IN THE SUPREME COURT OF OHIO

ARAMARK CORPORATION, Appellant v. PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, Appellee.	:	Supreme Court Case No. 2023-1540 Board of Tax Appeals Case No. 2019-2975

BRIEF AMICUS CURIAE OF THE OHIO CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT ARAMARK CORPORATION

ON APPEAL FROM THE BOARD OF TAX APPEALS

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STATEMENT OF INTEREST OF AMICUS CURIAE

Founded in 1893, the Ohio Chamber of Commerce ("the Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization, representing businesses ranging from sole proprietorships to some of the largest U.S. companies. The Ohio Chamber promotes and protects the interests of its more than 8,000 business members, and works to build a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance. The Ohio Chamber seeks a stable and predictable legal system which fosters a business climate where enterprise and Ohioans prosper.

Many of the Ohio Chamber's members are subject to Ohio's Commercial Activity Tax ("CAT"), and thus have an interest in the CAT—and its exemptions—being applied in a way that is fair and predictable, and consistent with the plain meaning of the CAT statute. The Tax Commissioner's position in this case—and the Board of Tax Appeals decision upholding that position—undermines that goal.

The Ohio Chamber asks this Court to reverse the BTA decision denying the refund claims for Aramark Corporation ("Aramark").

LAW AND ARGUMENT

One fictitious winter morning, an exuberant Ebenezer Scrooge sprang to his window and waved down a young man on the street below. Scrooge first confirmed with the boy that he had not missed Christmas, and then inquired about the prize turkey that—he soon learned—was still hanging at a nearby poulterer's shop. The now-reformed miser decided to buy the bird and send it to his employee, Bob Cratchit. Now imagine Dickens had this story in Columbus, rather than London, and consider three variations on his tale.

The first is the version Dickens himself wrote: Scrooge gave the boy these instructions: "Go and buy it, and tell 'em to bring it here . . . Come back with the man, and I'll give you a shilling. Come back with him in less than five minutes and I'll give you half-a-crown."[1] The boy returned in due course with the poulterer and turkey in tow, and Scrooge laughed to himself as "he paid for the turkey" and "recompensed the boy." We can safely assume in Dickens' version that Scrooge bought the turkey directly himself. So there would be no need to determine whether the boy was Scrooge's "agent," for either way the boy would pay the Commercial Activity Tax on only the half crown he received for fetching the poulterer.

The second variation is the one found in the Muppet Christmas Carol, where Scrooge told the young lad "go and buy [the turkey] and I'll give you a shilling. No, I'll

[1] A coin worth two and a half shillings.

give you five shillings." Scrooge then tossed down a bag of money, and the boy took off to buy the turkey. In this version, the boy would pay the CAT on his five-shilling fee as a purchasing agent, but the money he received from Scrooge to pay for the turkey itself would not be considered "gross receipts" under the agency exclusion to the CAT.

The last version is one that Aramark might tell, and it is similar to the one we see in the 1999 film adaptation, where Scrooge instructs the boy to "go and buy [the turkey] in my name and tell them to bring it here." We might suppose here that the boy did just that: he spent his own money to buy the turkey, and returned to Scrooge to be reimbursed for the turkey and compensated for playing messenger on Christmas morning. And in this version, the Tax Commissioner's application of the CAT changes.

Based on her denial of Aramark's refund claims, the Commissioner would treat both the two-shilling agent's commission[2] *and* the reimbursement for the turkey as taxable "gross receipts" under the CAT. For the Tax Commissioner—and this Court in *Willoughby Hills Dev. & Distribution, Inc. v. Testa*—concluded that a person can be an "agent" for purposes of the CAT *only if* that person has the actual authority to bind the principal to a contract. That was a mistake, because the CAT's statutory definition of "agent" requires only that a putative agent be "authorized by another person to act on its behalf to undertake a transaction for the other," and specifically includes "a person

[2] Sir Patrick Stewart's pence-pinching Scrooge was evidently not yet fully reformed; he hesitantly offered the boy only two shillings for a speedy return.

retaining only a commission from a transaction with the other proceeds from the transaction being remitted to another person." R.C. 5751.01(N)(2).

I. Prologue: R.C. 5751.01 defines "Agent."

Like Dickens's stingy protagonist, the Tax Commissioner has forged a chain of errors here. But it is not too late to course correct. This case can and should be decided on the text of R.C. 5751.01, using the plain meaning of the statutory text and ordinary tools of statutory construction.

Begin with the statutory text: Ohio levies "a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state." R.C. 5751.02(A). Section 5751.01(F) defines "gross receipts," and specifically *excludes* "Property, money, and other amounts received or acquired by an agent on behalf of another in excess of the agent's commission, fee, or other remuneration." R.C. 5751.01(F)(2)(l). And "agent," in turn, is defined as "a person authorized by another person to act on its behalf to undertake a transaction for the other, including any of the following: . . . (2) A person retaining only a commission from a transaction with the other proceeds from the transaction being remitted to another person." R.C. 5751.01(N).[3]

So the question in this case—and many others involving the agency exemption—is whether Aramark is: "authorized" by its Management Fee Contract counterparties

[3] The 135th General Assembly moved the definition of "Agent" from division (P) to division (N) in Am. Sub. H.B. 33. The statutory text has not changed.

(the statutory "another person"), to act on those counterparties' behalf to undertake acquiring and selling food (the statutory "transaction"). And under division (N)(2), Aramark is an agent if it retains only a commission from the food transactions and remits the other proceeds to its contract counterparties. Aramark ably explains in its brief why it meets that straightforward definition.

II. The Errors of "Agent" Past: *Cincinnati Golf* and *Willoughby* rewrote division (N)(2).

This case turned out to be difficult only because the Tax Commissioner and this Court rewrote R.C. 5751.01(N) in *Willoughby Hills Development & Distribution, Inc. v. Testa*, 155 Ohio St. 3d 276, 2018-Ohio-4488, 120 N.E.3d 836. But to see the error in *Willoughby*, one must begin even earlier with the analysis that *Willoughby* wrongly borrowed from *Cincinnati Golf Management, Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929. To be clear, the Court's analysis and outcome in *Cincinnati Golf* was right. And the outcome in *Willoughby* was likewise correct. The mistake was the underlying analysis in *Willoughby*, which was not necessary to reach the right outcome.[4]

A. *Cincinnati Golf* analyzed the sales and use tax, and the common-law understanding of "agency."

Cincinnati Golf involved the state sales and use tax, R.C. 5739.02(B)(1)—not the CAT. Under the sales and use tax statute, sales made to Ohio and any of its political subdivisions are exempt from the tax. R.C. 5739.02(B)(1). In *Cincinnati Golf*, the taxpayer

[4] As evidenced in part by the Chief Justice's vote to concur only in the judgment.

claimed that it made purchases as an agent on behalf of the City of Cincinnati, and thus was entitled to the exemption. *Cincinnati Golf*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929, at ¶ 1.

The sales and use tax does not explicitly exempt sales to or by an agent. So the question for the Court was "what characteristics a contractual relationship must possess to constitute an agency relationship that will bring the transactions at issue within R.C. 5739.02(B)(1)'s requirement that the sale be one that has been made 'to' Cincinnati." *Cincinnati Golf Mgt.* at ¶ 18. But the sales tax does not define "agent," so the Court borrowed the definition of "agency" from common law principles. *Id.* at ¶ 20.

The Court made two observations that were crucial to the analysis in *Cincinnati Golf*: *First*, the Court defined "agency" as "a consensual fiduciary relationship between two persons *where the agent has the power to bind the principal by his actions*, and the principal has the right to control the actions of the agent." *Id.* ¶ 20 (emphasis added). *Second*, the Court concluded that "the proper focus is whether or not [the taxpayer] had an agent's actual authority to bind Cincinnati as the purchaser in the transactions at issue." *Id.*

The agency exemption to the CAT tax is distinct from the sales and use tax in *Cincinnati Golf* on both of those points. Unlike the sales and use tax, the CAT tax contains its own definition of "agent," and that definition is more capacious than common law definition. And if a statute defines a term, then the Court must apply the

definition in the statute, rather than the one found in common law. *DeBose v. Travelers Ins. Cos.*, 6 Ohio St.3d 65, 67, 451 N.E.2d 753, 755 (1983). If the General Assembly meant to give "agent" its technical, narrow common law meaning, then it would have used those words (or left the term undefined). But it did not, so neither the Tax Commissioner nor the Court can swap in the common law definition.

As to the "power to bind" question, the CAT statutory definition of "agent" does *not* require that the taxpayer have the authority to bind the principal as a direct party to the contract. It is sufficient that the agent be authorized to act on behalf of the principal, without getting into the finer details of the powers to bind or right to control. And as expressly illustrated in division (N)(2), it is enough that the agent retains only a commission for the transaction and directs any additional proceeds to "another person"—it need not even be to the principal (though it is here and in RPMG's case outlined below).

B. *Willoughby* reached the right outcome for the wrong reason.

Despite those important distinctions, the Tax Commissioner and the Court in *Willoughby* imported the *Cincinnati Golf* analysis wholesale into the CAT agency exemption. In *Willoughby*, the taxpayer was a distributor: it bought gasoline from Sunoco and resold it to retailers in northern Ohio. *Willoughby*, 155 Ohio St. 3d 276, 2018-Ohio-4488, 120 N.E.3d 836, at ¶ 2. The taxpayer claimed the agency exemption from the CAT tax as an agent of Sunoco, largely on the theory that the taxpayer had to protect

Sunoco's image and branding by policing the behavior of its customers who retailed Sunoco gasoline. The taxpayer had a responsibility to protect Sunoco's image and branding. *Id.* at ¶ 16.

The *Willoughby* Court started in the right place with the statutory definition of "agent." *Id.* at ¶¶ 23-24. But the Court too quickly left that path when it wrestled with what it means to be a "person authorized." The Court deemed "authority" to be ambiguous—"Authority is a concept with different shades of meaning"—because it could mean "apparent authority" or "actual authority," and the CAT statute did not specify which was required to establish an agent relationship.[5] *Id.* at ¶ 25. So to answer that question, the Court turned to what it called common law principles of agency. *Id.* at ¶ 25. And applying those principles, the Court concluded that "authorized" in the CAT statute must refer to actual authority. So far, so good.[6]

[5] The reference to "apparent authority" is a distraction. Apparent authority is focused on the perspective of third-party—"apparent authority" is about whether an outsider (say, Dickens's poulterer) would reasonably believe that the agent (the young lad) had authority to act for the principal (Scrooge). But the CAT is not concerned with third-party perceptions; it is about the actual state of relationship between the agent and principal.

[6] The Court did not even need to go that far. The dictionary definition of "authorized," the Court noted, is to "be endowed with authority." *Willoughby* at ¶ 24 (quoting *Webster's Third New International Dictionary* 147 (2002). To be "endowed with authority" *by another*—as the CAT statute requires—plainly means that the agent has actually been given authority; it is not enough to merely *seem* to have authority.

But the Court then made the mistake of importing the *Cincinnati Golf* analysis wholesale into the CAT statute, turning to common law principles and concluding that "[o]ne of the most important features of the agency relationship is that the principal itself becomes a party to contracts that are made on its behalf by the agent" and "that the agent make the contracts on the principal's behalf *with actual authority to do so*." *Willoughby*, at ¶ 27.

In its effort to define "authority," the Court allowed the concept of "authority" to swallow the entire definition of "agent." In *Willoughby*, the definition of agent morphed from the statutory one: "a person authorized by another person to act on its behalf to undertake a transaction for the other," into the *Cincinnati Golf* and common law one: "a person authorized to enter into contracts on the principal's behalf and bind the principal thereto as a party." The result was neutering the agency exemption for a wide variety of relationships that the General Assembly plainly intended to exempt.

The Court reached the right result in *Willoughby*. An unadorned distributor who resells *for its own profit* is not an agent of the manufacturer under the CAT. But the Court did not need to import the inapposite analysis from *Cincinnati Golf* to reach that outcome. And it should not have.

III. The Errors of "Agent" Present: Aramark.

This case illustrates the dangers of the *Cincinnati Golf* and *Willoughby* approach. Aramark is plainly an "agent" *as defined by* R.C. 5751.01(N)(2). Aramark is, for statutory

purposes, "a person." R.C. 5751.01(A). Aramark has been "authorized by another person"—Aramark has actual authority from its contract counterparties, not just apparent authority. And Aramark has been specifically authorized "to act on [the other person's] behalf to undertake a transaction for the other"– Aramark acts on behalf of its contract counterparties to provide food service at those counterparties' locations. And Aramark falls within the specific example of an "agent" in division (N)(2) as a person who retains only a commission (or management fee) and disburses all other proceeds back to its contract counterparties.

The Tax Commissioner reached a different conclusion only by effectively rewriting the definition of "agent" in the CAT statute. For example, the Tax Commissioner's regulations require that "the agency relationship should be explicitly stated in a contract." OAC § 5703-29-13. But the CAT statute contains no such requirement; neither does the common law. An agency rule is invalid if it adds to or subtracts from a legislative enactment. *Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St.3d 376, 2007-Ohio-2201, 865 N.E.2d 1259, ¶ 17. The Tax Commissioner's "explicitly stated" requirement plainly adds to the statutory requirements of the CAT, and thus ought not control here.

There are good reasons why the CAT statute does not require parties to reduce every agency relationship to an explicitly stated contract provision. The statutory definition of "agent" is not coextensive with (or limited to) the common law definition

of "agent." And even if it were, it is not reasonable to expect every person doing business in Ohio (a) to reduce all of their transactions to written contracts, and (b) to draft agency provisions with the CAT's relatively unique scope in mind. Indeed, with the Tax Commissioner's "explicitly stated" requirement, no version of Scrooge's proxy purchase of poultry would constitute an agency relationship under the CAT.

IV. The Errors of "Agent" Yet to Come: RPMG and MACs.

Chamber supporter RPMG is one of the businesses adversely affected by the Tax Commissioner's mistaken approach to the agency exemption. RPMG is a marketing cooperative. That structure enables RPMG's sole Ohio owner-principal, Guardian Lima, LLC ("Guardian"), and RPMG's non-Ohio owner-principals to access otherwise inaccessible markets for their products, to obtain the highest market price for their products, and to bring their products to market at the lowest possible cost. This marketing cooperative structure, commonly referred to as "marketing agencies-in-common" or "MACs," has been around before, and recognized as part of, the Capper-Volstead Act of 1922. In fact, the marketing cooperative structure is such a common industry practice that the USDA has published research reports on the structure and its inherent principal-agency relationship.

RPMG, as a marketing agent, operates in the best interests of its owner-principals. RPMG does not earn a profit on the products that it sells on behalf of Guardian and its other owner-principals, but instead retains only a commission called a

marketing fee, which is set at the minimum amount necessary to cover RPMG's overhead and associated costs. Moreover, the overarching, essential purposes for which RPMG was formed and continues to exist are to enable Guardian and its other principals (a) to access otherwise inaccessible markets for their products, (b) to obtain the highest market price for their products, and (c) to bring their products to market at the lowest possible cost. RPMG's cooperative structure and business practices are designed specifically to further these purposes.

Like Aramark, RPMG is plainly within the statutory definition of "agent." It is a person, and it has been authorized by its owner-principals to undertake transactions on their behalf: it brings their products to market. It exists solely to facilitate transactions between its owner-principals and customers who want to buy their products—not unlike the "remarkable boy" Ebenezer sent to fetch a Christmas turkey. And just as division (N)(2) describes, RPMG retains only a commission for its services (little more than the cost of overhead) while passing the proceeds back to its owner-principals.

But the Tax Commissioner determined that RPMG is not the "agent" of its owner-principals.[7] The Tax Commissioner offered a few justifications for that decision, but none of them hold up against the text of R.C. 5751.01(N)(2). For example, the Tax Commissioner concluded that RPMG's owner-principals do not exert enough control

[7] That decision is on appeal to the Board of Tax Appeals, No. 2024-168.

over RPMG to constitute a principal-agent relationship. But that is not the question the CAT statute asks; the statutory definition of "agent" asks only whether the agent has been authorized to undertake transactions on the principal's behalf. RPMG plainly satisfies *that* requirement, regardless of how much or how little day-to-day micromanagement it receives from its principals.

The Tax Commissioner also relies on contract language that identifies RPMG as an "independent contractor" or disclaims an "agency" relationship. But the CAT statute is concerned with the substantive relationship between a potential agent and principal, not with labels. *Bay Mechanical & Electrical Corporation v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, 978 N.E.2d 882, ¶ 19; *Hope Academy Broadway Campus v. White Hat Mgt., L.L.C.*, 145 Ohio St.3d 29, 2015-Ohio-3716, 46 N.E.3d 665, ¶ 41 (lead opinion). Put another way, the CAT favors substance, not form. And to the extent that form matters, it is important to note that most parties (including the non-Ohio owner-principals of RPMG) use the word "agent" in its narrow common law sense, not the more capacious and CAT-specific definition in R.C. 5751.01.

In *Willoughby*, the Court invited the Tax Commissioner to rewrite the CAT agency exemption and functionally replace the statutory definition of "agent" with the common law definition. The Tax Commissioner took up that invitation, to the detriment of Ohio's taxpayers. The Court should correct that mistaken course.

CONCLUSION

The Tax Commissioner's denial of Aramark's refund claims appealed in this case, and the BTA decision affirming it, should be overturned. Neither decision is consistent with the ordinary meaning of the CAT statute and its agency exemption.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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