <p>17 opened up actually a season ticket holder gate that</p> <p>18 opens 30 minutes prior.</p> <p>19 Q. Let me clarify, you said access. You</p> <p>20 mean in terms of receiving them during the game?</p> <p>21 A. In terms of receiving them upon arrival.</p> <p>22 Q. Upon arrival, okay.</p> <p>23 A. They expect a priority compared to a</p> <p>24 single game fan. So we opened up a gate 30 minutes</p> <p>25 before general public that grants season ticket</p>
<p style="text-align: right;">Page 18</p> <p>1 because, again, we are in the business of selling</p> <p>2 tickets. As I stated earlier, ticket revenues is a</p> <p>3 primary driver for us, and these items help drive</p> <p>4 ticket sales specifically in this case with giving a</p> <p>5 promotional item to children.</p> <p>6 Q. Uh-huh. Okay. Then just kind of paging</p> <p>7 through the last couple pages, I see quite a few</p> <p>8 other references to bobbleheads.</p> <p>9 A. Uh-huh.</p> <p>10 Q. This would be -- are bobbleheads the</p> <p>11 predominant promotional item that was used?</p> <p>12 A. Yeah. Bobbleheads we have found through</p> <p>13 time and -- they are the single biggest driver of</p> <p>14 promotional -- or the single biggest promotional item</p> <p>15 that drives ticket sales.</p> <p>16 Q. Okay. So you referenced quite a few</p> <p>17 times the provision of these -- the advertisement of</p> <p>18 these promotional items well before the games to</p> <p>19 drive the ticket purchases.</p> <p>20 A. Correct.</p> <p>21 Q. How do you -- how does that tie in with</p> <p>22 your season ticket holders?</p> <p>23 A. Well, season ticket holders we try to</p> <p>24 renew usually in our fiscal fourth quarter. Our</p> <p>25 first promotional schedule typically comes out around</p>	<p style="text-align: right;">Page 20</p> <p>1 holders access to the park early. And, you know, on</p> <p>2 promotional giveaways, depending on the quality of</p> <p>3 the promotional giveaway, bobbleheads are a great</p> <p>4 example, that line is longer than games that are not</p> <p>5 populated with a promotional item. There is a demand</p> <p>6 for these items.</p> <p>7 Q. So how does the company determine the</p> <p>8 promotional items to be purchased and then provided</p> <p>9 at the games to the ticket purchasers?</p> <p>10 A. There is a group of folks who plan the</p> <p>11 upcoming calendar. It involves finance, it involves</p> <p>12 marketing/advertising, you have in certain cases</p> <p>13 members of the executive team.</p> <p>14 What we do is we look at the upcoming</p> <p>15 year and we really focus in two areas. One, we focus</p> <p>16 on weekend and we focus on those weekends that are</p> <p>17 going to be lesser attended. Specifically, you know,</p> <p>18 we do have premium pricing on certain games during</p> <p>19 the year, and typically those games, the reason we're</p> <p>20 premium pricing them, we know they're going to be</p> <p>21 fairly well attended; so we move off those games and</p> <p>22 really try to --</p> <p>23 Q. Move off with respect to promotional</p> <p>24 items?</p> <p>25 A. With respect to promotional items.</p>

<p style="text-align: right;">Page 21</p> <p>1 Q. Okay.</p> <p>2 A. And what we try to do is layer in</p> <p>3 promotional items on the games where we know we have</p> <p>4 opportunity for incremental ticket lift. As I</p> <p>5 mentioned earlier, we are a regional franchise which</p> <p>6 is why we focus on weekends, there's better</p> <p>7 opportunity for folks to come from out of town, spend</p> <p>8 a weekend in Cincinnati, attend a Reds game, and do</p> <p>9 other things in the city.</p> <p>10 Q. So, for example, without -- you might</p> <p>11 have an expectation that the attendance might be at a</p> <p>12 certain level --</p> <p>13 A. Yes.</p> <p>14 Q. -- and then it can increase?</p> <p>15 A. Or decrease. So what we do as part of</p> <p>16 the budget process, we actually prepare a</p> <p>17 game-by-game budget, and it is what it sounds like;</p> <p>18 we layer in with our best current thinking and</p> <p>19 analytics what we are expecting attendance to be over</p> <p>20 the 81 games.</p> <p>21 Q. Without promotional items?</p> <p>22 A. Without promotional items, correct.</p> <p>23 Q. Okay.</p> <p>24 A. As part of our budget process -- you</p> <p>25 know, ownership has been clear that they do not want</p>	<p style="text-align: right;">Page 23</p> <p>1 we -- again, a little bit on our budget cycle, we</p> <p>2 figure out what our sold number is going to be, and</p> <p>3 then from there we calculate concessions,</p> <p>4 merchandise, programs, other things that a consumer</p> <p>5 will purchase at the park.</p> <p>6 Q. Right.</p> <p>7 A. But concessions and merchandise are the</p> <p>8 two largest revenue items.</p> <p>9 Q. So would it be true that you do not</p> <p>10 provide promotional items at games that are</p> <p>11 anticipated to be sold out?</p> <p>12 A. Yes. With the exception of opening day,</p> <p>13 which we have put a promotional item on, we want to</p> <p>14 drive weekend attendance and we want to drive the</p> <p>15 weekends where we think we need a little lift.</p> <p>16 Q. Okay.</p> <p>17 A. And that was the strategy that we</p> <p>18 employed when we set the budget, when we set the --</p> <p>19 once the game-by-game ticket summary is done, we do</p> <p>20 layer these promotional items on with a little bit of</p> <p>21 strategy.</p> <p>22 Q. Uh-huh. Even the -- when you provide</p> <p>23 them for a promotion -- the promotional items with</p> <p>24 respect to the opening day game, does it help you to</p> <p>25 assure the sellout and capacity attendance?</p>
<p style="text-align: right;">Page 22</p> <p>1 to lose money; so we layer in our promotional items</p> <p>2 on games where we feel that we can drive additional</p> <p>3 ticket revenue. As I mentioned, those typically are</p> <p>4 weekend games and/or games, depending on the quality</p> <p>5 of the opponent, that we need an additional lift.</p> <p>6 Q. And so your thinking is that it's tough</p> <p>7 to get somebody regardless to go to a weekday game,</p> <p>8 you know, sometimes even if it's a lower quality</p> <p>9 opponent, but on a weekend game, that same opponent,</p> <p>10 it's a lot easier for families or individuals to come</p> <p>11 to a weekend game, and you know that incremental push</p> <p>12 with the promotional item then would help drive that</p> <p>13 additional attendance?</p> <p>14 A. Yes. Based on the size of our market we</p> <p>15 have higher attended games on weekends, and</p> <p>16 promotional items are one of the reasons why.</p> <p>17 Q. And you would anticipate then that the</p> <p>18 incremental revenue you get from the ticket sales</p> <p>19 more than offsets the cost of the promotional item?</p> <p>20 A. Absolutely. Otherwise, we wouldn't do</p> <p>21 it.</p> <p>22 Q. And the attendees, are they -- are there</p> <p>23 benefits from the attendees at the park such as other</p> <p>24 purchases they might make?</p> <p>25 A. Sure. So, you know, what we budget as</p>	<p style="text-align: right;">Page 24</p> <p>1 A. Yeah. We had an example in 2009 where</p> <p>2 when the economic -- I guess it's called the great</p> <p>3 recession now -- hit we had a significant revision</p> <p>4 just to what we thought we would do that year. And</p> <p>5 that was the one year when I look back and I say,</p> <p>6 wow, there was -- in Cincinnati, you know, baseball's</p> <p>7 religion, and it was the one opening day that I felt</p> <p>8 like it needed a little lift.</p> <p>9 Besides that, you know, baseball is --</p> <p>10 opening day is a big deal in Cincinnati.</p> <p>11 Q. Uh-huh.</p> <p>12 A. You know, fans like to get something</p> <p>13 when they show up.</p> <p>14 Q. Uh-huh. So they have some expectation</p> <p>15 even on opening day, right?</p> <p>16 A. Yeah. I think we've somewhat</p> <p>17 established that expectation.</p> <p>18 Q. Okay. Do you charge the game attendees</p> <p>19 for the promotional items? Do you have a separately</p> <p>20 identified charge?</p> <p>21 A. No. It's not separate, it's part of the</p> <p>22 ticket price.</p> <p>23 Q. And then do you take into consideration</p> <p>24 the cost of the promotional items when you're setting</p> <p>25 the ticket price?</p>

A. Yes. As I mentioned, part of our general operating budget, as you can imagine, there are various costs that go into it. One of the single biggest costs of the business side is our promotional items, and that is part of the overall model when we're creating what we -- you know, where we're going to set ticket prices for the upcoming year.

Q. And those costs would include not only the costs of the promotional items, but anything else?

A. Additional costs, we have inventorying costs, there is a cost to hold it, we have a cost to staff.

Q. To hand them out?

A. As you can imagine, 30,000, 40,000 promotional items in a game, there is a significant amount of people there to make sure the distribution is going fairly, that folks aren't getting two bobbleheads or two player card sets, and, you know, there are other associated costs, the cost of advertising, you know, the game. So there are a lot of costs beyond just the cost of the promotional item.

Q. And would it be true that some of the fans with respect to the games that may not be quite

BY MR. DIMENGO:

Q. In your experience, do the customers expect to receive and feel entitled to a promotional item?

A. Yes. One of the biggest feedbacks we get are complaints from fans that lag on days. So an example, if we think we ordered 30,000 bobbleheads for a Saturday and great weather, we're in contention for a playoff position, you know, there's a lot of extenuating circumstances that could drive up the attendance. Those examples, you know, we would get fan complaints, "Hey, I didn't receive," you know, whatever, "Scott Rolen bobblehead."

You know, it's a little bit of a PR nightmare when you have to deal with a significant number of fans. So we try to -- as we establish what we think attendance is going to be and what we're going to order, you know, our goal is to drive or -- I'm sorry, our goal is to order a quantity that is -- that is close to what we expect. In some cases we go over and in some cases we go under, because it's based on a budget that's very preliminary. While there's some science in it, team play can change the expectation overnight.

Q. Do you have any other experiences that

a draw, that they feel that the ticket price isn't -- doesn't quite warrant the -- just mere attendance without a promotional item?

A. You know, it's hard to quantify what the fans -- you know, what our fans think. It is, you know, the April, early May and September timeframe when kids are in school, we do see a dropoff in weekday attendance. I think that -- or, in my opinion, you know, clearly when you have a promotional item the games will be incremental over what our otherwise baseline would be on those days.

But, you know, again, I think our fans, when we say we have a bobblehead, there is a certain level of expectation that they will receive the bobblehead.

Q. So when a customer purchases a ticket, the customer believes he or she is purchasing both the right to view the game at the park and the promotional item?

A. Absolutely.

Q. And so the customers feel entitled to the promotional items?

A. Yes.

MR. TEAFORD: Objection, speculation.

EXAMINER YOUNG: Can you rephrase?

you can share with respect to fans and their pursuit of the bobbleheads?

A. Yeah. You know, one thing that we've noticed, and actually it's not a problem, but, you know, fans on certain peak games and, again, bobbleheads are a great example, fans will purchase numerous tickets and they'll purchase numerous tickets to get the bobbleheads.

We had situations in years past where, you know, folks may buy a lowest-dollar ticket, get the bobblehead, go take the bobblehead back to the car and come back in with a second purchased ticket. So there is demand for these items. You know, these items, it's amazing how these items wind up on E-bay and the various resale sites, and typically at a premium over what even the cost of the ticket would be.

Q. Any fights amongst fans?

A. We have some pushing and shoving at times. You know, again, there is a level of expectation, especially with the higher -- the higher perceived promotional items.

Q. What would happen if you decided not to provide the promotional items that you had told the public you would?

<p style="text-align: right;">Page 29</p> <p>1 A. Well, outside of it being a public 2 relations nightmare, as I mentioned earlier, you 3 know, I would anticipate that our phones would be 4 ringing off the hooks with fan complaints demanding 5 refunds. You know, there is an expectation when we 6 put it out to the marketplace that if we say we're 7 going to have -- you know, example, let's say 30,000 8 bobbleheads, that the Reds are going to have 30,000 9 bobbleheads. 10 Q. And that's what your anticipated 11 attendance would be? 12 A. Yeah. You know, we don't purposely 13 order under with the exception of kids and, you know, 14 Mother's Day and specific quantities. 15 Q. That drive that group? 16 A. Yeah. We don't purposely order -- 17 underorder promotional items. 18 Q. Okay. 19 MR. DIMENGO: May I approach the 20 witness, Your Honor? 21 EXAMINER YOUNG: Yes. 22 BY MR. DIMENGO: 23 Q. I'm handing you Exhibit 3. 24 A. Yep. 25 Q. Can you tell me what this is?</p>	<p style="text-align: right;">Page 31</p> <p>1 so it's possible we might have missed a handful of 2 them as I look at it. 3 Q. Okay. So every attendee expects to not 4 only view the game, but also receive a promotional 5 item in exchange for the paid ticket price? 6 A. Yes. I think we have set an expectation 7 that when folks arrive at the game, you know, we 8 encourage people, especially on these promotional 9 item days, to arrive early. As you see in the 10 advertising, we will say to the first 30,000 fans. 11 So, you know, there is an expectation, especially if 12 they arrive early, that they're going to get a 13 promotional item. 14 Q. Let's go back to Exhibit 3. 15 A. Okay. 16 Q. The first page references games for 17 2010. 18 A. Yep. 19 Q. And then I just want to make sure this 20 is the predominant promotional items for 2009 on 21 Page 2. 22 A. Yes. 23 Q. As well as predominant promotional items 24 in 2008. 25 A. Yes.</p>
<p style="text-align: right;">Page 30</p> <p>1 A. The first page is listing home dates, 2 not gates, home dates during 2010 where we had 3 promotional items attached to those games. 4 Q. And there's a reference to the quantity 5 that you had purchased in the third-to-the-right 6 column. 7 A. Yep. So that would be the quantity that 8 we were ordering, and then the far column, 9 "Attendance," is where we actually wound up with, you 10 know, folks in the park. 11 Q. This is in -- the attendance figure's 12 actually the number that were in the park? 13 A. Correct. 14 Q. So it looks like sometimes you got it 15 right, sometimes you had a little bit more, sometimes 16 you had a little bit less? 17 A. Yeah. Like I said, we set the budget 18 early on in the season based on what we think, and 19 sometimes we order too many and sometimes we don't 20 order enough. You know, it's a little bit of science 21 and a little bit of questioning. 22 Q. Are there some other -- are some of the 23 promotional items that are at issue not on this in 24 this exhibit? 25 A. Yes. The spreadsheet's a little older;</p>	<p style="text-align: right;">Page 32</p> <p>1 Q. Okay. For the games in both those 2 years? 3 A. Yes. 4 Q. So you're confident providing the 5 promotional items increases the ticket sales and the 6 attendance? 7 A. Yes. You know, we have over time and 8 what we see across professional sports is that 9 promotional items really are a driver in growing 10 incremental tickets above a baseline expectation. 11 Q. Does this mean that some fans -- some of 12 your fans will not purchase tickets unless it's 13 accompanied by a promotional item? 14 A. You know, it depends on the game, but I 15 would say that what the promotional items do is drive 16 the incremental ticket sales. So to answer that 17 question, yes, I would say on those incremental 18 ticket sales, you know, above an expected baseline 19 that the promotional items are a ticket driver. 20 Q. What's the average cost of a promotional 21 item? 22 A. It ranges from, you know, below a dollar 23 up to the more ornate you get on the bobbleheads and 24 the figurines can be \$4 per item. 25 Q. Okay. Now, if I saw that Ken Griffey,</p>

<p style="text-align: right;">Page 33</p> <p>1 Junior bobblehead and I said, boy, I think I could 2 make that myself and produce 50,000 of them -- 3 A. Can't do that. 4 Q. Why is that? 5 A. Well, there's limitations, you know, 6 MLB, Major League Baseball and the Major League 7 Baseball Players Association, so there are two 8 separate entities, we control our own marks, marks 9 defined as the Reds, you know, the Reds emblem; 10 Players Association and the player controls their 11 likenesses. So if somebody wanted to go out and just 12 create, as an example, a Rolen bobblehead there would 13 be significant issues. 14 Q. Legal problems? 15 A. Yes. 16 Q. And liability, that would not be 17 allowed? 18 A. That would not be allowed, no. 19 Q. But the Reds have the ability, because 20 of the special -- the licensing you have -- 21 A. We control our marks. 22 Q. Yeah. 23 A. So unless we grant our marks or baseball 24 grants marks, there is limitations with where in this 25 case our wishbone C can be used.</p>	<p style="text-align: right;">Page 35</p> <p>1 find a specific mini bat that we had as a promotional 2 item, but you will find a mini bat in the team store. 3 So it's close, but it's not exact. 4 Q. Is there a reason for that, that it's a 5 unique item that you actually provide to the fan with 6 their -- his or her ticket purchase? 7 A. Yes. We try to make -- again, using the 8 bobbleheads as an example, we want to make these 9 promotional items of value, we don't want to diminish 10 the value. And the best way to do that is control 11 the distribution and control the merchandising of 12 those items and, frankly, control where they're sold. 13 So that's why our bobbleheads -- you won't find, as 14 an example, Scott Rolen bobblehead in our team store 15 or this specific Scott Rolen bobblehead in our team 16 store. 17 Q. So you're trying to focus more on that 18 unique experience? 19 A. Yes, for the fan. 20 Q. For the fan? 21 A. Uh-huh. 22 Q. Do attendees that receive promotional 23 items get to keep them? 24 A. Yes. 25 Q. And are the promotional items provided</p>
<p style="text-align: right;">Page 34</p> <p>1 Q. Okay. So the bobbleheads and player 2 cards, only you can produce those and provide them to 3 the fans? 4 A. Correct. I mean, you have to be an MLB 5 licensee to produce -- 6 Q. Right. Okay. 7 A. -- those types of items. 8 Q. How valuable can these promotional items 9 become, the bobbleheads, the player cards, so forth? 10 A. You know, we've -- again, I've seen them 11 on the Internet for more than the cost of the item. 12 You know, they can go \$10, \$15, \$20, depending on the 13 significance of the bobblehead. You know, some 14 bobbleheads even go for more. It all depends on 15 consumer demand and, frankly, how good the quality of 16 the bobblehead is at times. 17 Q. Do you sell merchandise in your fan 18 shops at the ballpark that is the same as some of the 19 promotional items? 20 A. Not the same, but close. A good example 21 is baseball hats, you know, we will have a 22 promotional giveaway of a baseball hat. You won't 23 find that replicated hat in our team store, but you 24 will find Reds baseball caps in our store. 25 Mini bats is another example, you won't</p>	<p style="text-align: right;">Page 36</p> <p>1 to anyone that does not purchase a ticket? 2 A. No. You got to have a purchased ticket 3 to get the promo item. 4 Q. And the Reds intend to make a sale of 5 both the ticket and the promotional item in exchange 6 for the ticket price paid by the customer? 7 A. Yes. 8 MR. DIMENGO: I have no further 9 questions. 10 EXAMINER YOUNG: Thank you. 11 Cross-examination. 12 MR. TEAFORD: Yes. 13 --- 14 CROSS-EXAMINATION 15 BY MR. TEAFORD: 16 Q. Good morning, Mr. Healy. 17 A. How are you? 18 Q. I don't have too much. So, again, just 19 like Mr. Dimengo's questions, I'm really only 20 interested in 2008 through 2010 for this particular 21 audit period. 22 A. Okay. 23 Q. You said before some of the examples of 24 the items were bobbleheads, hats, T-shirts, mini 25 bats, those sorts of things.</p>

<p style="text-align: right;">Page 37</p> <p>1 A. Yes.</p> <p>2 Q. How much do they vary from the items</p> <p>3 that are sold in the club shop?</p> <p>4 A. Well, it all depends. An example is,</p> <p>5 you know, a hat could vary significantly. You know,</p> <p>6 there was in the year past where, you know, we had a</p> <p>7 hat that was a John Deere type hat where you had the</p> <p>8 mesh, and we did not have that exact style in the</p> <p>9 team shop. We had a like -- or a hat that was close,</p> <p>10 but not that exact style.</p> <p>11 The bobbleheads, you're not really going</p> <p>12 to find the specific bobbleheads that we have for a</p> <p>13 game in our team shop. You know, player card sets,</p> <p>14 those are unique as well. You know, Tops obviously</p> <p>15 has player cards, but, you know, each item has enough</p> <p>16 of a difference in order to protect, you know, the</p> <p>17 paid fan.</p> <p>18 Q. So take the Jay Bruce bobblehead</p> <p>19 example, so we wouldn't find a Jay Bruce bobblehead</p> <p>20 in the team shop? That's on Exhibit No. 2.</p> <p>21 A. Yeah. You would not find this Jay Bruce</p> <p>22 bobblehead in the team shop, that is correct.</p> <p>23 Q. So you could find a Jay Bruce one, just</p> <p>24 not this particular Jay Bruce bobblehead?</p> <p>25 A. I don't recall if a Jay Bruce bobblehead</p>	<p style="text-align: right;">Page 39</p> <p>1 items, so the bobbleheads and such --</p> <p>2 A. Yeah.</p> <p>3 Q. -- those aren't sold anywhere else</p> <p>4 outside of, like, maybe another store, maybe they're</p> <p>5 licensed elsewhere to be sold?</p> <p>6 A. You know, I -- I can't speak to where</p> <p>7 they're sold. You know, there are different forms of</p> <p>8 bobbleheads out there. But, again, for a player</p> <p>9 bobblehead, you'd have to get our consent, you know,</p> <p>10 to the extent you're using our mark, you'd have to</p> <p>11 get their consent through the PA or through the</p> <p>12 player. And, you know, again, each bobblehead is</p> <p>13 unique unto itself.</p> <p>14 So I can't tell you what the value of a</p> <p>15 bobblehead is to a third party. What I can tell you</p> <p>16 is I know our bobbles and our giveaway items have</p> <p>17 significant value to our fans.</p> <p>18 Q. Let me rephrase. So, say, take a</p> <p>19 T-shirt, a T-shirt that's given out as a promotional</p> <p>20 item, say, to the first 100 attendees or something</p> <p>21 like that, are those also licensed to be sold in</p> <p>22 other locations, so at Footlocker or at some other</p> <p>23 type of store, are those licensed out in that way?</p> <p>24 A. The T-shirts that we give away at the</p> <p>25 games, you know, a great example would be a T-shirt</p>
<p style="text-align: right;">Page 38</p> <p>1 was in the team shop. Usually the bobbleheads in the</p> <p>2 team shop were larger, you know, taller in stature.</p> <p>3 We also have -- you know, in addition to players in</p> <p>4 our team shop, we have some of our mascots as a great</p> <p>5 example so that the type of bobbleheads that are in</p> <p>6 the team shop are, you know, slightly different than</p> <p>7 what you would receive as a paying fan.</p> <p>8 Q. So they wouldn't be exclusive to a</p> <p>9 person. So you could have Jay Bruce swinging a bat</p> <p>10 as a promotional item and Jay Bruce with a fielder's</p> <p>11 glove in the clubhouse or in the gift shop?</p> <p>12 A. You know, it all depends. Our</p> <p>13 relationship with our concessionaire would give us</p> <p>14 the -- we have consent rights. So, you know, we</p> <p>15 control, you know, what goes where in the team shop.</p> <p>16 Again, there are a limited set of bobbles that are in</p> <p>17 the team shop. I can't recall specific to what was</p> <p>18 in the team shop during -- from '08 to '10, but</p> <p>19 player likenesses, those are usually things that we</p> <p>20 keep at the park or in the park.</p> <p>21 Q. And the ones that are sold as</p> <p>22 promotional items, if I understand correctly, those</p> <p>23 aren't sold elsewhere outside of the team shop?</p> <p>24 A. Can you repeat the question? Sorry.</p> <p>25 Q. The items that are used as promotional</p>	<p style="text-align: right;">Page 40</p> <p>1 we give away for a former player, that you will not</p> <p>2 find in a store, you know, it's specific to the</p> <p>3 player. You know, the mesh jersey -- you know, will</p> <p>4 you find a jersey in a store? Sure, you can find an</p> <p>5 MLB licensed jersey, but the uniqueness of the jersey</p> <p>6 in this example here, you know, we're driving it to</p> <p>7 kids and you will not find that exact style of a</p> <p>8 jersey. You'll find some close, but it won't be that</p> <p>9 exact style.</p> <p>10 Q. Are the items ever modified from the</p> <p>11 time that you receive them to the time that they go</p> <p>12 out, the promotional items?</p> <p>13 A. When you say "modified," do you mean do</p> <p>14 we do something to them?</p> <p>15 Q. Uh-huh.</p> <p>16 A. Other than potentially putting them</p> <p>17 together, no, a bobblehead comes prepackaged. We're</p> <p>18 not changing the design, unless the manufacturer</p> <p>19 screws it up, then we'll send them back.</p> <p>20 Q. Any of the other items, the</p> <p>21 non-bobblehead items, so hats, T-shirts, players</p> <p>22 cards, anything like that, do you repackage them?</p> <p>23 A. No. But what we do is, you know, player</p> <p>24 cards is a great example, they come in boxes so we</p> <p>25 spend a significant amount of time breaking them</p>

<p style="text-align: right;">Page 41</p> <p>1 down, making sure we have them readily available. So</p> <p>2 for the folks -- our employees who are ultimately</p> <p>3 responsible for distributing those types of items,</p> <p>4 you know, they would be breaking the boxes down, you</p> <p>5 know, they're responsible for, you know, in that case</p> <p>6 cardboard collection, getting it down to our</p> <p>7 recycling bins. So there is some cost associated</p> <p>8 with it.</p> <p>9 Q. Okay. Let's talk about some of the</p> <p>10 advertising elements.</p> <p>11 A. Okay.</p> <p>12 Q. You mentioned before that typically</p> <p>13 promotional items are used to increase sales whenever</p> <p>14 you -- I think you said whenever you need a small</p> <p>15 lift on a -- for a particular game. Are the</p> <p>16 promotional items always advertised prior to the</p> <p>17 game?</p> <p>18 A. Always in advance, yes.</p> <p>19 Q. Okay.</p> <p>20 A. Always in advance.</p> <p>21 Q. Approximately how far in advance?</p> <p>22 A. It all depends. Our promotional</p> <p>23 schedule is usually available in December. So, you</p> <p>24 know, for some games they are typically early April,</p> <p>25 has been as early as late March. So, you know,</p>	<p style="text-align: right;">Page 43</p> <p>1 that's being offered?</p> <p>2 A. If it's not on a premium game, then yes,</p> <p>3 yes.</p> <p>4 Q. What if it's on a premium game?</p> <p>5 A. Well, we typically don't put them on</p> <p>6 premium games because we know those games are already</p> <p>7 going to be higher attended. So what we want to do</p> <p>8 is we want to drive the incremental tickets. As I</p> <p>9 mentioned earlier on, these promotional items help</p> <p>10 drive incremental ticket sales. So there's some</p> <p>11 strategy that we do when we layer those games on --</p> <p>12 or, I'm sorry, those promotional items on the game.</p> <p>13 Q. With regard to the season ticket</p> <p>14 holders, you mentioned how there's an expectation --</p> <p>15 I think you said that -- among season ticket holders</p> <p>16 that these promotional items will be made available.</p> <p>17 Is that something that's included in the season</p> <p>18 ticket holder contract?</p> <p>19 A. Well, we don't -- we don't have</p> <p>20 contracts. I want to make sure I'm answering your</p> <p>21 question. I don't make a season ticket holder sign</p> <p>22 up for -- you know, in a formal contract. Typically</p> <p>23 what will happen is they will just -- we send out the</p> <p>24 informational literature, they'll send back a deposit</p> <p>25 and they renew.</p>
<p style="text-align: right;">Page 42</p> <p>1 upwards of a few months or several months I guess</p> <p>2 that would be, but, you know, we want to advertise</p> <p>3 them early on in order to drive incremental</p> <p>4 attendance.</p> <p>5 Q. Are price -- are ticket prices changed</p> <p>6 as a result of the promotional items that are going</p> <p>7 to be provided at that game?</p> <p>8 A. No. What we do is -- what we do is, you</p> <p>9 know, we want to smooth those ticket prices</p> <p>10 throughout the year, because what we don't want to do</p> <p>11 as an organization is devalue any game to the general</p> <p>12 public, we don't want to set a price below what we</p> <p>13 would say is a baseline price on a Tuesday for</p> <p>14 obviously business reasons. So we typically will</p> <p>15 smooth that pricing and, again, with the exception of</p> <p>16 certain premium games which depending on the opponent</p> <p>17 and those games we typically don't have promotional</p> <p>18 items tied into.</p> <p>19 We budget, you know, a specific number</p> <p>20 of tickets sold, and then we set our average ticket</p> <p>21 price off that budget knowing there will be some lift</p> <p>22 on a number of the games throughout the year.</p> <p>23 Q. So all else being equal, same day, same</p> <p>24 opponent, whatever else, it's going to be the same</p> <p>25 ticket price regardless of the promotional item</p>	<p style="text-align: right;">Page 44</p> <p>1 You know, I -- if you're asking is there</p> <p>2 a separate line item on the invoice, there's not,</p> <p>3 but, again, the -- the way we view that as a business</p> <p>4 is, you know, we don't separately state on the</p> <p>5 invoice that the promotional item is, you know,</p> <p>6 resold as part of the ticket when a fan comes in.</p> <p>7 Q. But there is some sort of agreement,</p> <p>8 right? I assume whenever you sign up as a season</p> <p>9 ticket holder, you sign something that says I agree</p> <p>10 to pay this amount as a season ticket holder and so</p> <p>11 forth?</p> <p>12 A. Yeah. I think online -- again, I'm</p> <p>13 going back in time here -- I think online there is</p> <p>14 some form of an acceptance. You know, typically what</p> <p>15 will happen is you pay as you go. You know, if you</p> <p>16 stagger your payments, you pay as you go.</p> <p>17 Obviously I never want to get upside</p> <p>18 down in an arrangement where games have been issued</p> <p>19 but payment hasn't been received, and we will stop --</p> <p>20 you know, we've stopped season ticket holders, we've</p> <p>21 turned their access off, frankly, if they failed to</p> <p>22 pay. So I think that answers your question.</p> <p>23 Q. Okay. Are there any guarantees on -- if</p> <p>24 you're not a season ticket holder, you're just an</p> <p>25 individual game ticket holder, are there any</p>

<p style="text-align: right;">Page 45</p> <p>1 guarantees on the ticket that guarantee the</p> <p>2 promotional item?</p> <p>3 A. No. There's no guarantees on the</p> <p>4 ticket. But, again, what we do through the</p> <p>5 advertising is we set an expectation, you know, in</p> <p>6 certain cases by calling out the quantity and the</p> <p>7 number that, you know, show up at the game and, you</p> <p>8 know, we have 30,000 magnet promotional items that</p> <p>9 are at a given day.</p> <p>10 Q. So I've been to games before where you</p> <p>11 have the ticket and it will say at the bottom of the</p> <p>12 ticket, you know, possession of the ticket doesn't</p> <p>13 guarantee you a particular item or whatever. Are</p> <p>14 those types of clauses put onto the tickets?</p> <p>15 A. I'm trying to think of a ticket. I</p> <p>16 truly -- I truly don't know. I know what's on the</p> <p>17 back of the ticket, but I don't know on the front.</p> <p>18 Q. Okay.</p> <p>19 A. Yeah.</p> <p>20 Q. Well, on the back, either/or, anywhere</p> <p>21 on the ticket.</p> <p>22 A. On the back is just the disclaimer, just</p> <p>23 the general you accept liability when you come to a</p> <p>24 game.</p> <p>25 Q. Okay.</p>	<p style="text-align: right;">Page 47</p> <p>1 after the game?</p> <p>2 A. The answer -- the short answer is it all</p> <p>3 depends on the total attendance. You know, in</p> <p>4 situations where we've overordered based on -- you</p> <p>5 know, again, as you can see in those pages, yes,</p> <p>6 we'll remedy it.</p> <p>7 In situations where, you know, we</p> <p>8 underordered, you know, attendance far exceeded what</p> <p>9 we thought it would, you know, we will remedy it, but</p> <p>10 maybe not with that item. We might give them another</p> <p>11 promotional item, we might invite them back to a ball</p> <p>12 game. But our ownership group is fan first, fan</p> <p>13 friendly, and we will make it right by, you know,</p> <p>14 inviting them back down or, like I said, give them</p> <p>15 another item.</p> <p>16 Q. So in that sense, there is no guarantee</p> <p>17 to that particular item. If they come in, you know,</p> <p>18 if I come in, say, first 200 get a T-shirt, and I'm</p> <p>19 number five but I don't get my T-shirt, if I'm</p> <p>20 understanding you correctly, there's really no</p> <p>21 guarantee that I'm going to get that item if I don't</p> <p>22 receive it. You know, they said, well, we didn't</p> <p>23 think you were number five so you don't get your</p> <p>24 T-shirt, I don't get that after the fact?</p> <p>25 A. Again, it all depends on the quantity of</p>
<p style="text-align: right;">Page 46</p> <p>1 A. Caught a foul ball.</p> <p>2 Q. Or if you get in a fight over a</p> <p>3 promotional item or something.</p> <p>4 With regard to the season ticket holders</p> <p>5 or the individual ticket holders, have the Reds ever</p> <p>6 been subject to a legal action for not providing</p> <p>7 promotional items?</p> <p>8 A. We've received threats of cancelling,</p> <p>9 you know, from season ticket holders that they'll</p> <p>10 cancel their tickets if they don't receive the</p> <p>11 promotional item. We have fielded numerous</p> <p>12 complaints from single game consumers that did not</p> <p>13 receive a promotional item.</p> <p>14 But if you're asking about class action</p> <p>15 suit or something, no, we have not. But I would</p> <p>16 venture a guess that if we were ever to truly just</p> <p>17 cancel a bobblehead or cancel a significant</p> <p>18 promotional item -- again, speculation -- but I would</p> <p>19 say that there could be a threat.</p> <p>20 Q. Okay. Whenever you get a -- whenever</p> <p>21 you receive a complaint from either a season ticket</p> <p>22 holder or an individual ticket holder saying, you</p> <p>23 know, I was one of the first 200 people in the</p> <p>24 stadium but I didn't receive X promotional item, do</p> <p>25 the Reds remedy that by providing them with that item</p>	<p style="text-align: right;">Page 48</p> <p>1 the number of items that were ordered and then the</p> <p>2 ultimate attendance at the ball game, whether or not</p> <p>3 the item's available.</p> <p>4 Q. So it wouldn't be possible for the Reds</p> <p>5 to order more of that same item?</p> <p>6 A. Depends where we sourced it from as</p> <p>7 well. You know, I mean, is it possible? Sure. Have</p> <p>8 we done that? I truly don't recall any situation</p> <p>9 where I've done a one-off order, because as you can</p> <p>10 appreciate the cost, it gets pretty expensive to</p> <p>11 order.</p> <p>12 Q. Would there be a situation where -- and</p> <p>13 I guess maybe this is a little bit of speculation --</p> <p>14 where a sufficient number of individuals didn't</p> <p>15 receive a promotional item and the Reds would order</p> <p>16 more?</p> <p>17 A. We have modified, you know, if we -- if</p> <p>18 there is a game that it just pops well in advance, we</p> <p>19 have modified our quantity, but, again, it depends</p> <p>20 where we're sourcing it from. If it's being shipped</p> <p>21 from China or if it's being shipped overseas, it's a</p> <p>22 little bit more difficult for sourcing it</p> <p>23 domestically, but we do try to monitor and manage and</p> <p>24 we have made changes upward where, you know,</p> <p>25 attendance has increased.</p>

<p style="text-align: right;">Page 49</p> <p>1 Q. So I'm thinking of scenarios where, you 2 know, you're not looking at any marginal increase, 3 you're looking at a set number of individuals. So I 4 think usually most of the examples that I've seen 5 are, you know, any -- you know, the first X number of 6 individuals into the park get this item. 7 A. Uh-huh. 8 Q. So in that type of scenario, do the Reds 9 ever purchase items after the fact because someone 10 didn't get their item? So kind of back to my example 11 before, let me ask that question again: If the first 12 200 individuals in the park get a T-shirt and I'm 13 number five but I don't get my T-shirt for one reason 14 or another, can I come back and say, "Reds, I didn't 15 get my T-shirt. Where's my T-shirt? It's a 16 promotional item which I was assured that I would 17 get, but I didn't get it"? 18 A. I mean, we have received complaints like 19 that in the past. You know, part of the challenge 20 here is quantifying were you really number five or 21 number 205. As we've gotten more sophisticated as an 22 organization, you know, we have the ability to track 23 when you came into the park, but in certain 24 situations where, you know, a fan will complain and 25 say, you know, "I was number five," we never</p>	<p style="text-align: right;">Page 51</p> <p>1 I have this fleece blanket or something, you know, we 2 try to provide a fan with something that remedies the 3 situation. 4 I can't speak to specifics of I didn't 5 get a Rolen bobblehead so give me a Bruce bobblehead. 6 You know, it truly depends on available inventory 7 because, again, we do overorder, you know, in several 8 games so there is some excess inventory that is 9 around. 10 Q. Have you ever refunded a portion of a 11 ticket price for -- because a person didn't receive 12 their promotional item? 13 A. We will refund the full ticket price. 14 Q. Okay. If a person doesn't receive the 15 promotional item, you'll -- 16 A. If they complain enough, we will refund 17 them. It's not something that we do often, but if 18 the person complains enough we will refund the full 19 ticket price. 20 Q. So you say it's not something that's 21 done often. So there are individuals who have 22 complained that have not received a full refund of 23 the ticket price? 24 A. Correct. Usually we're able to remedy 25 that situation. The ultimate -- what we try to do is</p>
<p style="text-align: right;">Page 50</p> <p>1 challenge the fan. We don't say, "No. You were 2 number 205." We make accommodations, and typically 3 it's another promotional item or it's, "Hey, you 4 know, come back to a ball game on us." 5 You know, what we want to do is make 6 sure that it's still a family friendly experience and 7 we want to make sure that you, the paying consumer, 8 has a good experience. 9 Q. All right. So what about -- you said a 10 lot of times these items have significant resale 11 value. 12 A. Yes. 13 Q. You saw online they can be worth -- I 14 forget how much you said, but they can be worth a lot 15 of money afterwards. 16 A. Yeah. 17 Q. You know, do you provide them with 18 something of comparable -- comparable cost? So, you 19 know, if a bobblehead's going to be worth \$200 20 online, do you provide them with something of similar 21 value? 22 A. I can't speculate to the resale value. 23 What we try to do is if you show up and you don't 24 receive, let's just say, X bobblehead, but I have Y 25 bobblehead available or I have this promotional item,</p>	<p style="text-align: right;">Page 52</p> <p>1 remedy it prior to issuing a refund is our goal. 2 Q. Okay. How do you decide usually the 3 criterion for who gets the ticket item? 4 A. I'm sorry? 5 Q. How do you decide the criteria for who 6 receives the item? So some of them are structured to 7 kids or Mother's Day or whatever. How do you decide 8 what makes sense? 9 A. Sure. Sundays usually we will promote 10 as family day, kids' days, you know, it's typically 11 an early afternoon start so it works out well. You 12 know, I'm a father of three young daughters; so it 13 works out well compared to a night game. So what we 14 do is we try to have a promotional item layered in on 15 a game that kids see value in, whether it's a mesh 16 jersey giveaway or a kid's hat or something that the 17 kid wants in addition to, like I said, driving the 18 incremental sales of mom and dad coming so we don't 19 have a bunch of nine year olds running around 20 unsupervised. 21 Q. Right. A couple questions about -- you 22 made some statements before about, you know, how fans 23 would respond if the promotional items were not 24 provided. Have the Reds ever done any sort of 25 standardized -- and by "standardized," I mean looking</p>

<p style="text-align: right;">Page 53</p> <p>1 at -- you know, standard methods for looking at</p> <p>2 markets -- to see how fans would respond to the</p> <p>3 promotional items being done away with?</p> <p>4 A. Can I ask a clarifying question?</p> <p>5 Q. Sure.</p> <p>6 A. Are you asking do we benchmark other</p> <p>7 professional sports franchises and say maybe they</p> <p>8 don't have promotional items and what would happen?</p> <p>9 Q. I think that would be one way of doing</p> <p>10 it, but, yeah.</p> <p>11 A. Okay.</p> <p>12 Q. So I'll ask that question, I think that</p> <p>13 works, too.</p> <p>14 A. Okay. So the short answer is based on</p> <p>15 our market, the size of our market, you know, our</p> <p>16 core market, it's not something we've considered.</p> <p>17 You know, I think larger markets and even, you know,</p> <p>18 over the last several years larger markets have even</p> <p>19 migrated to promotional items.</p> <p>20 Chicago's a great example, very big</p> <p>21 market, but they had promotional items to drive</p> <p>22 incremental ticket sales. I think what has been</p> <p>23 found is that the value of these items do</p> <p>24 significantly improve -- or, you know, in the fans'</p> <p>25 perception -- a ball game. So it's not something</p>	<p style="text-align: right;">Page 55</p> <p>1 track of customer -- or, you know, ticket holder</p> <p>2 complaints.</p> <p>3 A. Uh-huh.</p> <p>4 Q. And what they're complaining about.</p> <p>5 A. We do.</p> <p>6 Q. From 2008 to 2010, do you know, you</p> <p>7 know, how many complaints the Reds received about not</p> <p>8 receiving promotional items?</p> <p>9 A. Oh, boy. I couldn't even guess. I</p> <p>10 couldn't even guess.</p> <p>11 Q. The value on resale, we talked about</p> <p>12 that, how that can --</p> <p>13 A. Yeah.</p> <p>14 Q. I assume that can be a pretty broad</p> <p>15 range. Have the Reds ever done any -- ever done</p> <p>16 something to get data on what the resale value of</p> <p>17 these items are?</p> <p>18 A. Not really. I mean, what usually will</p> <p>19 happen is someone will highlight, "Hey, did you</p> <p>20 happen to see" -- you know, pick a bobblehead --</p> <p>21 "what it's going for on E-bay?" So I'll go on E-bay</p> <p>22 and look, oh, my, it's going for 15 bucks, but, no,</p> <p>23 it's not something that we necessarily track.</p> <p>24 Q. Okay. For the promotional items that</p> <p>25 you say are incorporated in the ticket, are any sales</p>
<p style="text-align: right;">Page 54</p> <p>1 that we've considered. We've talked about it, but</p> <p>2 it's not gone beyond speculation.</p> <p>3 Q. Okay. You mentioned before that</p> <p>4 sometimes fans will even purchase multiple tickets</p> <p>5 and come in and out of the park for that.</p> <p>6 A. Yes.</p> <p>7 Q. Do you have any kind of -- have the Reds</p> <p>8 ever acquired any kind of data on that, about how</p> <p>9 frequently that happens?</p> <p>10 A. It all depends. You know, on</p> <p>11 bobbleheads, it happens. I mean, I see it. I sit on</p> <p>12 our terrace and you can see what's going on. I mean,</p> <p>13 I've seen them hand it back out through to a kid who</p> <p>14 runs them somewhere, I don't know where it goes. So,</p> <p>15 you know, there are situations where, you know, folks</p> <p>16 will buy cheaper tickets to get the promotional item,</p> <p>17 and usually those items wind up on an E-bay or a</p> <p>18 third-party resale site.</p> <p>19 Q. Did the Reds ever do any hard numbers</p> <p>20 for that from 2008 to 2010?</p> <p>21 A. Huh-uh, no.</p> <p>22 Q. Okay.</p> <p>23 A. It's hard to quantify.</p> <p>24 Q. In terms of the number of complaints</p> <p>25 that are received, do the Reds -- I assume they keep</p>	<p style="text-align: right;">Page 56</p> <p>1 taxes collected on the tickets?</p> <p>2 A. Huh-uh.</p> <p>3 Q. What about the items that are sold in</p> <p>4 the gift shop that are comparable, do the Reds</p> <p>5 collect and remit sales tax on those items?</p> <p>6 A. That would be our third-party</p> <p>7 concessionaire or merchandise operation and, yeah,</p> <p>8 they collect and remit sales tax.</p> <p>9 MR. TEAFORD: One item I wanted to the</p> <p>10 get in was what I've got as No. 3, it's the</p> <p>11 Cincinnati Reds Baseball Heaven brochure that was</p> <p>12 produced in discovery. I can have him authenticate</p> <p>13 it if you want or if you guys are fine with bringing</p> <p>14 it in.</p> <p>15 MR. DIMENGO: We're fine.</p> <p>16 MR. TEAFORD: Is that okay?</p> <p>17 MR. DIMENGO: Yes.</p> <p>18 MR. TEAFORD: Okay. I don't have any</p> <p>19 more questions.</p> <p>20 EXAMINER YOUNG: Okay. Thank you,</p> <p>21 Mr. Teaford.</p> <p>22 Mr. Healy, before we do redirect, I just</p> <p>23 had a couple of questions.</p> <p>24 THE WITNESS: Sure.</p> <p>25 ---</p>

<p style="text-align: right;">Page 57</p> <p>1 EXAMINATION</p> <p>2 BY EXAMINER YOUNG:</p> <p>3 Q. I'm not sure I'm clear on the ticket</p> <p>4 pricing. I understand that you, you know, look at</p> <p>5 your year long schedule and you assign -- you know,</p> <p>6 there are certainly premium games that you know</p> <p>7 everybody's going to be interested in. But if I'm a</p> <p>8 fan and I come on a fairly regular basis and I buy</p> <p>9 the same seat every time --</p> <p>10 A. Yeah.</p> <p>11 Q. -- for -- you know, let's say I go once</p> <p>12 a month to a game and I buy the same seat,</p> <p>13 potentially I could be paying literally then</p> <p>14 different prices for every one of those games, is</p> <p>15 that correct, because on -- you know, if they're</p> <p>16 playing the --</p> <p>17 A. As a season ticket holder?</p> <p>18 Q. No, no. As an individual --</p> <p>19 A. As an individual.</p> <p>20 Q. -- ticket holder.</p> <p>21 A. Not for every game, but, again, for</p> <p>22 those premium games you would be paying a different</p> <p>23 ticket price.</p> <p>24 Q. So the only difference in the pricing</p> <p>25 for any particular seat, and this is, again, just for</p>	<p style="text-align: right;">Page 59</p> <p>1 post the audit period, I don't recall.</p> <p>2 Q. But that is a possibility as well?</p> <p>3 A. It is a possibility, yes.</p> <p>4 Q. And that's just something that you</p> <p>5 advertise through Ticketmaster or whomever also</p> <p>6 probably?</p> <p>7 A. Reds.com, yeah.</p> <p>8 Q. And you indicate that if you're willing</p> <p>9 to pay -- and I don't recall what the Indians call it</p> <p>10 but it's a special name -- and if you pay that</p> <p>11 additional \$5 premium, then you're absolutely</p> <p>12 guaranteed that you will get the item?</p> <p>13 A. Correct.</p> <p>14 Q. Okay. But as to whether that occurred</p> <p>15 during that period, you're not sure?</p> <p>16 A. I don't recall.</p> <p>17 Q. All right. Thank you.</p> <p>18 EXAMINER YOUNG: Mr. Dimengo.</p> <p>19 ---</p> <p>20 REDIRECT EXAMINATION</p> <p>21 BY MR. DIMENGO:</p> <p>22 Q. Yes. Following up on her question, you</p> <p>23 have premium pricing for some of the tickets, but</p> <p>24 then the tickets are the same price throughout the</p> <p>25 year?</p>
<p style="text-align: right;">Page 58</p> <p>1 the individual games --</p> <p>2 A. Yeah.</p> <p>3 Q. -- is when they've been assigned the</p> <p>4 title of premium game?</p> <p>5 A. Correct.</p> <p>6 Q. Okay. So if I'm coming to a game that's</p> <p>7 a nonpremium game, I'm going to pay the same amount</p> <p>8 for my ticket, whether there's a promotional item</p> <p>9 offered or not?</p> <p>10 A. Correct.</p> <p>11 Q. Okay. Do the Reds offer -- I know the</p> <p>12 Indians do -- when there's a promotional item</p> <p>13 offered, you can pay a premium, I think it's an extra</p> <p>14 \$5 per ticket and you are absolutely guaranteed that</p> <p>15 you may -- that you will get that item and you have</p> <p>16 to go to a special place in the stadium and you pick</p> <p>17 the item up there? Does the Reds do anything like</p> <p>18 that, other than I know you described for the season</p> <p>19 ticket holders --</p> <p>20 A. Yeah.</p> <p>21 Q. -- but just for the general public,</p> <p>22 single ticket?</p> <p>23 A. I mean, we have in the past, yes. As</p> <p>24 for this specific audit period, I don't recall if we</p> <p>25 were doing it during this audit period or if it was</p>	<p style="text-align: right;">Page 60</p> <p>1 A. Uh-huh.</p> <p>2 Q. But you've testified that in some of</p> <p>3 those games you don't anticipate that it's quite the</p> <p>4 same value for the attending fan. So is it fair to</p> <p>5 say then that the promotional item is a supplement to</p> <p>6 that value to add more value to that game?</p> <p>7 A. Yes. That is a fair statement.</p> <p>8 Q. Okay. So even though the price is the</p> <p>9 same, that attending fan for the nonpremium game is</p> <p>10 getting -- even though the price for the ticket is</p> <p>11 the same, is getting a little bit more because of the</p> <p>12 promotional item, and that's the intent?</p> <p>13 A. Correct, yeah. It's used to drive</p> <p>14 ticket sales, yes.</p> <p>15 Q. Okay. And you have used the phrase</p> <p>16 "drive ticket sales" or "incremental ticket sales" a</p> <p>17 few times. Is it fair to say that those regular fans</p> <p>18 that are going to be buying a ticket regardless also</p> <p>19 when they're making their ticket purchases expect</p> <p>20 that they're going to get some promotional items?</p> <p>21 A. Yes. On days where there's a</p> <p>22 promotional item, yes.</p> <p>23 Q. Uh-huh.</p> <p>24 A. Yes.</p> <p>25 Q. So if you normally have 10,000 fans at a</p>

<p style="text-align: right;">Page 61</p> <p>1 game --</p> <p>2 A. Yeah.</p> <p>3 Q. -- and you're going to decide to add</p> <p>4 promotional items to get that up to 25,000, so you</p> <p>5 order 25,000 promotional items, it's fair to say that</p> <p>6 those 10,000 baseline also were expecting that they</p> <p>7 might receive -- that they would receive a</p> <p>8 promotional item as well?</p> <p>9 A. Yeah. I think that's a fair statement.</p> <p>10 Q. On the disclaimer that was referenced --</p> <p>11 and I don't think you testified as to your specific</p> <p>12 knowledge as to the language on a ticket as to</p> <p>13 disclaiming that there's no guarantee that they're</p> <p>14 going to get the promotional item. Is that because</p> <p>15 you -- it's not a precise science, that even though</p> <p>16 you're trying to drive -- you're trying to order</p> <p>17 enough for all the attendees, sometimes you just</p> <p>18 don't get it right?</p> <p>19 A. That's a fair statement.</p> <p>20 Q. Yeah. So that's why there would not be</p> <p>21 a guarantee?</p> <p>22 A. Yeah, yes. I mean, again, I don't</p> <p>23 recall the ticket with complete knowledge, but, yes.</p> <p>24 Q. Okay. And then one of the earlier</p> <p>25 questions from the Attorney General concerned when</p>	<p style="text-align: right;">Page 63</p> <p>1 was the park of the Great American Ballpark and blue</p> <p>2 represents the sky behind it; so it was a four</p> <p>3 bobblehead collector set.</p> <p>4 Q. And would this -- any of these</p> <p>5 bobbleheads then, based upon your earlier testimony,</p> <p>6 presumably they would not be in the team shop?</p> <p>7 A. These would not, that's what I meant,</p> <p>8 these specific are not.</p> <p>9 Q. Okay.</p> <p>10 MR. TEAFORD: Can I ask one follow-up</p> <p>11 question?</p> <p>12 EXAMINER YOUNG: Sure.</p> <p>13 ---</p> <p>14 RECROSS-EXAMINATION</p> <p>15 BY MR. TEAFORD:</p> <p>16 Q. So these are -- the ones from Exhibit 2,</p> <p>17 these are from this year, not from 2008; is that</p> <p>18 right? You said the second of four set for the Jay</p> <p>19 Bruce bobbleheads.</p> <p>20 A. I think this was either 2009 or 2010,</p> <p>21 I'd have to double-check, but I'm pretty certain it</p> <p>22 was during the audit period.</p> <p>23 Q. Okay.</p> <p>24 EXAMINER YOUNG: And I guess I would</p> <p>25 just follow up and ask: Would you agree that the</p>
<p style="text-align: right;">Page 62</p> <p>1 you receive these items in bulk, are you -- whether</p> <p>2 you're conveying them in their same form that you've</p> <p>3 received them. Is it fair to say that the item that</p> <p>4 the attending fan wants, the item of value, the</p> <p>5 bobblehead itself, the player card, those items that</p> <p>6 the fan specifically wants when they're paying for</p> <p>7 their -- purchasing their ticket, that they are</p> <p>8 conveyed to the attending fan in the same form that</p> <p>9 you've received them, that you get the bobblehead,</p> <p>10 you don't modify the bobblehead, and you give them</p> <p>11 the bobblehead in the same form that you've received</p> <p>12 them?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. I have no further -- well, do you</p> <p>15 have any?</p> <p>16 On Exhibit 2, Page 4, there's a</p> <p>17 reference to a Jay Bruce bobblehead giveaway.</p> <p>18 A. Yep.</p> <p>19 Q. And it references the second of four in</p> <p>20 a collectible set.</p> <p>21 A. Yes.</p> <p>22 Q. Does that make it more valuable because</p> <p>23 it's a limited availability?</p> <p>24 A. Yes. This year we had four specific</p> <p>25 bobbles, you can see in the background it actually</p>	<p style="text-align: right;">Page 64</p> <p>1 quality of the items, the promo items, I mean, the</p> <p>2 reason why they're not in the gift shop is because</p> <p>3 they're not the same quality, you know, whether it's</p> <p>4 a T-shirt or -- I mean, that's why they're a</p> <p>5 promotional item, you're buying them in bulk, they're</p> <p>6 cheaper quality, cheaper grade items?</p> <p>7 THE WITNESS: Yeah. I mean, again, a</p> <p>8 little bit of speculation here; is the T-shirt the</p> <p>9 exact as a \$25 T-shirt in the gift shop? No. But I</p> <p>10 would put these bobbleheads up against any bobblehead</p> <p>11 in the team store or, frankly, what you can buy</p> <p>12 online. I mean, these items are of higher quality.</p> <p>13 The baseball cards are of good quality, but, you</p> <p>14 know, the hats and the T-shirts, no, I mean, it's not</p> <p>15 the same quality.</p> <p>16 EXAMINER YOUNG: Okay.</p> <p>17 ---</p> <p>18 FURTHER REDIRECT EXAMINATION</p> <p>19 BY MR. DIMENGO:</p> <p>20 Q. So to follow up on that question: A</p> <p>21 bobblehead that you receive, a Ken Griffey, Junior</p> <p>22 bobblehead that you receive, you would expect that to</p> <p>23 be a higher quality than a -- that you receive as a</p> <p>24 promotional item, would that be of a higher quality</p> <p>25 than the -- what's received in the team shop -- you</p>

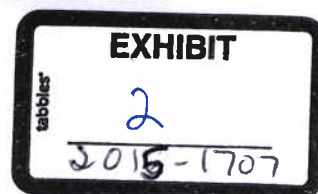
<p style="text-align: right;">Page 65</p> <p>1 can buy in the team shop?</p> <p>2 A. I would say -- I mean, our expectation</p> <p>3 is on these items here, the more premium promotional</p> <p>4 items, that they are of at least the same quality. I</p> <p>5 mean, we do review these things, we make sure we get</p> <p>6 molds in advance, there's a lot of time spent through</p> <p>7 the order process to make sure they look like what we</p> <p>8 want them to look like.</p> <p>9 Q. And would it be fair to say that the</p> <p>10 promotional items, the bobblehead type and the player</p> <p>11 cards are even of a more limited quantity for future</p> <p>12 appreciation purposes as compared to what you could</p> <p>13 buy in a team shop?</p> <p>14 A. Yeah. I think it all depends on the</p> <p>15 specific item, but, you know, we know our fans see</p> <p>16 value in these items. I would venture to guess that</p> <p>17 as time passes, especially if a player achieves a</p> <p>18 certain milestone, Griffey is a great example with</p> <p>19 his 600th home run, you know, there might be more</p> <p>20 perceived value in a Ken Griffey bobblehead than</p> <p>21 someone else, and, you know, being a collector or the</p> <p>22 bearer of that, there probably is some appreciation</p> <p>23 to these items.</p> <p>24 Q. Right. And you might only have 30,000</p> <p>25 Ken Griffey bobbleheads, but you could potentially</p>	<p style="text-align: right;">Page 67</p> <p>1 of the Appellant?</p> <p>2 MR. DIMENGO: We're going to be filing</p> <p>3 briefs --</p> <p>4 EXAMINER YOUNG: Okay.</p> <p>5 MR. DIMENGO: -- post hearing.</p> <p>6 EXAMINER YOUNG: And I will be assigning</p> <p>7 that schedule shortly.</p> <p>8 Mr. Teaford, anything on behalf of the</p> <p>9 Commissioner?</p> <p>10 MR. TEAFORD: No. I don't have</p> <p>11 anything, just to enter in State's Exhibit 3, which</p> <p>12 was stipulated to. It's just the brochure that</p> <p>13 discusses season ticket information.</p> <p>14 EXAMINER YOUNG: Okay. Just so that we</p> <p>15 may keep things clear in briefing, let's call the</p> <p>16 Commissioner's Exhibit 3 actually Exhibit A.</p> <p>17 MR. TEAFORD: A.</p> <p>18 EXAMINER YOUNG: And I'm going to, if</p> <p>19 it's okay with Mr. Teaford, I'm going to remove all</p> <p>20 of these other exhibits --</p> <p>21 MR. TEAFORD: Perfect.</p> <p>22 EXAMINER YOUNG: -- just so that there's</p> <p>23 no confusion on our end. But we are renaming what</p> <p>24 has been previously identified by the Commissioner as</p> <p>25 Exhibit 3, it is now going to be known as Exhibit A.</p>
<p style="text-align: right;">Page 66</p> <p>1 have an unlimited that you'd sell of a different</p> <p>2 nature in the team store?</p> <p>3 A. Sure.</p> <p>4 Q. Right. And that's kind of the point I</p> <p>5 was making with respect to the question.</p> <p>6 A. Uh-huh.</p> <p>7 MR. DIMENGO: I have no further</p> <p>8 questions.</p> <p>9 EXAMINER YOUNG: Thank you very much.</p> <p>10 You may step down.</p> <p>11 THE WITNESS: Okay.</p> <p>12 EXAMINER YOUNG: Thank you for your</p> <p>13 time.</p> <p>14 THE WITNESS: Thank you.</p> <p>15 EXAMINER YOUNG: Anything else on behalf</p> <p>16 of the Appellant? I assume you would like to offer</p> <p>17 into evidence your Exhibits 1 through 3.</p> <p>18 MR. DIMENGO: Yep.</p> <p>19 EXAMINER YOUNG: Any objection,</p> <p>20 Mr. Teaford?</p> <p>21 MR. TEAFORD: No objection.</p> <p>22 EXAMINER YOUNG: Okay. Exhibits 1, 2,</p> <p>23 and 3 are received into evidence.</p> <p>24 (EXHIBITS ADMITTED INTO EVIDENCE.)</p> <p>25 EXAMINER YOUNG: Anything else on behalf</p>	<p style="text-align: right;">Page 68</p> <p>1 As counsel -- I'm sorry -- as counsel stated during</p> <p>2 the hearing, there is no objection to receiving</p> <p>3 Exhibit A as far as the Appellant is concerned; so</p> <p>4 Exhibit A is received into evidence.</p> <p>5 (EXHIBIT ADMITTED INTO EVIDENCE.)</p> <p>6 EXAMINER YOUNG: Okay. So our last</p> <p>7 order of business then is to assign a briefing</p> <p>8 schedule. Initial briefs would be due on January</p> <p>9 31st, and any reply briefs would be due on February</p> <p>10 14th.</p> <p>11 MR. DIMENGO: Simultaneous, Your Honor?</p> <p>12 EXAMINER YOUNG: Yes, yes.</p> <p>13 If there is nothing further, this</p> <p>14 hearing is concluded. Thank you all for coming.</p> <p>15 MR. DIMENGO: Thank you.</p> <p>16 (Thereupon, the hearing was</p> <p>17 concluded at 10:14 a.m.)</p> <p>18 ---</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

CERTIFICATE

I do hereby certify that the foregoing
is a true and correct transcript of the proceedings
taken by me in this matter on Tuesday, December 20,
2016, and carefully compared with my original
stenographic notes.

Carolyn D. Ross, Registered
Professional Reporter and
Notary Public in and for
the State of Ohio.

My commission expires April 3, 2019.
(CDR-82653)





INDY DAY!

SUNDAY, APRIL 11 VS. CUBS

FANS FROM INDY GET
HALF-PRICE TICKETS!

FREE 2011 MAGNETIC SCISSOR-TICKET MACHINE
TO FIRST 20,000 FANS IN ATTENDANCE

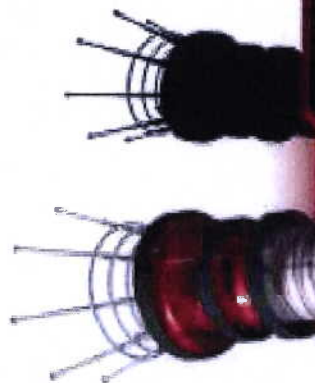
RON LARSEN

reds.com



CALENDAR DAY
Saturday, April 5th
Free to the first 20,000
fans in attendance

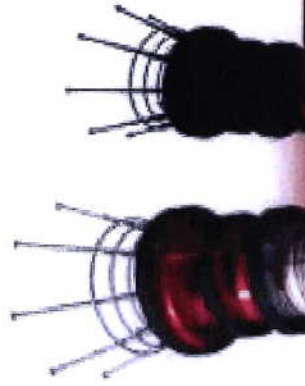




JAY BRUCE BOBBLEHEAD GIVEAWAY

Saturday, July 4 - 1:10
Second of four in collectible set!





JAY BRUCE MESH JERSEY GIVEAWAY

Sunday, August 2 - 1:10

Free to the first 10,000 kids in attendance



Bob Evans
RESTAURANT



MOM'S APPRECIATION DAY GIVEAWAY

Sunday, May 9th - 1:10pm

Reds scarf free to first
10,000 moms



HARANG KIDS GROWTH CHART

SUNDAY



vs.



1:15



vs.

REDS

ROLEN BOBBLEHEAD

SAT., JUNE 12



VOLQUEZ BOBBLEHEAD



VS.



SAT., JULY 18 - 7:10



TURF GROWER GIVEAWAY



TODAY 1:10


PHILLIPS BOBBLEHEAD



TOMORROW


7:10






TAKE HOME BRONSON'S SHIRT

SATURDAY 7:10



vs.





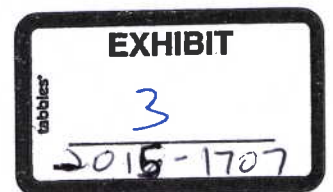
REDS TEAM BASEBALL CARD SET

Sunday, June 27 - 1:10pm

Free to the first 30,000 fans



DATE	DAY	OPPONENT	PROMOTIONAL ITEM	Quantity	VENDOR	Attendance
April 5, 2010	Monday	Cardinals	Magnetic Schedule	40,000	degy	43,067
April 7, 2010	Wednesday	Cardinals	Fleecie	20,000	Associated Premium	26,621
April 9, 2010	Friday	Cubs	T-shirt	20,000	degy	23,279
April 11, 2010	Sunday	Cubs	Magnetic schedule with car magnet	20,000	degy	26,355
April 23, 2010	Friday	Padres	Kroger Calendar	25,000	Original Smith Printing	12,230
April 24, 2010	Saturday	Padres	Great American Ball Park Grass grower	20,000	Right Brain	16,362
April 25, 2010	Sunday	Padres	Eco friendly water bottle	10,000	degy	15,559
May 7, 2010	Friday	Cubs	Ladies Night bag (Dove Chocolate)	10,000	BDA	18,513
May 8, 2010	Saturday	Cubs	Team Photo	40,000	RR Donnelley	23,028
May 9, 2010	Sunday	Cubs	Mother's Day scarf	10,000	Associated Premium	18,758
May 15, 2010	Saturday	Cardinals	Perez Mesh Jersey	30,000	degy	38,685
May 16, 2010	Sunday	Cardinals	Kids mesh BP Jersey	10,000	Associated Premium	25,838
May 26, 2010	Monday	Astros	Pet Waste bag dispenser	5,000	degy	17,419
May 29, 2010	Thursday	Astros	Joey Votto figurine	20,000	Right Brain	37,282
May 30, 2010	Friday	Astros	Skateboard deck	10,000	Right Brain	34,340
June 12, 2010	Saturday	Royals	Scott Rolan Bobblehead	30,000	Impact Direct Marketing	15,559
June 13, 2010	Sunday	Royals	Brandon Philpott Wall graphic	10,000	Associated Premium	11,472
June 26, 2010	Monday	Indians	FSChio Pennant	20,000	Associated Premium	17,419
June 27, 2010	Tuesday	Indians	Set of 2010 baseball cards	40,000	Original Smith Printing	15,498
July 17, 2010	Saturday	Rockies	Chris Sabo bobblehead	30,000	Impact Direct Marketing	40,495
July 18, 2010	Sunday	Rockies	batting helmet	10,000	degy	23,777
July 31, 2010	Saturday	Braves	Fans Choice Homer Bailey Bobblehead	30,000	Impact Direct Marketing	41,253
August 1, 2010	Sunday	Braves	Kids t-shirt (kids vote on design)	10,000	degy	40,653
August 14, 2010	Saturday	Marlins	Garden Gnome	30,000	Right Brain	34,773
August 15, 2010	Sunday	Marlins	Back to School Catcher's backpack	10,000	degy	27,389
August 28, 2010	Saturday	Cubs	Reusable Grocery Bag	20,000	degy	40,625
September 14, 2010	Tuesday	Diamondbacks	Pet ball on rope	10,000	degy	16,167



Date	Day of the Week	Opponent	Other	Promotional Item	Vendor	Attendance
April 10, 2009	Monday		Opening Day	Opening Day poster (4 invoices)	40,000 Moore Wallace	38,882
April 11, 2009	Friday	Pirates		Magnetic Schedule/car magnet (2 dates- April 12 as well)	25,000 on each date Associated Premium	38,882
April 12, 2009	Saturday	Pirates		Kroger Calendar	20,000	22,749
April 13, 2009	Friday	Braves		Team Photo	40,000 Moore Wallace	30,188
April 14, 2009	Saturday	Braves		Fleece Blanket	20,000 Associated Premium	32,045
April 15, 2009	Sunday	Braves		Kids Brandon Phillips baseball glove	10,000 Associated Premium	28,916
April 16, 2009	Monday	Braves		Singles Night t-shirt	20,000 BDA	13,632
May 7, 2009	Thursday	Brewers		Joey Votto Bobblehead	30,000 Four Amigos Trading Co.	40,261
May 9, 2009	Friday	Cardinals	Mother's Day	Mother's Day Tote Bag	10,000 Right Brain	25,833
May 10, 2009	Saturday	Cardinals	Dog Day #1	Doggie Bandannas	5,000 Associated Premium	24,672
May 23, 2009	Saturday	Indians		FS Ohio Hat	10,000 Ganz	34,872
May 24, 2009	Sunday	Indians		Lil Kins (webkinz) Pig	10,000 Ganz	26,355
May 25, 2009	Monday	Indians		Bandanna for pig	10,000 Associated Premium	26,355
June 6, 2009	Saturday	Cubs		Kahn's baseball cards	30,000 Original Smith Printing	39,389
June 7, 2009	Sunday	Cubs		Joey Votto Matted picture (500 signed)	30,000 Toon Art, Inc.	30,352
June 20, 2009	Saturday	White Sox	Civil Rights wkend	Add Mesh Jersey-civil rights	20,000 BDA	35,282
June 21, 2009	Sunday	White Sox	Father's Day	Dad Appreciation Tie in keepsake box	10,000 Associated Premium	29,653
July 4, 2009	Saturday	Cardinals		Jay Bruce Bobblehead	30,000 Four Amigos Trading Co.	36,665
July 18, 2009	Saturday	Brewers		Fans Choice bobblehead- volquez	30,000 Four Amigos Trading Co.	38,996
July 29, 2009	Wednesday	Padres	Ladies Night	Brown/pink hat	10,000 BWM Global	14,140
August 1, 2009	Saturday	Rockies		Framed picture of Stadium	20,000 Toon Art, Inc.	21,815
August 2, 2009	Sunday	Rockies		Bruce Mesh Jersey for kids	10,000 Associated Premium	29,067
August 15, 2009	Saturday	Nationals		Brandon Phillips Bobblehead	30,000 Four Amigos Trading Co.	29,644
August 16, 2009	Sunday	Nationals		Stretch Jersey book covers	10,000 Associated Premium	15,763
August 29, 2009	Saturday	Dodgers		Reusable Grocery Bag	20,000 BDA	23,590
August 30, 2009	Sunday	Dodgers		Build A Bear Monkey	10,000	23,097
September 15, 2009	Tuesday	Astros		Dog Day give-away doggie bowls	10,000	9,096
September 18-20	weekend	Marlins		Goodyear Hat	20,000 BWM Global	14,480

Rainout

Date	Day of Week	Opponent	Other	Promotional Item	Quantity	Vendor	Attendance
April 4, 2008	Friday	Phillies		Magnetic Schedule/Car Magnet	30,000		13,523
April 5, 2008	Saturday	Phillies		Kroger Calendar	20,000		21,430
April 6, 2008	Sunday	Phillies		Magnetic Schedule/Car Magnet	30,000		26,496
April 18, 2008	Friday	Brewers		Singles Night t-shirt	20,000		12,771
April 19, 2008	Saturday	Brewers		Fleece Blanket	20,000		14,657
April 20, 2008	Sunday	Brewers		Aaron Harang Growth Chart	10,000		9,211
May 16, 2008	Friday	Indians		BBC Apron	20,000		29,049
May 17, 2008	Saturday	Indians		Brandon Phillips 30/30 Duel Bobblehead	30,000		38,598
May 18, 2008	Sunday	Indians		Mom's reversible handbag	10,000		30,443
May 31, 2008	Saturday	Braves		Beach Towel	20,000		34,868
June 1, 2008	Sunday	Braves		Kids Floppy Cap	10,000		32,963
June 10, 2008	Tuesday	Cardinals		Joe Nuxhall bronze Statue	30,000		34,241
June 14, 2008	Saturday	Red Sox		Reds Team Flag	20,000		37,829
June 15, 2008	Sunday	Red Sox		Dad's Appreciation safari-style hat	10,000		37,042
June 17, 2008	Tuesday	Dodgers		Ken Griffey Jr. oversized baseball card- 600th	40,000		26,730
July 5, 2008	Saturday	Nationals		Griffey Camo mesh Jersey	20,000		19,311
July 6, 2008	Sunday	Nationals		Griffey Camo mesh Jersey- kids	10,000		26,666
July 18, 2008	Friday	Metts		Gold glove framed print	20,000		30,312
July 19, 2008	Saturday	Metts		FSN Hat- HOF 50th anniversary	20,000		35,319
July 20, 2008	Sunday	Metts		Kids vintage baseball	10,000		27,886
July 26, 2008	Saturday	Rockies		1980's Adam Dunn bobblehead	30,000		32,211
July 27, 2008	Sunday	Rockies		Kids Metal Lunchbox	10,000		25,389
August 9, 2008	Saturday	Astros		Bronson Arroyo designed t-shirt	20,000		23,512
August 10, 2008	Sunday	Astros		Build a Bear Puppy	10,000		25,429
August 16, 2008	Saturday	Cardinals		Day Planner	20,000		27,545
August 17, 2008	Sunday	Cardinals		Kids Backpack	10,000		32,455
August 31, 2008	Sunday	Giants		Kahn's baseball cards	40,000		18,675
September 16, 2008	Tuesday	Cardinals		Tom Browning anniversary bobblehead	30,000		17,046
September 20, 2008	Saturday	Brewers		2008 Team Photo	40,000		11,969

STATE OF OHIO
DEPARTMENT OF TAXATION

In the matter of the appeal before
The Board of Tax Appeals filed by:

NOV 20 2015

The Cincinnati Reds LLC
100 Main St.
Cincinnati, OH 45202-4109

Appellant

B.T.A. Case No. 2015-1707

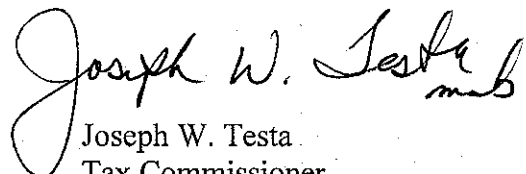
v.

Joseph W. Testa
Tax Commissioner of Ohio

Appellee

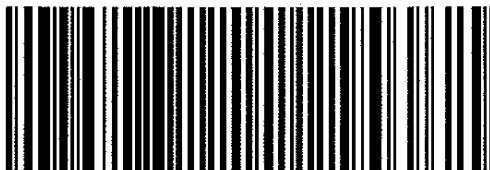
Use Tax

I hereby certify that the papers hereto attached are a complete transcript of the record of the proceedings before the Tax Commissioner of Ohio, together with all evidence, documentary and otherwise, considered in connection with the matter therein described.


Joseph W. Testa
Tax Commissioner

USPS CERTIFIED MAIL

30 E Broad Street
Columbus, OH 43215-3414
tax.ohio.gov



9214 8900 0028 2901 2285 73

**FINAL
DETERMINATION**

The Cincinnati Reds, LLC
100 Main St
Cincinnati, OH 45202-4109

August 06, 2015
Contact ID: 4672330480

RE: Ohio Tax Account #: 97120173
Tax Type: Use
Assessment #: 8110402974
Reporting Period: 12/31/2010 - 12/31/2010

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.

The petitioner operates the Cincinnati Reds professional baseball team in Cincinnati, Ohio. This assessment is the result of the audit of the petitioner's purchases during the periods of January 1, 2008 through December 31, 2010. The petitioner objected to the assessment and filed a petition for reassessment. A hearing was held on the matter. The petitioner's objections will be discussed by subject matter below.

Scoreboard Equipment & Display

During the audit period, the petitioner purchased a multi-million dollar video board display system and installation services from Daktronics and did not pay sales tax to the company. As described in the petitioner's memorandum in support of the petition for reassessment, the system includes a main video board, left field fence display and digital ribbon displays. The main video board is 138 feet wide and 39 feet high and is composed of 80 video display "cabinets" that are welded to the walls of the ballpark to form one display unit. The left field fence display is 153 feet high and is composed of 18 video display cabinets that are attached to the left field fence. The digital ribbon displays are attached to the low walls that run along the first and third base lines in the interior of the ballpark. The ribbon displays are composed of 114 of the video display cabinets.

The petitioner argues that the purchase of the video board display system is not taxable because the transaction represents the installation of real property. Because the video display boards were constructed at the ballpark and permanently affixed to the realty, the petitioner argues that the contract to install the video display boards was a construction contract for the installation of realty. If so, as a construction contract, the contractor, Daktronics, would be the consumer of the materials installed and responsible for paying tax on the materials. This argument is without merit.

R.C. 5701.02 is the section of the Ohio Revised Code that provides for different definitions relating to real property. It begins with the definition of real property itself as including "land itself,

CCAT0001

1 of 7

The Cincinnati Reds, LLC
Use Tax
BTA Case No. 2015-1707

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*** and, unless otherwise specified in this section or section 5701.03 of the Revised Code, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto." R.C. 5701.02(A).

The Revised Code section continues with definitions of other terms related to real property. Three of the definitions, "building," "improvement," and "structure" cover objects that are never considered tangible personal property, even before the component parts are attached to the land. These items are described as "fabrications or constructions" to stress the fact that they formed upon the land itself and not tangible personal property that is merely attached to the land. These items are usually composed of bricks, mortar, beams, cement, boards, etc. Buildings, improvements and structures are constructed upon the realty in which they are situated and have no existence until they are constructed on site.

R.C. 5701.02 also considers tangible personal property that is attached to the land. A "fixture" is defined by R.C. 5701.02(C) as "an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the realty and not the business, if any, conducted by the occupant on the premises." Fixtures exist as tangible personal property until they are delivered and permanently attached to the land. A fixture is an existing article of tangible personal property that may be assembled and affixed to the land or realty.

R.C. 5701.03 is the section of the Ohio Revised Code that describes and defines personal property. Business fixtures retain their status as tangible personal property and are defined by R.C. 5701.03(B) as "tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty." The section includes examples of business fixtures as "machinery, equipment, signs, storage bins and tank, *** and broadcasting, transportation, transmission, and distribution systems ***."

Based upon the above, the video board system at issue is clearly a business fixture. The video boards are composed of separate pieces of tangible personal property, the video display cabinets, that are assembled on site to make the transportation of 180 feet of equipment more efficient. In addition, the video display cabinets match the description of the specific items listed in R.C. 5701.03(B) as perfect examples of business fixtures. The video display system is akin to "equipment," "signs," or a "broadcasting system," all of which are specifically listed in R.C. 5701.03(B) as examples of business fixtures. Therefore, the petitioner's purchases meet the statutory definition of business fixtures and should not be treated as real property.

Despite meeting the statutory definition of "business fixture," the petitioner argues that because the video display boards were constructed at the ballpark and permanently affixed to the realty, they should be considered realty. This argument is not well met. The definition of business fixture includes "permanently attached or affixed to the land or building." The fact that the video display boards were permanently attached to the ballpark does not change the fact that the display boards are business fixtures. The items at issue are pieces of tangible personal property that were assembled at the ballpark for convenience. The video display boards are "signs" or part of a "broadcasting system" that was clearly intended to benefit the business conducted by the Cincinnati Reds on the premises.

The petitioner also relies upon the Ohio Board of Tax Appeals case, *Polaris Amphitheater Concerts, Inc. v. Del. County Bd of Revision*, BTA No. 2004-V-1294; 2007 WL 283010 (Jan. 26, 2007) to support the position that video display boards are real property. In that case, the Board included a quote from an appraiser hired by the Board of Education of the Olentangy Local

Schools that describes the property. In that quote, the appraiser described many of the structures and buildings at issue. The description of one of the buildings included "several video projection screens." The petitioner relies upon this brief section of the property description as support for the argument that video screens and displays are realty. However, when making the determination that the "brick and mortar buildings, improvements and structures" failed to constitute items of personal property, the Board listed the specific items that should be considered real property:

The amphitheater stage, loading docks, attached wings, concession facilities, merchandising facilities, restroom facilities, storage facilities, video production facilities, administrative offices, VIP lounges, outdoor lounges, storage facilities, maintenance facilities, cafeteria, hospitality facility, first aid and public safety facilities, paved parking lots and walkways, and the like all constitute buildings, improvements, and/or structures as defined by R.C. 5701.02, as they are all of "permanent fabrication or construction," affixed to the land, intended as "habitation for people, animals or a shelter for tangible personal property" ***.

The Board did not include video displays in the long list of property that was found to be real property. In fact, the Board concluded that the items were buildings, improvements and structures and made no mention of fixtures at all. Clearly, the Board did not include the video projection screens in its finding that the property located at Polaris Amphitheater was real property.

In addition, the Board was aware of the definition of "business fixture" at R.C. 5701.03(B), and included the definition in the conclusion that the buildings and structures were realty:

The buildings, improvements, and structures before us are borne from permanent fabrication and construction upon the property (e.g., brick and mortar construction 'consisting of foundations, walls, columns, girders, beams, floors, and a roof'), rather than items(s) of personal property (e.g., 'machinery, equipment, signs, storage bins and tanks, ***, broadcasting, transportation, transmission, and distribution systems') that have been otherwise delivered and permanently attached to the land.

The Board made the distinction that signs and broadcasting systems are not permanent fabrications and constructions; therefore the decision of the Board of Tax Appeals in Polaris cannot be used to support the contention that the video display boards at issue here should be treated as real property.

The video display boards meet the statutory definition of "business fixture" contained within R.C. 5701.03(B). As such, they retained their status as tangible personal property when they were affixed to the ballpark. The purchase of the video display board system was properly assessed as the untaxed sale of tangible personal property and the request to remove the transactions from the assessment is denied.

Miscellaneous Services in Scoreboard Equipment and Display Contract

The petitioner argues that the contract to install the scoreboard and equipment included transactions that were exempt from taxation. The petitioner requests that these transactions be removed from the total taxable base of the contract used to calculate the assessment liability.

The contract includes charges for fiber-optic wires and electrical components. The petitioner

argues that these items are "common to all commercial buildings;" therefore the items are not business fixtures but part of the realty. This argument is not well met. The fiber-optic and electrical components are the type needed to run several hundred feet of advanced video display equipment. The fiber-optic wiring and electrical components are not the type of systems that are common to all commercial buildings. The request to remove the transactions from the taxable base of the contract is denied.

The contract includes charges for supervision, engineering design services and engineering certification. The petitioner argues that these services are exempt from taxation and should not be included in the taxable base for the scoreboard contract. This contention is well met. The contract also includes "LES Operator training" and "LES Event Support." The petitioner contends that these services were training services. The request to remove the transactions labelled "LES Operator training" is granted, however, the petitioner has not provided information that describes "LES Event Support" services, or why the transaction was listed separately from the training services. Therefore, the taxable base for the scoreboard contract will be reduced by \$447,480.00

The contract includes charges for the contactor use tax, domestic bonding and permits. The petitioner's request to remove these items from the taxable base of the contract is granted. The taxable base for the scoreboard will be reduced by \$307,513.00.

The contract contains charges for "miscellaneous" repairs and removal of tangible personal property. The petitioner argues that the charges should be removed from the taxable base of the contract because they represent exempt transactions. For the charge labelled "Removal of existing scoreboard" the request to remove the transaction is granted. The taxable base of the contract shall be reduced by \$211,126.00. For the charge labelled "Structural Modifications" the request to remove the transaction is denied because the petitioner has not provided any information to describe the transaction. For the transactions labelled "Relocate Speakers" and "Three-Sided Rotating Ads" the request to remove the transactions is denied because the items are business fixtures and the installation of business fixtures is a taxable transaction. For the final transaction labelled "HVAC for ProFence," the petitioner argues that the charge is for the removal of old HVAC units that were necessary for the old scoreboard. This argument is not well met. The detail of the contract includes transactions labelled "ProFence electrical installation," "ProFence data installation," and "Fireproofing installation @ ProFence." Obviously, "HVAC for ProFence" could quite possibly represent the installation of specialty HVAC units for a business fixture, and not the removal of these items from the old scoreboard. The request to reduce the taxable base of the contract for this transaction is denied.

Based upon the foregoing, the total amount of reductions that will be applied to the taxable base of the scoreboard contract is \$966,119.00 and the assessment calculation will be adjusted to reflect the taxable base of \$7,453,081.00.

Amnesty Program

The petitioner contends that it filed an application to enter the consumer's use tax amnesty program offered by the Ohio Department of Taxation for purchases made prior to January 1, 2009. The petitioner argues that all items included in the assessment that were purchased before that date should be removed from the assessment. This argument is without merit. Because multiple consumer's use tax assessments had been issued against the taxpayer before the amnesty program started, the petitioner did not qualify for the amnesty program. The request to remove all purchases made before January 1, 2009 is denied.

Promotional Items

The petitioner objects to the fact that the assessment contains purchases of promotional items. The petitioner contends that the items were included as part of the ticket price and resold with admission to the games; therefore the purchases were not retail sales per R.C. 5739.01(E). This contention is not well met.

The items in question were not offered to attendees at every game. The ticket prices for admission were identical on days when promotional items were available and on days where promotional items were not distributed. Based upon the information provided by the petitioner, there is no evidence that the promotional items were resold with the admission to the games. The request to remove the purchases from the assessment is denied.

Advertising Materials

The petitioner objects to the fact that the assessment contains purchases of advertising materials. The petitioner contends that the materials are exempt per R.C. 5739.02(B)(35) because the items price and describe the ticket packages for each season. This contention is not well met. R.C. 5739.02(B)(35) provides an exemption for advertising material that prices and describes tangible personal property offered for retail sale. The petitioner is neither offering tangible personal property nor making a retail sale. A sale is defined by R.C. 5739.01(B)(1) as all transactions by which title to tangible personal property is transferred. The Revised Code section goes on to describe services that are treated as sales under R.C. 5739.01(B)(3). The transaction that is priced and described by the petitioner's advertising material, which is admission to a ballpark, is not defined as a retail sale under R.C. 5739.01. The advertising material purchased by the petitioner does not qualify for the exemption provided by R.C. 5739.02(B)(35) and the request to remove the transactions from the assessment is denied.

Scarborough Research

The petitioner objects to the fact that the assessment includes the purchase of marketing research services and reports from Scarborough Research. The petitioner argues that the purchases are exempt from taxation because they are professional services. The petitioner has supplied information to support the argument. The request to remove the transactions from the assessment is granted.

Penalty

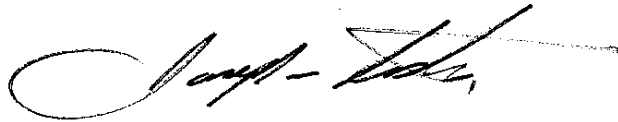
The petitioner requests a remission of the penalty. The request is granted in part and the penalty will be reduced to five percent of the liability.

Therefore, the assessment(s) shall be adjusted as follows:

The Cincinnati Reds, Llc 8110402974 12/31/2010 - 12/31/2010	As Adjusted
Tax Due Amount	\$660,304.29
Pre-Assessment Interest	\$77,068.40
Assessment Penalty on Tax	\$33,015.21
Totals	\$770,387.90
Less Payment(s)/Credit Carry Forward(s)	\$0.00
Balance Due	\$770,387.90

Current records indicate that payment of \$0.00 has been made on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO 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.



Joseph W. Testa
Tax Commissioner



Dear Taxpayer:

Enclosed is the Tax Commissioner's final determination regarding your case. The title is captioned either "Journal Entry" or "Final Determination."

You have the right to appeal this decision to the Board of Tax Appeals. Unlike appeals to the Tax Commissioner, proceedings before the Board of Tax Appeals are very formal, and the Board's procedures must be carefully followed. An appeal to the Board may be done in the following way:

- You have only **sixty (60) days** from the date you received this final determination to appeal.
- If you choose to appeal, you must send the Board of Tax Appeals your original notice of appeal **and** two copies. A copy of the enclosed final determination should also be attached to each notice of appeal. Your notice of appeal must **clearly** state why you are appealing. The law requires you to describe carefully each error which you believe the Tax Commissioner made.
- You must also send the Tax Commissioner a copy of your notice of appeal **and** a copy of the enclosed final determination.
- The Board of Tax Appeals and the Tax Commissioner **must each receive** the notice of appeal and the copy of the final determination within sixty (60) days of your receipt of this final determination. In order to file your appeal on time, you must mail the notices by certified mail, express mail, or authorized delivery service and make sure that the recorded date is within sixty (60) days of your receipt of the enclosed final determination. Ordinary mail delivery is not considered received until each agency actually receives your notice of appeal. Alternatively, you may personally deliver the notices before the sixty (60) days are up to be sure both agencies receive it within the sixty (60) day time limit. Appeals which are received late do not meet the requirements of the law and cannot be considered.

Ohio Revised Code Section 5717.02 is the section of the Code stating the requirements for a proper appeal to the Board of Tax Appeals. You **must** follow all of these **mandatory** requirements in order to appeal. If you don't, you may lose your right to appeal.

The mailing address of the Board of Tax Appeals is:

30 E Broad Street
Columbus, OH 43215-3414

The Tax Commissioner's mailing address is:

30 E Broad Street
Columbus, OH 43215

2007 WL 283010 (Ohio Bd.Tax.App.)

Board of Tax Appeals

State of Ohio

POLARIS AMPHITHEATER CONCERTS, INC., APPELLANT

v.

DELAWARE COUNTY BOARD OF REVISION, THE DELAWARE COUNTY AUDITOR,
AND THE BOARD OF EDUCATION OF THE OLENTANGY LOCAL SCHOOLS, APPELLEES

Case No. 2004-V-1294

January 26, 2007

Appeal Filed February 22, 2007 Ohio Supreme Court

*1 (Real Property Tax)

DECISION AND ORDER

Appearances:

For Appellant

Sleggs, Danzinger & Gill, Co., LPA
Todd W. Sleggs
820 West Superior Ave.
Suite 410
Cleveland, OH 44113

For the County Appellees

Dave Yost
Delaware County Prosecuting Attorney
140 North Sandusky Street
Delaware, OH 43015

For the Appellee BOE

Rich, Crites & Dittmer, LLC
James R. Gorry
300 East Broad Street
Suite 300
Columbus, OH 43215-3452

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by Polaris Amphitheater Concerts, Inc. ("Polaris") from a decision of the Delaware County Board of Revision ("BOR"). In said decision,

the BOR determined the true and taxable values of the subject property for tax year 2003 originally established by the Delaware County Auditor ("auditor") should remain as follows:

Parcel 318-442-02-025-001	TRUE VALUE	TAXABLE VALUE
LAND	\$ 3,666,700	\$1,283,350
BLDG	\$ 5,668,400	\$1,983,940
TOTAL	\$ 9,335,100	\$3,267,290
 Parcel 318-442-02-025-918	 TRUE VALUE	 TAXABLE VALUE
LAND	\$ 3,224,200	\$1,128,470
BLDG	\$ 0	\$ 0
TOTAL	\$ 3,224,200	\$1,128,470
 Parcel 318-442-02-025-000	 TRUE VALUE	 TAXABLE VALUE
LAND	\$ 1,102,300	\$ 385,810
BLDG	\$ 0	\$ 0
TOTAL	\$ 1,102,300	\$ 385,810
 Parcel 318-442-02-025-919	 TRUE VALUE	 TAXABLE VALUE
LAND	\$ 5,688,700	\$1,991,050
BLDG	\$ 1,258,700	\$ 440,550
TOTAL	\$ 6,947,400	\$2,431,600
 Parcel 318-442-02-024-000	 TRUE VALUE	 TAXABLE VALUE
LAND	\$ 117,200	\$ 41,020
BLDG	\$ 8,500	\$ 2,980
TOTAL	\$ 125,700	\$ 44,000
 Grand Totals	 \$20,734,700	 \$7,257,170

Polaris requests that the subject property's improvements be reclassified as personalty and for the remaining land to be valued at \$7,200,000.¹ The Olentangy Local Schools Board of Education ("BOE") requests that the subject property's value remain unchanged as originally determined by the auditor. We now consider this matter upon the notice of appeal, the statutory transcript ("S.T.") certified by the auditor, and the evidence presented at this board's evidentiary hearing ("H.R. I" and "H.R. II").

The subject property is an outdoor amphitheater constructed in 1994 and is located on 90.685 acres² of land located in Delaware County, Ohio. S.T., Ex. 3.

Before this board, Polaris presented the appraisal and testimony of Mr. Robin Lorms, an MAI appraiser, who rendered an opinion of value of \$7,200,000 for the land only. Polaris further presented the testimony of Mr. Bryan A. Ross, a civil engineer employed by Advance Civil Design; Mr. Thomas M. Warner, project engineer and managing partner of Advance Civil Design; and Ms. Michelle Galaida, tax consultant employed by Deloitte & Touche. The BOE presented the testimony of Mr. Sam Koon, an MAI appraiser, who opined a value of \$21,000,000 for the subject's land and improvements.

*2 We begin our review of the evidence by noting that a party who asserts a right to an increase or decrease in the value of real property has the burden to prove its right to the value asserted. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336; *Crow v. Cuyahoga Cty. Bd. of Revision* (1990), 50 Ohio St.3d 55; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318. Consequently, it is incumbent upon an appellant challenging the decision of the board of revision to come forward and offer evidence that demonstrates its right to the value sought. *Cleveland Bd. of Edn.*, supra; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St. 3d 493.

It is not enough, however, to simply come forward with some evidence of value. Neither is it sufficient to grant the requested increase or decrease merely because no evidence is adduced in contradiction to the claim. *Western Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340. In short, there is a burden of persuasion that rests with the appellant to convince this board that the appellant is entitled to the value which it seeks. *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325. Once the appellant presents competent and probative evidence of value, other parties asserting a different value then have the corresponding burden of providing evidence that rebuts appellant's evidence of value. *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493. Accordingly, this board must proceed to examine the available record and to determine value based upon the evidence before it. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120; *Clark v. Glander* (1949), 151 Ohio St. 229. In so doing, we will determine the weight and credibility to be accorded to the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13. We proceed by examining the evidence of the subject's true value as presented by the parties.

When determining value, the Ohio Supreme Court has long held that "the best evidence of 'true value in money' of real property is an actual, recent sale of the property in an arm's-length transaction." *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410. Absent a recent sale, as in the instant matter, true value in money can be calculated by applying any of three alternative methods provided for in Ohio Adm. Code 5703-25-07: 1) the market data approach, which compares recent sales of comparable properties, 2) the income approach, which capitalizes the net income attributable to the property, and 3) the cost approach, which depreciates the improvements to the land and then adds them to the land value.

Polaris argues that the court's decision in *Funtime v. Wilkins*, 105 Ohio St.3d 74, 2004-Ohio-6890, dictates that all improvements situated upon the subject property should be classified as "business fixtures" under R.C. 5701.03(B), and hence, not subject to taxation as real property. Polaris asks this board to value the subject property, in essence, as land only.

*3 The issue before the court in *Funtime* was whether construction contracts relating to the repair and installation of amusement park rides and accessory structures should be excepted from sales tax liability as real property pursuant to R.C. 5739.01(B)(5).³ The court held that the rides and accessory structures were "business fixtures" under R.C. 5701.03(B), and therefore constituted personal property not entitled to the sales and use tax exception. The court analyzed the statutory definitions of real property, building, fixture, improvement, and structure found in R.C. 5701.02, and the definitions of personal property and business fixture found in R.C. 5701.03.

R.C. 5701.02 provides in pertinent part:

“(A) ‘Real property,’ ‘realty,’ and ‘land’ include land itself, *** with all things contained therein, and, unless otherwise specified in this section or section 5701.03 of the Revised Code, all buildings, structures, improvements, and of whatever kind on the land, ***.

“(B)(1) ‘Building’ means a permanent fabrication or construction, attached or affixed to land, consisting of foundations, walls, columns, girders, beams, floors, and a roof, or some combination of these elemental parts, that is intended as a habitation or shelter for people or animals or a shelter for tangible personal property, and that had structural integrity independent of the tangible personal property, if any, it is designed to shelter. ***

“(C) ‘Fixture’ means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the realty and not the business, if any, conducted by the occupant on the premises.

“(D) ‘Improvement’ means with respect to a building or structure, a permanent addition, enlargement, or alteration that, had it been constructed at the same time as the building or structure, would have been considered a part of the building or structure.

“(E) ‘Structure’ means a permanent fabrication or construction, other than a building, that is attached or affixed to land, and that increases or enhances utilization or enjoyment of the land. ‘Structure’ includes, but is not limited to, bridges, trestles, dams, storage silos or agricultural products, fences, and walls.”

R.C. 5701.03 provides in pertinent part:

“(A) ‘Personal property includes every tangible thing that is subject to ownership, whether animate or inanimate, including a business fixture, and that does not constitute real property as defined in section 5701.02 of the Revised Code. ***

“(B) ‘Business fixture’ means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. ‘Business fixture’ includes, but is not limited to, machinery, equipment, signs, storage bins and tanks, whether above or below ground, and broadcasting, transportation, transmission, and distribution systems, whether above or below ground. ‘Business fixture’ also means those portions of buildings, structures, and improvements that are specially designed, constructed, and used for the business conducted in the building, structure, or improvement, including, but not limited to, foundations and supports for machinery and equipment. ‘Business fixture’ does not include fixtures that are common to buildings, including, but not limited to, heating, ventilation, and air conditioning systems primarily used to control the environment for people or animals, tanks, towers, and lines for potable water or water for fire control, electrical and communication lines, and other fixtures that primarily benefit the realty and not the business conducted by the occupant on the premises.”

*4 Counsel for the BOE has filed an expansive brief chronicling the history of case law and legislative enactments relating to the classification of real and personal property. The BOE argues that classification of property is necessarily governed by Section 2, Article XII of the Ohio Constitution, which provides that “[l]and and improvements thereon shall be taxed by uniform rule according to value.”

The statutory transcript certified by the auditor includes “property record cards” for the subject parcels; however, none of the exhibits describe the improvements upon the land. ⁴ S.T. at 3. The BOE’s appraiser, Mr. Koon, has included a foundation sketch of the 46 structures on the subject property. Ex. A, page facing 30. Mr. Koon further describes the improvements as follows: “The subject improvements have been designed for use as a regional, outdoor amphitheater and entertainment complex. The semi-circular amphitheater represents the core structure, around which all other surrounding improvements have been constructed. *** There are two wings which attach to either side of the stage. The west wing consists of a cafeteria and six

fully finished dressing rooms, each with its own full bath. A patio and deck area extends from the west wing, and attaches to a hospitality building, which is essentially a large, open room which is used for small meetings and events. The hospitality building is approximately 900 square feet in area. The east wing consists of administrative offices and the video control room.

"In addition to the above-described improvements, that facility features several maintenance buildings which service the property. These include a pole building and a steel framed maintenance building to the rear of the amphitheater, as well as a metal Quonset-style storage building both to the rear of the amphitheater and on the south side of the parking lot.

"The amphitheater structure exhibits a nearly semi-circular shape and consists primarily of masonry construction. It has a sloping, poured concrete floor, tilt-up concrete panel walls, and poured concrete support columns. The roof consists of a pre-engineered metal truss system under metal decking with a rubber membrane cover. There is a metal panel parapet around the perimeter of the roof which houses several large video projection screens which service the amphitheater's uncovered, rear lawn seating. Additionally, two large video projection screens are mounted on the inside wall of the amphitheater and service the seated area. The amphitheater's lawn area is contained with a wood fence. To the rear of the amphitheater there are eight, (sic) dock-height loading bays which service the stage area from the rear.

"There are two main food concession buildings which are located on either side of the amphitheater. These structures are nearly identical in design and construction quality. They consist of single story, concrete block structures on concrete slab foundations. Each has a gable-style, asphalt shingle roof. These buildings are designed with food sales areas to the front, with food preparation and cool/dry storage rooms to the rear. There is additional office space to the rear of the west concession building. These facilities are heated and cooled via gas-fired heat/electrically-fired HVAC units.

*5 "There are men's/women's restroom facilities located adjacent to each of the main concession buildings. These facilities are contained within one story, concrete block buildings. Additional building improvements include medical/first aid, police, and equipment storage buildings. There is a VIP/covered outdoor bar/lounge area to the east of the amphitheater with separate restroom facilities. The facility's main ticket sales building consists of a one story structure located at the amphitheater's main entrance. There is also an ATM machine and several vending machines adjacent to the front ticket sales building. There are multiple kiosk-type, open, wood frame concession booths and memorabilia sales buildings which line the main entrances to the amphitheater areas.

"The interior finish of the facility's office, administrative, and back-stage video, sound, dining, and dressing rooms primarily consists of a combination of carpeted and/or vinyl flooring with vinyl basing, painted drywall walls, drywall or acoustical panel ceilings with a combination of recessed incandescent and recessed fluorescent lighting.

"Site improvements include two main asphalt-paved parking areas, as well as asphalt paved walkways providing pedestrians with access to both sides of the amphitheater. There is a substantial amount of asphalt paved parking and truck-turnaround areas to the rear of the amphitheater's stage. It is significant to note that a substantial amount of required parking for the amphitheater is not paved and consists of driveways through grassy parking areas." Id. at 30-32.

The threshold issue before us is whether the amphitheater's facilities should be valued as real property by the auditor.

Setting aside the issue of whether the facilities are business fixtures under R.C. 5701.03(B) for the moment, we find the facilities described above are real property under R.C. 5701.02. The amphitheater stage, loading docks, attached wings, concession facilities, merchandising facilities, restroom facilities, storage facilities, video production facilities, administrative offices, VIP

lounges, outdoor lounges, storage facilities, maintenance facilities, cafeteria, hospitality facility, first aid and public safety facilities, paved parking lots and walkways, and the like all constitute buildings, improvements, and/or structures as defined by R.C. 5701.02, as they all are of "permanent fabrication or construction," affixed to the land, intended as "habitation for people, animals or a shelter for tangible personal property" and furthermore "increase the utilization or enjoyment of the land."

R.C. 5701.02(A) defines realty, with the caveat: "unless otherwise specified in this section or section 5701.03 of the Revised Code." We next turn to the issue of whether the buildings, improvements, and/or structures on the subject property should be classified as business fixtures. We find that they should not.

*6 R.C. 5701.03(B) provides "'[b]usiness fixture' means an item of tangible personal property that has become permanently attached or affixed to the land, ***." The evidence before us concerning the nature of the buildings, improvements, and structures fails to demonstrate that any of them are items of personal property that have become permanently attached to the subject property. The buildings, improvements, and structures before us are borne from permanent fabrication and construction upon the property (e.g., brick and mortar construction "consisting of foundations, walls, columns, girders, beams, floors, and a roof"), rather than item(s) of personal property (e.g., "machinery, equipment, signs, storage bins and tanks, ***, broadcasting, transportation, transmission, and distribution systems") that have been otherwise delivered and permanently attached to the land.

It is unnecessary to consider whether or not the buildings, improvements and structures before us "primarily benefit the business conducted" on the property because the brick and mortar buildings, improvements and structures fail to constitute "[an] item of personal property" under R.C. 5701.03(B) in the first instance.

Furthermore, there is no evidence before us that would enable us to conclude that there are any portions of buildings, structures or improvements on the subject property specifically constructed for use in business, such as foundations and supports for machinery and equipment. Within the definition of business fixture, R.C. 5701.03(B) provides: "'Business fixture' also means those portions of buildings, structures, and improvements that are specially designed, constructed, and used for the business conducted in the building, structure, or improvement." Polaris mis-interprets said portion of the definition and argues that because the subject property is put to a commercial use, any and all buildings, any and all structures and any and all improvements "are specially designed, constructed and used in business" and are therefore business fixtures. We disagree.

As the Ohio Supreme Court held in *Funtime*, supra, R.C. 5701.02 and 5701.03 must be interpreted in pari materia. The distinction between real property and personal property does not hinge upon the singular distinction of whether property is used in business or a commercial venture. Rather, only the distinction of whether an item of personal property constitutes a "fixture" under R.C. 5701.02(C) and is therefore defined as real property, or whether an item of personal property constitutes a "business fixture" under R.C. 5701.03(B) and is therefore defined as personal property does hinge upon the determination of whether the item of personal property is used in business.

The limited inclusion of language by the legislature in the definition of business fixture permits foundations and supports specifically designed for machinery, equipment, and the like to be classified as business fixtures.⁵ If we were to accept Polaris' argument, the definition of business fixture would necessarily eclipse all the definitions of real property found in R.C. 5701.02 and require that all buildings, structures and improvements (e.g., car washes, office buildings, retail stores, banks, gas stations, indoor and outdoor arenas) be classified as personal property solely because they are all used for a commercial purpose. We fail to read the statutory enactments and the court's holdings to produce this result.

*7 Based upon the evidence before us, we find that the buildings, structures and improvements situated upon the subject property are properly classified and valued as realty pursuant to Ohio law.

In support of its contention of value, Polaris offered at this board's evidentiary hearing the testimony and written appraisal report of Mr. Robin Lorms. Mr. Lorms has limited his analysis to the valuation of the subject's land only. We are unable to assign any

more than limited weight to the report and opinion of Mr. Lorms because he has failed to value the buildings, improvements and structures on the subject property.

Even if we were to rely upon Mr. Lorms' opinion of value for the subject, we are concerned about his failure to consider the subject's current use in determining the highest and best use for the subject property. Mr. Lorms' highest and best use analysis concludes that "no use of the site would be as profitable as office use." Ex. 13 at 33.

The Appraisal of Real Estate (12th Ed.) defines "highest and best use" as:

"[T]he reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and results in the highest value." Id. at 297.

The text further describes:

"Appraisal theory holds that as long as the value of a property as improved is greater than the value of the site unimproved, the highest and best use is use of the property as improved. Once the value of the vacant land exceeds the value of the improved property, the highest and best use becomes use of the land as though vacant." Id. at 298.

The subject property is improved with a regional outdoor amphitheater. Any analysis of the subject's highest and best use must necessarily include a determination that the value of the vacant land would exceed the value of the property as improved. Before this board, Mr. Lorms acknowledged that he did not endeavor to value the subject property as improved. H.R. I at 170-181. Furthermore, Mr. Lorms testified that he had not formed an opinion that the subject property's value, if vacant, would exceed its valuation as improved. Id.

Based on the evidence before us presented by Polaris, we fail to see any discussion or consideration of the subject's valuation as improved. Furthermore, we are unable to conclude that the value of the subject property as vacant necessarily exceeds the value of the property with its current improvements. Therefore, we find Mr. Lorms' analysis premised upon the highest and best use of the subject as vacant land for redevelopment as office space fails to constitute competent and probative evidence of value.

Polaris additionally provided the testimony of two civil engineers who provided their opinions and documentary evidence concerning how the subject property might be redeveloped and reconfigured as office-space development. Because Polaris has failed to demonstrate that the subject's highest and best use of the property, if vacant, would exceed its value as improved, we must necessarily conclude that evidence concerning possible redevelopment for an alternative use fails to constitute competent and probative evidence of the subject's value on January 1, 2003.

*8 Polaris additionally provided testimony and evidence concerning proposed changes to its personal property tax returns, assuming the buildings, structures and improvements on the subject property were reclassified as business fixtures. As the instant appeal comes to this board through a complaint filed before the BOR pursuant to R.C. 5715.19, our jurisdiction is limited to determining the value of the subject real property as it appears on the 2003 tax list and duplicate. See R.C. 5715.19(A)(1)(d). Furthermore, there is nothing in the record to suggest that Polaris has sought any reassessment for its previously filed personal property tax returns with the Tax Commissioner, and hence, there is no final determination of the Tax Commissioner from which Polaris may appeal.⁶ Therefore, we are without the requisite jurisdiction to assess or otherwise determine the accuracy of Polaris' proposed personal property returns, and further find that the testimony and evidence regarding Polaris' proposed returns fail to constitute competent and probative evidence of value for the subject parcels before us.

The BOE presented the written appraisal report and testimony of Mr. Sam Koon. Mr. Koon's appraisal report was prepared with an "as of" date of January 1, 2003. Ex. A at 62. Mr. Koon ultimately arrived at an opinion of value of \$21,000,000 for the subject property. Ex. B at 62, H.R. II at 15.⁷

Given the special use and nature of the subject's improvements as a regional outdoor amphitheater, Mr. Koon testified that he was unable to identify any comparable sales data or comparable economic rental data from the sale or lease of other amphitheatres. H.R. II at 16, Ex. A at 59-60. Therefore, Mr. Koon's opinion of value is limited to his conclusions derived from his cost approach valuation of the subject.

In his cost approach, Mr. Koon began by arriving at a raw land value by considering five comparable land sales that occurred between August 2000 and July 2005. All of the comparable sales were in close proximity to the subject property, utilizing the Polaris Parkway/I-71 freeway interchange. The price per acre paid for the comparables ranged between \$85,237 and \$151,146 per acre. After making adjustments to the comparable sales, Mr. Koon developed a range of \$95,000 to \$110,000 per acre. Utilizing the lower end of the range of value, Mr. Koon opined to a land value of \$95,000 per acre for the subject, or \$8,600,000 for the subject's 90.687 acres. Ex. A at 39-53.

In estimating the subject's replacement cost (as new), Mr. Koon used the actual construction costs as supplied by the subject's developer. Ex. A at 54. Mr. Koon testified that the subject's special use necessitates reliance upon the actual costs to construct, given information pertaining to the reproduction costs of an outdoor amphitheater is not included in the majority of national cost indexes. Id.

Mr. Koon analyzed the subject's 1994 construction costs, which totaled \$9,629,200 for both the costs of site and building improvements. Relying upon his analysis of trend multipliers for the subject's regional location, Mr. Koon increased the 1994 site and improvement costs by 27%, to arrive at a cost to construct value of \$12,229,084 for January 1, 2003. Id. at 54. Mr. Koon then included the cost to construct additional special use improvements (i.e., outdoor grill and a patio/deck area) made upon the subject property after 1994, again utilizing trend multipliers to determine the costs relevant to 2003. The additional cost of the new special use improvements was estimated to be \$68,296. Id. at 55. Additionally, Mr. Koon included the costs to construct additional improvements (i.e., maintenance building and concession kiosk buildings) made upon the subject property after 1994, utilizing Marshall Valuation Service reproduction cost estimates relevant to 2003. The additional costs of the new improvements were estimated to be \$267,446. Combining the updated cost to construct the original facility, together with additional improvements, Mr. Koon arrived at a value of \$12,600,000 for the hard costs associated with the subject for January 1, 2003. Id. at 55, H.R. II at 14.

*9 Mr. Koon next estimated the soft costs (i.e., architectural, engineering fees, financing costs, various legal and administrative fees, and the like), by utilizing 10% of the total hard cost of the development, or \$1,260,000. Mr. Koon fixed entrepreneurial profit at \$1,100,000. In sum, Mr. Koon's total reproduction cost of the subject property was \$14,960,000. Id. at 56, H.R. II at 14.

To estimate accrued depreciation of the improvements, Mr. Koon assigned an economic life of 40 years to the buildings that consist of masonry construction, assigned an economic life of 35 years for the steel frame and wood pole buildings, and assigned an economic life of 15 years to the remaining smaller wood frame buildings pursuant to the indexes provided by the Marshall Valuation Service. Ex. B at 57. The subject's original improvements were approximately eight years old on tax lien date. Mr. Koon assigned depreciation percentages to the various grades of buildings, based upon their economic life and their age as of January 1, 2003. The sum total of depreciation was estimated at \$2,588,079. Id., H.R. II at 14.

In conclusion, Mr. Koon arrived at a depreciated value for all improvements of \$12,371,921. After adding his valuation of the subject's land (\$8,600,000), Mr. Koon arrived at a final value of \$21,000,000 for the subject property as of January 1, 2003. Ex. B at 58, H.R. II at 15.

As described above, the county auditor's and BOR's valuation of the subject property for January 1, 2003 is \$20,734,700. Mr. Koon's opinion of \$21,000,000 for the subject is nearly the same, and it provides support for such value. In addition, in its brief, the BOE urges this board to leave the auditor's and BOR's value unchanged. BOE brief at 86.

Based upon the record and the evidence before us, we hold that Polaris has not met its burden of demonstrating the subject property's fair market value as of tax lien date. We further find that the evidence of value provided by the BOE is supportive of the original values assigned to the subject property by the auditor and affirmed by the Delaware County Board of Revision. Therefore, we find the value of the subject as of January 1, 2003 to be:

Parcel 318-442-02-025-001	TRUE VALUE	TAXABLE VALUE
LAND	\$ 3,666,700	\$1,283,350
BLDG	\$ 5,668,400	\$1,983,940
TOTAL	\$ 9,335,100	\$3,267,290
 Parcel 318-442-02-025-918	 TRUE VALUE	 TAXABLE VALUE
LAND	\$ 3,224,200	\$1,128,470
BLDG	\$ 0	\$ 0
TOTAL	\$ 3,224,200	\$1,128,470
 Parcel 318-442-02-025-000	 TRUE VALUE	 TAXABLE VALUE
LAND	\$ 1,102,300	\$ 385,810
BLDG	\$ 0	\$ 0
TOTAL	\$ 1,102,300	\$ 385,810
 Parcel 318-442-02-025-919	 TRUE VALUE	 TAXABLE VALUE
LAND	\$ 5,688,700	\$1,991,050
BLDG	\$ 1,258,700	\$ 440,550
TOTAL	\$ 6,947,400	\$2,431,600
 Parcel 318-442-02-024-000	 TRUE VALUE	 TAXABLE VALUE
LAND	\$ 117,200	\$ 41,020
BLDG	\$ 8,500	\$ 2,980
TOTAL	\$ 125,700	\$ 44,000
 Grand Totals	 \$20,734,700	 \$7,257,170

***10** It is the decision and order of the Board of Tax Appeals that the Delaware County Auditor shall list and assess the subject property in conformity with this decision. It is further ordered that this value be carried forward in accordance to law.

Footnotes

- 1 In its brief, Polaris notes that it does not contest the value of the fifth parcel, 318-442-02-024-000. Brief of appellant, at 5, footnote 2.
- 2 The appellee BOE's appraiser describes the property as 90.687 acres. Ex. A at 27. The appellant's appraiser describes the subject to be 83.086 acres; however, said description does not include the fifth parcel, 318-442-02-024-000, containing approximately 8 acres. Ex. 13 at 2.
- 3 R.C. 5739.01(B)(5) excepts from the sales tax provisions the incorporation of tangible personal property into a structure or improvement on and becoming a part of real property.
- 4 Entitled "Parcel Maintenance," the information on the property record cards is minimal. Ohio Adm. Code Section 5703-25-09 requires the auditor to maintain property record cards that describe, among other things, building details and construction features, dimensions, and the like.
- 5 All of the examples cited within the definition of business fixture found in R.C. 5701.03(B) support the conclusion that business fixtures are items of personal property that have been brought upon the land and otherwise affixed (i.e., machinery, equipment, signs, storage bins and tanks; broadcasting, transportation, transmission, and distribution systems).
- 6 R.C. 5717.02 sets forth certain prerequisites necessary to invoke the jurisdiction of this board from a final determination of the Tax Commissioner, providing in pertinent part:

"Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner *** within sixty days after notice of the *** determination *** by the commissioner *** has been given or otherwise evidenced as required by law."
- 7 At hearing before this board, Mr. Koon identified various corrected pages to his appraisal report, marked as Exhibit B.

2007 WL 283010 (Ohio Bd.Tax.App.)

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Baldwin's Ohio Administrative Code Annotated
5703 Taxation Department (Refs & Annos)
Chapter 5703-9. Sales and Use Tax (Refs & Annos)

OAC 5703-9-20

5703-9-20 Sales and use tax; production or fabrication of tangible personal property

Currentness

(A) Production or fabrication of tangible personal property for a consideration is included in the definition of "sale" and "selling," as defined in division (B) of section 5739.01 of the Revised Code, whether all or a portion of the materials are supplied by the person performing the production or fabrication, by the consumer, or by a third party. Any change in the substance or form of tangible personal property, so as to create a new article or substantial change in an existing article of tangible personal property, constitutes "production" or "fabrication."

(B) The price of the transaction is the entire amount charged to the purchaser for such production or fabrication, including charges for the cost of materials, labor, overhead, and profit, pursuant to division (H) of section 5739.01 of the Revised Code and rule 5703-9-26 of the Administrative Code.

(C) A person engaged in production or fabrication of tangible personal property for consideration is deemed to be manufacturing for sale and subject to the provisions of rule 5703-9-21 of the Administrative Code.

Credits

HISTORY: 1991-92 OMR 507 (A), eff. 11-4-91; 1982-83 OMR 499 (R-E), eff. 10-18-82; prior TX-15-07

Notes of Decisions (1)

Rules and appendices are current through June 12, 2015

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Daktronics PST LED video panels combine quickly in the field to form a large-screen video display of any shape or size. Built using large, hand-stackable sections makes PST display ideal for speedy setup and teardown while also minimizing cabling and display weight. The result is a tough, road-ready display line featuring industry-leading image quality perfect for any concert tour, corporate function, award or auto show, festival or sport event.

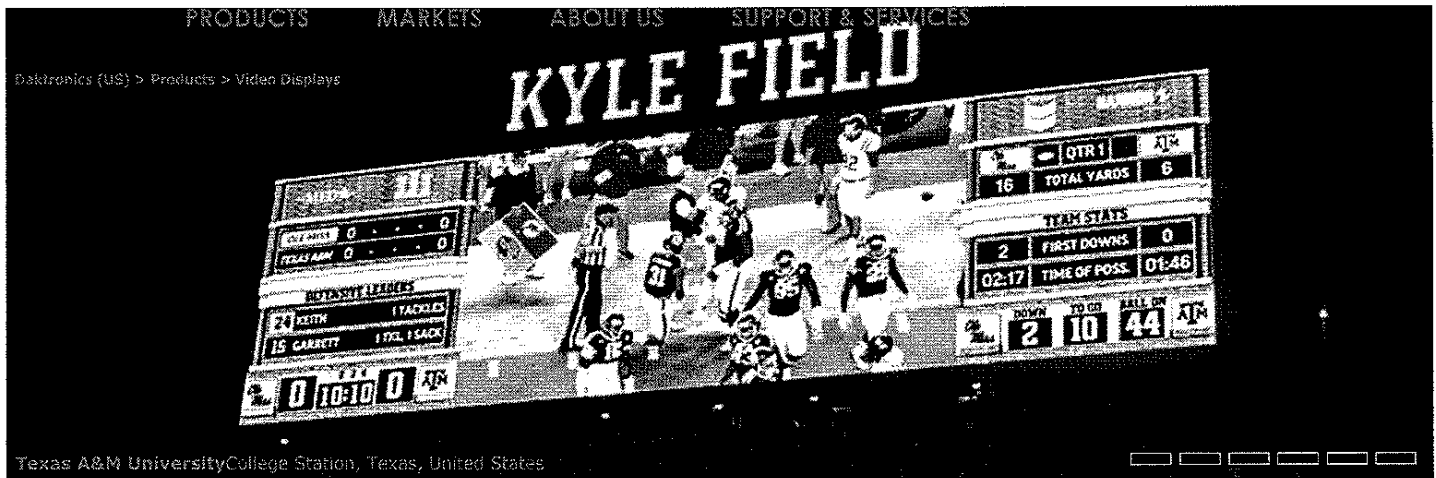
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Daktronics is committed to providing products that are the best in the industry. Every LED display in our Mobile and Modular product line includes:

- 22 bit distributed video processing
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- 4800 hertz LED refresh rate
- 100,000 hour lifetime (at 1/2 brightness)
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See how a modular panel is set up.

Watch our short video of our set up crew assembling a modular panel.



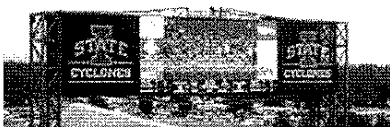
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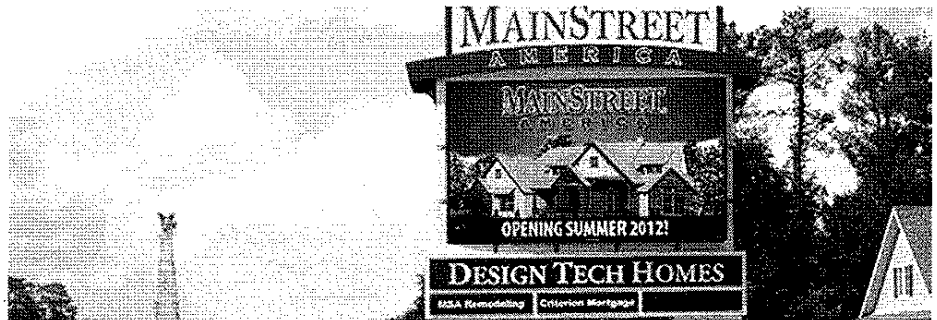
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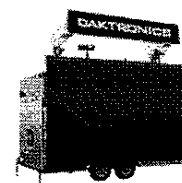
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January 6, 2015

Via Certified Mail

Ohio Department of Taxation
Attention: Dara L. Greene, Attorney
30 E. Broad Street, 23rd Floor
Columbus, Ohio 43215

Re: The Cincinnati Reds, LLC
Memorandum In Support of Petition for Reassessment

Dear Ms. Greene,

Enclosed is a copy referenced Memorandum which was sent to you via email yesterday.

Very truly yours,



Steven A. Dimengo

SAD/tml

Enclosure

AK3:1185954_v1

**STATE OF OHIO
DEPARTMENT OF TAXATION**

January 5, 2015

In Re:

The Cincinnati Reds, LLC

) Use Tax
) Assessment No. 8110402974
)
)
) Account No. 97120173
)
)

MEMORANDUM IN SUPPORT OF PETITION FOR REASSESSMENT

I. INTRODUCTION

The Cincinnati Reds, LLC contracted for the purchase and installation of Daktronics, Inc. massive video boards at Great American Ball Park, as described more fully below. The Reds have authorized the undersigned, retained by Daktronics, to represent it with respect to the video board project. This Memorandum in Support only addresses Transaction ID 6613307, described as "*Scoreboard Equipment / Display (Daktronics)*." The other objections raised by the Reds are addressed separately.

Business fixtures are items of tangible personal property attached to real property that primarily benefit the underlying business. A threshold element to be classified as a business fixture is that the property be a distinct item of tangible personal property brought to the site and attached, rather than property fabricated at the site and incorporated into land or a building in such a manner so as to lose its identity as personal property. Such permanent incorporation occurs where the property at issue cannot be removed without damaging the realty or itself. Accordingly, permanent improvements fabricated at the site, incorporated into a building such as the Ball Park, and forming fundamental components thereof are not business fixtures.

Only when the property is a distinct item of tangible personal property, must the benefit to the real property be weighed against the benefit to the business operated on the premises. Classifying property as a business fixture requires more than a simple business purpose for the property. Otherwise, essentially all property used in business would constitute a business fixture. The fact the item of property have utility to a subsequent occupant of the premises operating a different business demonstrates it primarily benefits the realty, rather than any particular business.

In this case, the gigantic video boards installed at the Ball Park were fabricated at the site from hundreds of video display cabinets and countless other component parts. They were incorporated into the Ball Park, becoming integral parts of the building's walls and façade. The video display cabinets are not removable, as this would require grinding off welding or detaching the cabinets from permanent concrete anchors, which would effectively destroy the individual video displays. Thus, it is impossible to relocate the video boards to a new location if the Reds moved to a new stadium.

The only aspect of this project specifically benefitting the Reds' business is the software used to control the images displayed on the video boards. The video boards are no different than those installed by Daktronics for other businesses, such as malls, stock exchanges, airports, banks, retailers (e.g., Time Square displays), casinos, theaters, and entertainment venues (except the software is tailored for a professional baseball team). In fact, another occupant of the Ball Park, whether used for a different sport, as a concert / entertainment venue, movie theatre, or for holding large public or private gatherings, would use the same video boards by simply changing the software.

As explained herein, the video boards are not business fixtures because they do not constitute distinct items of tangible personal property, but are comprised of hundreds of video displays incorporated into the Ball Park. Further, video display screens have been recognized as real property when permanently incorporated into a building or structure. In *Polaris, infra*, the Board of Tax Appeals held that an amphitheater structure, including the multiple video display screens permanently attached thereto, was real property.

II. STATEMENT OF FACTS

A. Background

In 2009, The Cincinnati Reds, LLC (the "Reds") retained Sony, as the general contractor, and Daktronics, Inc., as the subcontractor, to design and install new video boards (the "Video Boards") at Great American Ball Park (the "Ball Park") in Cincinnati.¹ Only the price related to Daktronics' portion of the project is at issue (\$8,419,200).²

Of the total for the Daktronics portion, the price of the following separately-stated components, totaling \$7,693,192, are in dispute:³

- Main video board - \$2,591,474
- Left field fence display - \$549,007⁴
- Digital ribbon displays - \$1,539,770
- Delivery and installation - \$616,975

¹ See Exhibit A for photographs of the Video Boards.

² Transaction ID 6613307 in the Audit Workpapers. Sony's total \$13.3 million sale price to the Reds consisted of two components: (1) \$8,419,200 for installing the Video Boards (i.e., Daktronics' portion); and (2) \$4,891,359 for high-definition video cameras and production equipment (i.e., Sony's portion). Only the Daktronics' portion was assessed tax since Sony collected and remitted approximately \$289,000 of tax on the high-definition video cameras and production equipment which, unlike the Video Board, are undisputedly distinct items of tangible personal property sold to the Reds.

³ See Exhibit B for a more detailed breakdown of the price of the various components of the project, as set forth on the Contract Scoreboard Price Sheet. The Contract Scoreboard Price Sheet has been redacted to remove proprietary information used in calculating the price of each component. Further, the actual price Sony charged the Reds (\$8,419,200) reflects an approximate 5% reduction from the total reflected on the Contract Scoreboard Price Sheet (\$8,861,700). The prices herein have been reduced accordingly, as shown on Exhibit B.

The Reds concede the following components of the assessed transaction are taxable: (1) Scoreboard / message center control equipment (\$260,585); (2) software (\$329,375); (3) spare parts (\$91,712); and (4) channel letter "C" with LED lights (\$44,336).

⁴ "Wide Vide - OOTE" refers to the left field fence display.

- Warranty and maintenance -- \$395,460
 - Fiber-Optic Wires / Electrical - \$426,649
 - Management / Professional Services - \$575,330⁵
 - Bonding, Tax and Permits - \$307,513
-
- Miscellaneous nontaxable components - \$691,014⁶

Each Video Board is comprised of numerous individual video cabinets configured and fabricated at the Ball Park to act in unison as a single video display. The individual cabinets are generally 8' x 8', with custom-sized cabinets used as necessary based upon the video board's dimensions. The Video Boards are the first three items above, as described more fully below.⁷

1. Main Video Board

The main Video Board above the left field stands is 138 feet wide by 39 feet high and comprised of 80 video display cabinets. Each cabinet is welded to the Ball Park's beams and forms part of the wall above the stands shielding the patrons and field from wind and other elements. Due to safety issues, the cabinets must be installed pursuant to designs stamped by a professional engineer (i.e., PE stamped) showing that they can withstand the Cincinnati climate (e.g., snow and wind loads).

2. Left Field Fence Display

The 153 foot Video Board installed within the left field fence is comprised of 18 video display cabinets. The left field fence is comprised of concrete with ply wood covered by padding. There is an enclosed area between the fence and the stands used as a walkway for Ball Park staff and to run electrical and other wires throughout the Ball Park. Each video display cabinet is incorporated into the fence using anchors embedded into the concrete.

3. Digital Ribbon Displays

Digital ribbon displays are installed along the first and third base lines, and left field second deck, totaling 630 linear feet. The ribbon displays are comprised of 114 video display cabinets. The cabinets are mounted to the front of the stands using anchors embedded into the concrete, thereby permanently becoming part of the Ball Park's façade.

B. Audit

The Ohio Department of Taxation (the "Department") audited the Reds for sales / use tax and determined the Video Boards were business fixtures, rather than real property improvements. The Reds were assessed tax (\$547,249), pre-assessment interest (\$63,424), and penalties (\$81,926).

⁵ Includes: (1) installation supervision (\$224,162); (2) project management / engineering / design services and professional engineering certifications (\$177,204); and (3) LES Operating Training and LES Event Support (\$174,964).

⁶ Includes: (1) removal of existing boards (\$211,126); (2) Structural modifications (\$184,735); (3) Relocate speakers (\$91,206); (4) HVAC removal (\$39,269); and (5) three-sided rotating ads (\$164,678).

⁷ See Exhibit C (project design sheets).

C. Daktronics Refund Claim

Daktronics treated the Video Boards as real property improvements and paid use tax totaling \$165,156 on its material purchases. On June 13, 2013, Daktronics filed a protective refund claim to recover the tax paid. This refund claim was initially denied, but appealed to the Department's Office of Chief Counsel, which has not set a hearing date.

III. LAW AND ARGUMENT

This dispute involves whether the Video Boards are real property improvements, consistent with Daktronics' reporting of the transaction (rather than business fixtures taxable on the final sale price to the Reds).⁸

A. Real Property vs. Business Fixture

In 1992, the Ohio General Assembly statutorily defined "business fixture" which incorporates the traditional appropriation-to-use test articulated by the Ohio Supreme Court in *Teaff v. Hewitt*⁹ and developed for over a century.¹⁰

*(B) "Business fixture" means [1] an item of tangible personal property [2] that has become permanently attached or affixed to the land or to a building, structure, or improvement, and [3] that primarily benefits the business conducted by the occupant on the premises and not the realty.*¹¹

On the other hand, real property includes land, buildings, structures, improvements, and fixtures.¹² The following definitions of "building" and "improvement" are relevant in this case:

(B) "Building" means a permanent fabrication or construction, attached or affixed to land, consisting of foundations, walls, columns, girders, beams, floors, and a roof, or some combination of those elemental parts, that is intended as a habitation or shelter for people or animals or a shelter for tangible personal property, and that has structural integrity independent of the tangible personal property, if any, it is designed to shelter.

* * *

*(D) "Improvement" means, with respect to a building or structure, a permanent addition, enlargement, or alteration that, had it been constructed at the same time as the building or structure, would have been considered a part of the building or structure.*¹³

⁸ R.C. 5739.01(B)(5).

⁹ 1 Ohio St. 511 (1853).

¹⁰ *Furtime v. Wilkins*, 105 Ohio St.3d 74 (2004).

¹¹ R.C. 5701.03(B).

¹² R.C. 5701.02(A).

¹³ R.C. 5701.02. The remaining components of real property are defined as follows:

(C) "Fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the realty and not the business, if any, conducted by the occupant on the premises.

* * *

In determining whether property is a "business fixture," one first must determine that the property at issue is "an item of tangible personal property."¹⁴ Otherwise, without this critical threshold element, nearly all buildings, structures, and improvements used for commercial purposes would constitute a business fixture – certainly, the amphitheater structure in *Polaris* and the Ball Park in this case would be business fixtures if the only inquiry was whether the property benefitted the business operated on the land. To avoid this absurd result, property that is "borne from permanent fabrication" at the site and whose removal would cause harm to the real property, or itself, is incorporated into the real property in such a manner that it loses its character as personal property, regardless of any benefit to the business operated on the property.¹⁵

1. *The Video Boards are permanent improvements to the Ball Park which lost their separate identity upon installation and have become part of the building (or structure), properly classified as real property upon their installation.*

The Ball Park is a building, as it is a permanent fabrication on the land comprised of a foundation, walls, columns, girders, and floor, intended as shelter for people (i.e., baseball players and fans) and tangible personal property (i.e., the Reds' property, such as furniture and merchandise, and other tangible personal property kept at the Ball Park).¹⁶ This is true despite the specific benefit the Ball Park itself provides to the Reds. The Video Boards are "improvements" to the Ball Park since they are "a permanent addition, enlargement, or alteration that, had it been constructed at the same time as the building or structure, would have been considered part of the building or structure."¹⁷

Daktronics constructed the Video Boards from hundreds of video display cabinets and countless other component parts used to permanently incorporate each cabinet into the Ball Park. In the case of the main Video Board, the video display cabinets were welded to the Ball Park's beams above the left field stands. For the left field fence display and ribbon displays, the video display cabinets were incorporated into the walls using anchors embedded into the concrete becoming part of the Ball Park's walls and facade.

The original video boards, also funded by the Reds, became permanent additions to the Ball Park pursuant to the terms of the lease between the Reds and Hamilton County. This further reflects the intent that the Video Boards would have been part of the building had they been constructed at the same time as the Ball Park.

(E) "Structure" means a permanent fabrication or construction, other than a building, that is attached or affixed to land, and that increases or enhances utilization or enjoyment of the land. "Structure" includes, but is not limited to, bridges, trestles, dams, storage silos for agricultural products, fences, and walls."

¹⁴ *Polaris Amphitheater Concerts, Inc. v. Del. County Bd. of Revision*, Ohio BTA Case No. 2004-V-1294 (Jan. 26, 2007); *Heidman Inc. v. Limbach*, BTA Case No. 90-P-1519 (Mar. 12, 1993); and *Post-Browning Inc. v. Limbach*, BTA Case No. 88-H-756 (Dec. 20, 1991).

¹⁵ *Id.*; see also *Inverness Club v. Wilkins*, Ohio BTA Case No. 2004-R-338 (May 11, 2007) (golf course renovations were real property because they were "more akin to permanent fabrication and construction to property rather than personal property that has become permanently attached to the land.").

¹⁶ At a minimum, the Ball Park is clearly a structure per *Polaris*.

¹⁷ R.C. 5701.02(D).

- (a) Permanent improvements fabricated at the site that cannot be removed and relocated to another business location are not business fixtures.

In 1992, Ohio enacted the specific "*business fixture*" definition for tax purposes to clarify an inconsistent area of law in response to a line of cases whereby certain structures were classified as real property despite being removable / temporary and useful to only one particular type of business.¹⁸ In *Green Circle Growers, Inc.*, greenhouses were held to be real property because they constituted "*structures*," even though the greenhouses were "*disassembled and stored*" in the summer (i.e., removable without damaging the real property or themselves). To avoid this result, the Ohio General Assembly reinstated the appropriation-to-use test "*for determining whether a structure is real or personal property.*"¹⁹

The legislative history concerning the law change states:

Definitions and recent court interpretations

The act changes the law as it recently has been interpreted by the Ohio Supreme Court. Before the recent rulings, when considering a question of whether property attached to land was real or personal property, the Court generally asked whether the property primarily benefitted the land or the business on the land. In addition to having to meet other standards, property that primarily benefitted the land was thought to be real property, and property that primarily benefitted the business was thought to be personal property. See Zangerle v. Standard Oil Co. ... In recent sales tax cases, however, the Court has differently interpreted the statutory definition of "real property" ... which states that any property attached to land is real property unless otherwise specified. See Green Circle Growers, Inc...., Rotek, Inc...., and Thomas Steel Strip Corp.... These cases did not acknowledge as relevant in sales tax cases the Standard Oil and other property tax cases that had held that even though personal property became attached to the land, if it primarily benefitted the owner's business it was not an improvement on land...

The act's definition of a "business fixture" codifies the earlier standard [set forth in Standard Oil]...²⁰

Accordingly, the law merely eliminated the emerging principle that all structures were real property, regardless of use or the ability to remove such structures. Further, the General Assembly intended: (1) other standards to apply in classifying property besides simply whether property benefits the business conducted on the premises, including whether the property is incorporated into real property such that its removal would cause harm to the real property to which it is incorporated or the property itself (versus a distinct item of tangible personal property that is merely permanently attached and can be removed without harm); and (2) the principles set

¹⁸ See e.g. *Green Circle Growers, Inc. v. Lorain Cty. Bd. of Revision*, 35 Ohio St.3d 38 (1988); and *Rotek v. Limbach*, 50 Ohio St.3d 81 (1990).

¹⁹ *Funtime*, at 80 ("Although we previously abandoned any consideration of the appropriation-to-use test set forth in *Teaff*... for classifying property, the General Assembly has reinstated that test for determining whether a structure is real or personal property.").

²⁰ 1992 Sub. S.B. 272, Ohio Legislative Commission Summary (emphasis added) (attached as Exhibit D).

forth in *Standard Oil Co.*²¹ to be incorporated into the statutory definitions of real and personal property.

- (b) Property permanently fabricated at the site so as to be incorporated into real property, which cannot be removed without damaging the realty or property itself, is real property regardless of any specific business purpose.

Property permanently incorporated into real property, such that it has no independent physical existence separate from the realty and whose removal would cause harm, is not a business fixture, even when such improvements are specifically designed for, or associated with, the business conducted on the property.²² As explained in *Polaris*, a specific business purpose is irrelevant when property is incorporated into real property as a permanent fabricated/constructed improvement.

*[T]he nature of the buildings, improvements, and structures fails to demonstrate that any of them are items of personal property that have become permanently attached to the subject property. The buildings, improvements, and structures before us are borne from permanent fabrication and construction upon the property (e.g., brick and mortar construction consisting of foundations, walls, columns, girders, beams, floors, and a roof), rather than items of personal property (e.g., machinery, equipment, signs, storage bins, and tanks, ***, broadcasting, transportation, transmission, and distribution systems) that have been otherwise delivered and permanently attached to the land.*

It is unnecessary to consider whether or not the buildings, improvements and structures before us "primarily benefit the business conducted" on the property because the brick and mortar buildings, improvements and structures fail to constitute an item of tangible personal property ... in the first instance.

Likewise, in *Inverness Club*, golf course improvements were made specifically for the business conducted on the premises to modernize the course by improving playability and drainage, and change the difficulty level. Even though related solely to the business conducted on the property, the Board of Tax Appeals correctly found the bunkers and tee boxes were not business fixtures since they were incorporated into the land, not merely permanently attached thereto.

*These are not fixtures that can be readily removed and transported and installed somewhere else, and their removal would cause significant injury to the land itself. These changes to the land in renovating the golf course have no physical existence separate and apart from the land itself. Therefore, like in *Polaris* [which involved buildings and structures on the land], it is unnecessary to consider whether or not the renovations "primarily benefit the business conducted" on the property because these items fail to constitute an item of personal property ... in the first instance.*²³

²¹ *Zangerle v. Standard Oil Co. of Ohio*, 144 Ohio St. 506, 514 (1945).

²² *Polaris. Inverness Club v. Wilkins*, Ohio BTA Case No. 2004-R-338 (May 11, 2007). *SSN II Ltd. v. Warren Cty. Bd of Rev.*, 2013-Ohio-1112 (12th Dist. Ct. of App.) (golf course features and driving range canopy held to be real property).

²³ *Inverness Club*.

Therefore, under Ohio law, property that is incorporated into a building or structure loses any characterization as personal property, regardless of its business purpose. *Inverness* emphasizes that the ability to remove the property and install the property elsewhere are significant factors in determining whether property has lost its character as personal property in the first instance.

For example, the Board of Tax Appeals has found that vault doors, safety deposit boxes, teller cabinets, and countertops installed at a bank, as well as a rainforest room and large aquariums installed in McDonald's restaurants, were real property since they were incorporated into the underlying building.²⁴ Further, in discussing concession areas, restaurants, etc. constructed at the Richfield Coliseum, the Board of Tax Appeals stated:

*These items were annexed solidly to the building by concrete, mortar, nails, and bolts. It is a preposterous notion to say that they were not incorporated into the structure. The items became walls and doors and counters.*²⁵

Therefore, improvements borne from permanent fabrication, whose removal would cause significant damage to the realty or the real property itself, become fully incorporated into real property and do not constitute an item of personal property. The common characteristic of an improvement found to be real property is that it becomes a fundamental part of the building, structure, or land – that is, floors, walls, rooms, doors, fences, and lawns are all core components of real property, regardless of their purpose.

- (c) The Video Boards, comprised of hundreds of video display cabinets and countless component parts, are permanent fabrications fully incorporated into the Ball Park and, thus, do not constitute an item of personal property.

The statutory “business fixture” definition was tested in *Funtime* where roller coasters and amusement rides, which were not incorporated into the realty and whose removal would not harm the realty or the rides themselves, were found to be business fixtures. However, unlike the Video Boards at issue here, which will never and could never be relocated, roller coasters and amusement rides are often relocated to different amusement parks.²⁶

The reinstatement of the appropriation-to-use test did not, however, supersede the well-established principle that property permanently incorporated into a building or the land, and whose removal would cause harm, becomes real property.²⁷

To determine the degree of annexation which will convert what was once a chattel into part and parcel of the real property to which it is attached, is a matter of much difficulty.... [A]s a general rule to give it such character [as real property]

²⁴ *Heidman Inc. and Post-Browning Inc. Ameritrust Co., N.A. v. Limbach*, BTA Case No. 88-G-893 (May 22, 1992).

²⁵ *Ohio Sports Center, Inc. v. Lindley*, BTA Case No. 77-C-53 (May 3, 1979) (emphasis added).

²⁶ See e.g., Brady MacDonald, *California's Great American amusement park losing another roller coaster*, Los Angeles Times, Jan. 28, 2011 (“The Stealth flying coaster was removed the next year and relocated to Carowinds in North Carolina. * * * Invertigo will be relocated to an as-yet-undisclosed sister park in the Cedar Fair amusement park chain...”) (available at: <http://articles.latimes.com/2011/jan/28/news/la-trb-great-america-coaster-01201128>); and Jay Fitzgerald, *Engineering a relocated roller coaster*, Boston Globe, May 21, 2012 (“Built early last decade for a California park, its relocation and reassembly have presented a series of engineering challenges ...”) (available at:

http://www.boston.com/business/articles/2012/05/21/the_ups_and_downs_of_a_roller_coaster_installation/).

²⁷ *Zangerle v. Standard Oil Co. of Ohio*, 144 Ohio St. 506, 514 (1945).

*it must be so attached that it loses its identity as chattel or that it cannot be removed without injury to itself or to the freehold...*²⁸

Following the principles in *Standard Oil Co.*, the Board of Tax Appeals determined that large pumps, manufacturing equipment, and boilers were personal property because they were “installed on the premises solely for use in the manufacturing operations carried on ... at this plant...” and “readily removable” from the property if a different business were conducted thereon.²⁹ A significant inquiry in characterizing property as a business fixture is whether the business would, or could, take the property if it relocated its operations to a new location.³⁰

The Video Boards at issue are not removable structures useful to only a single industry, such as the property at issue in *Funtime* or *Green Circle Growers, Inc.* Rather, this case involves the construction of specific elements of a building, not a standalone, removable structure.

The Video Boards were fabricated at the Ball Park from hundreds of video display cabinets and countless other component parts, mostly taken from Daktronics’ inventory, which were welded into the Ball Park’s structure or actually constructed into the Ball Park’s walls or façade. The installation is similar to installing dry wall, with rows of cabinets being permanently attached to studs / supports to form a seamless wall partially enclosing the Ball Park. Removing the main Video Board and left field fence Video Board would leave large voids in the Ball Park’s walls above the stands and in left field, thereby affecting the utility in shielding the patrons and field from wind and other elements, and dividing areas of the Ball Park.

More importantly, not only would removal harm the Ball Park, but removing the hundreds of video display cabinets would render them worthless. Removing the main Video Board would require grinding off the welding and unfastening the cabinets. Removing the left field fence display would require partial disassembly of the wall and severing the permanent concrete anchors. Removing the digital ribbon displays would require severing the permanent concrete anchors and unfastening the cabinets. Due to the nature of the video display cabinets, removal would damage the cabinets such that they would never function properly, leaving them worthless.³¹ Accordingly, removal for use at another location is simply not a practical or cost effective option, similar to removal of the Ball Park’s parking lot for use at another location.

The Video Boards are not akin to manufacturing equipment, or amusement rides for that matter, which are items of tangible personal property that can be disconnected, moved, and reinstalled at another location if the business were relocated. Further, due to significant technological advancements, the Video Boards are unlike previous generation scoreboards that were large, freestanding items of property and “designed for facile removal.”³² Instead, the Video Boards are complex arrangements of hundreds of components functioning together forming fundamental components of the Ball Park.

²⁸ *Id.*

²⁹ *Diamond Alkali Co. v. Lake Cty. Bd. of Revision*, 98 N.E.2d 95 (Bd. of Tax Apps. 1951).

³⁰ *Ameritrust Co., N.A.*, (“when Ameritrust abandons a branch site the counters and cabinets stay with the building because 50% of the counter would be destroyed when trying to move it.”). *Buehler Food Market, Inc. v. Tracy*, BTA Case No. 96-T-643 (July 11, 1997) (conveyor system permanently attached to the building was real property where “removal would cause damage to the conveyor system, if not the building itself.”).

³¹ *Ameritrust Co., N.A.*,

³² *Ohio Sports Center, Inc. v. Lindley*, BTA Case No. 77-C-53 (May 3, 1979).

The baseball field is undisputedly real property. It is incorporated into the land, even though individual strips of sod are laid down together to form the field, and the field may be resodded many times during the Ball Parks' life.³³ Just as the field is a compilation of sod assembled together to form part of the Ball Park, the Video Boards are compilations of hundreds of video display cabinets assembled at the Ball Park becoming part thereof. One strip of sod has minimal utility itself, only becoming useful after being combined together in a manner specifically designed for the particular business / sport being conducted on the property. Certainly, the individual strips of sod do not constitute "*an item of tangible personal property*" after incorporated into the ground. Likewise, a single video display cabinet has minimal utility alone, but becomes useful to the Reds' business only when operating in unison with hundreds of parts and controlled by specialized software.

Recognizing the permanent nature of video displays, the Board of Tax Appeals in *Polaris* found the amphitheater structure, including several video screens attached thereto, to be real property.

The amphitheater structure exhibits a nearly semi-circular shape and consists primarily of masonry construction. It has a sloping, poured concrete floor, tilt-up concrete panel walls, and poured support columns. The roof consists of a pre-engineered metal truss system under metal decking with a rubber membrane cover. There is a metal panel parapet around the perimeter of the roof which houses several large video projection screens which service the amphitheater's uncovered, rear lawn seating. Additionally, two large video projection screens are mounted on the inside wall of the amphitheater and service the seating area.

The Board of Tax Appeals made no exceptions for the video screens in finding the amphitheater structure was real property. Therefore, *Polaris* supports that permanent video displays incorporated into entertainment venues, such as an amphitheater or stadium, become real property. Such a result recognizes that the video displays are not removable, but would actually be used by any occupant of the venue.

In summary, the Video Boards are permanently incorporated into the Ball Park's walls and façade and, if removed, would severely diminish the utility thereof. Significantly, the Video Boards could not be removed and relocated to different property, as the removal process would damage the hundreds of video display cabinets rendering them worthless. Therefore, based upon *Standard Oil Co.* and *Polaris*, the Video Boards are not business fixtures because they are not distinct items of personal property, but rather permanent fabrications borne from many component parts incorporated into the Ball Park and cannot be removed without substantial damage.³⁴

³³ See *Inverness Club*.

³⁴ *Polaris. Funtime II* (fences and railings were real property because they served the general purpose of protecting and restricting pedestrian traffic, as well as separating one area from another, even though the property they protected and separated were business fixtures).

2. *The Video Boards primarily benefit the Ball Park and would be valuable to numerous types of businesses occupying the building. The specific benefit to the Reds' business as a professional baseball team is derived only from the software controlling the images displayed on the Video Boards.*

Notwithstanding the above, even if the Video Boards were distinct items of tangible personal property not fabricated / constructed at the site that could be removed without harm such that their primary benefit is relevant, the Video Boards primarily benefit the real property, including the Ball Park, as explained below.

Property that is permanently attached and provides utility to other future tenants operating different businesses is real property.³⁵ For example, in the entertainment context, the Board of Tax Appeals held that property which can be used for multiple professional sports and other entertainment purposes is not specialized to a particular business.³⁶ In *Ohio Sports Center, Inc.*, items permanently incorporated into the building, such as the communication system and seats, were found to benefit the realty because they were “*designed, suited and appropriated to the use of the building*” which was a multi-purpose entertainment and sports venue.

The general nature and usage of the Video Boards is illustrated by numerous different types of businesses that use displays similar to those used by the Reds. In addition to professional sports venues, Daktronics has constructed video displays, using the same type of component parts as used for the Video Boards, at malls, stock exchanges, airports, banks, retailers (e.g., Time Square displays), casinos, theaters, and entertainment venues.³⁷ The software controlling the Video Boards is the primary difference from those used by other types of businesses; the Ball Park's Video Boards could easily be converted to use by another business that occupies the underlying premises by simply changing the software controlling the displays.

Any subsequent occupant of the Ball Park would use the Video Boards, for instance if the Ball Park were used as a concert / entertainment venue, movie theatre, or for large public or corporate gatherings (such as speeches, presentations, conventions, corporate events, or political gatherings). In fact, the Video Boards have been used for concerts and other entertainment events occasionally held at the Ball Park.³⁸ Moreover, the Video Boards could even be used to display television shows or play video games, simply by installing different software.

Conversely, the Channel Letter “C” installed as part of the Video Board project, which the Reds concede is taxable, specifically benefits the Reds' business since it displays the Reds' logo. No subsequent occupant of the Ball Park could use the Channel Letter “C” because doing so would infringe on the Reds' intellectual property rights. This illustrates the distinction between a business fixture, such as the Channel Letter “C” which is specifically designed and valuable only to the Reds business, and a permanent improvement, such as the Video Boards which are used by the Reds' for business purposes, but add value to the real property since they would be used by a subsequent occupant of the Ball Park conducting a different business.

³⁵ See *Funtime II*.

³⁶ *Ohio Sports Center, Inc.*

³⁷ Exhibit E (representative examples of other Daktronics projects).

³⁸ See e.g., Cincinnati Business Courier, *Major concert event coming to Great American Ball Park* (Apr. 29, 2014) (available at: <http://www.bizjournals.com/cincinnati/news/2014/04/28/major-concert-event-coming-to-great-american-ball.html>).

In *Polaris, Ohio Sports Center, Inc.* and *Post-Browning Inc.*, the Board of Tax Appeals correctly recognized that permanent improvements primarily benefit the real property when designed specifically for that building. In this case, the PE stamped drawings for the Video Boards were necessary to ensure they would withstand the wind and snow loads in Cincinnati, related to the real property's location, not the Reds' business. The Video Board's dimensions were determined based upon the Ball Park's design, not the Reds' business.

Furthermore, the Ball Park and the land it sits on was appropriated by Hamilton County for use as a professional sports venue (and used occasionally for other entertainment events). The Ball Park itself was specifically designed for that purpose, just as the amphitheater structure, concession stands, restrooms, and ticket booths in *Polaris* were specifically designed for a concert venue. However, as recognized by the Board of Tax Appeals, the primary benefit of these permanent improvements, which cannot be removed and relocated, is to the real property and the particular use for which it has been appropriated.

In *Funtime* and *Green Circle Growers, Inc.*, the property was completely useless to any occupant of the property, except the particular type of business being conducted thereon (i.e., horticulture or amusement park). If the businesses in those cases had relocated, the structures would likely have been de-assembled and installed at the business' new location. Here, the Video Boards have been designed, suited, and appropriated to the use of the Ball Park (i.e., the real property). The Video Boards could not be relocated if the Reds' business moved. Instead, in such an event, the Video Boards would be used by the next occupant of the Ball Park – by simply changing the software, the Video Boards could be appropriated to any business operated at the Ball Park. Therefore, the Video Boards primarily benefit the real property.

3. *Classifying the Video Boards as business fixtures by merely considering whether the property has a business purpose would further muddle an area of law the 1992 law change, supported by the Tax Commissioner, sought to clarify.*

In supporting legislation defining business fixtures, the Department testified "*that this legislation is essential to clarify what has become a very muddled area of Ohio tax law. * * * the bill is meant to restore the status quo on classification. It is not intended to create new issues in presently noncontroversial areas.*"³⁹ The controversial area referred to by the Deputy Commissioner for Tax Policy in her testimony was the developing line of cases which classified certain structures, such as removable greenhouses, as real property. The property at issue in *Funtime* was precisely the type of property the legislature intended to classify as personal property – structures which could be removed and relocated with the particular business conducted on the premises. Tellingly, if the business operated in *Funtime* relocated, the amusement rides would likely have been relocated with the business; if the business operated in *Polaris* relocated, the amphitheater structure, including the specially designed stage, roof, and video projection screens, would not have been relocated with the business.

Furthermore, the decisions in *Ohio Sports Center, Inc.* and *Post-Browning Inc.* did not rely upon the structure line of cases, but rather recognized that fundamental components of real property, such as countertops, communication lines, and doors, are real property, even when designed for a particular business. Thus, consistent with the Deputy Commissioner for Tax Policy's testimony, the holdings in these cases must be respected here.

³⁹ 119 Sub. S.B. 272, Testimony of the Ohio Department of Taxation (Feb. 19, 1992) (attached as Exhibit D).

The Department's position seems to be that any property with a business purpose is a business fixture. This erroneously ignores the statutory definition which requires that a business fixture first be an item of tangible personal property and, if so, then requires an examination of the benefits flowing to the building to which it is attached. Furthermore, finding that the Video Boards are personal property would be totally inconsistent with the decision in *Polaris*, which found that video projection screens incorporated into an amphitheater specifically designed as a concert venue were real property.

Based upon the foregoing, the Video Boards are not business fixtures because they: (1) are permanent improvements incorporated into, and becoming fundamental components of, the Ball Park, which itself is real property; (2) are not distinct items of tangible personal property, but rather borne from fabrication at the Ball Park from hundreds of video display cabinets and countless component parts; and (3) primarily benefit the Ball Park, as opposed to the Reds' business.

B. Other Nontaxable Components of the Project

The following elements of the project are also not taxable.

1. *Electrical and communication lines are common to all commercial buildings and, thus, real property improvements.*

Electrical and communication lines are common to all types of buildings and specifically excluded from the business fixture definition.⁴⁰ The following cases hold that electrical and communication lines are real property, even when powering or communicating between business fixtures:

- *Ohio Sports Center*: Electrical conduit, wiring, and raceways connected to the scoreboard (which, unlike this case, was freestanding and designed for facial removal) and communication system were found to be real property improvements.
- *Champion International Corp.*: "[T]he electrical circuit could be useful to any owner of the land, and must therefore be viewed as a permanent fixture to the realty..."⁴¹

In this case, the Reds were separately charged \$426,649 for installation of electrical components and fiber-optic wire (consisting of cable / junction boxes; installation (electrical); and installation (data)). These components are common to all commercial construction and serve the general purpose of providing power to the property and transmitting communications.

In 1998, the Board of Tax Appeals found that high-tech computer cabling that would not be available or useable by other building occupants and was not common to buildings was a business fixture. However, the technology has substantially changed since this case and fiber-optic wire, which has superior speed to older communication lines, is now commonly used in all types of buildings. The following examples illustrate the current wide-spread use of fiber-optic cable:

- AT&T, through its Project VIP initiative, recently undertook several projects to bring fiber-optic wire to many buildings used for a variety of businesses, including over 107

⁴⁰ R.C. 5701.03(B).

⁴¹ *Champion Int'l Corp v. Limbach*, BTA Case No. 85-A-6 (Aug. 21, 1987).

Ohio buildings in 2013.⁴² Similar projects were undertaken in Florida where fiber was installed in 750 office buildings and in 29 North Carolina office buildings. *"As part of its Project VIP initiative, AT&T plans to expand its fiber network to reach 1 million additional business customer locations by the end of 2015."*

- The Ohio School Facilities Commission has published specifications in the Ohio School Design Manual for fiber-optic wiring installed in schools.⁴³
- The City of Columbus authorized contracts to prepare two city buildings, located at 724 Woodrow Ave. and 1111 East Broad Street, for fiber-optic cable installation.⁴⁴
- A wholesale food manufacturer recently announced plans to install fiber-optic wire in its state-of-the-art manufacturing facility in Columbus.⁴⁵
- *"Before all-fiber-optic networks became part of the way large organizations were wired up, Case Western Reserve was the first university to have an all-fiber-optic network, in 1989."*⁴⁶

Although perhaps uncommon and specialized in 1998, fiber-optic wires are now installed in all types of buildings and useful to any occupant thereof.

*While UTP copper has dominated premises cabling, fiber optics has become increasingly popular as computer network speeds have risen to the gigabit range and above. Most large corporations or industrial networks use fiber optic for the LAN backbone cabling. Some have also adopted fiber to the desktop ... Even fiber to the home architectures are being used in premises networks.*⁴⁷

In fact, fiber-optic wires are recognized in the TIA-568 standards, which are telecommunication standards established by the Telecommunications Industry Association for cabling and wiring in all commercial buildings regardless of use.⁴⁸

The fences in *Funtime II* were found to be of a general nature, protecting and separating areas of the property, even though the roller coasters and rides which they protected were found to be business fixtures. Likewise, the electrical components and fiber-optic wires installed at the Ball

⁴² See Fierce Telecom, *AT&T extends fiber into 107 buildings in Ohio through Project VIP initiative* (Oct. 18, 2013) (available at: <http://www.fiercetelecom.com/story/att-extends-fiber-107-buildings-ohio-through-project-vip-initiative/2013-10-18#ixzz2i5Jr1cv9>). See also, AT&T Installing Fiber Optic Cable to Multi-Tenant Office Buildings (<https://www.youtube.com/watch?v=EN6yff2IolA>).

⁴³ Available at: <http://osfc.ohio.gov/LinkClick.aspx?fileticket=1z2IVl-zzjI%3D&tabid=242&mid=904>.

⁴⁴ See Columbus Ordinance No. 1278-2012 (June 26, 2012) (available at: <https://columbus.legistar.com/LegislationDetail.aspx?ID=1142004&GUID=A5ECB940-72F9-4D36-BDA0-7D7E58E07ACD>).

⁴⁵ Telleab's Optical LAN Selected by SK Food Group for its New Manufacturing Facility (Marketwired – Nov. 19, 2014) (available at: <http://www.marketwired.com/press-release/tellabs-optical-lan-selected-by-sk-food-group-for-its-new-manufacturing-facility-1969876.htm>).

⁴⁶ *Case Western Reserve University Joins Gig.U*, Bytes from Lev; From the Virtual Desk of Case's VP for Information Technology Services, July 27, 2011 (available at: <http://blog.case.edu/lev.gonick/2011/07/27/case-western-reserve-university-joins-gigu>).

⁴⁷ See *Guide to Fiber Optics & Premises Cabling*, The Fiber Optic Association (available at: <http://www.thefoa.org/tech/ref/appln/LANarch.html>).

⁴⁸ See *Guide to Fiber Optics & Premises Cabling*.

Park are of a general nature such that you could find similar wiring and components in any commercial building. Furthermore, these electrical and fiber-optic wires would not be removed if the Reds vacated the Ball Park and would be used by any subsequent business occupying the Ball Park.⁴⁹

2. *Personal and professional services.*

Personal and professional services are not subject to Ohio sales / use tax. Personal services are those "involving a recognized skill performed by a person who is specifically engaged by the purchaser to perform the act."⁵⁰ Professional services include any act performed by a person pursuant to a professional license, certificate, or other legal authority.⁵¹ When nontaxable services are provided in a transaction that also involves tangible personal property, the services are not subject to tax if the charge for the property is separately identified.⁵²

(a) Installation Supervision – \$224,162

This charge relates to Daktronics supervising other contractors at the Ball Park completing components of the entire project. Daktronics was chosen to do so for its recognized skill in creating large video displays. Nontaxability is further supported since the installation being supervised related to real property improvements.

The BTA has held that supervisory services related to amusement ride installations were not subject to tax since *"the true object of the [taxpayer] was to obtain the service per se."*⁵³ The same result is required here.

(b) Project Management / Engineering / Design Services and Professional Engineering Certification - \$177,204

Management, engineering, and design services are undisputedly personal or professional services since Sony and Daktronics were retained specifically for their expertise in engineering and designing video boards, such as those at issue herein. This is further supported by the professional engineering certification required for this project, which itself is nontaxable.

(c) LES Operator Training (\$46,114) and LES Event Support (\$127,850)

LES Operator Training and LES Event Support consist of on-site training conducted at the Ball Park for Reds employees using the Video Boards, including during several Reds home games. Daktronics provided qualified trainers to render these services. Because such training and support was selected due to Daktronics' recognized skill for large video display operation, these are nontaxable personal or professional services. Since the training pertains to the operation of a real property improvement, no different than training to use a new HVAC system, it is nontaxable.

⁴⁹ R.C. 5701.03(B).

⁵⁰ *Emery Industries, Inc. v. Limbach*, 43 Ohio St.3d 134, 136 (1989) (underline added).

⁵¹ *Id.*

⁵² R.C. § 5739.01(B); *Emery Industries, Inc. v. Limbach*, 43 Ohio St. 3d 134 (1989); *Albright v. Limbach* (1988), 37 Ohio St. 3d 275 (1988) (separately stated charges for selecting, measuring, ordering, fitting, and dispensing eye glasses and lenses were exempt from tax).

⁵³ *Cedar Point, Inc. v. Lindley*, BTA 82-A-556 (Apr. 22, 1986).

3. *Contractor's Use Tax, Bonding and Permits*

No tax may be imposed upon the \$208,851 charge for "*Contractor's Use Tax*" paid by Daktronics and its subcontractors on material purchases. It would be inequitable, and a windfall to Ohio, to impose sales tax on a charge for contractor's use tax, especially when the use tax would not be owed according to the Department's position. These amounts are the subject of Daktronics' protective refund claim.

Further, the charges for obtaining domestic bonding (\$70,160) and building permits (\$28,502) are nontaxable. Bonding constitutes insurance, which is not subject to Ohio sales tax.⁵⁴ The building permits pertain to the real property improvements conducted at the Ball Park and, thus, are not taxable.

4. *Miscellaneous Nontaxable Items*

Charges related to removal of the existing video displays (\$211,126), structural modifications (\$184,735), speaker relocation (\$91,206), HVAC removal (\$39,269), and three-sided rotating ads (\$164,678) are nontaxable. While the installation or repair of taxable tangible personal property is taxable, the removal or relocation of such property is not.⁵⁵

The Board of Tax Appeals has specifically found that the relocation of speakers in an entertainment venue is exempt from tax.⁵⁶ The HVAC for ProFence charge relates to the removal of an HVAC system used by the previous video displays, but no longer necessary for the Video Boards. Regardless of the classification of the speakers or HVAC system as real or personal property, the services of relocating or removing property is nontaxable.

Further, structural modifications and rotating ads constitute real property improvements, not business fixtures. The structural modifications were changes to the Ball Park itself necessary for installation of the Video Boards and relate to aspects of the Ball Park undisputedly real property. Likewise, the rotating ad system installed is a permanent improvement to the Ball Park that would be used by a subsequent occupant of the building.

⁵⁴ R.C. 5739.01(B) (last unnumbered paragraph).

⁵⁵ See R.C. 5739.01(B)(3).

⁵⁶ *Ohio Sports Center, Inc.*

In summary, the following charges are exempt from tax and must be removed from the tax base:

Charge	Amount	Reasoning
Electrical and Fiber-Optic Wires	\$426,649	Real property improvement
Installation Supervision	\$224,162	Personal / professional service
Project Management / Engineering / Design Services and Professional Engineering Certification	\$177,204	Personal / professional service
LES Operator Training and LES Event Support	\$173,964	Personal / professional service
Contractor's Use Tax	\$208,851	No basis to charge sales tax on use tax, which was not owed if the property is a business fixture and is the subject of Daktronics' protective refund claim
Domestic Bonding	\$70,160	Insurance transaction
Building Permits	\$28,502	Real property improvements
Removal of existing display (\$211,126) speaker relocation (\$91,206), and HVAC removal (\$39,269)	\$341,601	Nontaxable services
Structural modifications (\$184,735) and rotating ads (\$164,678)	\$349,413	Real property improvements
TOTAL	\$2,000,506	

IV. CONCLUSION

The Department has incorrectly classified the Video Boards as business fixtures due to their alleged limited business purpose. However, such a conclusion contradicts the business fixture definition because the Video Boards are not distinct items of tangible personal property. Rather, the Video Boards are permanent fabrications, constructed at the site from hundreds of video display cabinets and countless component parts, which have been incorporated into the Ball Park's walls and façade and whose removal would cause harm to the building to which it is incorporated, as well as the property itself. The video display cabinets comprising the Video Boards could never be removed and relocated to be incorporated into a different building or structure, as the act of removing the hundreds of individual video display cabinets would render them worthless.

Furthermore, the Video Boards primarily benefit the real property (*i.e.*, the land and the Ball Park). A subsequent occupant of the Ball Park, regardless of the particular business to be operated, would use the Video Boards by simply updating the software controlling the Video Boards.

Moreover, determining that the Video Boards are business fixtures in this case would create an irreconcilable difference in the law. On one hand, video displays permanently attached to an amphitheater used as a concert venue have been found to be real property, but the Video Boards incorporated into a professional baseball stadium would be personal property. Accordingly, the Tax Commissioner must follow existing precedent and rule that the Video Boards are real property as permanent improvements to the Ball Park.

Several remaining components of the project, as set forth in the table above, involve nontaxable services and real property improvements.

Respectfully submitted:

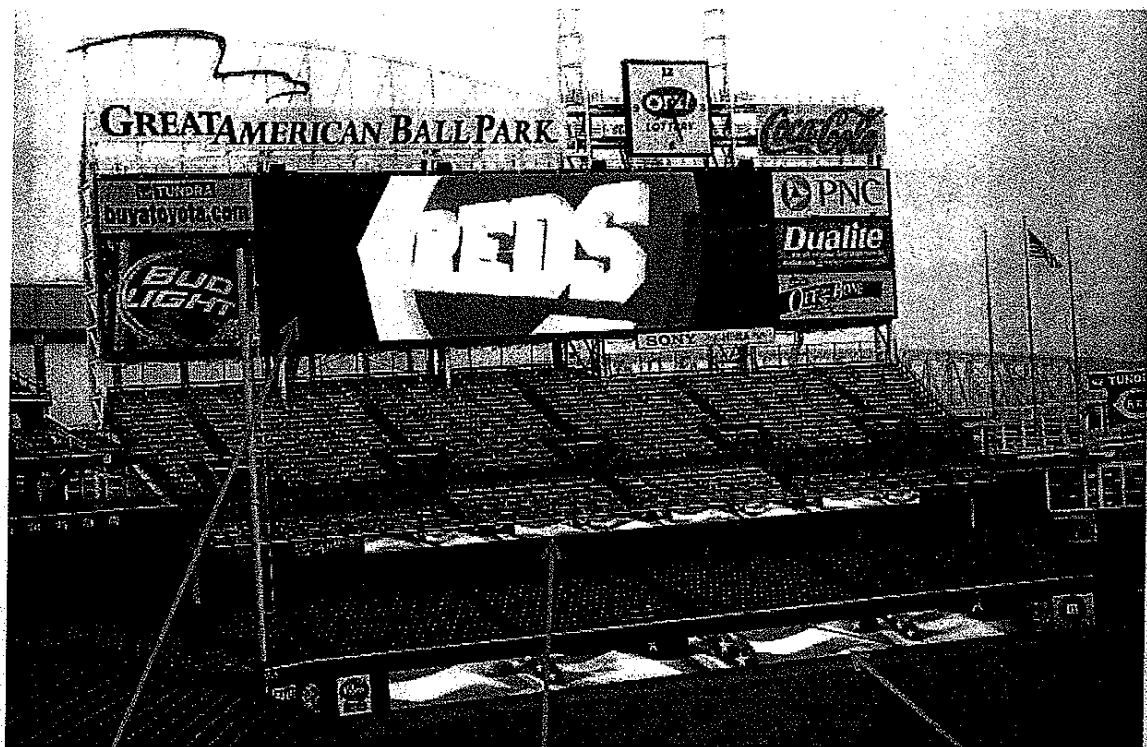


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EXHIBIT A

PHOTOGRAPHS OF VIDEO BOARDS

AK3:1178441_y1

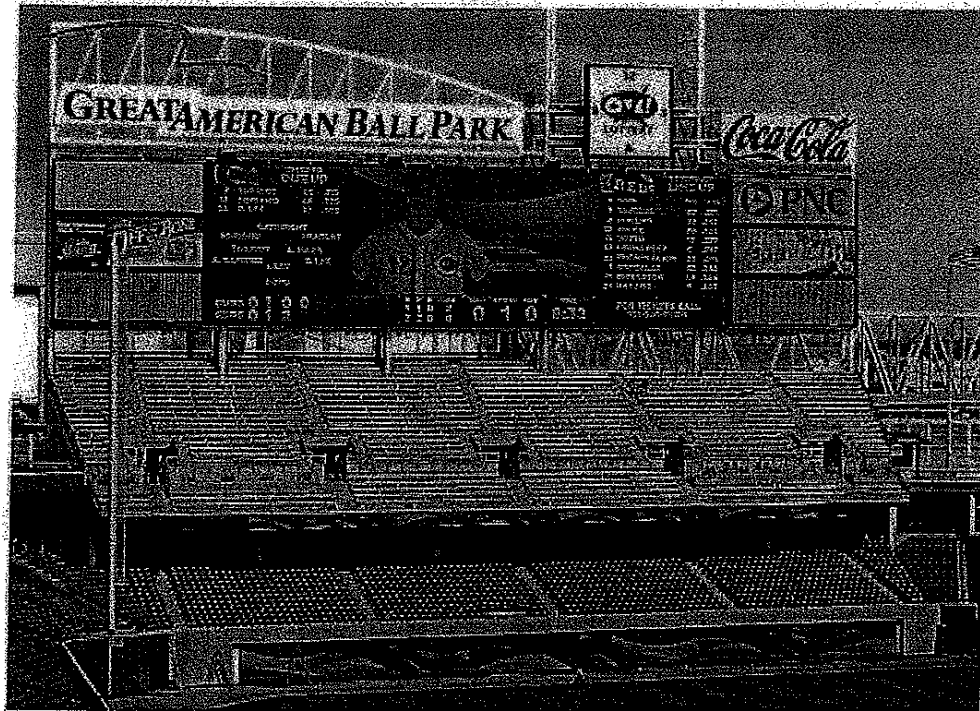


Main Video Board

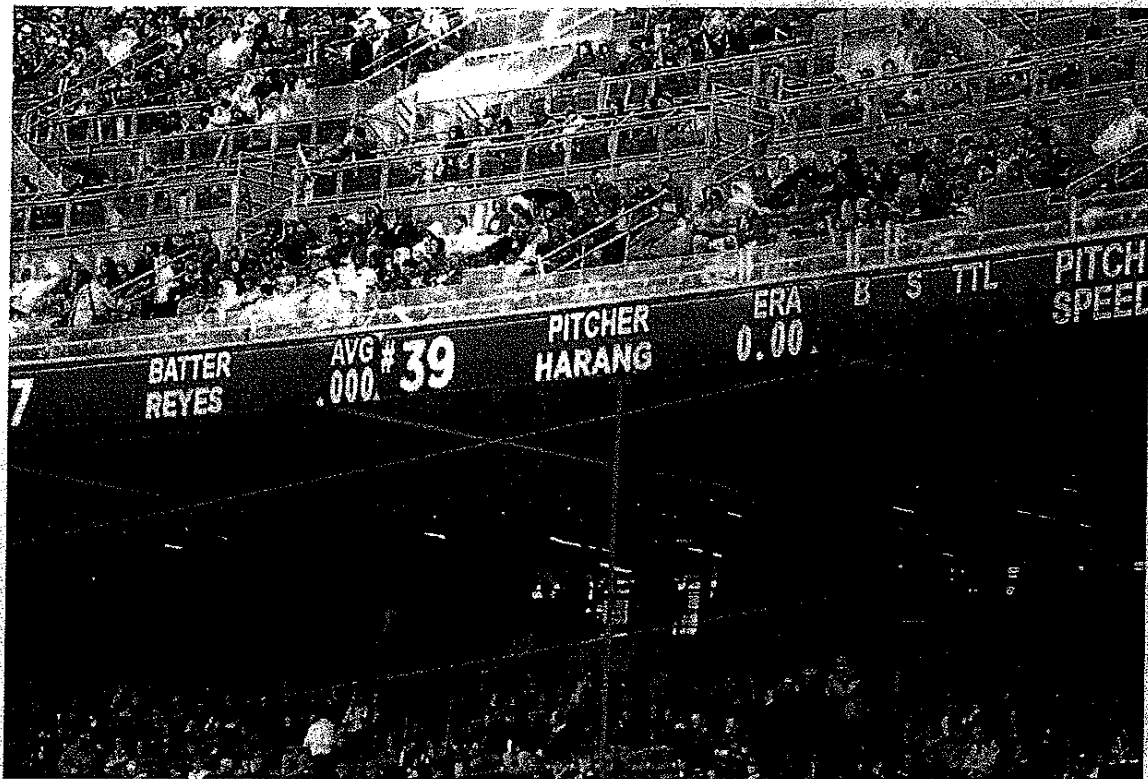
Digital Ribbon Boards

LF Fence Digital Display

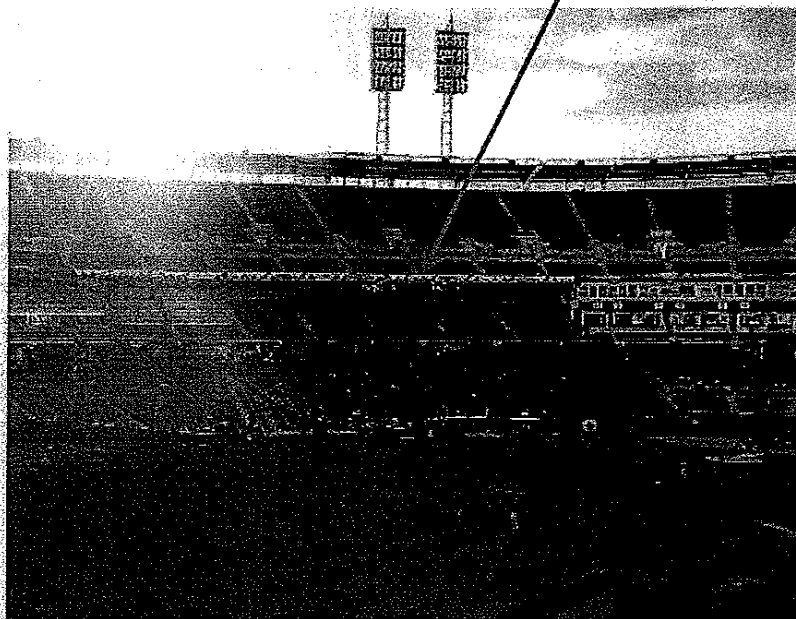


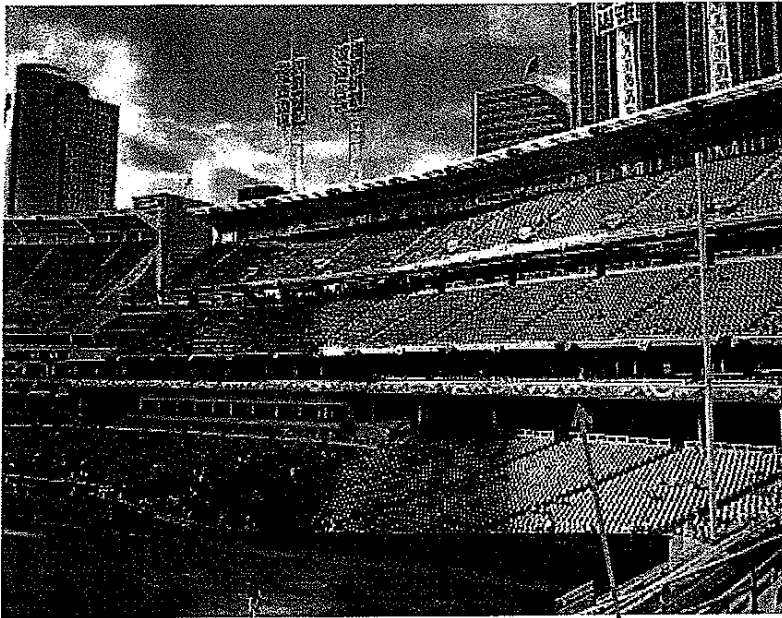


Fence Display during construction



1st Base Line
Ribbon Display





3rd Base Line
Ribbon Display



EXHIBIT B
REDS' VIDEO BOARD PROJECT PRICE SHEET

EXHIBIT B
Reds' Video Board Project Prices

	Per Contract Scoreboard Price Sheet	Price after Reduction
Video Boards:	4,926,238	4,680,251
Main video board	2,727,678	2,591,474
Left field fence display	577,862	549,007
Digital ribbon displays	1,620,698	1,539,770
Delivery and Installation:	649,402	616,975
Crating & Shipping	109,402	103,939
Installation (Physical)	540,000	513,036
Warranty and maintenance:	416,245	395,460
Warranty	154,022	146,331
Extended service	262,223	249,129
Scoreboard / Message Center Control Equipment:	274,281	260,585
Scoreboard control equipment	4,217	4,006
MC control equipment	270,064	256,579
Fiber-optic wires and electrical:	449,073	426,649
Fiber-optic	45,684	43,402
Panels	85,720	81,440
Power switches	12,670	12,037
Main LF display electrical	66,667	63,338
Fascia electrical	83,333	79,172
ProFence electrical	27,778	26,391
Standing displays electrical	11,111	10,556
Main LF display data installation	44,444	42,225
Fascia data	42,778	40,642
ProFence data	20,000	19,001
Standings displays data	8,889	8,445
Software:	346,686	329,375
Sports software	42,250	40,140
Custom manual / technical writing	5,791	5,502
LES / Keyframe (content / animation)	298,645	283,733
Management / Professional Services:	605,568	575,330
Installation supervision	235,944	224,162
Project Management / Engineering / Design Services	175,407	166,648
Professional engineering certification	11,111	10,556
LES Operator Training	48,537	46,114
LES Event Support	134,569	127,850
Bonding and Tax:	323,675	307,513
Domestic bonding	73,847	70,160
Contractor's use tax	219,828	208,851
Permits	30,000	28,502
Spare Parts:	96,532	91,712
Miscellaneous Nontaxable:	727,333	691,014
Removal of existing scoreboard	222,222	211,126
Structural Modifications	194,444	184,735
Relocate Speakers	96,000	91,206
→ HVAC for ProFence	41,333	39,269
→ Three-Sided Rotating Ads	173,333	164,678
Channel Letter "C" with LED Lights	46,667	44,336
Total Purchase Price	8,861,700	8,419,200

Project Name & City/State: Cincinnati Reds

Schedule P		Contract Order Summary (COS)	
211231	DESCRIPTION	SELLING PRICE	
Spec/Manufacturer	PRODUCTS/SERVICES (Excluding Warranties)	\$	8,815,343.77
Basic Rep/Project Manager	SOUND SYSTEMS & HOIST SYSTEMS	\$	
	WARRANTY	\$	184,022.32
	EXTENDED SERVICES	\$	267,722.80
Drawing / Rev.	SUBCONTRACTING	\$	1,830,111.11
	COMMISSION	\$	
Date pricing prepared	TOTAL PROJECT	\$	8,891,700.00
	TOTAL PROJECT W/SALES TAX 0.00%	\$	
Custom pricing page last Updated: 06 July 2008 by B Schatz		FALSE	FALSE
	DIMENSIONS: PRODUCTS/SERVICES (Excl. Warranty)		
	DIMENSIONS: EXTENDED SERVICE ONLY		
	DIMENSIONS: SUBCONTRACTING		
	DIMENSIONS: SOUND SYSTEMS & HOIST SYSTEMS		
	Finalist Extension Form DF-2109-Product		
	Preproposal Exception Form DF-2109-Sub		
600 CABLE/JUNCTION BOXES - Redundant cable has been included			
W-1489 6 fiber-optic (50um for VMax4 applications)	FEET	3000	
W-1489 6 fiber-optic (50um for VMax4 applications)	FEET	500	
W-1489 6 fiber-optic (50um for VMax4 applications)	FEET	500	
W-1490 12 fiber-optic (50um for VMax4 applications)	FEET	8000	
W-1490 12 fiber-optic (50um for VMax4 applications)	FEET	4000	
W-1489 6 fiber-optic (50um for VMax4 applications)	FEET	1000	
W-1489 6 fiber-optic (50um for VMax4 applications)	FEET	1600	
W-1490 12 fiber-optic (50um for VMax4 applications)	FEET	4000	
W-1489 6 fiber-optic (50um for VMax4 applications)	FEET	3000	
W-1489 6 fiber-optic (50um for VMax4 applications)	FEET	1000	
QA-1079-0129 Outdoor fiber patchpanel 1-12 pps		8	
Fiber Terminations		1000	
Main Distribution Panels w/ Connectors - Control Center	Main display	61	
Remote power switch tri-vision		1	
Remote power switch video		1	
Remote power switch fascia displays		31	
Remote power switch fence & smoke stack		2	
Fiber power controlpanels (fascia, fence, Standings)		5	
			\$ 144,875.16
600 SCOREBOARD CONTROL EQUIPMENT			
All Sport 510C		31	
Cycling Case; All Sport 500B		31	
			\$ 4,217.22
900 SPORTS SOFTWARE			
DakState 3000 Software, User's Kit (Play by Play)		11	250.00
DSTI, DakState: Pro Vetsen - FB, BB, VB, BA		11	2,500.00
GameDay for Baseball - Premium In-Game		11	5,000.00
Sports Wire 4800		11	3,000.00
DCCI		11	30,000.00
			\$ 42,260.00
1000 M.C. CONTROL EQUIPMENT		Refer to DD-1170951 or DD-1202378 for more information	
control room pricing per adam petersen		11	
			\$ 270,064.77
1300 CUSTOM MANUALS/TECHNICAL WRITING			
Technical writing	# of days	81	
			\$ 5,791.89
1900 INSTALLATION SUPERVISION			
Technician	# of Days	165	
Per Day	# of Days	165	
Rental Car	# of Days	165	
Hotel	# of Nights	165	
Alcohol		16	
			\$ 235,943.93
2000 SUBCONTRACTING / OUTSOURCED ITEMS			
Removal of existing LED displays		11	\$ 222,222.22
Main LF display video installation	16 HD	11	\$ 111,111.11
ProFence physical installation	LED	11	\$ 38,888.88
Padding installation		11	\$ 38,888.88
Chain Link fence installation		11	\$ 22,222.22
Fingerprint installation @ ProFence		11	\$ 5,555.56
Move out of wall 6"		11	\$ 16,666.67
Block wall		11	\$ 11,111.11
Structural Modifications		11	\$ 168,668.67
Tri-Vision physical assembly & installation		11	\$ 100,000.00
3rd base fascia LED installation		11	\$ 70,000.00
1st Base fascia LED installation		11	\$ 70,000.00
OF LF LED fascia installation		11	\$ 38,888.88
Recolor speakers		11	\$ 96,000.00
Wishbone "C" installation		11	\$ 33,333.33
Standing displays physical installation		11	\$ 11,111.11
Main LF display electrical installation		11	\$ 66,666.67
Main LF display data installation		11	\$ 44,444.44
Fascia electrical installation		31	\$ 83,333.33
Fascia data installation		31	\$ 42,777.77
ProFence electrical installation		11	\$ 27,777.77
ProFence data installation		11	\$ 20,000.00
Standing displays electrical installation		11	\$ 11,111.11
Standing displays data installation		11	\$ 8,888.88
HVAC for ProFence		11	\$ 41,333.33
Three-Sided Rotating Ads (DF-2109 Quote Form Required)		61	\$ 173,333.33

Confidential. For MINIMUM Use only - Contact Scoreboard Price Sheet

Airfare			\$	461,750.88
B910 COMMISSIONS			\$	-
Extra Insurance due to over \$10 million			\$	-
B920 Permits			\$	-
City of Cincinnati Permit \$3000 + \$3/100C	(based on \$9 mt)		\$	30,000.00
			\$	30,000.00
TOTAL PROJECT PRICE (w/o Sales Tax):				\$ 8,851,700.00
SALES TAX - NOT INCLUDED IN SELLING PRICE:				
Sales Tax	\$ 8,851,700.00	0.00%	\$	-
			\$	-
TOTAL PROJECT PRICE (w/Sales TAX):				\$ -

EXHIBIT C
PROJECT DESIGN SHEETS

OOT/FENCE DISPLAY
100 JOE NUXHALL WAY
CINCINNATI, OH 45202

NOTES
INSTALLATION CLASSIFIED SECRET
NOFORN
PAGE 2 OF 2
CLASSIFIED BY 1045
DECLASSIFY ON: 1045

STUCK AND STUCK INCREASES IN THE PRICE OF SUPPLIES FOR THE FISHING INDUSTRY ARE BEING REPORTED BY FISHERMEN.

[illegible]

DATE	TIME	PLACE	NO. OF	WAGER
NO.				
10	10:00	100	100	100
11	10:00	100	100	100
12	10:00	100	100	100
13	10:00	100	100	100
14	10:00	100	100	100
15	10:00	100	100	100
16	10:00	100	100	100
17	10:00	100	100	100
18	10:00	100	100	100
19	10:00	100	100	100
20	10:00	100	100	100
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22	10:00	100	100	100
23	10:00	100	100	100
24	10:00	100	100	100
25	10:00	100	100	100
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82	10:00	100	100	100
83	10:00	100	100	100
84	10:00	100	100	100
85	10:00	10		

SEE DWG. B1B264 FOR
FENCE BRACKET DETAILS

☐ PARTS INSTALLED & WELDED PER PRINT

☐ MODIFICATIONS MADE
- IF MODIFICATIONS ARE MADE, CHANGES SHALL BE DOCUMENTED & AS-BUILD DRAWINGS OR SKETCHES RETURNED TO DARTMOUTH PROJECT MANAGEMENT OR ENGINEERING STAFF

☐ APPROVED
☒ APPROVED AS NOTED
☐ APPROVED AS NOTED & REQUIRED
 COMMENTS: _____
 TITLE: _____ DATE: _____

SHEET 303

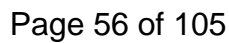
[illegible]

EXHIBIT D

**119 SUB. S.B. 272
LEGISLATIVE HISTORY**

-971-

of the county in which the property is located; a legal description of the property; the property's taxable value; the amount of taxes, penalties, and interest charged; the date of acquisition of the property; the use of the property during the time taxes accrued; and any other information required by the Tax Commissioner. Upon the request of the owner, any of this information must be supplied by the county auditor.

The act permits the Tax Commissioner to apply the act to any qualified property that is the subject of an application for exemption pending before the Tax Commissioner on the act's effective date, without requiring the property owner to file an additional application, and to qualified property that is the subject of an application for exemption filed on or after the act's effective date, but on or before May 31, 1993, even if the application does not specifically request remission of taxes.

Secs. 718.09, 718.10, and 5705.19.

* * *

Sub. S.B. 272

Sens. Finan, Nettle, Meshel, Snyder, Horn, Drake, Gaeth.

Reps. Corbin, Byers, Watkins, Conley, Rensch, Thomas.

Revises the definition of "real property" for taxation purposes, by adding specific definitions of "building," "structure," "improvement," and "fixture"; and defines a "business fixture" as an item of tangible personal property that has become permanently attached to real property and that primarily benefits the business on the premises and not the realty, and specifies that a business fixture is personal property for taxation purposes. (Effective: July 20, 1992)

"Real property" defined

Under continuing tax law, "real property" and "land" are defined to include land itself and all buildings, structures, improvements, and fixtures of whatever kind on the land, unless otherwise specified. The act adds a level of detail to this definition, by further defining "building," "structure," "improvement," and "fixture."

These terms have the following meanings under the act:

--"Building" means a permanent fabrication or construction, attached or affixed to land, consisting of foundations, walls, columns, girders, beams, floors, and a roof, or some combination of these elemental parts, that is intended as a habitation or shelter for people or animals or a shelter for tangible personal

property, and that has structural integrity independent of the tangible personal property, if any, it is designed to shelter.

--"Structure" means a permanent fabrication or construction, other than a building, that is attached or affixed to land, and that increases or enhances utilization or enjoyment of the land. "Structure" includes bridges, trestles, dams, storage silos for agricultural products, fences, and walls.

--"Improvement" means, with respect to a building or structure, a permanent addition, enlargement, or alteration that, had it been constructed at the same time as the building or structure, would have been considered a part of the building or structure.

--"Fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the realty and not the business, if any, conducted by the occupant on the premises.

"Personal property" defined; business fixtures

Prior law defined "personal property," with certain exceptions, to include every tangible thing that was the subject of ownership and that did not form part of a parcel of real property. The act revises this definition to refer to every tangible thing that is the subject of ownership and that does not "constitute" real property, and to include a "business fixture" as personal property.

Under the act, "business fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. "Business fixture" includes machinery, equipment, signs, storage bins and tanks, whether above or below ground, and broadcasting, transportation, transmission, and distribution systems, whether above or below ground. "Business fixture" also means those portions of buildings, structures, and improvements that are specially designed, constructed, and used for the business conducted in the building, structure, or improvement, including foundations and supports for machinery and equipment. It does not include fixtures that are common to buildings, including heating, ventilation, and air conditioning systems primarily used to control the environment for people or animals, tanks, towers, and lines for potable water or water for fire control, electrical and communication lines, and other fixtures that primarily benefit the realty and not the business conducted by the occupant on the premises.

The act states that any kind of building, structure, improvement, or fixture on the land is real property, unless

otherwise specified under the definitions of personal property and business fixture. The act also makes "realty" synonymous with "real property" and "land" under tax law. In addition, the act eliminates a specific exclusion from the definition of "real property" for storage tanks for storing petroleum for use in business or for subsequent sale.

Application of revised definitions

The act states that the revisions to the definitions of "real property" and "personal property" do not alter or affect the intended meanings of the terms "building," "structure," "improvement," and "fixture" in sections of the Revised Code enacted prior to the act and not amended by the act, where the context in those sections indicates that the usage of "building," "structure," "improvement," or "fixture" is not specifying the act or procedure of classifying for taxation the property as real or personal.

Definitions and recent court interpretations

The act changes the law as it recently has been interpreted by the Ohio Supreme Court. Before the recent rulings, when considering a question of whether property attached to land was real or personal property, the Court generally asked whether the property primarily benefited the land or the business on the land. In addition to having to meet other standards, property that primarily benefited the land was thought to be real property, and property that primarily benefited the business was thought to be personal property. See Zangerle v. Standard Oil Co. (1945), 144 Ohio St. 506. In recent sales tax cases, however, the Court has differently interpreted the statutory definition of "real property" for all Title 57 tax purposes, which states that any property attached to land is real property unless otherwise specified. See Green Circle Growers, Inc. v. Lorain Cty. Bd. of Revision (1988), 35 Ohio St. 3d 38, Rotek, Inc. v. Limbach (1990), 50 Ohio St. 3d 81, and Thomas Steel Strip Corp. v. Limbach (1991), 61 Ohio St. 3d 340. These cases did not acknowledge as relevant in sales tax cases the Standard Oil and other property tax cases that had held that even though personal property became attached to the land, if it primarily benefited the owner's business it was not an improvement on land and, therefore, what is now Revised Code Chapter 5711. (Listing Personal Property) "otherwise specified" it to be taxable as personal property.

The act's definition of a "business fixture" codifies the earlier standard--that an item of personal property that has become permanently attached to real property is personal property for taxation purposes if it primarily benefits the business conducted on the premises and not the real property.

Secs. 5701.02 and 5701.03.

* * *

Sub. Senate Bill 272
Testimony of the Ohio Department of Taxation
February 18, 1992

Good afternoon Mr. Chairman and members of the Committee, I am Carol Bessey, Deputy Commissioner for Tax Policy for the Ohio Department of Taxation. I am here today to testify in support of Sub. Senate Bill 272. The Department feels that this legislation is essential to clarify what has become a very muddled area of Ohio tax law. The issue at hand is the classification of property - specifically what is real property versus personal property.

For many years the distinction between real and personal property was relatively clear and stable. The distinction was based upon an 1853 Supreme Court decision which applied the test "Does the item primarily benefit the land or the business?" Over the past several years the courts have been drifting away from this long standing test. Finally, in a 1991 Supreme Court decision, the court clearly stated that the traditional test of whether the property benefited the land or the business is no longer to be applied in determining whether property is real or personal property.

While so far the key court decisions have concerned sales tax liabilities, in fact classification is also a concern for real and tangible property taxation, including public utility property taxation. Clearly this is an issue of some magnitude. Sub. Senate Bill 272 will restore much needed structure to the classification of property. It will define

what constitutes real property and personal property in such a manner as to codify the traditional concept of "benefit to the land or to the business."

With the absence of definitions for terms like "structure," "fixture," and "building", the terms have been used rather imprecisely both in Title 57 and sections of law concerning taxation outside of Title 57. Certain taxpayers expressed concern that establishment of these definitions would somehow change the effect of other statutes that use these terms. Section 3 is intended to preclude a taxpayer, school district, county auditor, or the Tax Commissioner from taking the position that Sub. Senate Bill 272 changed or eliminated the effect of a previously enacted statute because the terminology used does not precisely coincide with these definitions enacted by the bill. With the exception of the line of court cases described above, the bill is meant to restore the status quo on classification. It is not intended to create new issues in presently noncontroversial areas.

We have reviewed this legislation with the Ohio Chamber of Commerce and the Ohio Manufacturers Association and agree that this will help return needed certainty to the law governing the classification of property.

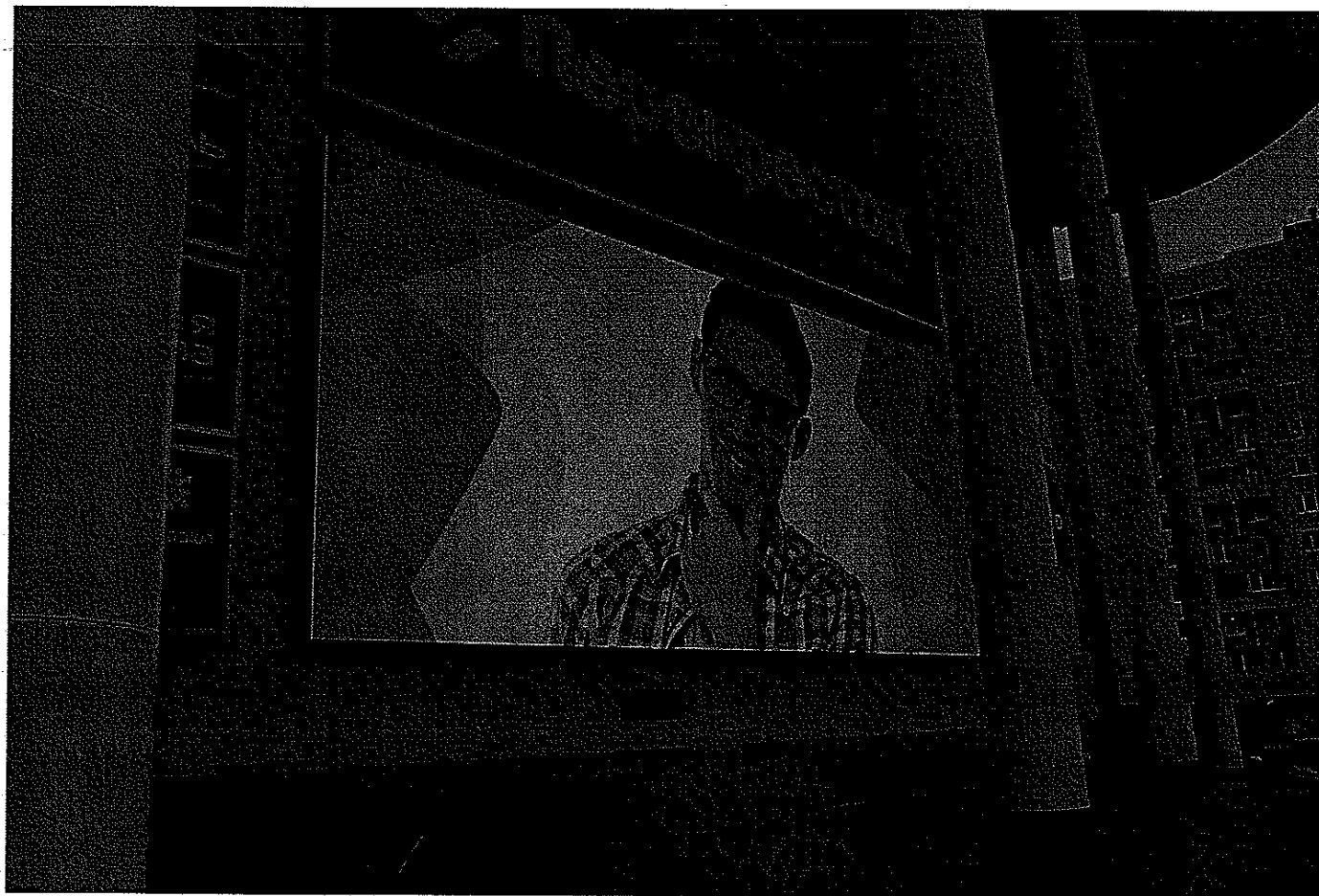
EXHIBIT E

EXAMPLES OF OTHER DAKTRONICS' PROJECTS



LED Displays for Gaming Facilities

Promote all the action happening at your gaming facility. From Minnesota to Macau, gaming facilities around the world are attracting patrons and keeping them coming back for more. With decades of industry experience, Daktronics designs the products you need to pull ahead of the competition. Add a dynamic visual element to your gaming facility and build excitement with digital displays.



Kaleidoscope Mall

Moscow, Russian Federation

Display 1

Product Line:	Video Displays
Spacing (Line/Pixel):	16 mm
Series:	DVX
Product Category:	Permanent
Lines & Columns:	528 x 1,232
Approx. Dimensions:	29' 0" x 67' 0" (8839 mm x 20422 mm)

201 Daktronics Drive PO Box 5128 Brookings SD 57006-5128
Tel 888-325-8726
www.daktronics.com
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Times Square Sunglass Hut

New York, New York, United States

Display 1

Product Line:	Video Displays
Spacing (Line/Pixel):	16 mm
Series:	DVX
Product Category:	Permanent
Lines & Columns:	88 x 3,872
Approx. Dimensions:	5' 0" x 212' 0" (1524 mm x 64618 mm)
LED Color:	Full-Color

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The display shows a financial market ticker with columns for stock symbols, prices, and changes. Below the ticker, there is a news anchor in a suit, with the text 'ebanon ironmen' and '22.0 C 39.3 %' next to him. At the bottom, there is a large announcement: 'Real Estate Investment Co. on Dec. 12, 2005' with various numbers and dates.

Kuwait Stock Exchange, Café Wall

Kuwait City, Kuwait

Display 1

Product Line: Message Displays
Spacing (Line/Pixel): 6 mm
 Product Category: Galaxy
 Lines & Columns: 448 x 576
 Approx. Dimensions:
 8' 6" x 11' 0"
 (2591 mm x 3353 mm)

Display 2

Product Line: Message Displays
Spacing (Line/Pixel): 6 mm
 Product Category: Galaxy
 Lines & Columns: 768 x 608
 Approx. Dimensions:
 14' 7" x 11' 7"
 (4445 mm x 3531 mm)

Display 3

Product Line: Video Displays
Spacing (Line/Pixel): 6 mm
 Product Category: Permanent
 Lines & Columns: 320 x 576
 Approx. Dimensions:
 6' 1" x 11' 0"
 (1854 mm x 3353 mm)

Display 4

Product Line: Message Displays
Spacing (Line/Pixel): 6 mm
 Product Category: Galaxy
 Lines & Columns: 32 x 1,184
 Approx. Dimensions:
 0' 6" x 22' 7"



Kuwait Stock Exchange, Wall A

Kuwait City, Kuwait

Display 1

Product Line: Message Displays
Spacing (Line/Pixel): 6 mm
Product Category: Galaxy
Lines & Columns: 256 x 4,192
Approx. Dimensions: 4' 9" x 80' 3"
(1448 mm x 24460 mm)

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Kuwait Stock Exchange, Wall B

Kuwait City, Kuwait

Display 1

Product Line: Message Displays
Spacing (Line/Pixel): 6 mm
Product Category: Galaxy
Lines & Columns: 256 x 2,688
Approx. Dimensions: 4' 9" x 51' 5"
 (1448 mm x 15672 mm)

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Kuwait Stock Exchange, Wall C

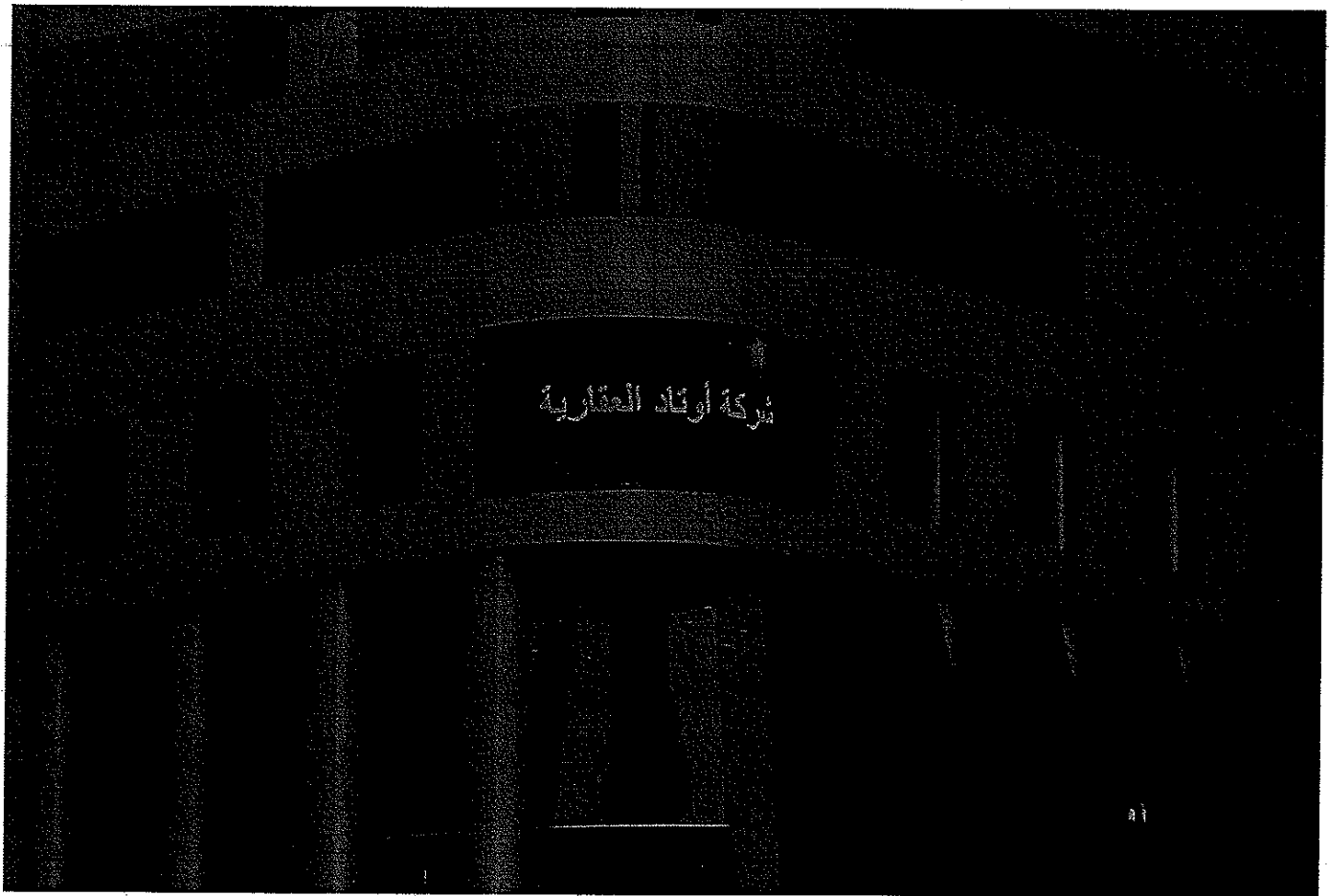
Kuwait City, Kuwait

Display 1

Product Line: Message Displays
Spacing (Line/Pixel): 6 mm
Product Category: Galaxy
Lines & Columns: 256 x 3,936
Approx. Dimensions: 4' 9" x 75' 4"
(1448 mm x 22962 mm)

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Awtad Tower

Kuwait City, Kuwait

Display 1

Product Line:	Video Displays
Spacing (Line/Pixel):	20 mm
Series:	PS-X
Product Category:	Permanent
Lines & Columns:	128 x 368
Approx. Dimensions:	8' 5" x 24' 2" (2565 mm x 7366 mm)

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Bank of America, Times Square

New York, New York, United States

Display 1

Product Line: Video Displays
Spacing (Line/Pixel): 13 mm
Series: DVX
 Product Category: Permanent
 Lines & Columns: 448 x 1,176
 Approx. Dimensions: 19' 2" x 50' 4"
 (5842 mm x 15342 mm)
 LED Color: Full-Color

Display 2

Product Line: Video Displays
Spacing (Line/Pixel): 13 mm
Series: DVX
 Product Category: Permanent
 Lines & Columns: 420 x 2,380
 Approx. Dimensions: 18' 0" x 102' 0"
 (5486 mm x 31090 mm)
 LED Color: Full-Color

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Qantas Domestic Airport - Melbourne

Melbourne, Australia

Display 1

Product Line: Video Displays
Spacing (Line/Pixel): 6 mm
Series: DVN
 Product Category: Permanent
 Lines & Columns: 384 x 1,344
 Approx. Dimensions: 8' 6" x 29' 0"
 (2591 mm x 8839 mm)

Display 2

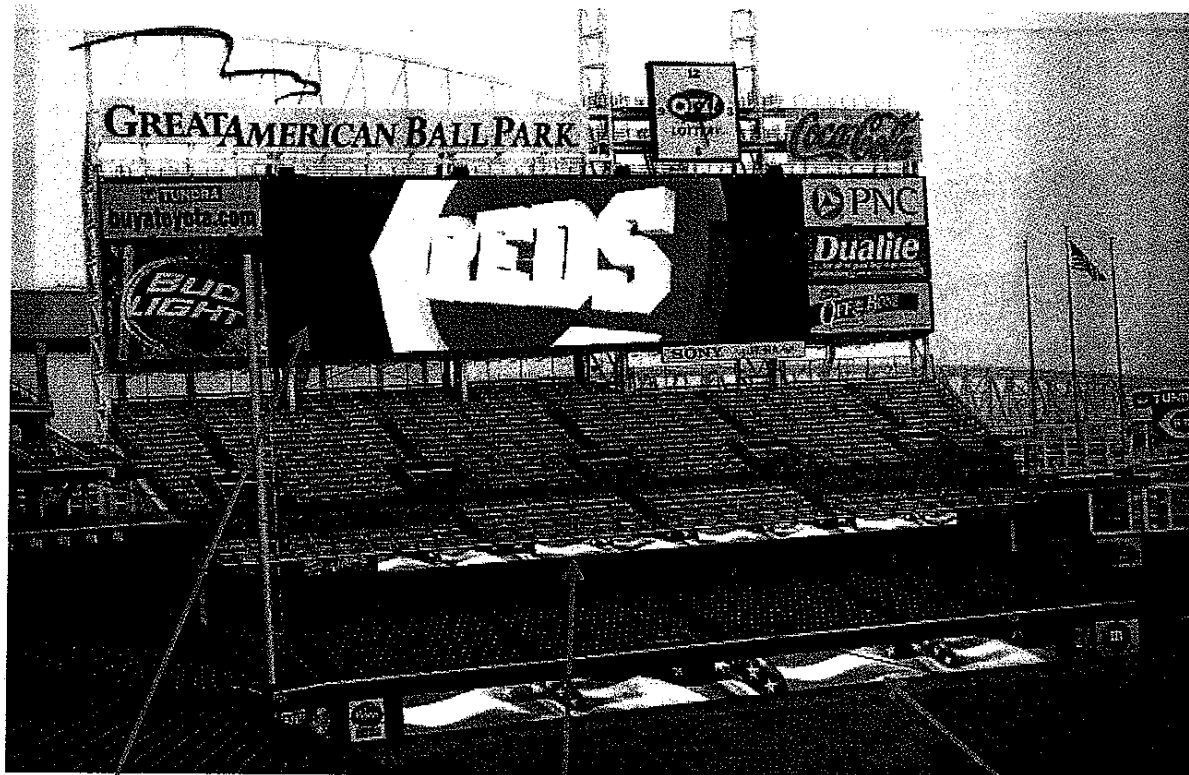
Product Line: Video Displays
Spacing (Line/Pixel): 6 mm
Series: DVN
 Product Category: Permanent
 Lines & Columns: 384 x 624
 Approx. Dimensions: 8' 6" x 13' 6"
 (2591 mm x 4115 mm)

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 Tel 888-325-8726
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PHOTOGRAPHS OF VIDEO BOARDS

AK3:1178441_v1

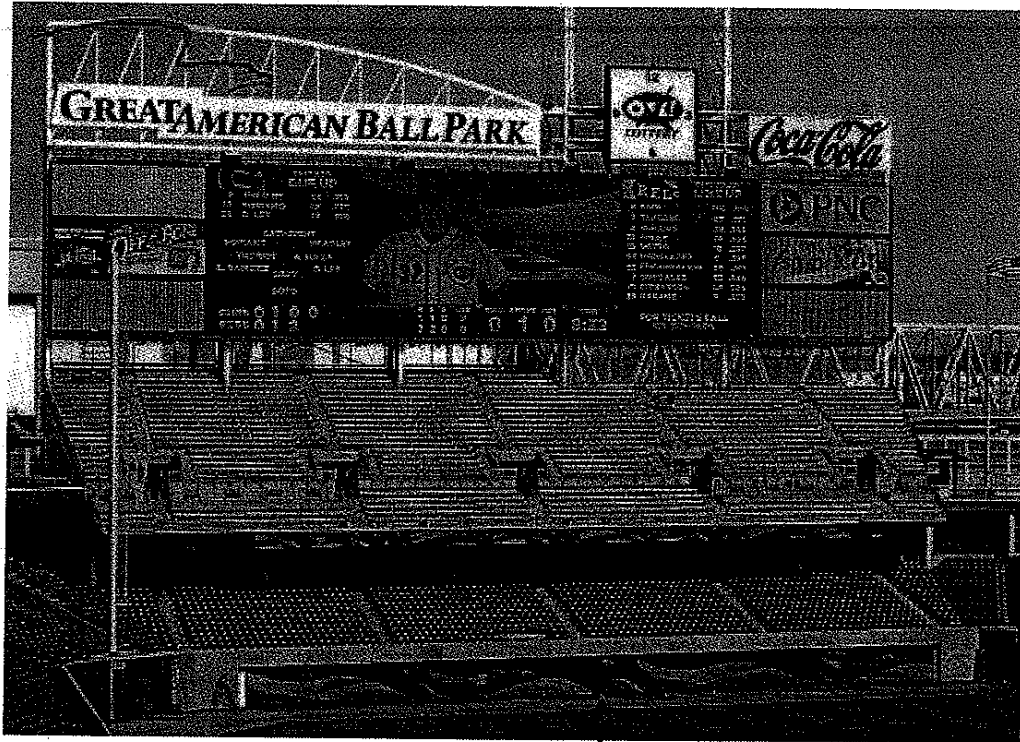


Main Video Board

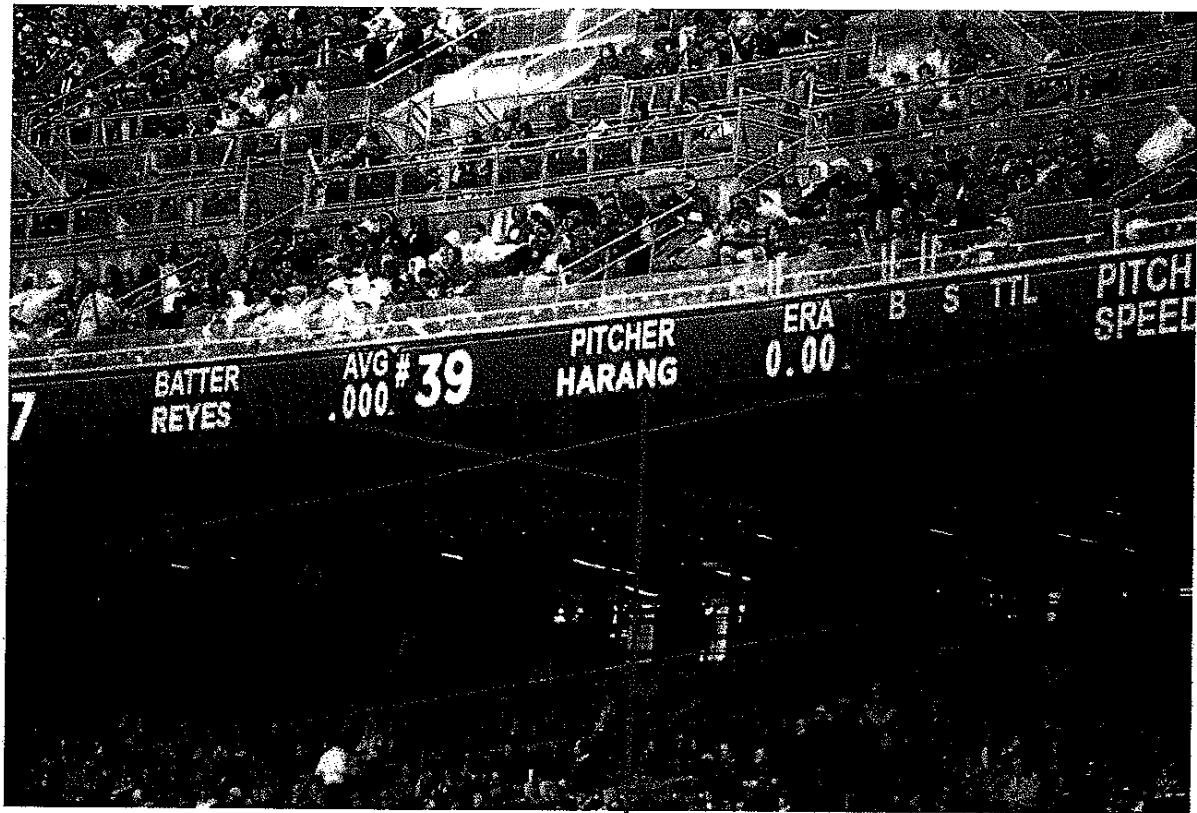


Digital Ribbon Boards

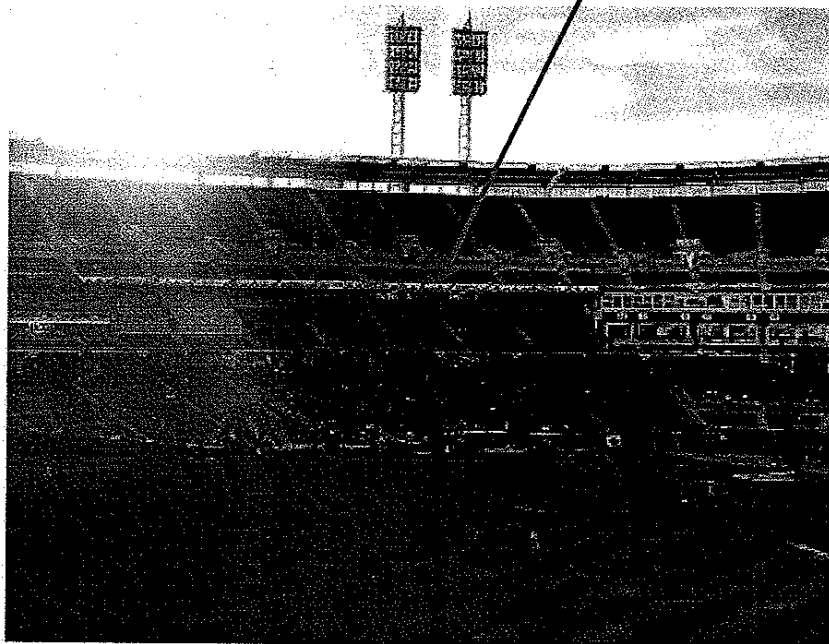


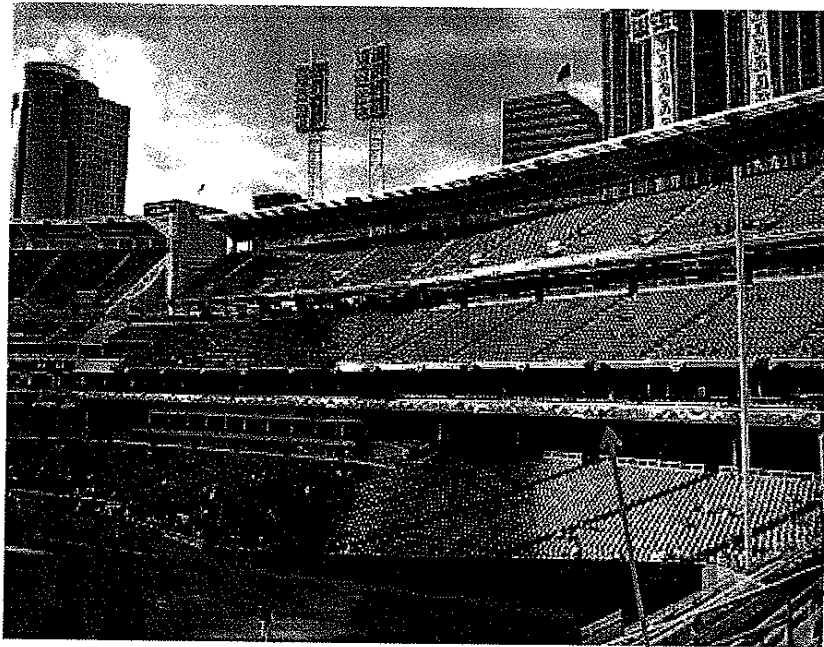


Fence Display during construction



1st Base Line
Ribbon Display

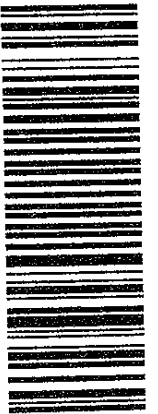




3rd Base Line
Ribbon Display



7014 1200 0001 0088



UNITED STATES MAIL

FIRST CLASS

FIRST CLASS

First Class Mail

SAD

b

BUCKINGHAM

Buckingham Doolittle & Burroughs, LLC
3800 Embassy Pkwy, Ste 300
Akron OH 44333-8398

Forwarding Service Requested

Ohio Department of Taxation
Attention: Dara L. Greene, Attorney
30 E. Broad Street, 23rd Floor
Columbus, Ohio 43215

January 5, 2015

Ms. Dara Greene
Attorney
Office of Chief Counsel
Department of Taxation
30 East Broad St. – 23rd Floor
Columbus, Ohio 43266-0420

**RE: The Cincinnati Reds, LLC
Consumer's Use Tax-Petition for Reassessment
Assessment Serial # 8110402974
Account # 97120173
Case #: 232041117A**

Dear Ms. Greene:

The Cincinnati Reds, LLC, ("Reds") submits this document in support of its objection to the assessment of Ohio consumer's use tax on the purchase of certain items that are purchased for resale pursuant to Ohio Revised Code § 5739.01(E), which states that a taxable "retail sale" does not include sales in which the purpose of the purchaser is to resell the property or benefit of the service by a person engaging in business in the same form as received.

The State has assessed use tax to the Reds on promotional items received by fans as they are admitted to a baseball game at Great American Ballpark in Cincinnati. The State believes the Reds are the consumer of these items and as such the Reds would be liable for sales or use tax.

The individual fan cannot receive a promotional item without the purchase of admission to a baseball game.

Ticket revenue is the principal revenue stream to the Reds organization and any promotional item that is included in the admission price to incentivize Reds fans to attend a ballgame is a business decision that is carefully thought through and paid for by the Reds ticket revenue. This is an important part of the Reds business model and strongly considered through the Reds budgetary procedures. The taxpayer needs to pay for every item that goes into game entertainment, which includes promotional matters. The budget for these items is determined on a line by line item basis and the Reds maximize spending in this area without exceeding the allowable budget limits.

The Cincinnati Reds transfer the t-shirts, bobbleheads, onesies, tote bags, hands fans, vinyl figures, blankets and jerseys in the same form as they are received and consideration is

Ms. Dara Greene
Ohio Department of Taxation
January 5, 2015

The Cincinnati Reds transfer the t-shirts, bobbleheads, onesies, tote bags, hands fans, vinyl figures, blankets and jerseys in the same form as they are received and consideration is received when the fan purchases a ticket to attend a baseball game and the right to receive these items upon admittance to the game.

A copy of the contract between the Cincinnati Reds and Scarborough Research is included per your request.

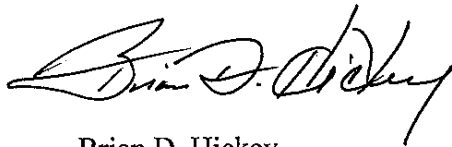
This vendor is a joint venture between The Nielsen Company and Arbitron. The company measures purchasing habits of sports fans for teams, leagues, marketers and media professionals. The data gathered by Scarborough is used by clients in developing corporate sponsorships, fan development, merchandising, promotion, competitive information, ticket sales, marketing, media selling, media placement and scheduling.

The court held in *WBNS TV, Inc. v. Roger W. Tracy*, Tax Commissioner of Ohio, Supreme Court of Ohio, No.94-1432, 75 Ohio St. 3d 572, 664 N.E. 2d 938, June 5, 1996, rating information provided to a television station by media research company was exempt from tax as a professional service.

We appreciate your consideration of this information and timely response.

If you have any questions related to the information provided in this letter, please contact me at 513-784-7171.

Very truly yours,



Brian D. Hickey
Director

Enclosure

**SCARBOROUGH RESEARCH
SCARBOROUGH SPORTS MARKETING
LICENSE AGREEMENT**

Date of Proposal: 7/16/08

This Agreement, dated as of the 16th day of July 2008, is between Scarborough Research with offices at 770 Broadway, New York, New York 10003 ("Scarborough"), and the Cincinnati Reds, LLC ("Licensee"), having its principal place of business at 100 Main Street, Cincinnati, OH 45202 for use only by the Cincinnati Reds and expressly not for any other entity, subsidiary or affiliate thereof.

1. **LICENSE GRANT:** Scarborough hereby grants to Licensee a limited, personal, nontransferable and nonexclusive license to receive and use certain data contained in Scarborough Report(s) ("Data" or "Report(s)") prepared based on surveys conducted for the geographic area (the "Market") described in Exhibit 1, attached hereto and fully incorporated by reference herein, subject to the conditions hereinafter set forth. Such Data and Reports may be furnished to Licensee in printed, electronic or other form, but title thereto will remain with Scarborough at all times.

2. **TERM:** The term of this Agreement shall be as provided in Exhibit 1. This Agreement shall become effective when countersigned by Scarborough's Contract Manager. This Agreement will continue without regard to Licensee's ownership of the entity(ies) licensed hereunder absent a valid Assignment pursuant to this Agreement. Licensee's license to use the Scarborough Report(s) provided hereunder shall terminate upon issuance of the same Report(s) for the next following data installment period unless Licensee is a then current Licensee of such Report at the time of issuance.

3. **LICENSE CHARGE AND PAYMENT.** Licensee shall pay a License Charge (the "License Charge") for the Report(s) in the amount and in accordance with the schedule set forth on Exhibit 1. License Charges shall be payable within thirty (30) days of receipt of invoice (to be provided in accordance with the schedule set forth on Exhibit 1). A late payment charge of one and one-half percent (1.5%) per month will be charged on all License Charges which are not paid within thirty (30) days after due hereunder, such late payment charge not to exceed one-twelfth (1/12) of the maximum annual percentage allowed to be charged under state usury law. Any failure to impose a late payment charge shall not prejudice Scarborough's right to do so should the default continue or should a subsequent payment not be made when due. In addition, Scarborough may, without terminating, breaching or committing a default under this Agreement: (a) accelerate or modify the payment schedule of License Charges for the duration of this Agreement; and/or (b) suspend delivery to Licensee of any Data or Reports due under this Agreement until such time as Licensee becomes current in its payment of all sums due hereunder; and/or (c) send Licensee written notice that its license hereunder is suspended, in which case Licensee expressly agrees that it shall thereafter not use the Data or Reports previously received until such time as Licensee becomes current in its payments of all sums due under this Agreement. Scarborough's suspension hereunder of delivery of Data or Reports to Licensee, and of this license, shall not relieve Licensee of its obligations hereunder. Licensee further agrees to reimburse Scarborough for all

collection costs and expenses (including reasonable attorneys' fees) incurred hereunder.

4. **COPYRIGHT: PERMITTED USES:** The Scarborough Report(s) are copyrighted. This Agreement is not a sale of the copyright or any other rights to the Scarborough Report(s) or any part thereof. Unauthorized copying of the Scarborough Report(s) or any part thereof is expressly prohibited. All Data and Reports provided under this Agreement will be furnished to Licensee solely for its own use, and with the understanding that none of the information contained therein will be disclosed or conveyed, directly or indirectly, to any non-Licensee, provided however, that Licensee may make available to its non-media and/or sponsorship clients or prospective non-media and/or sponsorship clients, such data or information as may be legitimately useful for purposes of media planning and selection. The individual copies of the Scarborough Report(s) provided hereunder and any pages thereof may only be given or made available to employees and authorized agents of Licensee. For Licensee to divulge the information contained in a Scarborough Report in a manner not permitted in this Agreement constitutes a breach of this Agreement and an infringement of Scarborough's copyright. Scarborough expressly does not grant hereunder a license to publish or post the Data or Reports on any location on the Internet, World Wide Web or any other global communications network and Scarborough expressly does not grant hereunder a license to combine, cross tabulate, index, model or in any way use the Data or Reports provided hereunder with data provided from any other source or with any other Scarborough data or reports without Scarborough's separate prior written consent. Licensee's obligations under this Section 4 shall survive any termination of this Agreement.

All disclosures of the Data shall cite the source as follows: "Source: [Year] Release [Number] Scarborough Report. Copyright [Year] Scarborough Research. All rights reserved."

Data with low statistical reliability will be identified by Scarborough. Licensee will not release such data to third parties as limited hereunder without indication to such third parties of low statistical reliability. The foregoing proscription includes any special tabulation data obtained by Licensee.

Subject to the following conditions, Licensee may authorize a third party to process the Scarborough Data licensed hereunder on Licensee's behalf. Licensee understands and agrees that it may do so only on condition: (1) that said third party is a then current Scarborough licensee in good standing who is authorized to process Scarborough data; and (2) that all restrictions on the use of the Data provided under this

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Agreement shall apply with full force and effect to any data, estimates, reports or other output, in any form, containing or derived from the Scarborough Data, produced by said third party for Licensee.

5. CONFIDENTIALITY OF RESPONDENT INFORMATION: Licensee agrees that all information provided by each respondent in the surveys conducted by Scarborough, including but not limited to names and addresses, is confidential, and that such information is provided to Scarborough with the understanding that it will remain confidential. Licensee agrees that it will not try either before, during or after a survey, or in connection with any litigation, to determine or discover the identity of any survey respondent, and that the anonymity of the respondents' identities will be maintained.

6. METHODOLOGY: SCARBOROUGH AND ITS THIRD PARTY LICENSORS MAKE NO WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, CONCERNING:

a. DATA GATHERED OR OBTAINED BY SCARBOROUGH FROM ANY SOURCE OR THE FAILURE OF ANY THIRD PARTY LICENSOR TO PROVIDE ANY DATA TO SCARBOROUGH;

b. THE PRESENT OR FUTURE METHODOLOGY EMPLOYED BY SCARBOROUGH IN PRODUCING THE DATA OR REPORTS; OR

c. THE DATA AND REPORTS LICENSED HEREUNDER.

ALL DATA AND REPORTS REPRESENT ONLY THE OPINION OF SCARBOROUGH. RELIANCE THEREON AND USE THEREOF BY LICENSEE IS AT LICENSEE'S OWN RISK.

7. LIABILITIES AND LIMITATIONS OF REMEDIES: THE SOLE AND EXCLUSIVE REMEDY, AT LAW OR IN EQUITY, FOR SCARBOROUGH'S BREACH OF ANY WARRANTY, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR FITNESS, AND THE SOLE AND EXCLUSIVE REMEDY FOR SCARBOROUGH'S LIABILITY OF ANY KIND, INCLUDING WITHOUT LIMITATION LIABILITY FOR NEGLIGENCE OR DELAY WITH RESPECT TO THE DATA OR REPORTS AND ALL PERFORMANCE PURSUANT TO THIS AGREEMENT, SHALL BE LIMITED TO A CREDIT (FOR EACH REPORT MATERIALLY AFFECTED BY ANY SUCH BREACH) TO LICENSEE OF AN AMOUNT EQUAL TO, AT THE MAXIMUM AMOUNT, THE LICENSE CHARGE PAID BY LICENSEE WHICH IS ATTRIBUTABLE TO THE MATERIALLY AFFECTED DATA OR REPORT. IN NO EVENT SHALL SCARBOROUGH BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, NOR SHALL IT BE SUBJECT TO INJUNCTIVE RELIEF WITH RESPECT TO THE PUBLICATION OF ANY DATA OR REPORT. LICENSEE UNDERSTANDS THAT DATA AND REPORTS EITHER WOULD NOT BE PREPARED OR WOULD BE AVAILABLE ONLY AT A SUBSTANTIALLY INCREASED LICENSE CHARGE WERE IT NOT FOR THE LIMITATIONS OF

LIABILITIES AND REMEDIES AS SET FORTH IN THIS SECTION.

Licensee agrees that it will notify Scarborough in writing of any alleged defect in any Report within thirty (30) days after Licensee learns of said alleged defect. Licensee further agrees that any action to be brought by it concerning any Data or Report shall be brought not more than one (1) year after such Data or Report was originally published by Scarborough.

8. DEFAULT AND TERMINATION: Scarborough may terminate this Agreement immediately upon written notice to Licensee in the event Licensee becomes delinquent by more than thirty (30) days in its payment or should Licensee default in any other condition or obligation of this Agreement. In addition, Scarborough may, in the event it ceases to produce the services provided hereunder, immediately terminate this Agreement at any time on written notice to Licensee.

9. ASSIGNMENTS AND CHANGES IN LICENSEE'S STATUS: (a) Scarborough shall be entitled to assign any of its rights or obligations under this Agreement, including the License Charge or any other charge(s) payable hereunder. Licensee may not assign either its rights or obligations under this Agreement without prior written consent of Scarborough, which consent will not be unreasonably withheld. In the event Scarborough consents to the assignment of this Agreement, Scarborough reserves the right to redetermine the rate to be charged to the assignee.

(b) Licensee acknowledges and agrees that the License Charge hereunder is based on Licensee's current business status and in the event it is purchased by or is otherwise merged with another business entity, Licensee remains fully obligated hereunder and may only be released from such obligations upon valid assignment of this Agreement. Licensee agrees that if its ownership, operating or sales policy, or business status or relationships change, it will report the date and nature of such change and its current status to Scarborough within thirty (30) days of such change; and that the License Charge or any other charge(s) hereunder may be re-determined due to such change, effective the first month thereafter. Licensee's failure or refusal to notify Scarborough of the change in its status as described herein shall not impair Scarborough's right to redetermine the License Charge or any other charge(s) hereunder.

10. SALES AND USE TAXES: Licensee shall pay to Scarborough any sales, excise, gross-receipts, service, use or other taxes now or hereafter imposed upon or required to be collected by Scarborough by any authority having jurisdiction over the Market(s) being surveyed or over any location to which Licensee directs Scarborough to deliver the Data or Reports, in any form, and such obligation shall survive the termination of this Agreement and/or license.

11. RESEARCH STANDARDS AND PROCEDURES: (a) Scarborough reserves the right to change at any time the geographical territory comprising the Market(s), its policies and procedures, survey dates, survey length, survey frequency, sampling procedures, methodology, method of Data or Report delivery, Data or Report content, Data or Report format, and to

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cancel surveys and the preparation of Data or Reports. Scarborough need not produce Data or Reports whenever, in its judgment, insufficient data are available to meet its minimum research standards or any event has jeopardized the reliability of the data. In the event that the Data and/or Reports are not produced, Licensee shall receive, at Scarborough's option, a refund or a credit reflecting the periodic charge(s) paid by Licensee attributable to the unpublished Report.

(b) In the event any cause(s) prevents Scarborough from conducting any survey in accordance with its Description of Methodology, schedules, or other publications, Scarborough reserves the right to produce abbreviated Reports. Licensee hereby consents to such abbreviated Reports under such circumstances. In the event that such abbreviated Report covers a substantially decreased geographic area, or deletes twenty-five percent (25%) or more of the survey days from the aggregate number of survey days scheduled, Licensee shall be entitled to either a proportionate refund for the abbreviated Report, or a full refund for the abbreviated Report, upon return of the abbreviated Report within ten (10) days, at Licensee's option. Further, Scarborough reserves the right in its sole discretion to augment available data by means of expanded or extended samples and Licensee agrees it shall not be entitled to any refund in such event.

AGREED TO:

Licensee: Cincinnati Reds, LLC
100 Main Street
Cincinnati, OH 45202

By: Bill Reinberger
Title: VP Corporate Sales
Date: 7/16/08

12. **GOVERNING LAW:** This Agreement shall be construed and enforced in accordance with the laws of the State of New York exclusive of its choice of law rules. The parties expressly agree that any and all disputes arising out of or concerning this Agreement will be litigated and adjudicated exclusively in State and/or Federal courts located in the State of New York, and each party consents to and submits to such jurisdiction.

13. **ENTIRE AGREEMENT:** This Agreement represents the entire agreement between the parties concerning the subject matter hereof, notwithstanding any previous discussions or understandings, and shall not be deemed to have been modified in whole or in part except by written instrument signed hereafter by officers or other persons to whom the parties have delegated such authority.

14. **SEVERABILITY:** Any litigated question regarding the legality, enforceability or validity of any section or part hereof shall not affect any other section, and if any section or part hereof is ultimately determined illegal, invalid, unconstitutional or unenforceable, that section or part thereof shall be severed from this Agreement and the balance of the Agreement shall thereafter remain in full force and effect for the remainder of the Term.

ACCEPTED BY:

SCARBOROUGH RESEARCH

By: 
Contract Manager

Date: 7/25/08

Exhibit 1

1. **Market(s) Provided:** Cincinnati
2. **Term:**
Term begins: 7/16/08; ends: 5/15/11.
3. **First Report:** Release 1, 2008 (R108); **Last Report:** Release 2, 2010 (R210).
4. **License Charge:**

	2008 Data	2009 Data	2010 Data
Annual License Charge	\$23,200	\$24,200	\$25,200

5. **Billing Information:**

	2008 Data	2009 Data	2010 Data
Each Payment Amount	\$2,320	\$2,016	\$2,100
Number of Payments	10	12	12
Date of First Payment	8/15/08	6/15/09	6/15/10
Date of Last Payment	5/15/09	5/15/10	5/15/11

OK
BR
7/16/08

SCARBOROUGH RESEARCH
Supplementary Services License Agreement

Date of Proposal: 7/16/08

THIS LICENSE AGREEMENT is supplementary to the Scarborough Research License Agreement ("Basic Agreement"), for a Term commencing 7/16/08 and ending 5/15/11, now existing between Scarborough Research ("Scarborough") and the Cincinnati Reds, LLC ("Licensee") for use only by: Cincinnati Reds

THIS LICENSE IS EXPRESSLY SUBJECT TO THE BASIC AGREEMENT AND THE TERMS ON THE REVERSE HEREOF. Licensee is permitted to receive and use, as detailed hereunder, certain computer software programs and/or data and/or other services which are supplementary to the Basic Agreement (such services collectively and/or individually referred to herein as the "Supplementary Service(s)"), which are expressly subject to the Terms and Conditions on the reverse of this Agreement.

a. Service: PRIME NEXt software
First Report: R108 Last Report: R210
Annual License Charge for Reports for:
2008: \$ (included in Scarborough agreement)
2009: \$ (included in Scarborough agreement)
2010: \$ (included in Scarborough agreement)

Term begins: 7/16/08; ends: 5/15/11
Said Charge will be invoiced and payable: (included in Scarborough agreement)

b. Service:
First Report: Last Report:
Annual License Charge for Reports for:

Term begins:
Said Charge will be invoiced and payable: (included in Scarborough agreement)

c. Service: _____
First Report: _____ Last Report: _____
Annual License Charge for Reports for:
_____: \$ _____
_____: \$ _____
_____: \$ _____
_____: \$ _____

AGREED TO:

Licensee: Cincinnati Reds, LLC

For: Cincinnati Reds

By (authorized signature): Bill Reinberger

Name: Bill Reinberger
(type or print above signature)

Title: VP Corporate Sales

Date: 7/16/08

Term begins: _____; ends: _____
Said Charge will be invoiced and payable: _____

d. Service: _____
First Report: _____ Last Report: _____
Annual License Charge for Reports for:
_____: \$ _____
_____: \$ _____
_____: \$ _____
_____: \$ _____
_____: \$ _____

Term begins: _____; ends: _____
Said Charge will be invoiced and payable: _____

Send invoice to: Bill Reinberger
100 Main Street
Cincinnati, OH 45202

Ship to: Scarboroughdelivers.com
breinberger@reds.com

Salesperson: Darren Hayden

____ New Order XX Renewal _____ Addendum

Specs (disk size, tape type, etc.):
1. CD-ROM - PRIME NEXT

Market(s): Cincinnati

ACCEPTED BY: [Signature]

By: _____
Contract Manager

Date: 7/25/08

SCARBOROUGH RESEARCH
770 Broadway
New York, New York 10003

SEE NEXT PAGE FOR ADDITIONAL TERMS AND CONDITIONS

Terms and Conditions

1. Incorporation of Basic Agreement:

(a) All terms and conditions of the Basic Agreement are hereby incorporated into this Supplementary Agreement by reference with the same force and effect as if printed at length herein and are applicable to any Supplementary Service provided hereunder.

(b) In order to receive a license to and access to any Supplementary Service, Licensee must be then currently licensed to receive and use Scarborough Data and/or Reports pursuant to the Basic Agreement.

In the event the Basic Agreement terminates, expires or becomes suspended for any reason, this Agreement and License(s) shall terminate, expire or become suspended concurrently therewith.

2. Mode of Use: Where use of a computer is necessary to access, receive and use any Supplementary Service, Licensee will obtain, from a vendor of its choice, computer equipment and an operating system conforming to the minimum specifications previously provided to Licensee. Licensee acknowledges that if such conforming equipment and systems are not obtained, the Supplementary Services may not operate properly. Scarborough does not warrant the operation of any Supplementary Service on any system configuration that does not conform to the specifications previously provided.

3. License Charges:

(a) "License Charges" for each Supplementary Service shall be paid as indicated on the face of this Agreement.

(b) In addition to and together with the License Charge, Licensee agrees to pay any sales, excise, gross-receipts, service, use or other tax now or hereafter imposed upon or required to be collected by Scarborough in conjunction with the provision of these Supplementary Services.

(c) Scarborough expressly reserves the right to change any License Charge for any Supplementary Service on prior written notice. Within thirty (30) days following such notice, Licensee may cancel only such Supplementary Service for which Scarborough has announced an increased charge, by notifying Scarborough in writing. In the absence of timely cancellation, this License Agreement as to such Supplementary Service shall continue and the new License Charge shall become payable as invoiced.

4. Termination: In addition to rights of termination stated elsewhere in this Agreement or in the Basic Agreement, Scarborough may, in the event it ceases to produce any Supplementary Service provided hereunder, immediately terminate this Agreement, at any time on written notice to Licensee.

5. Interruptions: Licensee agrees that Scarborough is not responsible for computer and/or telephonic communications interrupted by any Supplementary Service system failure, telephonic disruptions, weather, acts of God, force majeure or acts of third persons not connected with or controlled by Scarborough Research, nor for any additional expenses incurred by Licensee for subsequent and/or additional computer runs necessitated by such disruptions or interruptions.

6. Restrictions on Licensee's Use:

(a) Licensee acknowledges that the Scarborough Supplementary Services are proprietary to and copyrighted by Scarborough and/or or third parties ("Third Party Licensors") who have licensed Scarborough to use and sublicense certain portions of the Supplementary Services which are proprietary to such Third Party Licensors.

(b) Licensee agrees that it will not provide, loan, lease, sublicense or sell in whole or in part the Scarborough Supplementary Services, or data licensed by or to Scarborough and included with such Supplementary Services, to any other party or entity in any form,

(c) This restriction extends to, but is not limited to, any and all organizations selling or buying time to or from Licensee and any and all organizations providing data processing, software or computer services to Licensee.

(d) Licensee agrees that it will not use the Scarborough Supplementary Services under the control of computer programs written by its employees, agents or others. Scarborough makes no commitment to disclose to others the structure, format, access keys or other technical particulars of the Scarborough Supplementary Services.

(e) Subject to the following conditions, Licensee may authorize a third party to process the Scarborough Data licensed hereunder on Licensee's behalf. Licensee understands and agrees that it may do so only on condition: 1) that said third party is a then current Scarborough licensee in good standing who is authorized to process Scarborough Data; and 2) that all restrictions on the use of the Data provided under this Agreement shall apply with full force and effect to any data, reports or other output, in any form, containing or derived from the Scarborough Data and Reports, produced by said third party for Licensee.

7. Changes In Scope of Supplementary Services: Scarborough reserves the right from time to time to change, amend, enlarge or enhance the Supplementary Services in any manner from that which was initially delivered hereunder.

8. Methodology: SCARBOROUGH AND ITS THIRD PARTY LICENSORS MAKE NO WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR FITNESS, CONCERNING:

(A) DATA GATHERED OR OBTAINED FROM ANY SOURCE OR ANY SUPPLEMENTARY SERVICE PROVIDED BY SCARBOROUGH OR THE FAILURE OF ANY THIRD PARTY LICENSOR TO PROVIDE DATA OR SERVICES TO SCARBOROUGH;

(B) THE PRESENT OR FUTURE METHODOLOGY EMPLOYED BY SCARBOROUGH IN PRODUCING ANY SUPPLEMENTARY SERVICES; OR

(C) THE SUPPLEMENTARY SERVICES LICENSED HEREUNDER. ANY COMPUTER SOFTWARE PROGRAM(S) PROVIDED HEREUNDER IS PROVIDED "AS IS - WHERE IS".

ALL SUPPLEMENTARY SERVICES REPRESENT ONLY THE OPINION OF SCARBOROUGH. RELIANCE THEREON AND USE THEREOF BY LICENSEE IS AT LICENSEE'S OWN RISK.

9. Limitation of Scarborough's Liability and Licensee's Remedies: THE SOLE AND EXCLUSIVE REMEDY, AT LAW OR IN EQUITY, FOR SCARBOROUGH'S BREACH OF ANY WARRANTY, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR FITNESS, AND THE SOLE AND EXCLUSIVE REMEDY FOR SCARBOROUGH'S LIABILITY OF ANY KIND, INCLUDING WITHOUT LIMITATION LIABILITY FOR NEGLIGENCE OR DELAY WITH RESPECT TO ANY SCARBOROUGH SUPPLEMENTARY SERVICE AND ALL PERFORMANCE PURSUANT TO THIS AGREEMENT, SHALL BE LIMITED TO THE REFUND (FOR EACH SUPPLEMENTARY SERVICE MATERIALLY AFFECTED BY ANY SUCH BREACH) TO LICENSEE OF AN AMOUNT EQUAL TO THAT PORTION OF THE LICENSE CHARGE INCURRED AND PAID FOR IN THE TIME PERIOD DURING WHICH SUCH SUPPLEMENTARY SERVICE WAS MATERIALLY AFFECTED BY THE BREACH. IN NO EVENT SHALL SCARBOROUGH BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, NOR SHALL IT BE SUBJECT TO INJUNCTIVE RELIEF WITH RESPECT TO ANY SUPPLEMENTARY SERVICE. LICENSEE UNDERSTANDS THAT THE SUPPLEMENTARY SERVICES EITHER WOULD NOT BE AVAILABLE OR WOULD BE AVAILABLE ONLY AT A SUBSTANTIALLY INCREASED LICENSE CHARGE WERE IT NOT FOR THE LIMITATIONS OF LIABILITIES AND REMEDIES AS SET FORTH IN THIS SECTION.

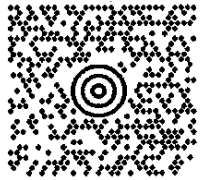

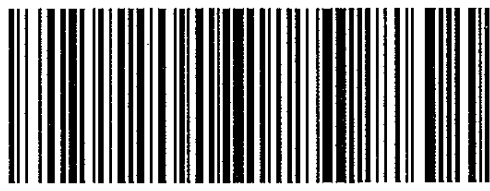

10. Severability: Any litigated question regarding the legality, enforceability or validity of any section or part hereof shall not affect any other section, and if any section or part hereof is ultimately determined illegal, invalid, unconstitutional or unenforceable, that section or part hereof shall be severed from this License Agreement and the balance of the License Agreement shall thereafter remain in full force and effect for the remainder of the Term.

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UPS Express Envelopes may only contain correspondence, urgent documents, and/or electronic media, and must weigh 8 oz. or less. UPS Express Envelopes containing items other than those listed or weighing more than 8 oz. will be billed by weight.

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		OH 432 9-50 	
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**Department of
Taxation**

*Office of Chief Counsel
30 E. Broad St., 22nd Floor
Columbus, OH 43215
(614) 466-6750
www.state.oh.us/tax/*

August 6, 2014

The Cincinnati Reds, LLC
100 Main Street
Cincinnati, OH 45202-4109

HEARING NOTICE

REPRESENTATIVE OF RECORD:

Deloitte Tax LLP
Attn: Brian D. Hickey
250 East Fifth Street
Suite 1900
Cincinnati, OH 45202-5109

Re: Sales/Use Tax
Assessment No. 8110402974

This matter is set for hearing on **Wednesday, September 17th, 2014 at 10:00 am** at the Rhodes State Office Tower, 30 East Broad Street, 22nd Floor, Columbus, Ohio. If you would prefer to have the hearing conducted on the telephone, simply call (614) 466-6750 at the appointed time and ask to speak with Dara Greene.

Please be prepared to discuss the issues under dispute and present all legal arguments you wish to have considered. Also, if you have any additional written information that you wish to submit, please do so prior to the time of the hearing.

If you have a conflict with the hearing date, please call me at (614) 466-6750. If you do not participate in the hearing, the matter will be considered on the basis of the information in the possession of the Commissioner and a final determination will be issued.

Sincerely,

Dara L. Greene, Attorney
Office of the Chief Counsel

Deloitte.

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OHIO DEPARTMENT OF TAXATION
OFFICE OF THE TAX COMMISSIONER

Deloitte Tax LLP
250 East Fifth Street
Suite 1900
Cincinnati, OH 45202-5109
USA

Tel: +1 513 784 7100
www.deloitte.com

February 10, 2012

Mr. Joseph W. Testa
Tax Commissioner
State of Ohio
Department of Taxation
30 East Broad St. – 21st Floor
Columbus, Ohio 43266-0420

RE: **The Cincinnati Reds LLC**
Consumer's Use Tax-Petition for Reassessment
Assessment Serial # 8110402974
Account # 97120173
Case #: 232041117A

Dear Mr. Testa:

The Cincinnati Reds LLC, ("Reds") submits this Petition for Reassessment in response to the enclosed Notice of Assessment dated December 13, 2011 (see attached) and a hearing is requested with respect to the matters covered by this protest. This request is made pursuant to Ohio Revised Code §5739.13.

The Reds hereby objects to the items described below for the sales/use tax assessment for the period 01/01/08 through 12/31/10. The following is a brief narrative of the reasons for such objections.

Issue One

The Reds have filed an application to enter the Ohio's Consumer Use Tax Amnesty program. At this time a determination has not been received from the State on this application. If the taxpayer is allowed to enter the amnesty program, it requests that all transactions before January 1, 2009 be removed from the audit assessment.

Issue Two

Video Displays/Scoreboard

The Reds contend that purchases from Daktronics Inc. and Sony of video displays/scoreboard were incorporated into real property under the terms of a construction contract and per Ohio

Mr. Joseph W. Testa
Ohio Department of Taxation
February 10, 2012

Revised Code § 5739.01(B)(5), the contractor is the consumer of the personal property and is liable for the sales tax on the purchase of the property.

In *Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Revision* (Jan. 26, 2007), BTA No. 2004-V-1294, unreported, reversed on other grounds, 118 Ohio St. 3d 330, 2008-Ohio-2454 held that various components of an outdoor theater complex including several large video projection screens should be classified as real property and were not business fixtures.

Issue Three

Promotional Items Sold with Admission

The Reds contends that certain promotional items are purchased for resale pursuant to Ohio Revised Code § 5739.01(E), which states that a taxable “retail sale” does not include sales in which the purpose of the purchaser is to resell the property or benefit of the service by a person engaging in business in the same form as received.

The State has assessed use tax to the Reds on promotional items received by fans as they are admitted to a baseball game at Great American Ball Park in Cincinnati. The State believes the Reds are the consumer of these items and, as such, the Reds are liable for sales or use tax.

However the State’s position does not consider that individual fans cannot receive a promotional item without the purchase of admission to a baseball game. The promotional item therefore is considered to be included in the price of admission and admissions are specifically scoped out of Ohio’s sales/use tax laws. As such, the promotional item should not have use tax levied against this purchase.

Furthermore, ticket revenue is the principal revenue stream to the Reds organization and any promotional item that is included in the admission price to incentivize Reds fans to attend a ballgame is a business decision that is carefully thought through and paid for by the Reds ticket revenue. This is an important part of the Reds business model and strongly considered through the Reds budgetary procedures. The taxpayer needs to pay for every item that goes into game entertainment, which includes promotional matters. The budget for these items is determined on a line by line item basis and the Reds maximize spending in this area without exceeding the allowable budget limits.

Issue Four

Advertising Materials

The Reds contend that certain purchases of advertising materials are exempt from Ohio sales and use tax pursuant to Ohio Revised Code § 5739.02(B)(35). These advertising materials “price and describe” an item for sale, which are the admission to a baseball game or games.

Mr. Joseph W. Testa
Ohio Department of Taxation
February 10, 2012

Issue Five

Research Services

The Reds contend that purchases from Scarborough Research are exempt from tax per Ohio Revised Code § 5739.01(B)(3),(Y)(2), that states professional and personal services are exempt from sales and use tax.

Scarborough Research provides research and market data on lifestyle, media behaviors and demographics of American consumers.

The Reds position is supported by Ohio Common Law. The court held in *WBNS TV, Inc. v. Roger W. Tracy*, Tax Commissioner of Ohio, Supreme Court of Ohio, No.94-1432, 75 Ohio St. 3d 572, 664 N.E. 2d 938, June 5, 1996, rating information provided to a television station by media research company was exempt from tax as a professional service.

Other Issues Not Being Objected to Currently

As a result of the Ohio Supreme Court decision in *CNG Development Company v. Limbach*, No. 91-211, February 19, 1992, 584 NE2nd 1180, 63OS3d, taxpayer reserves the right to raise the following issues:

Whether the Notice of Assessment constituted a denial of Equal Protection and Due Process of law for purposes of the United States and Ohio Constitutions, or whether the Notice of Assessment imposed sales/use taxes on transactions which are not within the taxing power of the State of Ohio by virtue of the United States and Ohio Constitutions.

Whether the Notice of Assessment constituted a violation of the Commerce Clause and/or Supremacy Clause of the United States Constitution.

Whether the issuance of the Notice of Assessment was contrary to the prior administrative rules, releases, rulings and pronouncements promulgated by the Commissioner.

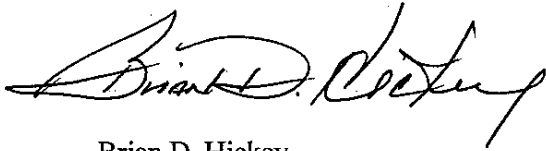
The taxpayer reserves the right pursuant to Ohio Revised Code §5739.13 to submit additional support for the issues protested and to submit any additional issues we discover between the date of this Petition and the Commissioner's final determination.

We appreciate your consideration of this information and timely response.

Mr. Joseph W. Testa
Ohio Department of Taxation
February 10, 2012

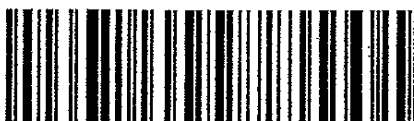
If you have any questions related to the information provided in this letter, please contact me
at 513-784-7171.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brian D. Hickey". The signature is fluid and cursive, with a large initial "B" and a stylized "H".

Brian D. Hickey
Director

Enclosure



7193 2971 4920 0906 3758

NOTICE OF ASSESSMENT

Compliance Division
P. O. Box 1090
Columbus, OH 43216-1090
Phone: 1-888-297-7150
Fax: 1-614-387-1847
TTY/TDD: 1-800-750-0750
tax.ohio.gov

December 13, 2011

7958670111207 ITAS

THE CINCINNATI REDS, LLC
100 MAIN ST
CINCINNATI, OH 45202-4109

Audit Type: FA
Case Type: 3

Pursuant to Section(s) 5703.261, 5739.12, 5739.13, 5739.132, 5739.133, 5739.15, 5739.33, 5741.11, 5741.12, 5741.13, 5741.14 of the Ohio Revised Code, The Tax Commissioner Hereby Certifies the Following:

CONSUMER'S USE TAX			ASSESSMENT #: 8110402974	
CASE TYPE: 3 (*) Refer to Definitions			ACCOUNT #: 97120173	
PERIOD ASSESSED: 01/01/08 through 12/31/10			CASE #: 232041117A	
TAX	INTEREST	PENALTY	ADDITIONAL CHARGE	ADDITIONAL CHARGE PENALTY
\$727,236.26	\$84,449.75	\$109,085.33	\$0.00	\$0.00
TOTAL ASSESSMENT DUE:				\$920,771.34

I HEREBY CERTIFY THE FOLLOWING TO BE A TRUE AND
CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER
TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

TAX COMMISSIONER, STATE OF OHIO

ASAT0095

Notice to taxpayers in Bankruptcy: This assessment is
a notice of tax deficiency permissible pursuant to
11USC 362(b) (9).

MAKE CHECK PAYABLE TO - TREASURER OF STATE

RETURN THIS PORTION WITH YOUR REMITTANCE AND/OR
CORRESPONDENCE PERTAINING TO THIS MATTER

THE CINCINNATI REDS, LLC

Account #: 97120173

Assessment #: 8110402974

Notice #: 7958670111207

CONSUMER'S USE TAX 410

ASSESSMENT PAYMENT COPY

Amount Owed: \$920,771.34

Enter Amount Paid: _____

*****State Use Only*****

Payment Code: PMT ITAS

Payment Date: _____

OTC #: _____

Case #: 232041117A

OHIO DEPARTMENT OF TAXATION
P.O. BOX 1090
COLUMBUS, OH 43216-1090

03541097120173620080101201012310017958670111207000000000000920771340

GENERAL INFORMATION

You have sixty days from the date shown on the enclosed tax assessment to pay the assessment in full without additional interest. The Tax Department does not arrange for installment payments; however, you may make partial payments anytime and they will be credited against the amount you owe. Sixty days from the date you receive this assessment, the assessment becomes final and is sent to the Attorney General's Collection Enforcement Section. That office may obtain a lien and/or contract with a private attorney and/or collection agency to enforce collection of this assessment. The Attorney General's Collection Enforcement Section can agree to a one-year payment plan, under certain conditions. Unpaid amounts will bear interest at the rate prescribed by Ohio Revised Code 5703.47 from the day the Tax Commissioner issues the assessment until paid.

IF YOU DISAGREE WITH THE ASSESSMENT

You have sixty days from the date you receive this assessment to file a petition for reassessment at: Ohio Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, OH 43216-1090. Your petition must be in writing and signed by you or your authorized agent.

We will schedule a hearing only if you request a hearing with your timely filed petition. If you send the petition by certified mail or other delivery service authorized by Ohio Revised Code 5730.056, the postmark date is considered as the date filed. However, if you send the petition by regular mail, the date the State receives the petition is the date filed. The Ohio Revised Code requires the dismissal of petitions which do not meet statutory requirements.

PAYMENT REQUIREMENTS

Sales/Use tax, no payment is required.

Employer Withholding/School District Employer Withholding assessments issued on or after October 16, 2009

Generally, no payment is required. However, the amount assessed must be paid no later than the last day the petition may be filed, if:

1. A return was filed showing no tax liability, but the reported amount was not based on the computations required by law.
2. No return was filed, except if the person had no nexus or if a properly completed return would result in a liability of one dollar or less.
3. The Tax Commissioner determined that the filed return was false, fraudulent or frivolous.

Employer Withholding/School District Employer Withholding assessments issued prior to October 16, 2009 and all Corporation Franchise assessments

The amount assessed must be paid no later than the last day the petition may be filed, if:

1. Your sole objection is the assessed penalty or interest, full payment of the assessment including interest, but not penalty, is required.
2. Prior to the date the assessment was issued you failed to file the annual return or any amended returns required by law for the given tax period, you must pay the entire assessment including interest, but not penalty.
3. Prior to the date the assessment was issued you filed the annual report and all amended reports required by law, but you did not pay the entire tax shown due on the reports you filed, you must pay that portion of the assessment representing the unpaid balance shown on the report(s).
4. **CORPORATE NEXUS - (This applies to Corporation Franchise tax assessments only)** The corporation assessed does not dispute that it is a taxpayer but claims the protection of Section 101 of Public Law 86-272, 73 Stat. 555 15 U.S.C.A. 381, as amended, the corporation must pay with the petition only the "Net Worth" portion of the tax along with the related litter tax (Ohio Revised Code Sections 5733.06(C), 5733.065(C)(2), and 5733.066(C)). You must also pay any related interest and penalty. If the corporation assessed disputes that it is a taxpayer, no payment is required.

NOTE: If none of the conditions outlined in 1 - 4 apply, no payment is required.

RESPONSIBLE PARTY INFORMATION

Your petition for reassessment must contain an explanation as to why you are not liable. The only issue you can raise is whether or not you are a responsible person for this debt.

A NOTE ABOUT INTEREST

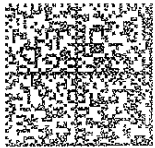
Interest accrues at the rate prescribed by Ohio Revised Code 5703.47 on any unpaid amount of the assessment, which is determined to be correct from the date of the assessment to the date of payment. Any overpaid amount will be refunded with interest at the same rate.

CASE TYPE DEFINITIONS

1. **DQ** Delinquency assessment issued for failure to file a return.
2. **NR** Nonremittance assessment issued for failure to timely pay reported tax and/or the return contained an error.
3. **FA** Field Audit assessment generated based on a field audit.
4. **OA** Office Audit assessment generated based on an in-house office audit.
5. **BC** Bad Check
6. **RP** Responsible Party assessment generated as a result of a taxpayer's responsible party status to a trust tax.
7. **JEP** Jeopardy assessment.
8. **DSC** Discovery assessment/estimated liability.
9. **ENF** Assessment issued as a result of an enforcement action.
10. **UTA** Use tax amnesty assessment issued as a result of failure to pay reported liability.

For additional information refer to the sections of the Ohio Revised Code listed at the top of your assessment notice.

7005 1820 0002 9563 0651



UNITED STATES
FIRST CLASS
\$ 06.40
02 1R
0006553631 FEB 10 2012
MAILED FROM ZIP CODE 45202

First Class Mail



Deloitte

250 East Fifth Street
Suite 1900
Cincinnati, OH 45202-5109
USA

Mr. Joseph W. Testa
Tax Commissioner
State of OH, Dept. of Taxation
30 E. Broad Street, 21st Floor
Columbus, OH 43266-0420

CONFIDENTIAL

Member of
Deloitte Touche Tohmatsu

LEGAL
MARGE
BREWER



Department of
Taxation

Ohio Department of Taxation
AUDIT REMARKS

Tax Form SUT REM
Rev. (4-09)

TAXPAYER INFORMATION

Name	The Cincinnati Reds, LLC
Address	100 Main Street
	Cincinnati, OH 45202
Account #	97120173
Assignment #	232041117
FEIN/SSN	31-1002055
Charter #	1115379

Taxpayer Contact

Name	Douglas Healy
Title	VP - CFO
Phone #/Fax #	(513) 765-7010 / (513) 765-7818
Email	dhealy@reds.com

External TBOR Representative (if applicable)

Name	None
Firm	
Phone #/Fax #	
Email	

Audit Period: 01/01/2008 through 12/31/2010	Audit Type: SUT - Purchases
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AUDITOR INFORMATION

Auditor(s) name

Name	Dale Race SP2577
Name	Iris Wilson SP3734
Name	Sara Young SP3736

Comment [Irv1]: A revision date will be added to the remarks after the file is first saved. Each succeeding time the file is opened, the revision date will indicate the last date the remarks were saved.

December 5, 2011

The Cincinnati Reds, LLC

AR-1 of 9



BUSINESS OVERVIEW

Business Activity Description: The Cincinnati Reds, LLC (Taxpayer) operates the Cincinnati Reds professional baseball team in Cincinnati, Ohio. The Cincinnati Reds were the first all professional baseball team in the United States, it was founded in 1882 as the Cincinnati Red Stockings and joined the National League in 1890. The Cincinnati Reds are currently in the Central Division of the National League. The Cincinnati Reds have won five World Series titles and nine National League pennants as of the 2010 season. The Cincinnati Reds currently play in Great America Ballpark. The taxpayer maintains a website at: www.reds.com.

Comment [DOT2]: Provide a detailed description of the taxpayer's type of business including but not limited to: industry, customers, competition, and industry outlook (bankrupt?).

Facilities in Ohio/Plant Tours: The taxpayer maintains their corporate headquarters at 100 Joe Nuxhall Way, Cincinnati, Ohio 45202. The Cincinnati Reds have one minor league baseball affiliate located in Ohio, the Dayton Dragons located in Dayton, Ohio which is a separate entity. The Cincinnati Reds make some purchases of equipment and supplies that are shipped to Dayton. These are Cincinnati Reds LLC purchases not Dayton Dragon purchases.

Comment [AFS3]: Describe the facility/plant, plant tours conducted during this audit, taxpayer business operations at each location. For a manufacturer include a description of the manufacturing process. Use your own words. Do not copy and paste language from promotional material supplied by the taxpayer.

Comment [AFS4]: Indicate if any other sales/use audits being performed (i.e. subs, pollution control, etc).

Locations Outside Ohio: The taxpayer has no locations outside of Ohio. The taxpayer conducts its yearly spring training in Goodyear, Arizona. The taxpayer does maintain minor league baseball affiliations with teams located outside of Ohio. These teams would currently include:

Comment [DOT5]: Provide a list of the taxpayer's locations outside of Ohio with a brief description of each location.

Louisville Bats located in Louisville, Kentucky
Carolina Mudcats located in Zebulon, North Carolina
Bakersfield Blaze located in Bakersfield, California
Billings Mustangs located in Billings, Montana
Arizona Reds located in Goodyear, Arizona
Dominican Reds located in Boca Chica, Dominican Republic
Venezuelan Reds located in Valencia, Venezuela

Corporate structure & recent changes: The taxpayer operates as a limited liability company (LLC) in Ohio. The most recent change was in 2006 when a group headed by Robert Castellini purchased a total of 70% of the LLC from Carl Lindner. Mr. Lindner maintains ownership of the other 30% of the LLC.

Comment [DOT6]: Describe the corporate structure. Hyperlink to the organizational chart document here and indicate source of document. Indicate any changes in structure for the audit period. Compare corporate structure to prior year and/or, if known, post audit period.

AUDIT HISTORY

Prior Audit Period(s): The auditor found three prior audits and one prior refund claim for the taxpayer. The AMS numbers and periods covered are:

AMS #232004067, period 10/01/1998 to 09/30/2001 Purchase audit on account 97-120713, paid in full.

AMS #232024532, period 01/01/2002 to 09/30/2005 Purchase audit on account 97-120713, payment made.

Comment [ANM7]: Describe issues encountered during last audit cycle and how they were resolved, status of appeals & settlement agreements that may exist. Provide a list of prior audit periods (minimum of last audit cycle if any) for same type of audit. Reference information obtained from any of the following sources: AMS, OFAST Central Location, Narrative Database, TDS. Depending on the circumstances additional details may be needed.



AMS #235027358, period 01/01/2002 to 09/30/2005 Refund Claim on account 97-120713, used as payment on audit AMS #232024532.

AMS #231026592, period 11/01/2002 to 10/31/2005 Sales audit on account 31-272151, payment received.

Issues: Not Applicable

Appeals: The taxpayer filed an appeal on AMS assignment number 231026592, Assessment number 7060421187, for remission of the penalty added to the audit. The penalty was reduced by 60% by the appeals officer.

Resolutions: Not Applicable

Settlement Agreements: Not Applicable

Cooperation from Taxpayer: The taxpayer has been cooperative during all audits and refund claims.

Comment [DOT8]: Describe the taxpayer's cooperation during previous audits (if known).

OTHER TAX TYPE ACTIVITY

Corporate Franchise/Income: Account 01505650, effective date 10/12/1999. No returns filed, taxpayer is a LLC.

Employer Withholding: Account 51612287, effective date 03/01/1981. Returns have been filed and paid for the entire audit period. No current audit assignments.

Comment [AFS9]: For each tax type:
Give account number, if registered indicate status of account (e.g., up to date, etc.). Indicate if they have returns and payments on file for each.
If not registered, describe action taken, indicate any past or current audits.
Reference AMS, Audit Narratives, Concurrent audits and note issues for each.



Pass-through Entity: Account 31-1002055. Returns filed through 2009 return.

Personal Property/Dealer in Intangibles: Account 10666083. Returns filed through 2008 return.

Commercial Activity Tax: Account 93013983, registered 07/01/2005. Returns have been filed and paid for entire audit period. Account was audited for the period 07/01/2005 – 12/31/2007.

Use Tax Accounts or Vendor's Licenses: Account 31272151, closed effective 05/31/2006.

Comment [AFS10]: Information concerning the SUT tax type not under audit. (e.g. if use audit please state information on vendor licenses, if sales audit provide info on use licenses)

AUDIT SCOPE

Reason for Audit: The taxpayer has been audited in the past and the audits have produced large assessments. The taxpayer purchased a new scoreboard/display system for Great America Ballpark in 2009.

Comment [oh11]: Indicate tax issue reason(s) why taxpayer was chosen for audit.

Pre-Audit Analysis: The taxpayer has in the past purchased "giveaway" items for which no tax was paid or accrued. The taxpayer has increased the frequency of "giveaway" games. The taxpayer purchased the new scoreboard/display system in 2009. The auditor also reviewed the taxpayer consumer use tax filings and found them to have not changed after the previous audit period.

Comment [oh12]: Indicate all issues reviewed during pre-audit analysis. This could be a combination of "old" issues if company was previously audited, as well as reference to accounts of interest and how they were developed. Identify other potential issues uncovered during pre-field contact.

Issues not Pursued: All issues pursued.

Comment [oh13]: Identify accounts of interest (bullet point list or hyperlink to document) that were questioned but not included and/or were not adjusted during the audit and reason for this conclusion. Also, brief description of other issues (ownership or registration issues, situsing issues, filing issues, etc) from pre-audit analysis that were considered but found to be correct during the audit process.

Issues Pursued: All capital and expense purchases reviewed for taxability.

Comment [oh14]: Indicate accounts of interest (bullet point list or hyperlink to document) that were questioned during the audit process and/or adjusted as part of the audit. Also, briefly describe other issues (ownership or registration issues, situsing issues, filing issues, etc) that resulted in changes and additional issues discovered during audit process.

AUDIT FINDINGS/TAXPAYER POSITIONS

Records reviewed during the Audit: The auditor reviewed all of the taxpayers purchase records. The records were reviewed at the taxpayers headquarters located at 100 Joe Nuxhall Way, Cincinnati, Ohio. The record review took place from June 7 to June 29, 2011.

Comment [AFS15]: For all audit adjustments, remember to properly cite the statutory authority. Types of authorities are (but not limited to): Ohio Revised Code, Ohio Administrative Code, Tax Commissioner Opinions, Final Determinations, BTA, Court of Appeal, Ohio Supreme Court decisions and ODT policy.

Comment [AFS16]: List records examined or if records available for only certain period(s) then list the records and period available. If no records exist then explain why. Provide location of records. Describe taxpayer's method of collecting, recording, and reporting their tax liability.



Audit Procedures/Basis for Assessment: The auditor contacted Doug Healy (Mr. Healy), CFO of the taxpayer on September 16, 2010 and informed him of the audit assignment. The auditor and Mr. Healy discussed the time frame for completing the audit assignment and it was decided that the examination of the taxpayer records would take place beginning January 24, 2011.

The auditor prepared the Audit Commencement Letter (\\09) Communications\ACL Letter 09-17-10.pdf) and emailed it to the taxpayer on September 17, 2010.

In January 2011, the auditor found that he would be going on medical leave starting in February 2011. The auditor called Mr. Healy to inform him of this. Mr. Healy informed the auditor that he was going to be taking off around the same time as his wife was due to have a baby. The auditor and Mr. Healy agreed to push the audit starting back until the auditor returned from medical leave.

The auditor returned to work on April 25, 2011.

The auditor contacted Mr. Healy regarding a starting date for the record review. Mr. Healy put forth doing the record review during the month of June. The auditor agreed to a starting date of June 7, 2011. Mr. Healy advised the auditor that B. J. Viator, Controller would be the contact person for the record review.

The auditor started the record review on June 7, 2011 at the taxpayer's headquarters at 100 Joe Nuxhall Way in Cincinnati, Ohio. The auditor was assisted by auditors Sara Young, Iris Wilson, Steve Brown and Audit Manager Robbin Randolph in completing the record review. The record review was completed on June 29, 2011.

During the record review, the taxpayer raised questions to items that are being listed in the audit. The largest of the issues raised by the taxpayer was regarding the purchase of a new scoreboard/display system for Great American Ballpark. The taxpayer is questioning the auditor's determination that the scoreboard/display system would be considered a "business fixture" as defined by Ohio Revised Code (ORC) section 5701.03 (B). The taxpayer requested a meeting with audit administration to discuss this issue.

On June 23, 2011, the auditor, Audit Manager Robbin Randolph, John Trippier, Audit Administrator and Steve Russell, Audit Administrator met with Mr. Healy, CFO, B.J. Viator, Controller and Jim Marx, Legal Counsel for the taxpayer. The taxpayer is questioning the scoreboard/display purchase being considered a "business fixture" by the auditor as opposed to being a construction contract. John Trippier and Steve Russell informed the taxpayer that they both were in agreement that the scoreboard/display system was a "business fixture" and would be a taxable purchase of tangible personal property by the taxpayer. As listed in the contested issues section below, the taxpayer is not in agreement with this determination.

The taxpayer also questioned the taxability of two other areas of purchases listed in the audit. The first area was giveaway items such as bobbleheads, t-shirts, blankets. The taxpayer believes that these items would be included in the price of the ticket to the giveaway games. The auditor maintains that the taxpayer is the consumer of these giveaway items as no additional charge is added to ticket prices for giveaway games. The taxpayer also makes the argument that they are reimbursed by sponsors and therefore they should not be the consumer of the items. The second area is printed matter used by the taxpayer in marketing of season and regular season ticket sales. The taxpayer points out that the print matter "prices and describes" the ticket packages and individual ticket purchases that are available to the public. The auditor believes that the taxpayer

Comment [AFS17]: Provide an overview of the audit by describing all important steps taken and corresponding dates pertaining to the audit. This overview should also:

- Identify and explain all major audit issues.
- Detail taxpayer's position and items of appeal.
- Include and explain any conclusions reached during the audit.
- arguments (if any) against our position,
- Include references to substantiate audit findings (i.e. Ohio Revised Code, Ohio Administrative Code, Court Cases, and Department Policy).
- Describe sample period methodology.



is not making "retail sales" as defined in ORC 5739.01 (O) and therefore the taxpayer would be the consumer of the printed matter listed in the audit. These two areas have been listed under the contested issues section of the audit remarks.

Due to waiting on information regarding the amnesty program being offered by the State of Ohio, the initial review of the audit listings was not completed until August 25, 2011. Please see the taxpayer review section below for detail of the review process.

Amnesty: The auditor did not offer the taxpayer the opportunity to participate in the 2011 Consumer Use Tax Amnesty Program. The auditor found that the taxpayer has been issued prior consumer use tax assessments. The auditor has included copies (.\\(06) TP Returns & Exhibits\\Cin Reds Assessments Amnesty.pdf) of the prior assessments that were found. The taxpayer questioned not being offered to participate in the amnesty program. The auditor forwarded the taxpayer the application for the amnesty program. The auditor has not received back the completed application at the time of submitting the audit. The taxpayer has indicated that they would be appealing this decision (see below).

Ofast Measures: The auditor created two measures for the OFAST audit file, Purchases and Scoreboard.

Comment [AFS18]: eList issues by OFAST measures first then by group (i.e. fixed assets v. expenses).

Purchases Measure:

This measure includes all taxable purchases made by the taxpayer, capital and expense, for which no evidence was found that sales tax had been paid to vendors or consumer use tax had been accrued and paid to the State of Ohio. The purchase of the scoreboard/display systems is not included in this measure; it is listed in the "Scoreboard" measure.

The largest areas of purchases in this measure include:

Promotional Items -- This includes the purchases of promotional giveaway items such as bobbleheads, pocket schedules, trading card sets, blankets, T-shirts/Jerseys.

Computer Software -- This area includes the purchase of software and software license renewals.

Printed Matter -- This includes the purchase of Season Ticket Renewal packets, Suite booklets, ticket and promotional mailers.

Other purchases listed in this measure include general office supplies, baseball equipment, stadium repairs and equipment, photography services and other general business items.

The approximate consumer use tax due in this measure is \$ 179,988.26

Scoreboard Measure:

This measure includes the purchase of the scoreboard/display systems from Sony Electronics Inc. (Sony) only. The purchase listed is for the portion of the contracted work for which Sony hired subcontractor Daktronics. The auditor found that Sony had charged collected and remitted sales tax (.\\(06) TP Returns &



Exhibits\Sony Sales Tax Backup.pdf) on the portion of the contract for which they performed the work. The Daktronics portion of the contract includes the sale and installation of the actual scoreboard/display equipment. Daktronics provided the auditor with documentation that shows that Daktronics had accrued use tax on the purchase of the materials used in the scoreboard/display contract and have remitted the tax on the Daktronics sellers use sales tax (.\(06) TP Returns & Exhibits\Daktronics Info) account (99-024568). The auditor explained to the taxpayer that Daktronics has incorrectly handled the sales tax remitted. The auditor explained to the taxpayer that Daktronics should not have paid any tax on the materials used under the scoreboard/display contract and that any tax paid by Daktronics would be subject to refund. The auditor explained to the taxpayer that the State would not be able to give any credit for the tax remitted by Daktronics. The auditor informed the taxpayer that Daktronics would need to file a refund claim for the tax remitted in error. The taxpayer is not in agreement with the listing of the scoreboard/display purchase.

The approximate use tax due on the scoreboard/display system purchase is \$ 547,248.00.

PENALTY JUSTIFICATION

Section #1 Criteria: The auditor did not check any boxes in this section of the Penalty Worksheet.

Section #2 Criteria: The auditor completed the Penalty Worksheet (PWS) (.\(05) Penalty Worksheet\Cin Reds PWS 11 03 11.xls) for the audit. The PWS shows five boxes in this section with checkmarks. This results in a 15% penalty being added to the audit.

SUMMARY

Taxpayer Contested Issues: The taxpayer is contesting the following issues:

- **Scoreboard/Display System:** The taxpayer is not in agreement with the auditors determination that the purchase of the scoreboard/display system would be taxable as a business fixture as defined by ORC section 5701.03 (B) which states "**...that primarily benefits the business conducted by the occupant on the premises and not the realty...**" and not a construction contract as defined under Ohio Administrative Code (OAC) 5703-9-14. It is the taxpayer's contention that the scoreboard/display system is an addition to the real property and should qualify as a construction contract under OAC 5703-9-14. The taxpayer has forwarded documentation showing sales tax that was remitted by Sony (.\(06) TP Returns & Exhibits\Sony Sales Tax Backup.pdf), on their entire portion of the contract. The taxpayer forwarded documentation from Daktronics (.\(06) TP Returns & Exhibits\Daktronics Info) showing that they accrued use tax on the cost of materials used in the completion of their portion of the scoreboard/display system contract. Daktronics does not maintain a consumer use tax account with the State of Ohio; as a result they forwarded the accrued tax on their sellers use account (99-024568) which was not the proper way to handle the accrual. It appears that Daktronics believes that the contract was for the installation of real property and not tangible personal property. The auditor explained to the taxpayer that Daktronics had incorrectly handled the tax due on the sales and installation of tangible personal property and as a result the auditor could not give the taxpayer credit for the tax remitted by

Comment [ANM19]: These remarks will be made in comparison to specific criteria for checking/not checking boxes based on Penalty Worksheet Guidelines.

Comment [AFS20]: Create hyperlink to the penalty worksheet here.

Comment [DOT21]: Identify how each penalty criteria applies or does not apply. These explanations will support the penalty charged during the appeals process. The criteria includes non-remittance of trust tax/willful non-collection of tax, non-compliance, automatic penalty imposition.

Comment [DOT22]: Identify how each penalty criteria applies or does not apply. The criteria includes tax compliance issues, tax audit compliance under (X)%, poor prior audit compliance improvement, records not made available during audit, unsatisfactory audit responsiveness and other.

Comment [AFS23]: Create a bullet point listing of areas the taxpayer disagrees with as described in the Audit Findings section of the remarks.



Daktronics. It was explained that Daktronics would need to file for a refund of the tax remitted in error.

- **Promotional (Giveaway) Items:** The taxpayer is not in agreement with the listing of promotional/giveaway items (i.e. bobbleheads, trading card sets, pocket schedules, etc.) by the auditor. The taxpayer contends that the items given away are included in the price of the ticket purchased, and therefore are being purchased for "resale" and not a taxable purchase. It is the contention of the auditor that no consideration is being given for the promotional item and that the taxpayer is the consumer of the items. The auditor notes that no additional price is paid for tickets to "giveaway" game as opposed to non "giveaway" games. It should also be noted that no sales tax is charged on the purchase of tickets to games and that the auditor contends that the sales of tickets do not qualify as "retail sales" as defined under ORC sections 5739.01(B)(1), (E) and (O).

The taxpayer has submitted a court case from Missouri to support their view; the auditor explained that this case is not from Ohio so that it could not be used by the auditor.

- **Printed Matter:** The taxpayer is not in agreement with the listing of printed matter used in the sale of season tickets by the taxpayer. The taxpayer contends that the printed matter "prices and describes" the items for sale and therefore qualifies for exemption under ORC section 5739.02(B) (35) (a). The auditor contends that the taxpayer would not qualify for this exemption as they do not qualify under ORC sections 5739.01(B) (1), (E) and (O) as making "retail sales".
- **Amnesty:** The auditor found prior consumer use tax assessments for the taxpayer and informed the taxpayer that this would not allow the taxpayer to participate in the 2011 Consumer Use Tax Amnesty program. The taxpayer still requested that they be allowed to complete the application to participate in the 2011 Consumer Use Tax Amnesty program enacted by The State of Ohio. The auditor has not received back the completed application at the time of submitting the audit. As stated above, the auditor researched the taxpayer and found prior consumer use tax assessments which resulted in the auditor informing the taxpayer that they did not qualify for the amnesty program.

End Result (Balance due/Refund): The end result of the audit is:

Comment [DOT24]: Identify the outcome of the audit: balance due, refund

• Consumer Use Tax Due:	\$ 727,236.26
• Penalty Due:	\$ 109,085.33
• Pre-Assessment Interest ran through 11/21/2011	\$ 83,334.10

The Major Finding Codes for the audit are:

▪ 100.005 Business Equipment/Assets	\$ 547,248.00
▪ 100.007 Business Supplies	\$ 179,988.26



Taxpayer Review: The auditor, Audit Manager Mark Bechtold, Auditors Sara Young and Iris Wilson met with Mr. Healy on August 25, 2011. Mr. Healy again stated his disagreement with the contested issues listed above. Mr. Healy requested more time to research the contested issues, the audit agreed to more time. The auditor issued the Letter of Confirmation (\\09) Communications\Cinti Reds LOC 08 25.pdf) to Mr. Healy on August 25, 2011 and explained that the letter gives the taxpayer 30 days to produce any additional information.

Comment [DOT25]: Identify the date you met with the taxpayer to review the ST-807; if no meeting, indicate date the ST-807 was sent to the taxpayer. Also indicate the taxpayer was notified of their rights as indicated above their signature on ST807 and that the ST-807 does not constitute a petition for reassessment. Include any correspondence or disagreement received from the taxpayer relative to the ST-807.

Mr. Healy emailed the auditor on September 30, 2011 with new information relating to a few of the audit listings. The auditor reviewed the information provided and made corrections to some of the audit listings. Mr. Healy also informed the auditor that Sony was researching the scoreboard/display purchase and would be sending Mr. Healy information by October 12, 2011. The auditor agreed to wait for the Sony information but informed Mr. Healy that the audit needed to be submitted to his audit manager by November 11, 2011. The auditor informed Mr. Healy that he would accept any information provided by Sony up to November 08, 2011.

On November 11, 2011 the taxpayer forwarded information regarding the Daktronics portion of the scoreboard/display system purchase. The auditor reviewed the documents and made adjustments to the OFAST import template. The auditor emailed Mr. Healy the ST-807 for the audit.

Mr. Healy informed the auditor on November 18, 2011 that no one would be signing the ST-807 (\\03) Audit Findings\ST-807 11 18 11.pdf) and that the audit file should be submitted.

Comment [DOT26]: Identify if payments were received from the taxpayer during the audit, the date and amount of those payments, and the disposition of the payments.

Audit Payments Received: No payments have been received on the audit.

Comment [DOT27]: For sales tax audits (except 120 day letter audits), direct payment permit audits, and seller's use tax audits identify the responsible party or parties and the reasons why they were selected. Hyperlink to responsible party questionnaire.

Responsible Party: Not Applicable