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Crew 4 You, Inc. v. Wilkins: The Ohio Supreme Court Misapplies Statute and Precedent to Eliminate the Resale Exception to Sales of Employment Services

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CREW 4 YOU, INC. v. WILKINS:¹ THE OHIO SUPREME COURT MISAPPLIES STATUTE AND PRECEDENT TO ELIMINATE THE RESALE EXCEPTION TO SALES OF EMPLOYMENT SERVICES

I. INTRODUCTION

Since 1993, Ohio has levied a sales tax on employment services.² Soon thereafter, Ohio's taxing authorities became fearful that if the resale exception³ were available to sales of employment services, the revenue attributable to the sales tax on employment services would vanish.⁴ In its first opportunity to decide a case involving a resale exception claim for sales of employment services, the Ohio Supreme Court so narrowly defined the benefit of an employment service that it appeared the resale exception could not apply to sales of employment services.⁵

In *Crew 4 You, Inc. v. Wilkins* (2005),⁶ the Ohio Supreme Court definitively precluded the possibility that the resale exception could ever apply to a sale of employment services.⁷ Unfortunately, as part of its

1. *Crew 4 You, Inc., v. Wilkins*, 105 Ohio St. 3d 356 (2005).

2. OHIO REV. CODE ANN. § 5739.01(JJ) (LexisNexis 1999), enacted by the 119th General Assembly in Am. Sub. H.B. 904 (effective Jan. 1, 1993), 144 Ohio Laws, Part IV, 6598, 6689, 6797 (Section 131).

3. OHIO REV. CODE ANN. § 5739.01(E)(1) (LexisNexis 1999). The resale exception excludes from taxation transactions where the purpose of the purchaser is to resell the purchased property or the benefit of the service provided in the same form to a person engaging in business. *Id.*

4. *See infra* Part IV.B.1 (discussing the Ohio Tax Commissioner's express, and the Supreme Court's implied, concerns with the resale exception as it applies to employment services).

5. *See Bellemar Parts Industries, Inc. v. Tracy*, 88 Ohio St. 3d 351 (2000). As will be discussed below, for a sale of an otherwise taxable service to be eligible for the resale exception, the purchaser thereof must resell the benefit of that service in the same form in which it was received. *See* OHIO REV. CODE ANN. § 5739.01(E)(1) (LexisNexis 1999). In *Bellemar Parts*, the Court narrowly defined the benefit of an employment service as the labor of the temporary employees and not the product of that labor. *Bellemar Parts*, 88 Ohio St. 3d at 354.

6. *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St. 3d 356 (2005).

7. *See id.* at 364. The Court held that a sale of employment services could not qualify for the resale exception unless the purchaser of those services actually sold employment services to its customers. *Id.* For reasons discussed below, it is impossible for a purchaser of employment

effort to eliminate the resale exception in the context of employment services, the Court ignored clear statutory language and abandoned its own precedent, creating uncertainty concerning the applicability of the resale exception to all otherwise taxable services.⁸

This Note critically examines the Ohio Supreme Court's opinion in *Crew 4 You*.⁹ Part II examines the tax on retail sales, the resale exception and its application to services, and the significant Ohio Supreme Court cases applying the resale exception to transactions involving services.¹⁰ Part III provides a synopsis of the arguments and reasoning at each stage of the appeal in *Crew 4 You*, including the Tax Commissioner's assessment, his Final Determination, the decision of the Ohio Board of Tax Appeals ("BTA"), and the decision of the Ohio Supreme Court.¹¹ Part IV analyzes the Ohio Supreme Court's reasoning in *Crew 4 You*, including its departure from the statutory text of the resale exception and from its own precedent.¹² Part IV also evaluates the consequences of the Court's holding in *Crew 4 You* and suggests that a different statutory scheme for the taxation of employment services may have avoided the uncertainty created by the Court.¹³ Finally, Part V concludes that the flawed analysis in *Crew 4 You* was likely the product of a result-driven orientation.¹⁴

II. BACKGROUND

A. The Tax on Retail Sales and the Resale Exception

Under Section 5739.02 of the Ohio Revised Code ("O.R.C."), an excise tax is levied on every retail sale made in Ohio.¹⁵ One exception

services to resell employment services, as those services are defined in O.R.C. § 5739.01(JJ). *See infra* note 127 and accompanying text.

8. *See infra* Parts IV.B.2, IV.B.3.

9. As will be discussed below, the Court misstated, incorrectly paraphrased, and misconstrued both its own precedent and the statute embodying the resale exception. *See infra* Parts IV.B.2, IV.B.3.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV.

13. *Id.*

14. *See infra* Part V.

15. OHIO REV. CODE ANN. § 5739.02 (LexisNexis 2005). *See* O.R.C. § 5739.02(B)(1)-(46) for numerous exemptions from the tax on retail sales. OHIO REV. CODE ANN. § 5739.02(B)(1)-(46) (LexisNexis 2005). Some interesting examples include "sales of food for human consumption off the premises where sold" (O.R.C. § 5739.02(B)(2)), "sales of food sold to students only in a cafeteria, dormitory, fraternity, or sorority maintained in a private, public, or parochial school, college, or university" (O.R.C. § 5739.02(B)(3)), "sales not within the taxing power of [Ohio] under

to the sales tax levied by O.R.C. § 5739.02 is the resale exception of O.R.C. § 5739.01(E)(1).¹⁶ A critical feature of the resale exception embodied in O.R.C. § 5739.01(E)(1) is its distinction between the resale of tangible personal property and the resale of services.¹⁷

During the period of the Tax Commissioner's audit of Crew 4 You, Inc. ("Crew 4 You"), O.R.C. § 5739.01(B)(3)(k) defined as a sale all transactions in which "employment service is or is to be provided."¹⁸ During the audit period, and presently, employment services were defined in O.R.C. § 5739.01(JJ).¹⁹ The following section highlights the

the Constitution of the United States" (O.R.C. § 5739.02(B)(10)), "sales of ships or vessels or rail rolling stock used or to be used principally in interstate or foreign commerce, and repairs, alterations, fuel, and lubricants for such ships or vessels or rail rolling stock" (O.R.C. § 5739.02(B)(14)), and "sales of animals by nonprofit animal adoption services or county humane societies" (O.R.C. § 5739.02(B)(28)). OHIO REV. CODE ANN. § 5739.02(B)(2), (3), (10), (14), and (28) (LexisNexis 2005).

16. During the period at issue, O.R.C. § 5739.01(E)(1) excluded from the definition of "sales" all sales 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." OHIO REV. CODE ANN. § 5739.01(E)(1) (LexisNexis 1999) (emphasis added). The resale exception is an exception, and not an exemption, because sales that meet the requirements of the resale exception are specifically excluded from the definition of a sale. *Id.* The exemptions in O.R.C. § 5739.02 would generally fall within the definition of a taxable sale, but they are specifically exempted from the tax. *See* OHIO REV. CODE ANN. § 5739.02(B) (LexisNexis 1999). Compare O.R.C. § 5739.02(B) which begins, "The tax does not apply to the following," with O.R.C. § 5739.01(E)(1) which states, "'Retail sale' and 'sales at retail' include all sales, except those in which the purpose of the consumer is to" OHIO REV. CODE ANN. §§ 5739.02(B) and 5739.01(E)(1) (LexisNexis 1999).

17. *See supra* note 16. Because it would be fairly impractical, and unlikely, for a consumer of services to resell the actual service provided, O.R.C. § 5739.01(E)(1) makes clear that, while the resale exception applies to a sale of tangible personal property only if the actual property is resold in the same form, by the original purchaser, the resale exception applies to sales of services as long as the *benefit* of that service is resold in the same form in which it was received. *Id.* This important distinction was all but ignored by the Ohio Supreme Court in *Crew 4 You*. *See infra* Part IV.

18. OHIO REV. CODE ANN. § 5739.01(B)(3)(k) (LexisNexis 1999). Employment services have been subject to sales tax in Ohio since 1993. H.B. 904, 119th Gen. Assem., Reg. Sess. (Ohio 1993). The fact that employment services are subject to sales tax is mentioned here because the Supreme Court determined that the service provided by Crew 4 You was a taxable employment service. *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St. 3d 356, 362 (2005). This article thus focuses on the resale exception in the context of services and not in the context of tangible personal property.

19. During the audit period, O.R.C. § 5739.01(JJ) provided:

(JJ) "Employment Service" means providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so supplied receive their wages, salary, or other compensation from the provider of the service. "Employment service" does not include:

- (1) Acting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser.
- (2) Medical and health care services.
- (3) Supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered

hallmark cases in which the Ohio Supreme Court decided whether the sale of a service qualified for the resale exception. While not all of these cases involve the sale of employment services, they are nevertheless important because they demonstrate how the Court has applied the resale exception to services, particularly the requirement that the “benefit of the service” be resold. Ultimately, the critical component of these cases is the Court’s definition of the “benefit” of the various services at issue.

B. Cases Applying the Resale Exception to Services

Several important decisions by the Ohio Supreme Court demarcate the bounds of the resale exception in the context of services. Analyzing and understanding the reasoning in these cases will aid in understanding the limits and boundaries of the resale exception and how the Court’s reasoning in *Crew 4 You* was flawed.

In *CCH Computax, Inc. v. Tracy* (1993),²⁰ the taxpayer provided taxable automatic data processing services to professional tax preparers.²¹ In a typical transaction, the tax preparers, lawyers, and accountants whose clients were primarily individual taxpayers, submitted their clients’ tax information to CCH Computax.²² CCH Computax translated that information into computer language so that it could be mechanically sorted.²³ With the mechanically sorted information, CCH Computax was able to prepare tax returns and related schedules for the tax preparers, who signed the returns and sold them to their customers.²⁴

CCH Computax argued that its sales of automatic data processing should be excepted from the sales tax levied by O.R.C. § 5739.02 because the tax preparers resold the benefit of the service (the completed tax return) to their customers in the same form in which that benefit was received.²⁵ The BTA rejected CCH Computax’s argument, reasoning

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

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

OHIO REV. CODE ANN. § 5739.01(JJ) (LexisNexis 1999).

20. *CCH Computax, Inc. v. Tracy*, 68 Ohio St. 3d 86 (1993).

21. *Id.* at 86. At the time of the decision in *CCH Computax*, O.R.C. § 5739.01(Y) defined automatic data processing as the “processing of others’ data” and “providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment.” OHIO REV. CODE ANN. § 5739.01(Y) (LexisNexis 1993).

22. *CCH Computax*, 68 Ohio St. 3d at 86.

23. *Id.*

24. *Id.* at 87-88.

25. *Id.* CCH Computax thus argued that its sales of services to the professional tax preparers

that the addition of the tax preparer's signature made the return more valuable and, accordingly, the tax return was not resold by the tax preparers "in the same form in which it was received."²⁶

The Supreme Court unanimously reversed on the issue of whether the resale exception applied.²⁷ The Court noted that CCH Computax's professional customers transferred the completed tax returns received from CCH Computax to their own clients and billed those clients for CCH Computax's services as an expense.²⁸ The Court held that the professional tax preparer's signature on the return may have increased the value of the return, but it did not change the "state or form of the return."²⁹ Thus, the tax form, which was the benefit of CCH Computax's service to its professional clients, was "resold" in the same form in which it was received.³⁰ Because the Supreme Court recognized

should be exempted from taxation because those sales qualified for the resale exception. *Id.* CCH Computax alternatively argued that its sales to the tax professionals were excluded from taxation because they were personal or professional services. *Id.* At the time of the Tax Commissioner's audit of CCH Computax, O.R.C. § 5739.01(B)(5) stated, "'sale' and 'selling' do not include professional, insurance, or personal service transactions which involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made." OHIO REV. CODE ANN. § 5739.01(B)(5) (LexisNexis 1993). The BTA rejected CCH Computax's argument, noting that whether a personal or professional service is provided is dependent upon the consequentiality of the property transferred. *CCH Computax, Inc. v. Limbach*, No. 88-D-566, 1992 Ohio Tax LEXIS 727, at *9-12 (Ohio B.T.A. June 26, 1992) (citing *Emery Industries, Inc. v. Limbach*, 43 Ohio St. 3d 134 (1989)). Based on *Emery*, the BTA found that the true object of the transaction between CCH Computax and the tax professionals was the receipt of automatic data processing, and not the receipt of a professional service. *Id.* at *11-12. The Supreme Court affirmed the BTA's decision on this issue without discussion. *CCH Computax*, 68 Ohio St. 3d at 87-88.

26. *CCH Computax*, 1992 Ohio Tax LEXIS 727, at *13. The BTA specifically stated that, "A tax return properly bearing the signature of a preparer and one that does not, significantly differ as a matter of fact and law." *Id.*

27. *CCH Computax*, 68 Ohio St. 3d at 88.

28. *Id.*

29. *Id.*

30. *Id.* It is important to note here that transactions between the tax professionals and their clients were not subject to sales tax. OHIO REV. CODE ANN. § 5739.01(Y)(2) (LexisNexis 1993). At the time *CCH Computax* was decided, O.R.C. § 5739.01(Y)(2) defined as a personal or professional service "accounting and legal services" and "any other situation where the service provider receives data or information and studies, alters, analyzes, interprets or adjusts [it]." *Id.* The issue was not argued or expressly addressed, but the Court in *CCH Computax* did not require or analyze the possible necessity of a taxable transaction between the professional tax preparers and their clients in order for the transaction between CCH Computax and its professional clients to be eligible for the resale exception. *See CCH Computax*, 68 Ohio St. 3d 86. This is significant because, as will be discussed below, in *Crew 4 You*, the Tax Commissioner vehemently argued for a requirement that the second transaction in a two-transaction chain be taxable before the first transaction can qualify for the resale exception. *See Initial Merit Brief of Appellant/Cross-Appellee, Crew 4 You, Inc. v. Zaino*, 105 Ohio St. 3d 356 (2005) (No. 03-1960); *see also infra* note 168 and accompanying text (discussing and evaluating the strengths and weaknesses of the

that the proper analysis focuses on whether the *benefit* of a service is resold in the same form, and not on the relative values of that benefit at each stage of the transactional chain, the Court held that the BTA's decision was "unreasonable and unlawful."³¹

In *Hyatt Corp. v. Limbach* (1994),³² a hotel made several purchases of linen cleaning services without paying sales tax thereon.³³ The taxpayer argued that the benefit of the linen cleaning service was clean linens and that, when it leased a room, it was transferring that benefit to its customers.³⁴ The Court first concluded that when a hotel leases a room to a transient guest, it transfers a license to use all tangible personal property in the room.³⁵ The Court thus unanimously concluded that Hyatt resold the benefit of the linen cleaning service to its transient customer.³⁶

Commissioner's argument on this point).

31. *CCH Computax*, 68 Ohio St. 3d at 88. In reviewing a decision of the Board of Tax Appeals, the Supreme Court must determine whether the decision is "reasonable and lawful." *Columbus City School Dist. Bd. of Edn. v. Zaino*, 90 Ohio St. 3d 496, 497 (2001). The Court held the BTA's decision unreasonable because it did not apply the language of the statute when analyzing CCH Computax's resale exception argument. *CCH Computax*, 68 Ohio St. 3d at 88. That is, instead of analyzing whether the professional tax preparers resold the *benefit of the service provided* by CCH Computax in the same form, the BTA looked only at whether the tax returns supplied by CCH Computax to the tax preparers were less valuable than the tax returns the tax preparers supplied to their clients. *CCH Computax*, 1992 Ohio Tax LEXIS 727, at *12-13 ("The printed materials supplied by Computax to its customers are not resold in the same form as received by Computax's customer . . ."). The Supreme Court recognized that, because the transaction between CCH Computax and the tax preparers was a service and not a sale of tangible personal property, the proper analysis should have focused on whether the benefit of that service was resold in the same form, not on whether the tax preparers signature added value to the return. *CCH Computax*, 68 Ohio St. 3d at 88. Because the tax preparers resold the benefit of the automatic data processing service (the completed tax return) to its customers, the resale exception applied. *Id.* Critical to this conclusion was the Court's definition of the benefit of the automatic data processing service as the completed tax return.

32. *Hyatt Corp. v. Limbach*, 69 Ohio St. 3d 537 (1994).

33. *Id.* at 540. During the audit period, the purchase of industrial linen cleaning services was a taxable transaction. OHIO REV. CODE ANN. § 5739.01(B)(3)(d) (LexisNexis 1993).

34. *Hyatt*, 69 Ohio St. 3d at 540. Hyatt thus argued that its purchase of the generally taxable industrial cleaning service should be excepted from sales tax under the resale exception of O.R.C. § 5739.01(E)(1). *Id.*

35. *Id.* The Court specifically noted:

The items of tangible personal property which are in the sleeping room for the use and consumption of the guest are therefore clearly items of tangible personal property which are being resold to the guest, by way of rental, in the same form in which the items were purchased by the hotel.

Id. (quoting *Hilton Hotels Corp., d.b.a. The Netherlands Hilton Hotel v. Bowers*, No. 48023 (Ohio B.T.A. July 31, 1962)).

36. *Id.* The Court stated:

In a lodging transaction, the hotel transfers a full sleeping room to its guest. This transfer includes the use of linens to sleep on and to wash with. The twist in the instant

The Court then, surprisingly, and without providing any supporting authority, held that when Hyatt rented rooms to customers who stayed for longer than thirty days, it did not resell the benefit of the clean linens because such a long-term rental is not considered a “sale” for the purposes of the sales tax statutes.³⁷ The Court used only two sentences to dispose of this portion of the case.³⁸

In *Bellemar Parts Industries, Inc. v. Tracy* (2000),³⁹ the Supreme Court was confronted for the first time with a resale exception argument in an employment services case. Bellemar Parts Industries, Inc. (“Bellemar”) operated a wheel manufacturing and assembly line.⁴⁰ To assist in production, Bellemar contracted with an employment services provider.⁴¹ The temporary employees performed the assembly of the component parts and Bellemar sold the completed wheels to its

case is that Hyatt paid another entity to launder these linens, and Hyatt now claims that it resells the benefit of this service to its guests. Under the resale exception, Hyatt is correct. Hyatt purchased this service, normally a taxable transaction, and its guests received the benefit of this service in being able to use clean linen.

Id. For this proposition, the Court cited, with approval, *CCH Computax*, 68 Ohio St.3d 86.

37. *Hyatt*, 69 Ohio St. 3d at 540.

38. *Id.* The Court stated:

Under the statutes, renting these rooms [for more than thirty days] is not a sale because lodging is not sold to a transient guest, and, consequently, the cleaning service is not resold. Accordingly, this linen cleaning transaction [those transactions relating to the renting of a room to a non-transient customer] is not excepted.

Id. (explanation added). Note that in allowing the exception in the case of short-term rentals, the Court analyzed whether the benefit of the linen cleaning service passed through to Hyatt’s customers, and concluded that it did. *See supra* note 36. However, once the Court pointed out that the rental of a room to guests for longer than thirty days is not a taxable service, it simply concluded that the linen cleaning service was not resold. *Hyatt*, 69 Ohio St. 3d at 540 (“[C]onsequently, the cleaning service is not resold.”). The Court thus interpreted the requirement that the benefit of a service be “resold” as requiring that the second transaction be a “sale” as defined in the sales tax statutes (i.e., that the transaction be a specifically enumerated taxable service). This added requirement is both contrary to the statutory language (which does not expressly require that the transaction between the intermediary and the final consumer be taxable) and the Court’s own holding in *CCH Computax* (where the transaction between the intermediary and the final consumer was not taxable, but the resale exception nevertheless applied). *See supra* note 30. The Court’s interpretation also violated the longstanding principle that the taxing statutes are to be construed strictly in favor of the taxpayer and against the taxing authorities. *See Clark Restaurant Co. v. Evatt*, 146 Ohio St. 86, 91 (1945) (“[I]n the construction and application of taxing statutes their provisions cannot be extended beyond the clear import of the language used; nor can their operation be so enlarged as to embrace subjects not specifically enumerated.”).

39. *Bellemar Parts Industries, Inc. v. Tracy*, 88 Ohio St. 3d 351 (2000).

40. *Id.* at 351. Bellemar purchased from various suppliers the component parts of its completed wheel assemblies, including tires, wheel weights, valve stems, rim covers and rims. *Id.* Bellemar then assembled the component parts and sold the completed wheel assembly to its customers. *Id.*

41. *Id.* Adia Temporary Services and Interim Personnel supplied Bellemar with temporary employees to help assemble the components of the wheel assembly. *Id.*

customers.⁴² Bellemar argued that the resale exception applied to its purchase of employment services because it resold to its customers the benefit of the employment service in the same form as it was received.⁴³ In making this argument, Bellemar contended that the benefit it received from the employment service provider was the completed wheel assembly.⁴⁴

The Tax Commissioner, on the other hand, argued that the benefit received by Bellemar was a “flexible, less costly and more efficient work force.”⁴⁵ The Court agreed with the Tax Commissioner and held that Bellemar did not resell the benefit of the service in the same form in which it was received.⁴⁶ The Court noted that when a consumer

42. *Id.* Bellemar and the Tax Commissioner agreed that the service provided by Adia was an employment service. *Id.*

43. *Id.* at 352.

44. *Id.* at 352-53. This argument would seem reasonable in light of the Court’s holdings in *Hyatt* and *CCH Computax* where, in each case, the Court deemed the benefit of the services being provided as the end-product of the service. See *infra* Part IV.A.1 (discussing the Tax Commissioner’s concern that the resale exception would substantially eliminate the tax revenue attributable to employment services, and noting that this concern may have been a factor in the Court’s restrictive definition of the “benefit” of an employment service relative to the characterization of the “benefit” of other services).

45. *Bellemar Parts*, 88 Ohio St. 3d at 353. The Tax Commissioner further argued that, if the benefit of the employment service was so construed, Bellemar could not be said to have resold the benefit in the same form in which it was received. *Id.* Rather, Bellemar received the benefit of the service, the flexible work force, and combined it with raw materials to create the tangible item sold. *Id.* The Tax Commissioner further argued that if the resale exception was upheld in *Bellemar*, the state would lose more than \$40 million in tax revenues generated by employment services. Brief of Appellant/Cross-Appellee at 18, *Bellemar Parts, Inc. v. Tracy*, 88 Ohio St. 3d 351 (2000) (No. 98-2516). The Commissioner was effectively arguing that if the resale exception applied to employment services, the tax on employment services would be substantially undermined. *Id.* at 18. (“It simply makes no sense that the General Assembly would enact a tax on a particular service that would be effectively negated by the resale exception.”); see also *infra* Part IV.A.1 (more fully discussing the Tax Commissioner’s concerns on this point and how those concerns may have contributed to the Court’s reasoning in *Crew 4 You*). Bellemar, on the other hand, argued that “[a] decision in favor of [Bellemar] will not destroy the tax on employment services. Employment services will remain subject to tax in every context provided a specific tax exception does not apply. It is illogical to argue otherwise.” Reply Brief of Appellee/Cross-Appellant Regarding Cross-Appeal at 18, *Bellemar Parts, Inc. v. Tracy*, 88 Ohio St. 3d 351 (2000) (No. 98-2516). Bellemar further noted that in “*CCH Computax*, this Court excepted ADP services from the tax pursuant to the resale exception. However, *CCH Computax* has not destroyed the tax on ADP services. Similarly, in *Hyatt*, this Court excepted laundry services from tax pursuant to the resale tax exception. Nevertheless, *Hyatt* has not destroyed the tax on laundry services.” *Id.* at 19.

46. *Bellemar Parts*, 88 Ohio St. 3d at 353. The Court did not address the Tax Commissioner’s argument that the tax on employment services would be eliminated if the resale exception was applicable to employment services. In fact, the Court noted that the resale exception remained available to employment service providers as long as the statutory requirements thereof are satisfied. See *id.* at 354 (“Nor does our holding today eliminate the resale exception’s application to services. The exception remains applicable to all services where the necessary statutory conditions are met.”).

contracts for temporary employees, the benefit of that service is the actual labor of the employees and not the end-product of their work.⁴⁷ Using its newly created definition of the benefit of an employment service, the Court held that Bellemar did not resell that benefit.⁴⁸ In *Bellemar*, the Court did not expressly foreclose the possibility of the resale exception in the case of employment services, though it may have intended that its decision would have that effect.⁴⁹

In *Corporate Staffing Resources, Inc. v. Zaino* (2002),⁵⁰ another employment service/resale exception case, a computer hardware provider (“Sarcom”) hired temporary workers through Corporate Staffing Resources (“CSR”).⁵¹ Sarcom contracted to provide maintenance, repair, and technology services for its customers’ computer equipment.⁵² Sarcom often hired CSR’s technicians when it could not

47. *Id.* at 354. The Court created a new standard when it held that the benefit of employment services is the labor of the employees and not their finished product. *Id.* The Court recognized the proper standard in a resale exception case involving otherwise taxable services, and it defended its definition of the benefit of an employment service as consistent with that standard. *Id.* at 353-54. Thus:

[W]e agree with [Bellemar] that the General Assembly included the term “benefit” to distinguish between the service purchased and the benefit received. It sought to clarify that if a service such as landscaping is purchased, the taxpayer need not resell landscaping services to meet the exception, but need only resell the benefit of those services, *i.e.*, cared-for grounds. But that distinction does not necessitate that the “benefit” of employment services be interpreted as the final product ultimately produced with temporary labor. Rather, our characterization of the actual benefit of employment services as the benefit inherent in the labor itself is fully consistent with the distinction created by the General Assembly.

Id.

48. *Id.* This was so because Bellemar did not resell the labor of the employees; Bellemar resold the end-product of the labor provided by the temporary employees (the finished wheel assembly). *Id.* at 351.

49. *See id.* at 354. The Court recognized as alive and well the statutory test for the resale exception as it applies to services when it stated, “[Bellemar’s] purchase of employment service would be excluded from tax only if [Bellemar’s] purpose, as consumer of the employment services, was to resell the benefit of the employment services to its customers in the same form as [Bellemar] received it.” *Id.* at 352 (emphasis in original omitted). As discussed below, while the Court did not expressly preclude the applicability of the resale exception to the sale of employment services, its narrow definition of the “benefit of the service provided” in an employment service transaction (the labor of the employees) may very well have been intended to eliminate the resale exception in the context of employment services. *See infra* Part IV.B.1 (discussing the possible factors that may have led the Court to so narrowly define the benefit of an employment service in *Bellemar*); *see also infra* note 149 and accompanying text (discussing the possibility that *Bellemar* was intended to implicitly eliminate the resale exception in most, if not all, employment service cases).

50. *Corporate Staffing Resources, Inc. v. Zaino*, 95 Ohio St. 3d 1 (2002).

51. *Id.* at 1.

52. *Id.* The technology services included system design and implementation, PC systems integration, educational and help-desk services, and hardware repair. Brief of Appellant at 6, *Corporate Staffing Resources v. Zaino*, 95 Ohio St. 3d 1 (2002) (No. 2000-2127). Sarcom

meet its demand.⁵³

CSR argued that its sales of employment services to Sarcom qualified for the resale exception because Sarcom resold the benefit of the service provided by CSR to its customers in the same form in which it was received.⁵⁴ The Ohio Supreme Court concluded that the benefit Sarcom provided to its customers was keeping the customers' computer systems functioning, while the benefit received by Sarcom was a temporary and flexible workforce.⁵⁵ The Court relied on *Bellemar* in reaching its holding.⁵⁶

As noted above, the Court has never expressly declared that the resale exception cannot apply to a sale of an employment service, but by limiting the definition of the benefit of an employment service to a flexible, less costly work force, the Supreme Court seemingly attempted to do so.⁵⁷ In *Crew 4 You, Inc. v. Wilkins*,⁵⁸ the Court finished what it had begun in *Bellemar*—it eliminated once and for all any chance that the resale exception could apply to a sale of employment services.⁵⁹ In

estimated the cost for providing such services and negotiated a contract with its customers. *Id.* Sarcom then entered into a contract with its customers to provide technicians who would provide the contracted for services. *Id.*

53. *Corporate Staffing Resources*, 95 Ohio St. 3d at 1. According to CSR, “CSR technicians were deployed in the same manner as Sarcom technicians, and Sarcom’s commitment to its customer was unchanged with respect to which technicians performed the services.” Brief of Appellant, *supra* note 52, at 8.

54. *Corporate Staffing Resources*, 95 Ohio St. 3d at 2. Specifically, Corporate Staffing Resources argued, “[t]he labor benefit of employment services is resold in the same form when a business contracts to receive employment services and deploys the temporary employees directly to its customers’ business sites to perform services on its customers’ equipment under the on-site supervision of its customer employees.” Brief of Appellant, *supra* note 52, at 10.

55. *Corporate Staffing Resources*, 95 Ohio St. 3d at 3. The Court properly applied the resale exception because it focused on the benefit received at each step in the transaction chain. *See supra* note 16 (quoting in full the statutory text of the resale exception).

56. *Corporate Staffing Resources*, 95 Ohio St. 3d at 3-5. The Court referred to the standard announced in *Bellemar* as the “actual benefit” inquiry. *Id.* at 3. Using that standard, the Court found that “the actual benefit to Sarcom was not the product of the workers’ labor—consistently operating computer hardware—but a temporary and flexible work force of sufficient size and expertise.” *Id.* at 3 (emphasis in original). The Court found that this benefit contrasted with the benefit sought and received by Sarcom’s customers—functioning computers. *Id.* It is important to note that in this case, the Court did not state that *Bellemar* stood for the proposition that the resale exception does not apply to employment services. *See id.* at 1. Rather, the Court stated, “[b]ecause we conclude that the company does not resell the benefit obtained from the temporary employment service in the same form in which it was received, we hold the resale exception inapplicable.” *Id.*

57. As discussed below, while the Court may have intended to eliminate the resale exception in the context of employment services by so narrowly defining the benefit of such service, a factual distinction in *Crew 4 You* created a reasonable argument that the benefit of an employment service could be resold, even under the Court’s narrow definition that benefit. *See infra* Part IV.B.3.

58. *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St. 3d 356 (2005).

59. *See infra* Part IV.B. As discussed below, the Court ignored the factual nuances presented

doing so, the Court created confusion and uncertainty for all service providers.⁶⁰

III. STATEMENT OF THE CASE

A. *Statement of the Facts*

During the audit period of September 1, 1996 through December 31, 1999, Crew 4 You provided personnel services to “trucking” companies, who in turn contracted with out-of-town broadcasting entities covering sporting events in Northeast Ohio.⁶¹ When an out-of-town sports team competes in Northeast Ohio, the out-of-town TV station that owns the broadcast rights for the sporting event generally sends to the event only its on-air announcer(s), a producer, and a director.⁶² The remaining personnel and equipment necessary to create the live broadcast for out-of-town viewing is provided by a local “trucking” company.⁶³ The trucking company then retains a company that has access to trained personnel capable of operating its equipment—a “crewing” company.⁶⁴ As one such crewing company, Crew 4 You supplied crewing services, for a charge, to the trucking companies.⁶⁵

Crew 4 You did not collect Ohio sales tax on its sales of services to the trucking companies.⁶⁶ The Tax Commissioner of Ohio assessed

in *Crew 4 You*, misapplied the resale exception test in the context of services, and mischaracterized its precedent seemingly in an effort to definitively preclude the use of the resale exception in the context of employment services. *Id.*

60. *See infra* Part IV.C.1. The Court added confusion because of the manner in which it misapplied the resale exception statute. *Id.* As detailed below, by blurring the distinction between tangible personal property and services for purposes of applying the resale exception (that is, by deeming the resale exception applicable to “employment services” only if “employment services” are resold), the Court left open the question of how it will treat services in future cases involving the resale exception. *Id.* Will it apply the resale exception test consistently with its past precedent (by inquiring into the benefit provided by the service), or will it use the fractured reasoning it used in *Crew 4 You* (by inquiring into whether the actual service is resold)? *See id.* The Court left these questions open because it did not announce that it was applying a new resale exception test (presumably because such an announcement would run counter to statutory language and legislative intent). *Id.* Instead, the Court simply misapplied the statute as if it were doing so consistent with its precedent. *See id.*

61. *Crew 4 You, Inc. v. Zaino*, No. 2002-V-958, 2003 Ohio Tax LEXIS 1505, at *2 (Ohio B.T.A. Oct. 24, 2003).

62. *Id.*

63. *Id.* The trucking company owns and provides all the cameras, microphones, production trucks, and related equipment necessary to produce a live broadcast. *Id.*

64. *Id.*

65. *Id.*

66. Final Determination of Tax Commissioner, Assessment No. 8000405434 (June 6, 2002) at

Crew 4 You's sales of personnel services to the trucking companies under O.R.C. § 5739.01(B)(3)(k), contending that Crew 4 You was a provider of employment services, as defined in O.R.C. § 5739.01(JJ).⁶⁷

B. Procedural History

The Tax Commissioner of Ohio audited Crew 4 You for the period of September 1, 1996 through December 31, 1999.⁶⁸ The result of this audit was an assessment of \$156,588.85 for unpaid taxes and fees.⁶⁹ Crew 4 You objected and filed a petition for reassessment.⁷⁰

1. The Tax Commissioner's Final Determination

In its petition for reassessment, Crew 4 You first argued that it did not provide employment services because the personnel at issue were not supervised or controlled by the purchaser of the services.⁷¹ Crew 4 You argued, in the alternative, that if it did provide employment services, its sales of those services were excepted from sales tax under the resale exception in O.R.C. § 5739.01(E)(1).⁷² Crew 4 You argued that the benefit of its service was the contribution of temporary, flexible, and less costly services and that the trucking companies resold that benefit to the broadcasting entities.⁷³

The Tax Commissioner determined that Crew 4 You did in fact provide employment services and rejected Crew 4 You's resale exception argument.⁷⁴ The Commissioner argued that, pursuant to the actual benefit inquiry, the trucking companies did not resell the actual benefit of the service provided by Crew 4 You.⁷⁵ Relying on the Ohio

6.

67. *Id.* Recall that O.R.C. § 5739.01(B)(3)(k) dictates that sales of employment services are taxable and O.R.C. § 5739.01(JJ) contains the definition of an employment service. *See* OHIO REV. CODE ANN. §§ 5739.01(B)(3)(k), (JJ) (LexisNexis 1999).

68. Final Determination of Tax Commissioner at 1.

69. *Id.* This assessment included not only the sales tax the Commissioner contended Crew 4 You should have collected on its sales of employment services, but also over \$30,000 in additional charges, penalties and interest. *Id.*

70. *Id.*

71. *Id.* Crew 4 You thus claimed that its personnel were independent contractors and fit the statutory exemption from employment services under O.R.C. § 5739.01(JJ)(1). The merits and relative strengths and weaknesses of this argument are not addressed herein because the focus of this Note is the Supreme Court's disposition of the case on resale exception grounds.

72. *Id.* at 4.

73. Final Determination of Tax Commissioner at 5.

74. *Id.*

75. *Id.* Specifically, the Tax Commissioner argued:

The mobile production companies do not resell employment services; the mobile

Supreme Court's decision in *Corporate Staffing Resources, Inc. v. Zaino*, the Commissioner asserted that the benefit received by the trucking companies was the labor of Crew 4 You's technicians.⁷⁶ The benefit sold by the trucking companies to the broadcasting entities, according to the Commissioner, only included the *end-product* of that labor and not the labor itself.⁷⁷

Crew 4 You filed a notice of appeal with the Ohio BTA.⁷⁸

2. The BTA

At the BTA, Crew 4 You again argued that the trucking companies resold the benefit of the employment services to the broadcasting entities in the same form in which those services were received.⁷⁹ Crew 4 You

production companies use the employment services to fill their vacant positions with temporary employees. Without the additional technical personnel, the mobile production companies would be unable to provide broadcast production services to the broadcasting entities. Their cameras would not be manned and no one would be there to operate the audio equipment and the other technologically advanced equipment essential to the production of a broadcast.

Id.

76. *Id.*

77. *Id.* Specifically, the Tax Commissioner argued that the benefit received by the trucking companies was the ability to fill their vacant positions with temporary labor. *Id.* The benefit provided to the broadcast entities, on the other hand, was the end-product of the crewing company's employees' labor—staffed equipment ready for use in broadcasting a live sporting event. *Id.*

78. *Crew 4 You, Inc. v. Zaino*, No. 2002-V-958, 2003 Ohio Tax LEXIS 1505, at *1 (Ohio B.T.A. Oct. 24, 2003). Pursuant to O.R.C. § 5717.02, appeals of a final determination of the Tax Commissioner may be taken to the BTA. OHIO REV. CODE ANN. § 5717.02 (LexisNexis 2005). Such appeals may be taken by filing a notice of appeal with the BTA and with the Tax Commissioner. *Id.* See *Clippard Instrument Laboratory, Inc. v. Lindley*, 50 Ohio St. 2d 121 (1977) (holding that the BTA lacks jurisdiction to hear an appeal if notice of the appeal is not sent to the Tax Commissioner). The notice of appeal must be filed within sixty days of the service of the final determination, must be attached to a copy of the Tax Commissioner's final determination, and must specify the alleged errors contained therein. OHIO REV. CODE ANN. § 5717.02 (LexisNexis 2005). The Tax Commissioner then certifies to the BTA a record of any proceedings that have occurred and all evidence considered by the Tax Commissioner. *Id.* An evidentiary hearing then takes place before an attorney examiner. *Id.* See also OHIO ADMIN. CODE 5717-1-15 (Anderson 2005). The BTA has no jurisdiction to determine an issue not presented in the notice of appeal. See *Gen. Motors Corp. v. Wilkins*, 102 Ohio St. 3d 33 (2004). Additionally, the alleged error must be stated with sufficient specificity to apprise the Board of the nature and extent of the error. See *General Mills, Inc. v. Limbach*, 63 Ohio St. 3d 273 (1992); *Ne. Ohio Reg'l Sewer Dist. v. Limbach*, 72 Ohio App. 3d 540 (1991).

79. *Crew 4 You*, 2003 Ohio Tax LEXIS 1505, at *13. As support for its argument, Crew 4 You offered sixteen letters of usage submitted by customers of Crew 4 You. *Id.* at *13 n.4. The letters were statements by Crew 4 You's customers indicating that they resold the benefit of the service provided by Crew 4 You in the same form in which it was received to various broadcasting entities. *Id.* The Board of Tax Appeals noted that the letters carried little weight, but that they were amplified by testimony given at the hearing before the Board. *Id.*

argued that the benefit of the service it provided to the trucking companies was a flexible and skilled workforce and that this benefit was passed through the trucking companies to the broadcasting entities.⁸⁰

While the BTA found that Crew 4 You sold employment services, it accepted Crew 4 You's resale exception argument, distinguishing the Ohio Supreme Court's decisions in *Corporate Staffing Resources* and *Bellemar*.⁸¹ The Board unanimously concluded that the benefit of Crew 4 You's personnel services was a flexible workforce of qualified technicians, a benefit that was passed through the trucking company to the broadcasting entity.⁸² The transactions between Crew 4 You and the trucking companies were thus entitled to the resale exception.⁸³

3. The Ohio Supreme Court⁸⁴

The Tax Commissioner appealed the BTA's decision and, having lost on resale exception grounds, changed his arguments.⁸⁵ The Commissioner now conceded that the benefit of the employment service passed through the trucking company to the broadcast entity.⁸⁶ The Commissioner contended, however, that the resale exception did not

80. Post Hearing Brief of Appellant at 12, *Crew 4 You, Inc. v. Zaino*, 2003 Ohio Tax LEXIS 1505 (Ohio B.T.A. Oct. 24, 2003).

81. *Crew 4 You*, 2003 Ohio Tax LEXIS 1505, at *17-18. The BTA stated:

In *Bellemar*, the benefit derived from the employment services was used by the taxpayers in the creation of its tangible product. In *Corporate Staffing Resources*, the benefit derived was not consistent throughout the transactional chain. Here, the benefit received at each step in the transactional chain was the same. The benefit of Crew 4 You's personnel services (a flexible, temporary workforce) is passed on through the trucking company to the broadcast entity.

Id. at *18.

82. *Id.* at *17-18. The BTA noted that a flexible workforce of qualified technicians to operate the trucking company's equipment was necessary in order for the broadcasting entity to air a live broadcast of a local sporting event. *Id.* at *17.

83. *Id.* at *18-19.

84. A taxpayer may appeal a decision of the BTA directly to the Ohio Supreme Court or to the Court of Appeals where the property taxed is situated or where the taxpayer resides. OHIO REV. CODE ANN. § 5717.04 (LexisNexis 2005). Either the Tax Commissioner or the taxpayer may appeal. *Id.* The appeal must be filed within thirty days after the date of the entry of the decision of the BTA on the journal of its proceedings. *Id.* The appeal must be filed with the Court in which the matter was appealed to and to the BTA. *Id.* The appeal must set forth the decision of the BTA appealed from and the alleged errors contained therein. *Id.*

85. See Initial Merit Brief of Appellant/Cross-Appellee, *Crew 4 You, Inc. v. Zaino*, 105 Ohio St. 3d 356 (2005) (No. 03-1960).

86. *Id.* at 3. According to the Tax Commissioner, "Unlike [*Corporate Staffing Resources* and *Bellemar*], the evidence here strongly indicates the benefit of the employment service provided to the purchaser did pass through in the same form to the purchaser's own consumer." *Id.* (explanation added).

apply because Crew 4 You failed to provide evidence that the transaction between the trucking companies and the broadcasting entities was a “sale” for the purposes of the Ohio sales and use tax.⁸⁷

The Commissioner specifically argued that, because the transactions between the trucking companies and the broadcasting entities were not taxable, the initial transactions between Crew 4 You and the trucking company could not qualify for the resale exception.⁸⁸ The Commissioner’s final point was that, because the transaction between the trucking companies and the broadcasting entities could not be characterized as a sale of employment services, the resale exception could not apply.⁸⁹

Crew 4 You argued that the record supported a finding that the trucking companies did “resell” the benefit of the crewing services and that the resale exception should apply.⁹⁰ Crew 4 You further argued that the Commissioner’s argument on this point was inconsistent because the Commissioner conceded, based on the letters of usage and the amplifying testimony, that the benefit of the crewing services passed through to the trucking companies to the broadcasting entities, while at the same time arguing that Crew 4 You presented no evidence that the

87. *Id.* at 2-3. The Tax Commissioner noted, “Although the BTA’s premise that the benefit of the employment service ‘passed through the trucking company to the broadcast entity’ is supported by the evidence in this case, its conclusion that there was a resale of employment services is mistaken.” *Id.* at 2. Interestingly, the BTA did not conclude that there was a “resale of employment services.” See *Crew 4 You*, 2003 Ohio Tax LEXIS 1505; see also *supra* notes 81-83 and accompanying text. The BTA simply concluded that, pursuant to statutory language, Crew 4 You was entitled to the resale exception. *Crew 4 You*, 2003 Ohio Tax LEXIS 1505, at *18-19. Despite the Tax Commissioner’s assertion, the BTA correctly avoided analyzing whether the trucking companies resold “employment services.” See *infra* note 136 and accompanying text (further discussing the BTA’s analysis). Rather, the BTA, following the statutory language, focused on whether the benefit of the personnel service provided by Crew 4 You was resold in the same form by the trucking companies. *Id.* Nevertheless, the Commissioner attempted to create an additional requirement to the resale exception—proof that the sale between the intermediary and the final consumer was taxable. Initial Merit Brief of Appellant/Cross-Appellee, *supra* note 85, at 4.

88. Initial Merit Brief of Appellant/Cross-Appellee, *supra* note 85, at 14. The Commissioner argued that the underlying goal of the resale exception is to tax the final transaction in a transactional chain. *Id.* at 10-11. The Commissioner recognized that his starting premise was “largely implicit in the caselaw.” *Id.* at 10.

89. *Id.* at 18. In the final paragraph of his initial merit brief, the Commissioner asserted, “Since the trucking companies could not be found to be selling employment services, it follows by iron force of logic that they did not resell the service they purchased from Crew 4 You.” *Id.* As mentioned, the fact that the trucking companies did not sell “employment services” is irrelevant to the inquiry of whether the transaction between Crew 4 You and the trucking companies qualified for the resale exception. See *supra* note 16 (quoting in full the statutory resale exception language); see also *infra* Parts IV.B.1, IV.B.2.

90. Second Merit Brief (Reply Merit Brief of Appellee and Brief in Support of Cross-Appeal by Crew 4 You, Inc.) at 4, *Crew 4 You, Inc., v. Zaino*, 105 Ohio St. 3d 356 (2005) (No. 03-1960).

trucking companies “resold” the benefit of the crewing services.⁹¹

Crew 4 You alternatively argued against imposing a requirement that the final sale in a transactional chain be a taxable sale⁹² and asserted that the plain language of the statute creates no such requirement and that such a requirement should not be judicially created.⁹³

In a unanimous decision, the Supreme Court reversed and held that the resale exception did not apply.⁹⁴ The Ohio Supreme Court agreed with the Commissioner that, because the trucking companies did not resell employment services, the resale exception could not apply.⁹⁵ The

91. *Id.* at 3-4. Crew 4 You specifically noted that, in making his concession that the benefit of the employment service passed through to the broadcasting entities, the Commissioner stated that the exhibits and testimony at the BTA hearing provided strong support for the passing of the benefit. *Id.* at 4 n.5. Crew 4 You characterized as disingenuous the Commissioner’s subsequent attempt to minimize the impact of that evidence for the purpose of determining whether the trucking companies “resold” the benefit of the crewing services to the broadcasting entities. *Id.* at 3.

92. *Id.* at 4-6. For the proposition that the final sale in the transaction must be taxable, the Commissioner relied heavily on *Hyatt Corp. v. Limbach*, 69 Ohio St. 3d 537 (1994), a case, discussed above, in which a hotel purchased linen cleaning services without paying sales tax on those purchases. *Hyatt*, 69 Ohio St. 3d at 540. In *Hyatt*, the Court concluded that Hyatt resold the benefit of the linen cleaning service to its customers who stayed for less than thirty days because a sale to such a customer was taxable. *Id.* Sales to guests who stayed long term were not taxable, and the resale exception did not apply. *Id.* Crew 4 You argued that the Commissioner misinterpreted *Hyatt*, particularly in light of several other resale exception cases. Second Merit Brief, *supra* note 90, at 6-8. For the proposition that the final sale in the transactional chain need not be taxable for the resale exception to apply, Crew 4 You cited *G & J Pepsi Cola Bottling, Inc. v. Limbach*, 48 Ohio St. 3d 31 (1990) (resale exception applied to a wholesaler’s purchase of equipment where the wholesaler transferred the equipment to retailers rent free because the retailers assumed liability in the event of damage or destruction of the equipment—consideration thus existed for the transfer of the equipment from the wholesalers to the retailers, though the transfer was not subject to sales tax), and *CCH Computax, Inc. v. Tracy*, 68 Ohio St. 3d 86 (resale exception applied to the purchase of automatic data processing services where the purchaser of those services transferred the benefit of that service to its customers, even though the service provided by the purchaser of the data processing services to its customers was not subject to sales tax). *Id.* at 5-6.

93. Second Merit Brief, *supra* note 90, at 8. The BTA agreed with Crew 4 You and focused not on the label given to the transaction between the trucking companies and the broadcasting entities, but on whether the benefit provided by Crew 4 You passed to the broadcasting entities through the trucking companies. *See supra* note 81 (discussing the BTA’s analysis); *see also supra* note 16 (quoting in full the statutory language).

94. *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St. 3d 356, 365 (2005).

95. *Id.* at 363. The Court reasoned that either the trucking companies or Crew 4 You was responsible for sales tax on the “employment services.” *Id.* (“[T]he critical question is whether Crew 4 You owes the sales tax or whether instead the trucking companies owe the sales tax on the sale of the employment services that Crew 4 You provided.”). The Court then stated, “Under the R.C. 5739.01(E) resale exception, the trucking companies owe the sales tax if they bought the services but then resold them in the same form to the broadcasting entities. Otherwise—as the Tax Commissioner found—Crew 4 You owes the sales tax.” *Id.* This analysis cannot be reconciled with the statutory language which dictates that the resale exception applies to a transaction involving services if the *benefit of that service* is resold. OHIO REV. CODE ANN. § 5739.01(E)(1) (LexisNexis 1999); *see infra* Part IV.B.2.

Court additionally analyzed the elements of an employment service, as defined in O.R.C. § 5739.01(JJ),⁹⁶ and concluded that the trucking companies did not sell employment services.⁹⁷ The Court then concluded that, because the trucking companies did not sell employment services, Crew 4 You was the only seller of such services and, accordingly, Crew 4 You owed the sales tax on the employment services.⁹⁸

In holding that the transactions between Crew 4 You and the trucking companies did not qualify for the resale exception because the trucking companies did not resell “employment services,” the Court avoided the question of whether the final sale in the transactional chain must be taxable for the resale exception to apply.⁹⁹ The Court quite simply held that, because the trucking companies did not sell employment services, the resale exception could not apply.¹⁰⁰

The Court avoided the express language of O.R.C. § 5739.01(E)(1).¹⁰¹ It focused rigidly on the service sold by the trucking companies to the broadcasting entities.¹⁰² The inquiry under O.R.C.

96. *Crew 4 You*, 105 Ohio St. 3d at 363. The Court stated:

A seller of an “employment service” as that term is used in Ohio pays the “wages, salary, or other compensation” of the personnel. O.R.C. § 5739.01(JJ). The trucking companies did not pay the personnel supplied by Crew 4 You, so those companies did not sell an employment service. Crew 4 You was the only seller of employment services in the three-way transaction involving Crew 4 You, the trucking companies, and the broadcasting entities. Crew 4 You owes sales taxes on the money it earned for providing those services.

Id. When the Court worked through the elements of an employment service to determine whether the trucking companies sold employment services to the broadcasting entities, the Court ignored both the statutory language of O.R.C. § 5739.01(E)(1) and its own prior directive that “the proper inquiry is a focus on the actual benefit received and not on the service provided.” *Corporate Staffing Resources, Inc. v. Zaino*, 95 Ohio St. 3d 1, 4 (2002); *see also infra* Parts IV.B.2, IV.B.3.

97. *Crew 4 You*, 105 Ohio St. 3d at 363. The Court noted that “the good or service that the trucking companies received from Crew 4 You was different from the good or service that the broadcasting entities received from the trucking companies.” *Id.*

98. *Id.*

99. *See id.* at 364. The Court did cite its holding in *Hyatt Corp. v. Limbach*, 69 Ohio St. 3d 537, (1994). *Id.* The Court’s ultimate reason for denying the resale exception was not, however, that the final sale from the trucking companies to the broadcasting entities was not a taxable sale. *Id.* *See also infra* note 174 and accompanying text. As discussed above, the reason the Court denied the resale exception was because the trucking companies did not sell employment services. *Crew 4 You*, 105 Ohio St. 3d at 364.

100. *Crew 4 You*, 105 Ohio St. 3d at 364. The Court’s ultimate reasoning is as follows: “[I]f the trucking companies did not *sell* employment services at all, then they certainly did not *resell* them.” *Id.* (emphasis in original). The Court went further: “The trucking companies did not sell employment services as those services are defined in R.C. § 5739.01(JJ), so those companies certainly cannot be said to have resold the services purchased from Crew 4 You.” *Id.* at 365.

101. *See infra* Part IV.B.2.

102. *See infra* Part IV.B.1.

§ 5739.01(E)(1) is not, however, whether the same service is resold; it is whether the *benefit of that service* is resold.¹⁰³ The Court made a critical error, and ignored past precedent, when it held that the resale exception did not apply because the trucking companies did not sell “employment services.”¹⁰⁴ This misapplication of the statute and precedent is the focus of the remainder of this Note.

IV. ANALYSIS

A. *The Court’s Possible Concern with Employment Services*

The Tax Commissioner was concerned from the inception of the tax on employment services that if the resale exception applied to those services, it would substantially eliminate the revenue the tax was expected to generate.¹⁰⁵ In *Bellemar Parts Industries Inc. v. Tracy*,¹⁰⁶ the Tax Commissioner argued that if the resale exception applied to employment services, the tax on employment services would be substantially undermined.¹⁰⁷

Though the *Bellemar* Court did not address the argument, it may have been considering the Tax Commissioner’s warning when it narrowly defined the “benefit” of an employment service.¹⁰⁸ The Court applied this narrow interpretation to the resale exception to determine that, where “an employer contracts for temporary employees to come into its facility and provide labor under its direction and control, that

103. See *infra* Part IV.B.2.

104. See *infra* Parts IV.B.2 and IV.B.3.

105. See Brief of Appellant/Cross-Appellee at 18, *Bellemar Parts, Inc. v. Tracy*, 88 Ohio St. 3d 351 (2000) (No. 98-2516) where the Tax Commissioner argued that if the resale exception was upheld in *Bellemar*, the state would lose \$40 million in tax revenues generated by employment services; see also *supra* note 45 (discussing the Tax Commissioner’s arguments on this point).

106. *Bellemar Parts Industries, Inc. v. Tracy*, 88 Ohio St. 3d 351.

107. Brief of Appellant/Cross-Appellee, *supra* note 105, at 18, (“It simply makes no sense that the General Assembly would enact a tax on a particular service that would be effectively negated by the resale exception.”). *Bellemar*, on the other hand, argued that “[a] decision in favor of [Bellemar] will not destroy the tax on employment services. Employment services will remain subject to tax in every context provided a specific tax exception does not apply. It is illogical to argue otherwise.” Reply Brief of Appellee/Cross-Appellant Regarding Cross-Appeal at 18, *Bellemar Parts, Inc. v. Tracy*, 88 Ohio St. 3d 351 (2000) (No. 98-2516).

108. See *Bellemar Parts*, 88 Ohio St. 3d at 354, where the Court defined the benefit of an employment service as the labor of the employees. Of course, the Court did not expressly acknowledge the Commissioner’s argument on this point, and its restrictive treatment of the resale exception as it applies to employment services may or may not have been influenced by the Tax Commissioner’s argument. Nevertheless, this part of the Note attempts to determine *why* the Court so restrictively applied the resale exception to employment services, and merely offers one possibility for such treatment.

'benefit' (the labor) is not resold to its customer in the same form (labor)."¹⁰⁹

Other examples of the resale exception and its application to services illuminate just how restrictively the *Bellemar* Court defined the benefit of an employment service. First, the *Bellemar* Court described a hypothetical service provider to acknowledge the different treatment of services and tangible personal property for resale exception purposes.¹¹⁰ In distinguishing between services and property, the Court noted that the General Assembly "sought to clarify that if a service such as landscaping is purchased, the taxpayer need not resell landscaping services to meet the exception, but need only resell the benefit of those services, i.e., cared-for grounds."¹¹¹ Thus, the Court reasoned that the benefit provided by a landscaping service is cared-for grounds.¹¹² Stated differently, the benefit of a landscaping service is the end-product of that service.¹¹³

Similarly, in *Hyatt Corp. v. Limbach*,¹¹⁴ the Court found that the benefit of an industrial linen cleaning service was the end-product of that cleaning service—clean linens.¹¹⁵ In his *Bellemar* dissent, Justice Pfeifer criticized the majority for characterizing the benefit of an employment service as a "flexible, less costly and more efficient

109. *Id.* This statement encompasses most temporary employment service arrangements. As discussed below, the Court may have thought that this interpretation of the benefit of an employment service and its application to an employment service for resale exception purposes effectively precluded the availability of the resale exception in the context of employment services. See *infra* Part IV.B.3.

110. *Bellemar Parts*, 88 Ohio St. 3d at 353-54.

111. *Id.* at 354.

112. *Id.*

113. *Id.*; see also *id.* at 357 (Pfeifer, J., dissenting) ("My disagreement with the majority is in regard to the characterization of the 'benefit of the service.'"). Justice Pfeifer continued, noting that:

The only way to fairly characterize the benefit of service [sic] is to look to the finished product, i.e., what the service yields. . . . The benefit alluded to by the majority, a "flexible, less costly, and more efficient work force," is ephemeral at best. *Bellemar* is not hiring temporary employees to hang around and get paid less than full-time workers. They hire them to work. They do work. And the benefit of that work is a completed project, which is resold.

Id.

114. *Hyatt Corp. v. Limbach*, 69 Ohio St. 3d 537 (1994).

115. *Id.* at 540. See also *CCH Computax, Inc. v. Tracy*, 68 Ohio St. 3d 86, 88, where the Court accepted that the benefit of an automatic data processing service was the product of the automatic data processing service (i.e., a completed tax return). Recall that in *CCH Computax* the Court held the resale exception applicable because the professional tax preparers, who submitted their customers' raw tax data to a data processing firm, resold the benefit of the automatic data processing service (the completed tax return) to their customers in the same form. *Id.*

workforce,” noting the similarities between *Bellemar* and *Hyatt*.¹¹⁶ Specifically, Justice Pfeifer stated:

We saw the benefit of the service in *Hyatt* to be simply clean linen—we did not look to any side benefit that might inure to *Hyatt*. We did not cite the economic benefit of outsourcing laundry as opposed to having *Hyatt* employees do the work. The benefit of the service was the finished product—clean laundry. Likewise, the benefit in this case is completed wheel assemblies. Since *Bellemar* resells that benefit, the temporary employment service meets the sales tax exclusion in R.C. 5739.01(E)(1).¹¹⁷

What emerges from these cases is that the Court has been much more liberal in its construction of the benefit of a service in cases where that service is any service other than an employment service.¹¹⁸ The question thus becomes, why is it appropriate for the “benefit of a service” to be the end-product of that service in every other instance but not in the case of employment services?¹¹⁹ The answer may simply be that the Court was impressed with the Tax Commissioner’s warning that if the resale exception applied to employment services, the tax on employment services would be eliminated.¹²⁰ It is quite possible that the unstated reasons that may have fueled the Court’s narrow construction of the benefit provided by an employment service in *Bellemar* were at work in *Crew 4 You*.¹²¹

B. The Court’s Reasoning in *Crew 4 You*

1. A Preference for Form Over Substance

The *Crew 4 You* Court was more concerned with the label given to

116. *Bellemar Parts*, 88 Ohio St. 3d at 357-58 (Pfeifer, J., dissenting).

117. *Id.* at 357-58. Thus, Justice Pfeifer recognized that the Court’s interpretation of the benefit of an employment service was unduly narrow and inconsistent with the Court’s definition of the benefit of other services. *See id.*

118. Note that in all of the cases described, and in the hypothetical provided by the majority in *Bellemar*, the benefit of the service provided was deemed to be the end-product of that service.

119. *See infra* Parts IV.B.1, IV.B.4 (suggesting that the Court engaged in improper judicial lawmaking by eliminating the resale exception in the case of employment services).

120. *See* Brief of Appellant/Cross-Appellee at 18, *Bellemar Parts, Inc. v. Tracy*, 88 Ohio St. 3d 351 (2000) (No. 98-2516). Whether the revenue attributable to the tax on employment services actually would be effectively eliminated by the resale exception is not explored in this Note.

121. *See infra* Parts IV.B.2 and IV.B.3, which explain in detail why the Supreme Court’s reasoning in *Crew 4 You* cannot be reconciled with the clear statutory language in O.R.C. § 5739.01(E)(1) or the Court’s own precedent, and which suggest that the opinion was quite possibly the product of a result-driven analysis.

the service provided by the trucking companies than the actual nature of the transaction.¹²² Indeed, the Court referenced, *thirteen times*, the fact that the service provided by the trucking companies to the broadcasting entities did not meet the statutory definition of an “employment service.”¹²³ Once the Court reduced its analysis to a label test (i.e., once it limited its analysis to comparing the actual service sold at each step of the transaction), it was easy for the Court to conclude that Crew 4 You owed the tax on its sale of employment services because it was the only party in the transactional chain that sold an employment service.¹²⁴

The Court played a label game that is uncalled for in the statute and

122. As will be discussed, the Court violated clear statutory language when it analyzed whether the trucking companies sold employment services, rather than analyzing whether the trucking companies sold the benefit they received from Crew 4 You in the same form. *See infra* Part IV.B.2. The Court also abandoned its own precedent. *See infra* Part IV.B.3. Though the Court’s holding in *Bellemar* was narrow indeed, it did not directly apply to the services provided by Crew 4 You because the temporary personnel supplied by Crew 4 You did not report to the consumer’s workplace to aid in manufacturing tangible personal property for sale. *See infra* note 157 (discussing the factual distinctions that should have formed the basis for distinguishing *Crew 4 You* from *Bellemar*).

123. *See Crew 4 You, Inc. v. Wilkins*, 105 Ohio St. 3d 356, 356-57 (2005). (“[W]e reverse the decision of the BTA because Crew 4 You has not shown that the employment services were in fact resold by the buyer.”); *id.* at 362 (“As the Tax Commissioner stated in his final determination, however, the trucking companies ‘do not resell employment services.’”); *id.* at 363 (“We agree with the Tax Commissioner’s view that the trucking companies did not resell employment services”); *id.* (“The trucking companies did not pay the personnel supplied by Crew 4 You, so those companies did not sell an employment service.”); *id.* (“Crew 4 You was the only seller of employment services in the three-way transaction involving Crew 4 You, the trucking companies, and the broadcasting entities.”); *id.* at 364 (“The company that did sell an ‘employment service’ as that term is defined in R.C. 5739.01(JJ) was Crew 4 You”); *id.* (“Because the trucking companies did not sell a taxable ‘employment service’ to the broadcasting entities—because the provider of ‘employment service’ under R.C. 5739.01(JJ) must pay the ‘wages, salary, or other compensation’ of the workers, and Crew 4 You (rather than the trucking companies) paid the workers’ wages—the trucking companies cannot be deemed to have resold the employment services that they purchased from Crew 4 You.”); *id.* (“[I]f the trucking companies did not *sell* employment services at all, then they certainly did not *resell* them.”); *id.* at 365 (“[T]rucking companies did not sell employment services as those services are defined in R.C. 5739.01(JJ), so those companies certainly cannot be said to have resold the services purchased from Crew 4 You.”); *id.* (“The record indicates that crewing companies did not sell or resell employment services”) (Note that this sentence contains an error or oversight, as the Court stated that the “crewing” companies did not sell employment services. The Court clearly meant that the “trucking” companies did not sell or resell employment services, as it had already found in its opinion that Crew 4 You did sell employment services.); *id.* (“Crew 4 You was the only company that sold employment services in the three-way transactions involving Crew 4 You, the trucking companies, and the broadcasting entities.”); *id.* (“Crew 4 You sold employment services, but the trucking companies did not.”); *id.* (“[A]nd the trucking companies certainly did not sell an ‘employment service’ as that term is defined in R.C. 5739.01(JJ).”)

124. *See Crew 4 You*, 105 Ohio St. 3d. at 364 (“The Company that did sell an ‘employment service’ . . . was Crew 4 You, and that company now owes taxes”).

unprecedented in its prior decisions.¹²⁵ This analysis was inconsistent with both clear statutory language and with the Court's own precedent.¹²⁶ Additionally, by limiting its analysis to whether the second party in the three-party transaction actually sold employment services, the Court permanently eliminated the availability of the resale exception in the context of employment services.¹²⁷ This amounted to judicial lawmaking and an abrogation of legislative prerogative.¹²⁸

2. The Court Abandoned Clear Statutory Language

In rigidly focusing on the service the trucking companies provided—and the fact that it was not an employment service—the Court treated the employment service Crew 4 You provided as if it were an item of tangible personal property, abandoning the express language of the resale exception statute requiring that tangible personal property and services be analyzed differently.¹²⁹ It makes sense, and is in fact mandated, that in the case of tangible personal property, if the second party to the transaction does not resell the same item of tangible personal property in the same form, the resale exception cannot apply.¹³⁰

125. See *infra* Parts IV.B.2, IV.B.3. The Court effectively stated that an employment service is a taxable service and that somebody must pay tax on such a service. See *supra* notes 123-24.

126. See *infra* Parts IV.B.2, IV.B.3. The Court's analysis also denies the existence of a benefit inquiry in the case of services because it treats a taxable service as taxable unconditionally, limiting the analysis only to which party to the transaction must pay tax on the sale of the service and not on whether one party to the transaction sold the benefit of the service to another party.

127. See OHIO REV. CODE ANN. § 5739.01(JJ) (LexisNexis 1999). This is so because one of the elements of a taxable employment service is that the provider of the employment service pays the wages of the temporary employees. *Id.* Thus, before Crew 4 You, or any employment service provider, can be found to have sold an employment service, it must be found that it pays the wages of the temporary employees. *Id.* Once that determination is made, it is, by default, impossible for the purchaser of those employment services to actually resell them because that purchaser does not pay the wages of the temporary employee. See *id.* Therefore, under the Court's formulation of the test, the resale exception can never exist in the case of employment services. See *id.*

128. See *infra* Part IV.B.4 (discussing the impropriety of the Court's performing a legislative function by precluding the applicability of the resale exception to employment services).

129. See OHIO REV. CODE ANN. § 5739.01(E)(1) (LexisNexis 1999). Recall that during the audit period, O.R.C. § 5739.01(E)(1) excluded from the definition of sales all sales 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." *Id.* (emphasis added).

130. See OHIO REV. CODE ANN. § 5739.01(E)(1) (LexisNexis 1999). Thus, if tangible personal property were involved, the proper analysis would focus on the product sold by Company 1 to Company 2, and whether Company 2 sold that product to Company 3 in the same form. See *id.* That is, in analyzing whether the resale exception applies to a sale of tangible personal property, a court *should* focus on and compare the product sold at each stage in the transactional chain and the label at each step *should* be the same. See *id.* As the statute clearly directs, the analysis differs in the case of services. *Id.* The focus should be directed to the benefit received by Company 2 when it

The Court, however, ignored the directive of O.R.C. § 5739.01(E)(1) to treat services and tangible personal property differently, and began its opinion, and perhaps set the groundwork for its misapplication of the statute throughout the case, by improperly paraphrasing the resale exception.¹³¹ After misstating the statutory resale exception test (a misstatement that eliminated the word “benefit” from the analysis), the Court misapplied the statute to the facts of the case several times.¹³² In each instance, the Court focused on whether the trucking companies sold employment services, as those services are defined in O.R.C. § 5739.01(JJ), and not on whether the trucking companies resold the benefit of the employment services they purchased

purchased the service and whether that *benefit* was sold to Company 3 in the same form. *Id.*

131. *See Crew 4 You, Inc. v. Wilkins*, 105 Ohio St. 3d 356, 362 (2005). The Court started by properly stating the statutory test:

R.C. 5739.01(E) excludes from the definition of “retail sale”—and therefore excludes from the R.C. 5739.02 sales tax on retail sales—any sale “in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person.”

Id. In the very next sentence, however, the Court improperly paraphrased the test in a manner that eliminates the crucial distinction between tangible personal property and services in the case of the resale exception. *Id.* The Court stated:

In other words, when the purchaser’s intent in buying a good or service is to resell it to yet another purchaser without changing the good or service in any way, then the original purchase is not considered a “retail sale” and is therefore not subject to the sales tax on retail sales.

Id. The Court paraphrased the statutory exception in such a way that the distinction between tangible personal property and services disappeared. *See id.* By paraphrasing the test, the Court was able to eliminate the word “benefit” from its analysis. *See id.* This set the stage for the balance of the Court’s opinion, where it improperly analyzed the applicability of the resale exception to the employment services at issue as though the resale was of an item of tangible personal property. *See Crew 4 You*, 105 Ohio St. 3d. 356; *see also supra* note 123 (noting that the Court referenced thirteen times the fact that the trucking companies did not sell “employment services” as those services are defined in O.R.C. § 5739.01(JJ)).

132. *See Crew 4 You*, 105 Ohio St. 3d. at 357 (“[T]hose employment services were not resold ‘in the same form in which [they had been] received’ by the buyer of them”); *id.* at 363 (“The personnel services are not resold in the same form in which they are purchased.”); *id.* (“Because . . . Crew 4 You provided an ‘employment service’ . . . the critical question is whether Crew 4 You owes the sales tax or whether instead the trucking companies owe the sales tax on the sale of the employment services that Crew 4 You provided.”); *id.* (“Under the . . . resale exception, the trucking companies owe the sales tax if they bought the services but then resold them in the same form to the broadcasting entities. Otherwise . . . Crew 4 You owes the sales tax.”); *id.* at 364 (“Because the trucking companies did not sell a taxable ‘employment service’ to the broadcasting entities . . . the trucking companies cannot be deemed to have resold the employment services that they purchased from Crew 4 You.”); *id.* at 365 (“The trucking companies did not sell employment services as those services are defined in R.C. 5739.01(JJ), so those companies certainly cannot be said to have resold the services purchased from Crew 4 You.”).

from Crew 4 You.¹³³ The Court practically excluded the word “benefit,” as in the “benefit” of the service provided, from its opinion.¹³⁴

As mentioned, the Supreme Court did not focus on the benefit received by the trucking companies and whether that benefit was transferred by the trucking companies to the broadcasting entities, where it was enjoyed by the broadcasting entities.¹³⁵ The BTA, on the other hand, did properly apply the statute to the facts of the case when it stated:

The record before us demonstrates that a portion of the transaction between the trucking companies and the broadcast entities is providing a flexible and temporary workforce of qualified technicians to operate the equipment necessary for the broadcast entity to air live coverage of regional sporting events. Similarly, the trucking company seeks to outsource its obligation to provide said technicians and contracts with

133. See *supra* note 123. Amazingly, the Court conceded that the trucking companies resold the benefit of the employment service. *Crew 4 You*, 105 Ohio St. 3d at 357. However, under the Court’s misapplication of the statute, it was not enough for the benefit of the service to be resold in the same form—the Court required the actual service to be resold in the same form, a requirement not present in the statute. *Id.* Specifically, the Court stated, “The record reveals rather that the buyer did pass on the benefit of the employment services to others, but those employment services were not resold ‘in the same form in which [they had been] received’ by the buyer of them, as required by R.C. 5739.01(E), the resale exception statute.” *Id.* As discussed, the resale exception only requires that the benefit of the service, and not the actual service, be resold in the same form. See *supra* note 16 (quoting the statutory text of the resale exception in full). As will be demonstrated below, the Court enabled itself to focus on whether an employment service was resold, as opposed to whether the benefit of the service was resold, by inserting the misleading explanatory parenthetical “[they had been]” in its formulation of the resale exception test. See *infra* notes 164-67 and accompanying text.

134. See *Crew 4 You*, 105 Ohio St. 3d 356. Note that the Tax Commissioner did attempt to compare the benefit received by the trucking companies with the benefit received by the broadcasting entities. See *id.* at 363 (“The Tax Commissioner explained, ‘The benefit to the broadcast entities is not the labor of the technicians; it is the end-product of that labor—staffed equipment ready for use in broadcasting a sporting event.’”). Interestingly, the Court did not accept the Commissioner’s invitation to properly analyze whether the benefit of the service was resold. See *id.* In fact, in the very next sentence, the Court, after citing the Commissioner, once again misstated the proper test when it explained, “In short, the good or service that the trucking companies received from Crew 4 You was different from the good or service that the broadcasting entities received from the trucking companies.” *Id.* Clearly, the Commissioner’s statement cannot be interpreted as supporting that conclusion. Rather, the Commissioner was attempting to argue that the *benefit* received by the trucking companies (i.e., the labor of the employees) was different than the *benefit* received by the broadcasting entities (i.e., staffed equipment ready for use). *Id.* The Tax Commissioner’s argument was seemingly weak in any event because it would appear that the broadcasting entities sought more than staffed equipment ready for use—they sought equipment (provided by the trucking companies) and personnel who could and would operate that equipment to produce a broadcast (provided by Crew 4 You).

135. See *supra* note 132 (highlighting several examples of the Court’s misapplication of the statute and its focus on the service sold by the trucking companies and whether that service was an employment service).

Crew 4 You to provide a flexible and temporary workforce of qualified technicians. The character of the benefit realized from Crew 4 You to the trucking company remains unchanged when it is resold to the broadcast entity.¹³⁶

Though the BTA conducted the proper analysis, the Supreme Court miraculously claimed that the Board did not engage in the appropriate inquiry because it did not “examine whether the trucking companies had acted with ‘the purpose . . . to resell the thing transferred or the benefit of the service provided . . . in the same form in which [it had been] received.’”¹³⁷ The Court then declared that “[t]hose critical requirements of the resale exception in the sales tax statutes were not satisfied in this case.”¹³⁸ Thus, in the span of three sentences, the Court stated the proper test (i.e., that the inquiry should be on whether the benefit of the service provided was resold in the same form), incorrectly stated that the BTA did not follow this test (“[t]he BTA went astray by failing to examine . . .”), and then misapplied the proper test by focusing on whether the trucking companies sold employment services “as those services are defined in R.C. 5739.01(JJ)” instead of focusing on the benefit received by the trucking companies and whether that benefit was sold in the same form to the broadcasting entities.¹³⁹

Based on the foregoing, it is readily apparent that the Court strayed from applying the resale exception statute consistently with its language.

3. The Court Abandoned its Own Precedent

In addition to misapplying the test dictated by the statute, the Court misapplied and misconstrued its past service/resale exception cases.

136. *Crew 4 You, Inc. v. Zaino*, No. 2002-V-958, 2003 Ohio Tax LEXIS 1505, at *17 (Ohio B.T.A. Oct. 24, 2003). Instead of improperly focusing on the name of the service being provided by the trucking companies, or whether that service met the definition of an employment service, the BTA correctly focused on the benefit of the service received by the trucking companies and compared it to the benefit received by the broadcasting entities. *Id.* Because the benefit was the same at each step in the transactional chain, the resale exception applied. *Id.* (“The benefit of Crew 4 You’s personnel services, ‘a flexible, temporary workforce,’ is passed on through the trucking company to the broadcast entity.”).

137. *Crew 4 You*, 105 Ohio St. 3d at 365. As discussed immediately above, the BTA most definitely did analyze whether the trucking companies acted with the purpose of reselling the benefit of Crew 4 You’s service. *Crew 4 You*, 2003 Ohio Tax LEXIS 1505, at *17 (“Similarly, the trucking company seeks to outsource its obligation to provide said technicians and contracts with Crew 4 You to provide a flexible and temporary workforce of qualified technicians.”).

138. *Crew 4 You*, 105 Ohio St. 3d at 365.

139. *Id.* (“The trucking companies did not sell employment services as those services are defined in R.C. 5739.01(JJ), so those companies certainly cannot be said to have resold the services purchased from Crew 4 You.”).

First, the Court disregarded its holding in *Bellemar Parts v. Tracy*, where it had acknowledged the distinction between tangible personal property and services in the context of the resale exception.¹⁴⁰ The *Bellemar* Court had also stated the proper application of the resale exception statute as it applies to services.¹⁴¹ After properly stating the resale exception test as it applies to services, and recognizing the distinction between services and tangible personal property, the *Bellemar* Court found that the taxpayer did not resell the employment service because:

[Bellemar] provided the temporary workers with materials and a workplace, and supervised and directed them in their job responsibilities. This, combined with permanent employee labor, resulted in the finished product. The benefit, therefore, was received by [Bellemar] and was not resold in the same form. Accordingly, the resale exception does not apply.¹⁴²

The *Bellemar* Court's significant contribution to the resale exception analysis, at least in the context of employment services, was to define the benefit of an employment service.¹⁴³ Had the Supreme Court

140. See *Bellemar Parts, Inc. v. Tracy*, 88 Ohio St. 3d 351, 353-54 (2000), where the Court stated:

In fact, we agree . . . that the General Assembly included the term "benefit" to distinguish between the service purchased and the benefit received. It sought to clarify that if a service such as landscaping is purchased, the taxpayer need not resell landscaping services to meet the exception, but need only resell the benefit of those services, *i.e.*, cared-for grounds.

Id. The most compelling line from the foregoing passage is the Court's recognition that "if a service such as landscaping is purchased, the taxpayer need not resell landscaping services to meet the exception, but need only resell the benefit of those services, *i.e.*, cared-for grounds." *Id.* The *Crew 4 You* Court simply abandoned this reasoning. See *supra* note 132 (discussing the *Crew 4 You* Court's focus on whether the trucking companies resold employment services as those services are defined in O.R.C. § 5739.01(JJ)).

141. *Bellemar Parts*, 88 Ohio St. 3d at 354. The *Bellemar* Court correctly stated that "where a taxpayer contracts with a company for a service and receives and resells the benefit of that service in the same form, the exception applies." *Id.*

142. *Id.* at 353 (explanation added). Despite the fact that the Court's definition of the benefit of an employment service may have been unduly restrictive, the Court properly analyzed what it defined as the benefit received by Bellemar (*i.e.*, the labor of the employees) and compared it with what Bellemar sold its customers (*i.e.*, finished, tangible products). *Id.* This was an appropriate analysis because the Court evaluated the benefit received at each step in the transactional chain. See OHIO REV. CODE ANN. § 5739.01(E)(1) (LexisNexis 1999). See also *supra* note 16 (quoting in full the statutory language). This is in stark contrast with the *Crew 4 You* Court's formulation and application of the test as it relates to services. See *Crew 4 You*, 105 Ohio St. 3d at 365 ("The trucking companies did not sell employment services as those services are defined in R.C. 5739.01(JJ), so those companies certainly cannot be said to have resold the services purchased from *Crew 4 You*."); see also *supra* Part IV.B.2.

143. *Bellemar Parts*, 88 Ohio St. 3d at 353. The *Bellemar* Court defined the benefit of an

in *Crew 4 You* used the same reasoning it used in *Bellemar Parts*, and its definition of the benefit of an employment service—the labor of the employees—the Court may have reached a different result.¹⁴⁴ Even if the Court did not find in favor of *Crew 4 You*, it would have at a minimum facilitated certainty in the law by consistently applying its precedent and the clear statutory language of O.R.C. § 5739.01(E)(1).¹⁴⁵

Also troubling is the *Crew 4 You* Court's reliance on *Bellemar*, particularly the proposition for which the Court cited *Bellemar* for support.¹⁴⁶ The Court stated its conclusion, citing *Bellemar* for support:

In other words, if the trucking companies did not *sell* employment services at all, then they certainly did not *resell* them. See, also, *Bellemar Parts Indus., Inc. v. Tracy* (2000), 88 Ohio St.3d 351, 353, 354, 2000 Ohio 343, 725 N.E.2d 1132 (explaining that “where a taxpayer contracts with a company for a service and receives and resells the benefit of that service in the same form, the [resale] exception [in R.C. 5739.01(E)] applies,” and rejecting a taxpayer's effort to claim the resale exception when employment services were not resold in the same form by the buyer of them).¹⁴⁷

The Court thus unfairly and inaccurately cited *Bellemar* for support and misstated *Bellemar*'s holding by implying that the *Bellemar* Court ruled against the taxpayer because the taxpayer did not resell “employment services.”¹⁴⁸

employment service as the “labor of the employees, not the product of their work.” *Id.* This made the Court's analysis in *Bellemar* relatively simple. See *id.* *Bellemar* did not resell the labor of the temporary employees; it sold the end-product of their labor (finished wheel assemblies). *Id.* at 353.

144. At the very least, the Court's analysis would have been different. Instead of focusing on whether the trucking companies sold employment services, the Court would have analyzed whether the trucking companies sold the “labor of the employees” (i.e., the benefit of an employment service) to the broadcasting entities. This would have been a much closer call. As the Board of Tax Appeals noted, “The record before us demonstrates that a portion of the transaction between the trucking companies and the broadcast entities is providing a flexible and temporary workforce of qualified technicians to operate the equipment necessary for the broadcast entity to air live coverage of regional sporting events.” *Crew 4 You, Inc. v. Zaino*, No. 2002-V-958, 2003 Ohio Tax LEXIS 1505, at *17 (Ohio B.T.A. Oct. 24, 2003).

145. See *infra* Part IV.C.1 (discussing the problems now faced by service providers in determining whether the services they sell are eligible for the resale exception).

146. See *Crew 4 You*, 105 Ohio St. 3d at 364, where the Court again misapplied the resale exception and cited *Bellemar* as support for its misstated formulation of the test.

147. *Id.* Note here that the Court again focuses on whether the trucking companies sold employment services. *Id.*

148. *Id.* As mentioned, the *Bellemar* Court did not hold *Bellemar*'s purchases of employment services ineligible for the resale exception because *Bellemar* did not sell employment services to its customers; it held the resale exception inapplicable because *Bellemar* did not resell the benefit of the employment service as the Court defined that benefit. *Bellemar Parts*, 88 Ohio St. 3d at 353. Thus, the *Crew 4 You* Court improperly cited *Bellemar* for the proposition that the second

One explanation could be as follows: the Court thought that, in *Bellemar*, it effectively eliminated all possibility of the resale exception's applicability to the sale of employment services.¹⁴⁹ Realizing that *Bellemar* was not expansive enough to eliminate the resale exception in the case of all employment services, the Ohio Supreme Court used its opportunity in *Crew 4 You* to eliminate the resale exception in the case of employment services once and for all, and it cited its previous attempt to do so for support, even though a significant factual distinction existed in *Crew 4 You*.¹⁵⁰

The fact that the technicians *Crew 4 You* provided did not report to the purchaser's "facility" to provide services was an extremely important fact, a fact the *Crew 4 You* Court ignored.¹⁵¹ It is reasonable and logical that when temporary employees come into a facility, as they did in *Bellemar*, the benefit of that service is not resold.¹⁵² When, however, the

transaction in a three-party transaction involving employment services needs to be a sale of employment service in order for the resale exception to apply. *Crew 4 You*, 105 Ohio St. 3d at 364. This misstatement appears to provide further evidence that the Court was engaging in a result-driven analysis. See *infra* Part IV.C.4.

149. See *Bellemar Parts*, 88 Ohio St. 3d at 354. The *Bellemar* Court stated, "Where, however, an employer contracts for temporary employees to come into its facility and provide labor under its direction and control, that 'benefit' (the labor) is not resold to its customer in the same form (labor)." *Id.* This holding could be read to eliminate the resale exception in all cases in which employment services are at issue because this statement embodies the typical employment service arrangement. See Article, *The Ohio Supreme Court Justices: A Biographical Sketch*, 27 OHIO N.U. L. REV. 341, 437 (2001), where the author, interpreting *Bellemar*, stated, "Now that it has been decided that temporary employment services are not excluded under the resale exception, companies may want to look at how the purchase of temporary employment can be excepted from employment service status under the code." See also *supra* Part IV.A.1 (discussing the possible motivation for the Court's attempt to eliminate the resale exception in the context of employment services).

150. One important fact distinguished the services at issue in *Bellemar* and those being provided in *Crew 4 You*: the temporary employees provided in *Crew 4 You* did not come into the purchaser's facility and provide labor. *Crew 4 You*, 105 Ohio St. 3d at 357. The labor was provided at an off-facility location. *Id.* Thus, the *Crew 4 You* Court could not simply cite its holding in *Bellemar* as standing for a wholesale ban on the resale exception in the case of all employment services. But see *Corporate Staffing Resources, Inc. v. Zaino*, 95 Ohio St. 3d 1 (2002) (holding that the resale exception does not apply in the context of employment services when the consumer of the employment services sends the personnel out to its customer's location to perform maintenance on computers). The *Corporate Staffing Resources* Court, however, did focus on the benefit of the service at each step in the transactional chain. *Corporate Staffing Resources*, 95 Ohio St. 3d at 3 ("The benefit to Sarcom's customers, then, was not the labor of CSR technicians, but the end product of that labor: consistently operating computers.").

151. This distinction, though not discussed by the Court in *Crew 4 You*, probably explains the Court's avoidance of its holding in *Bellemar* that the benefit of an employment service is the labor of the employees.

152. See *Bellemar Parts*, 88 Ohio St. 3d at 353. But see *id.* at 357 (Pfeifer dissenting) (arguing that the majority defined the benefit of an employment service in an unduly restrictive manner, and that the benefit of an employment service should be characterized as the end-product of the labor of

temporary employees are dispatched to a site that is not the “facility” of the purchaser, and the purchaser is also dispatched to that site, a much stronger argument can be made that the benefit of the service (i.e., the labor of the employee) is actually resold.¹⁵³ The Court misconstrued and misapplied the statutory test and, as a result, avoided addressing this argument.¹⁵⁴

The *Crew 4 You* Court also misstated its 2002 holding in *Corporate Staffing Resources, Inc. v. Zaino*.¹⁵⁵ In *Corporate Staffing Resources*, the Court affirmed its holding in *Bellemar* that the benefit of an employment service is the labor of the employees.¹⁵⁶ The *Crew 4 You* Court, however, cited *Corporate Staffing Resources* as a case that held that a sale of employment services did not qualify for the resale exception when the consumer of those services did not resell the employment service.¹⁵⁷ Specifically, the Court cited *Corporate Staffing*

the employees).

153. See *Crew 4 You v. Zaino*, No. 2002-V-958, 2003 Ohio Tax LEXIS 1505, at *17-18 (Ohio B.T.A. Oct. 24, 2003), where the BTA stated that the labor of the temporary employees provided by *Crew 4 You* was passed through the trucking companies to the broadcasting entities. See also *supra* note 136 and accompanying text (discussing the BTA’s analysis). It seems significant that both the temporary employees and the purchaser of the employment service were dispatched to the same location. In *Corporate Staffing Resources*, 95 Ohio St.3d 1, the taxpayer argued that because its technicians were dispatched to a location designated by the purchaser’s customers, the benefit received remained consistent throughout the transactional chain. *Corporate Staffing Resources*, 95 Ohio St. 3d at 4 (“[The purchaser] and its customers were joint beneficiaries of the deployment of CSR technicians to customer sites. The same benefit was received at the same location and at the same time by both [the purchaser] and its customers.”) (explanation added). The Court found this reasoning flawed and held that the benefit realized by the purchaser of the service was different than the benefit realized by its customers, notwithstanding the fact that the CSR technicians were dispatched to an off-site location to perform their tasks. *Id.* (“[The purchaser] and its customers have different interests and ultimately realize *different*, although related, benefits—regardless of where the laborers perform their work.”) (explanation added) (emphasis in original). In *Crew 4 You*, a much stronger argument existed that the benefit of the labor of the employees remained consistent throughout the transactional chain because both *Crew 4 You* and the purchasers of its services performed their functions at an off-site location for the benefit of the broadcasting entities. See *supra* note 136 and accompanying text (discussing the BTA’s holding that the benefit of the employment service was passed through the trucking companies to the broadcasting entities). The Court did not analyze this nuance using the proper “benefit of the service provided” inquiry, but instead embarked upon the simply incorrect, and seemingly result-driven, endeavor of determining whether the trucking companies sold employment services as those services are defined in O.R.C. § 5739.01(JJ). See *Crew 4 You*, 105 Ohio St. 3d 356. As discussed above, this is not the proper inquiry in a resale exception case involving services. See *supra* Part IV.B.2.

154. See *supra* Part IV.B.2.

155. *Corporate Staffing Resources*, 95 Ohio St. 3d 1.

156. *Id.* at 4-5 (“We therefore reaffirm our prior holding that ‘[w]here a consumer contracts for temporary employees to add to its workforce, the benefit of that service is the labor of the employees, not the product of their work.’”) (quoting *Bellemar Parts*, 88 Ohio St.3d at 354).

157. *Crew 4 You*, 105 Ohio St. 3d at 363.

Resources as a case where it “determined that a provider of employment services was not entitled to the resale exception when the computer hardware company that hired the temporary employees from the employment service provider did not resell those services.”¹⁵⁸ What the *Corporate Staffing Resources* Court actually said, however, was that:

[W]here a consumer contracts for temporary employees to add to its workforce, the benefit of that service is the labor of the employees, not the product of their work. Because it is the consumer of the services, not its customer, that receives the benefit of the service, the benefit is not resold in the same form and the resale exception from the sales tax does not apply. Accordingly, we hold that Sarcom did not resell in the same form the actual benefit it realized from its transactions with CSR to those customers who had purchased the service agreement.¹⁵⁹

Thus, the *Crew 4 You* Court improperly stated that the Court in *Corporate Staffing Resources* found the resale exception inapplicable because the purchaser of the services did not resell “employment services,” whereas the Court in *Corporate Staffing Resources* properly focused on the *benefit* of those services and found that the purchaser of the employment service consumed and did not resell that *benefit*.¹⁶⁰ The Court, in essence, attempted to impute its faulty reasoning in *Crew 4 You* to a prior case where its reasoning was proper in an effort to legitimize its present misapplication of the statute.¹⁶¹

The Court once again misstated the proper test for determining whether the resale exception applies to a sale of services when, summarizing the facts and holding of *Corporate Staffing Resources*, it

158. *Id.* This statement is familiar, of course, because it is the same approach the Court took when it inaccurately summarized its holding in *Bellemar*. See *supra* note 148.

159. *Corporate Staffing Resources*, 95 Ohio St. 3d at 4-5 (quoting *Bellemar Parts*, 88 Ohio St. 3d at 354) (internal citation omitted). Note here that the *Corporate Staffing Resources* Court properly applied the statutory test for the resale exception in the context of services by focusing on the “actual benefit” received by the consumer of the service and whether that benefit was resold in the same form. *Id.* This was the same analysis conducted by the *Bellemar* Court and the Board of Tax Appeals in *Crew 4 You*. *Bellemar Parts*, 88 Ohio St. 3d at 353; *Crew 4 You v. Zaino*, No. 2002-V-958, 2003 Ohio Tax LEXIS 1505, at *13 (Ohio B.T.A. Oct. 24, 2003).

160. *Crew 4 You*, 105 Ohio St. 3d at 363; *Corporate Staffing Resources*, 95 Ohio St. 3d at 4-5.

161. *Crew 4 You*, 105 Ohio St. 3d at 363. The Court’s inaccurate characterization of both *Bellemar* and *Corporate Staffing Resources* lends support to the theory that the Court’s analysis was result-driven. See *infra* Parts IV.B.4, V; see also *supra* Part IV.A.1 (discussing the possibility that the Court may have sought to eliminate the resale exception’s applicability to employment services out of fear that the exception would substantially reduce the tax revenues generated by the tax on employment services). It could, of course, be argued that the Court’s analysis was not result-driven, and that the case was simply one that is inherently subject to a difference of opinion. However, the fact that the Court inaccurately portrayed several of its past resale exception holdings undermines this possibility.

stated: “Those services were not, in other words, resold ‘in the same form in which [they had been] received,’ as would be required for the R.C. 5739.01(E) resale exception to apply to the initial sale of the employment services.”¹⁶² The Court was again misapplying the statute and it needed to improperly quote, through the use of a misleading parenthetical, one of its prior holdings to conform to its misapplication.¹⁶³

As evidence of this, note that when the Court summarized its holding in *Corporate Staffing Resources*, it referred to the statutory provision embodying the resale exception, O.R.C. § 5739.01(E)(1), and stated that the services at issue in *Corporate Staffing Resources*, were not resold “‘in the same form in which [they had been] received,’ as would be required for the R.C. 5739.01(E) resale exception to apply”¹⁶⁴ The Court thus intimated that O.R.C. § 5739.01(E)(1) required that the services, and not the *benefit* of those services, must be resold in the same form as they had been received for the resale exception to apply.¹⁶⁵ Of course, the statute dictates not that the services must be resold in the same form in which “they had been received,” but that the *benefit* of that service must be resold in the same form in which *it* had been received.¹⁶⁶ The fact that the Court added this misleading parenthetical tends to indicate that it was consciously avoiding the proper test and misapplying the statute.¹⁶⁷

4. The Court’s Opinion Amounted to Judicial Lawmaking

The Tax Commissioner forcefully argued that the resale exception should not apply to Crew 4 You’s sale of employment services because the transaction between the trucking companies and the broadcasting

162. *Crew 4 You*, 105 Ohio St. 3d at 363-64. As mentioned throughout, the proper inquiry is not whether the service is resold; it is whether the benefit of that service is resold. See *supra* Part IV.B.2. In fact, the *Corporate Staffing Resources* Court took note of the correct application of the test when it said, “[T]he proper inquiry is a focus on the actual benefit received and not on the service purchased.” *Corporate Staffing Resources*, 95 Ohio St. 3d at 4. The *Crew 4 You* Court did not follow the “proper inquiry,” but instead focused on the service being provided rather than the benefit of that service. See *supra* notes 130-135 and accompanying text.

163. *Crew 4 You*, 105 Ohio St. 3d at 363-64.

164. *Id.* Of importance here is that the Court supplied an explanatory parenthetical ((they had been)) in summarizing its holding in *Corporate Staffing Resources* and paraphrasing the applicable statutory test. *Id.*

165. *Id.*

166. See OHIO REV. CODE ANN. § 5739.01(E)(1) (LexisNexis 1999).

167. See *infra* Part V, concluding that the Court’s analysis was result-driven and that the Court was cognizant of its misapplication of the statute and its precedent.

entities was not a taxable “sale,” as defined in O.R.C. § 5739.01(B).¹⁶⁸

168. Initial Merit Brief of Appellant/Cross-Appellee at 4, *Crew 4 You, Inc. v. Zaino*, 105 Ohio St. 3d 356 (2005) (No. 03-1960). The Commissioner specifically argued:

Because the transactions between the trucking companies and the broadcast entities would not be “sales,” not recognizing a “sale-for-resale” exception in this case would lead only to the imposition of tax on the one, final sale of “employment service” by Crew 4 You. If that sale were excepted from sales tax, the result would be no tax on either transaction. *What Crew 4 You seeks is not to avoid “double taxation,” but to avoid any taxation at all.*

Id. (emphasis in original). Interestingly, the Tax Commissioner resorted to this argument after abandoning his argument, made at the Board of Tax Appeals, that the benefit received by the broadcasting entities was the same as the benefit received by the trucking companies. *Id.* at 3 (“[T]he evidence here strongly indicates the benefit of the employment service provided to the purchaser did pass through in the same form to the purchaser’s own consumer.”). The Tax Commissioner agreed that there has never been a stated requirement that the second transaction must be a taxable sale. See Initial Merit Brief of Appellant/Cross-Appellee *supra* at 11 (“[T]hese cases typically do not directly hold the proposition that the subsequent transaction must be a sales-tax ‘sale,’ but their analysis relies upon it.”). Though the requirement has never been definitively stated, the Tax Commissioner’s assertion that the second transaction must be a taxable “sale,” as defined in O.R.C. § 5739.01(B), is not without merit. O.R.C. § 5739.02 levies an excise tax on retail “sales,” and O.R.C. § 5739.01(B) defines the transactions that qualify as “sales” for this purpose. OHIO REV. CODE ANN. §§ 5739.02 and 5739.01(B) (LexisNexis 1999). Thus, it could be argued that in order for the benefit of a service to be “resold,” a purchaser would have to convey the benefit of that sale in a transaction that is defined as a “sale” by O.R.C. § 5739.01(B). *Id.*

Nevertheless, prior case law applying the resale exception to sales of tangible personal property supports the position that the second transaction need not be a taxable sale. For example, in *Procter & Gamble Co. v. Lindley*, 17 Ohio St. 3d 71 (1985), the Court analyzed whether Procter & Gamble’s transfer of artwork to its packaging suppliers, subject to a requirements contract whereby the supplier would use the artwork solely to produce all the packaging materials required by Procter & Gamble, qualified as a sale as defined in O.R.C. § 5739.01(B). At the time, O.R.C. § 5739.01(B) defined a sale as “all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted for a consideration.” OHIO REV. CODE ANN. § 5739.01(B) (LexisNexis 1985). Similarly, in *General Motors Corp. v. Kosydar*, 37 Ohio St. 2d 138 (1974), the Court considered whether General Motors’ transfer of tooling to its suppliers for use in making parts to be exclusively manufactured for General Motors, pursuant to a requirements contract, constituted a “sale” under the sales tax statutes. In both cases, the Court found that the existence of the requirements contracts between the purchaser of the property and the party to whom the purchaser granted a license to use that property was a sufficient legal detriment to constitute “consideration.” *Procter & Gamble*, 17 Ohio St. 3d at 76; *General Motors*, 37 Ohio St. 2d at 147. Thus, the initial purchase of the tangible personal property (i.e., the artwork by Procter & Gamble and the tooling by General Motors) was eligible for the resale exception even though the subsequent transfer of that property was not a taxable event (how would one value the detriment of entering into a requirements contract or assess a sales tax on that detriment?). What is interesting is that, according to *General Motors* and *Procter & Gamble*, a transfer of tangible personal property can constitute a “sale” and not be subject to sales tax. *Procter & Gamble*, 17 Ohio St. 3d at 76; *General Motors*, 37 Ohio St. 2d at 147.

The application of the resale exception to tangible personal property is fairly straightforward because the definition of a “sale” of tangible personal property is generally straightforward. In the context of services, on the other hand, the “benefit inquiry” has confused the resale exception analysis, and the Court has not dealt consistently with the exception as it applies to services. Compare *CCH Computax v. Tracy*, 68 Ohio St. 3d 86 (1993) (finding that the resale

As support for this proposition, the Commissioner relied on *Hyatt Corp. v. Limbach*, one of the Court's previous cases applying the resale exception to services.¹⁶⁹ The Commissioner argued that the distinction made in *Hyatt* was clear-cut, and its application to the facts of *Crew 4 You* straightforward.¹⁷⁰

exception applied despite the fact that the second transaction in the two-transaction chain was a non-taxable professional accounting service, and not a taxable "sale") with *Hyatt Corp. v. Limbach*, 69 Ohio St. 3d 537 (1994) (disallowing the resale exception where the second transaction in the two-transaction chain was not a "sale" for purposes of the sales tax statutes). Additionally, the Court's own hypothetical application of the resale exception in *Bellemar* blessed a resale of the benefit of a landscaping service (cared-for grounds) where a sale of that benefit is not a "sale" for purposes of the sales tax statutes.

169. *Hyatt*, 69 Ohio St. 3d 537. Recall that in *Hyatt* the Court concluded that a hotel resold the benefit of a linen cleaning service to its customers who stayed for less than thirty days because a sale to such a customer was taxable, but that because sales to guests who stayed long-term were not taxable, the resale exception did not apply to those sales. *Id.* at 540. The *Hyatt* Court cited *CCH Computax*, 68 Ohio St. 3d 86, for the proposition that the resale exception applied to Hyatt's purchase of the linen cleaning service when it rented a room to short-term customers because Hyatt's guests received the benefit of the linen cleaning service. *Id.* In the very next paragraph, the Court held that when Hyatt rented rooms to long-term guests, the resale exception did not apply to its purchase of linen cleaning services because a long-term rental is not a "sale" for sales tax purposes, and the benefit of the linen cleaning service was accordingly not "resold." *Id.* What is interesting, and perhaps ironic, is that in *CCH Computax* the transactions between the purchaser of the service and its customers were not subject to sales tax. See *CCH Computax*, 68 Ohio St. 3d 86; see also *supra* note 30 (discussing the fact that the transaction between the tax professionals, who purchased the data processing services of CCH Computax, and their customers were not subject to sales tax and noting that the Court did not address that fact). Thus, the Court cited a case for support and then seemingly created an additional element to the resale exception that was not required in that case.

Given the Court's difficulty in articulating the resale exception as it applies to services, as evidenced by its conflicting precedent, and the lack of analysis in *Hyatt* concerning the rejection of the resale exception therein, *Hyatt* should not be read as standing for the blanket proposition that the second transaction in the two-transaction chain must be a taxable sale—particularly as *Hyatt* predated *Bellemar*. See *supra* note 168. Most importantly, the *Crew 4 You* Court did not definitively state that it was deciding the case on such grounds, nor was its analysis consistent with a decision on such grounds. See *infra* note 100 (highlighting the Court's ultimate reasoning in deciding against *Crew 4 You*). Further, had the Court interpreted its *Hyatt* decision as standing for the proposition that the second transaction in the two-transaction chain must be a "sale" as defined in O.R.C. § 5739.01(B), its dismissal of *Crew 4 You*'s claim would likely have been as brief as was its dismissal of Hyatt's claim when Hyatt rented to long-term guests. See *supra* note 38 (reproducing the Court's two-sentence dismissal of Hyatt's claim of a resale in the case of rentals to long-term guests). Instead, the Court eliminated the word "benefit" from the resale exception and analyzed whether the service the trucking companies sold was the same as the service *Crew 4 You* sold. See *infra* Part IV.B.2; see also *infra* note 100. Had the Court announced a rule that the second transaction must be a taxable sale—and if its opinion would have conformed therewith—its opinion would have been more credible and less confusing. Of course, the Court may have had difficulty reconciling its past resale exception/services cases had it decided *Crew 4 You* on such grounds.

170. Initial Merit Brief of Appellant/Cross-Appellee *supra* note 168, at 13 ("Applying *Hyatt* to the present case is straightforward. *Crew 4 You* did not prove, and in fact the record militates against any finding that the trucking companies made sales-tax 'sales' with respect to the provision

The Court did not accept the Tax Commissioner's invitation to decide *Crew 4 You* by creating a requirement that is not expressly present in the statute.¹⁷¹ The Court did reference its opinion in *Hyatt*, but not in support of a requirement that the second transaction in the transactional chain must be a taxable sale.¹⁷²

of Crew 4 You's services."). Despite his insistence that the decision in *Hyatt* was directly on point, the Tax Commissioner ultimately gravitated towards (and possibly encouraged the Court to adopt) the faulty premise that because the trucking companies did not sell employment services as those services are defined in O.R.C. § 5739.01(JJ), the resale exception could not apply to Crew 4 You's sale of employment services to the trucking companies. *Id.* at 18. Specifically, the Tax Commissioner stated, "Since the trucking companies could not be found to be selling employment services, it follows by iron force of logic that they did not resell the service purchased from Crew 4 You." *Id.*

171. See *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St. 3d 356 (2005). Perhaps the Court realized that, notwithstanding its holding in *Hyatt*, it should not so simply dismiss a case on a requirement that is not present in the statute—a requirement that the second transaction in the transaction chain be a taxable transaction. If the Court felt that such a requirement should exist, the Court should have expressed that sentiment in its opinion and asked for legislative action. Because the Court misapplied the statute, however, and did not focus on whether the benefit of the employment service was resold, and because an actual employment service can never be resold (because of the requirement that the provider of the employment service must pay the wages of the temporary personnel), it was not necessary for the Court to appeal to the legislature for action because the Court's decision precluded the resale exception's applicability to employment services. See *supra* note 127 (noting that the Court's analysis, by default, foreclosed the possibility that the resale exception could apply when employment services are sold).

172. *Crew 4 You*, 105 Ohio St. 3d at 364. The Court specifically stated:

[B]ecause a hotel's act of renting rooms to guests for stays of more than 30 consecutive days was exempted from the sales tax . . . 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.

Id. However, when the Court cited *Hyatt*, it was not in the midst of arguing that the second transaction in a three-party transaction must be taxable; it was arguing that if the second party to the transaction (the purchaser of the taxable service) does not sell the taxable service, the first party to the transaction (the provider of the taxable service) owes the sales tax on the sale of the service. *Id.* Immediately before citing *Hyatt*, the Court cited *Corporate Staffing Resources, Inc. v. Zaino*, 95 Ohio St.3d 1 (2002), improperly characterizing it as a case holding that the actual taxable service purchased must be resold before the resale exception will apply. *Id.* The Court specifically stated:

The employment services were not resold by the computer company in *Corporate Staffing Resources* or by the trucking companies in this case. The company that did sell an "employment service" as that term is defined in R.C. 5739.01(JJ) was Crew 4 You, and that company now owes taxes, as did the employment-service provider in *Corporate Staffing Resources*.

Id.; see also *supra* Part IV.B.3 (detailing the many instances in *Crew 4 You* where the Court misconstrued and mischaracterized its precedent, including *Corporate Staffing Resources*). Oddly, and immediately after this passage, the Court stated, "Other decisions from this court support that view," and then proceeded to cite *Hyatt*, as reproduced immediately above. *Crew 4 You*, 105 Ohio St. 3d at 364. In the passage cited from *Hyatt*, the *Hyatt* court did not hold the resale exception inapplicable because *Hyatt* did not sell "linen cleaning services;" it held the resale exception inapplicable because the Hotel's long-term rentals were not taxable "sales." *Hyatt*, 69 Ohio St. 3d at 540. As mentioned above, the Court likely realized that it could not cite *Hyatt* for the proposition

Thus, the Court attempted to reign in its prior, statutorily unwarranted holding in *Hyatt*, and it declined to decide *Crew 4 You* consistently with *Hyatt*, despite the Tax Commissioner's urging.¹⁷³ Yet the Court did effectively engage in judicial lawmaking—the Court created a law, though not expressly stated, that the resale exception does not apply to sales of employment services.¹⁷⁴ It seems clear that the Court was committed to ruling against the taxpayer and to reaching a specific result—a result that would once and for all eliminate all concerns that the resale exception would engulf the tax on employment services.¹⁷⁵

What is most remarkable about *Crew 4 You* is the length to which the Court went to reach its desired result.¹⁷⁶ An act of judicial

for which it actually stands (i.e., the second transaction must be a taxable sale) because the requirement implicit in that holding does not expressly exist in the statute. *See supra* note 171. Immediately after citing *Hyatt* (a case holding the resale exception inapplicable where the second transaction in the two-transaction chain is not a taxable sale), the Court stated:

The same principle applies in this case: Because the trucking companies did not sell a taxable “employment service” to the broadcasting entities — because the provider of “employment service” under R.C. 5739.01(JJ) must pay the “wages, salary, or other compensation” of the workers, and *Crew 4 You* (rather than the trucking companies) paid the workers’ wages — the trucking companies cannot be deemed to have resold the employment services that they purchased from *Crew 4 You*. In other words, if the trucking companies did not *sell* employment services at all, then they certainly did not *resell* them.

Crew 4 You, 105 Ohio St. 3d at 364. What is apparent from these passages, when read together, is that the Court was not attempting to rely on the requirement, seemingly created in *Hyatt*, that the second transaction in the transactional chain must be taxable. It appears that the Court was simply mischaracterizing yet another one of its holdings to conform to its misapplication of the resale exception test in the case of services. *See supra* Part IV.B.3 (detailing other examples of the Court misstating its prior holdings to conform to its reasoning in *Crew 4 You*).

173. *See supra* note 171.

174. As mentioned, by inappropriately focusing on whether the trucking companies sold employment services, as those services are defined by O.R.C. § 5739.01(JJ), the Court precluded the possibility of an employment service being eligible for the resale exception. *See supra* note 127 (explaining that, because a provider of an employment service must pay the wages of the temporary employees, a purchaser of an employment service can never resell those services).

175. *See supra* Part IV.A.1 (discussing the possibility that Court’s employment service jurisprudence was influenced by an unstated concern that the tax on employment services would be effectively eliminated if the resale exception applied to such services).

176. *See supra* Part IV.B.2 (discussing the Court’s repeated misapplication and misstatement of the statutory language embodying the resale exception); *see also supra* Part IV.B.3 (discussing the Court’s mischaracterization of many of its prior holdings such that the holdings appeared to support the Court’s flawed analysis in *Crew 4 You*). For an analysis of the judiciary’s role in the lawmaking process, *see* Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1 (1990) (assessing the legitimacy of judicial lawmaking and refuting the traditional justifications supporting judicial lawmaking, while concluding that the proximity of the judiciary to the facts from which law often springs legitimizes a limited judicial lawmaking role). For a criticism of the Ohio Supreme Court and its recent forays into judicial lawmaking, *see* David N. Mayer and David J. Owsiany, *After*

lawmaking seems particularly egregious where, as in *Crew 4 You*, a court employs a misleading analysis to legitimize its faulty reasoning with the end result being that a statutory exception is made inapplicable to a provision despite the fact that the legislature did not exclude that provision from the exception's reach.¹⁷⁷

C. *The Effect of the Court's Opinion*

A fundamental problem facing taxpayers after *Crew 4 You* is determining whether their transactions qualify for the resale exception. Prior to *Crew 4 You*, many taxpayers, relying on past precedent, may have provided a service without collecting sales tax on that service, believing that it was eligible for the resale exception because the purchaser of that service sold the benefit of that service to its customers.¹⁷⁸ For instance, relying on *CCH Computax, Inc. v. Tracy*,¹⁷⁹ a taxpayer might have assumed that if it provides automatic data processing (normally a taxable service) to its customers, and its customers in turn sell the benefit of that service (the tangible output) in the same form to its own customers, it need not collect sales tax on its sales of the automatic data processing because those sales are eligible for the resale exception.¹⁸⁰

After *Crew 4 You*, however, that same taxpayer may be concerned that it no longer qualifies for the resale exception because its customers

DeRolph III: Who Makes Public Policy in Ohio, the Legislature or the Courts, THE BUCKEYE INST. FOR PUB. POL'Y SOLUTIONS, Dec. 1, 2001, at 1, http://www.buckeyeinstitute.org/docs/Public_Policy_Brief_DeRolph_III.pdf, where the authors, in their executive summary, state, "If judicial lawmaking is not stopped, Ohioans will lose one of their most precious rights, the right to be governed only by laws legitimately passed by the only body authorized under the Constitution to make new law: the General Assembly."

177. In this regard, it is interesting that the Court did not render their decision in *Crew 4 You* on policy grounds. That is, in arriving at its decision the Court did not analyze the tax on employment services and the legislative history of the tax, or whether the resale exception would prohibitively reduce the tax base derived from the tax on employment services. These arguments were, however, made by the Tax Commissioner in *Bellemar Parts Industries, Inc. v. Tracy*, 88 Ohio St. 3d 351 (2000). See Brief of Appellant/Cross-Appellee at 18, *Bellemar Parts Industries, Inc. v. Tracy*, 88 Ohio St. 3d 351 (2000) (No. 98-2516). Had the Court used such reasoning, it would have been directly confronting the legislature, but its opinion would have had more legitimacy.

178. See, e.g., *Corporate Staffing Resources, Inc. v. Zaino*, 95 Ohio St. 3d 1 (2002); *Bellemar Parts*, 88 Ohio St. 3d 351; *CCH Computax, Inc. v. Tracy*, 68 Ohio St. 3d 86 (1993). In each of these cases, the Court properly applied the resale exception, inquiring into whether the benefit of a service, rather than the actual service itself, is resold. See also OHIO REV. CODE ANN. § 5739.01(E)(1) (LexisNexis 1999) (excluding from taxation transactions 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.").

179. *CCH Computax*, 68 Ohio St. 3d 86.

180. See *id.*

do not provide automatic data processing services to their customers.¹⁸¹ Consider once again the *Bellemar* Court's recognition that services and tangible personal property are to be treated differently under the resale exception of O.R.C. § 5739.01(E)(1):

In fact, we agree . . . that the General Assembly included the term “benefit” to distinguish between the service purchased and the benefit received. It sought to clarify that if a service such as landscaping is purchased, the taxpayer need not resell landscaping services to meet the exception, but need only resell the benefit of those services, i.e., cared-for grounds.¹⁸²

Might the hypothetical taxpayer to whom the *Bellemar* Court referred be concerned that it no longer qualifies for the resale exception unless it actually resells landscaping services, and not simply cared-for grounds? Until the Court reaffirms that it will follow the resale exception as enacted by the General Assembly, uncertainty will remain. The Court could also clarify its position judicially, but this alternative seems rather unlikely given its analysis in *Crew 4 You*.

For the Court to eliminate the uncertainty it created in *Crew 4 You*, it would have to reaffirm its past precedent and once again acknowledge that the proper inquiry in resale exception/service cases is upon the benefit of the service provided and whether that benefit is resold, while at the same time reconciling its holding in *Crew 4 You*. The only way it could reconcile that holding would be to explain that the analysis differs when the service being provided is an employment service. Clearly, such a pronouncement would run counter to legislative intent, as no such “carve out” exists in the Revised Code.

D. Fixing the Problem—A Call for Action and Recommendations

An important factor contributing to the Court's inconsistent and awkward resale exception jurisprudence, as it applies to employment services, is the language of the resale exception itself.¹⁸³ Indeed, much of the confusion surrounding the application of the resale exception to employment services is attributable to the statutorily required inquiry into whether the purpose of the purchaser of the service is to resell the

181. See *infra* Part IV.B.2 (noting that the Court in *Crew 4 You* improperly focused on whether the second party in a three-party transaction resold the same service as the first party, rather than properly focusing on whether the *benefit* of the first service is resold in the same form).

182. *Bellemar Parts*, 88 Ohio St. 3d at 353-54.

183. See OHIO REV. CODE ANN. § 5739.01(E)(1); see also *supra* note 16 (quoting in full the statutory language).

benefit of that service in the same form.¹⁸⁴ The difficulty arises in defining the benefit of an employment service and in determining whether that benefit is resold in the same form.¹⁸⁵ The Court has fairly consistently, and without debate or confusion, defined the benefit of most services as the end-product of those services,¹⁸⁶ yet the benefit of an employment service has not been so easily defined.¹⁸⁷ This is likely because, while most services produce the same end-product, an employment service can produce a variety of end-products. It is perhaps this reason that compelled the *Bellemar* Court to announce that the benefit of an employment service is the labor of the employees and not the end-product of that labor.¹⁸⁸

Even accepting the *Bellemar* Court's definition of the benefit of an employment service as the labor of the employees, how is one to rationally and consistently determine whether that benefit is resold? For these reasons, the Ohio legislature should adopt legislation that more clearly expresses its intent regarding whether employment services should be eligible for the resale exception.¹⁸⁹ It is patently unfair to employment service providers that their service, and their service alone, has been judicially rendered ineligible for an exception statutorily made available to *all* services if the requirements thereof are satisfied.

Perhaps a more reasonable approach would be the approach adopted by the Wisconsin Department of Revenue. Employment

184. As evidenced above, the Court has had difficulty consistently applying the resale exception to employment services. *Compare Bellemar Parts*, 88 Ohio St. 3d 351, 354 (holding the resale exception inapplicable to a purchase of employment services because the purchaser consumed rather than sold the benefit of that services) *with Crew 4 You, Inc. v. Wilkins*, 105 Ohio St. 3d 356, 365 (2005) (holding that a purchase of employment services did not qualify for the resale exception because the purchaser of those services did not resell "employment services").

185. The Court in *Crew 4 You* did not engage in this inquiry, instead focusing on whether the *employment service* was resold in the same form. *See supra* notes 131-34 (discussing the *Crew 4 You* Court's formulation of the resale exception test and how that formulation was inconsistent with the statute).

186. *See infra* notes 110-21 and accompanying text (highlighting instances of the Court defining the benefit of a service to be the end-product of that service).

187. *See, e.g., Bellemar Parts*, 88 Ohio St. 3d 351, where the majority and dissent disagreed over the characterization of the benefit of an employment service. *Compare Bellemar Parts*, 88 Ohio St.3d at 354 ("We conclude, therefore, that where a consumer contracts for temporary employees to add to its work force, the benefit of that service is the labor of the employees, not the product of their work.") *with Bellemar Parts*, 88 Ohio St.3d at 357 (Pfeifer, J., dissenting) ("The only way to fairly characterize the benefit of service [sic] is to look to the finished product, *i.e.*, what the service yields.").

188. *Bellemar Parts*, 88 Ohio St. 3d at 354.

189. This is especially so considering that after *Crew 4 You*, employment services cannot qualify for the resale exception. *See supra* note 127 (explaining why, under the Court's rationale, a purchase of employment services can never qualify for the resale exception).

services are not taxable under the Wisconsin Statutes.¹⁹⁰ Nevertheless, in Wisconsin Tax Bulletin 141, released January 2005, the Wisconsin Department of Revenue indicated that it will interpret the sales tax statutes such that employment services will be taxable if the service being performed by the temporary employee at the direction of the purchaser of the employment service is taxable.¹⁹¹ Thus, in Wisconsin, for a determination of whether temporary employment services are taxable, one must look to the service being performed by the temporary employee to determine if that service is taxable under Wis. Stat. § 77.52(2)(a)1-20. If so, the charge by the employment service provider is subject to sales tax.¹⁹²

This approach has appeal, particularly in light of the confusion and uncertainty created by the decision in *Crew 4 You*. Perhaps the awkward nature by which the current resale exception is applied to employment services is grounds for the enactment of an employment service-specific resale exception provision. The approach of the Wisconsin Department of Revenue is one example of how a tax and resale exception can be fairly and consistently applied to a sale of employment services.

190. See WIS. STAT. § 77.52(2)(a) 1-20 (2005) (defining the services that are subject to Wisconsin sales tax).

191. Wisconsin Tax Bulletin No. 141 (Jan. 2005) at 31-37. This approach is rational, but hotly contested because the Wisconsin Legislature has not expressly made employment services taxable. See Memorandum from Joan Hansen, Director of Tax & Corporate Policy, Wisconsin Manufacturers & Commerce, to WMC Members Interested in Temporary Employment Services (Feb. 15, 2005), <http://www.wmc.org/printdisplay.cfm?ID=910> (discussing the lack of statutory authority for the imposition of a tax on employment services and protesting the Wisconsin Department of Revenue's attempt to tax those services by looking through to the work being performed by the temporary employee). Because employment services are already subject to Ohio sales tax, little or no resistance would exist if the Wisconsin approach were implemented.

192. See Wisconsin Tax Bulletin No. 141 (Jan. 2005) at 31-37. The Wisconsin Department of Revenue is receptive to resale exception claims if the service being performed by the temporary employee is the same service being sold by the purchaser of the employment services. *Id.* In Example 8 of Wisconsin Tax Bulletin 141, a landscaping company purchases employment services, and the temporary employees perform landscaping work for the customers of the purchaser of the employment services. *Id.* at 37. Landscaping services are subject to sales tax in Wisconsin. WIS. STAT. § 77.52(2)(a) 20 (2005). The Example says that the charge for the employment service is not subject to sales tax because the services are for resale. Wisconsin Tax Bulletin 141 at 37. The employees are mowing, fertilizing and planting grass, but the purchaser of the employment services is deemed to be reselling those services to its customers. *Id.* No resale exists in Example 1, however, where a temporary service provider contracts with the owner of an office complex to provide employees for on-site facility operations. *Id.* at 32-33. When a temporary employee performs landscaping services under such circumstances, the charge associated with that employee is taxable because the landscaping services are not being resold by the purchaser of the employment service. *Id.*

V. CONCLUSION

In *Crew 4 You*, the Ohio Supreme Court apparently set out to do one thing, and one thing only—to permanently eliminate any chance that the resale exception could apply to a sale of employment services. By employing this result-driven analysis, the Court engaged in judicial lawmaking by removing from the ambit of a statutorily created exception a service that the General Assembly did not choose to remove therefrom. The Court made law—solely because of the Court’s opinion in *Crew 4 You*, the resale exception does not apply in any case where the service upon which the exception is claimed is an employment service. To achieve this result, the Court had to misconstrue both the statutory text embodying the resale exception and the Court’s own precedent. In so doing, the Court created uncertainty for all taxpayers, in general, and service providers in particular, as they now must wonder whether the Court will apply to them the incorrect reasoning employed in *Crew 4 You*, or whether it will instead follow clear statutory language and precedent.

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