

# WHO'S IN CONTROL? – OHIO SUPREME COURT SAYS SEATON.

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On December 12, 2018, the Ohio Supreme Court issued its opinion in *Seaton Corp. v. Testa*, Slip Opinion 2018-Ohio-4911, in which it addressed whether the services provided by Seaton to Kal Kan met the definition of taxable employment services in R.C. 5739.01(JJ). The case focused on the second requirement in the definition that the personnel must perform work or labor under the supervision or control of another (someone other than the provider of the personnel).

Seaton entered into a contract with Mars, Inc. to “furnish, manage and supervise” supplemental staffing to Kal Kan, a division of Mars, Inc. The opinion detailed the obligations of Seaton under the contract:

Seaton was required to screen, hire, and train lower-level workers to assist in production operations at Kal Kan’s pet food manufacturing plant in Columbus, Ohio. This included maintaining an on-site office at Kal Kan’s plant, conducting interviews and testing applicants, and providing job orientation, uniforms, and safety equipment to those individuals selected for employment with Seaton at Kal Kan’s plant. Seaton was also required to schedule its workers, maintain an attendance policy, and process payroll. And by

agreement, Seaton had “the exclusive right to control” Seaton workers; neither Kal Kan nor Seaton could “assign, direct, or oversee” the activities of the other party’s workforce.

The Tax Commissioner audited both Seaton and Kal Kan and issued a sales tax assessment against Seaton and a use tax assessment against Kal Kan on the provision of personnel by Seaton to Kal Kan, asserting that the services were taxable employment services. Both taxpayers filed petitions for reassessment with the Tax Commissioner claiming that the services did not meet the definition of employment services. The Tax Commissioner issued final determinations upholding the assessments.

Both Seaton and Kal Kan appealed to the Board of Tax Appeals (“BTA”), which consolidated the appeals. Based on the testimony of Seaton’s operations manager, a Seaton supervisor, one of Kal Kan’s operations managers, and the contract between Seaton and Kal Kan, the BTA found that the Tax Commissioner’s conclusion that Kal Kan supervised and controlled Seaton’s employees was not supported by the evidence and held that Seaton did not provide an employment service to Kal Kan ([see our previous SALT Buzz](#)). The Tax Commissioner appealed to the Ohio Supreme Court.

As noted above, the case focused on the portion of the definition of employment services that requires the personnel provided to be under the supervision or control of another. The Court stated the Tax Commissioner’s challenge to the BTA’s determination that the requirement was not met because Seaton, both by contract and actual performance, exercised both supervision and control of its workers at Kal Kan’s plant: “The tax commissioner challenges this finding because, in his view, Kal Kan’s control over the manufacturing process and production lines equates to control over the Seaton workers themselves and, therefore, Seaton’s service qualifies as an employment service.”

The Court detailed the evidence and found that Seaton contractually retained and actually exercised supervision and control over its workers at the Kal Kan facility. The Court noted that the contract between the parties granted Seaton the exclusive right to control its employees and prohibited Kal Kan from assigning, directing, or overseeing the work of Seaton’s employees. Based on this evidence, the Court concluded that the BTA acted reasonably and lawfully in holding that Seaton did not provide an employment service to Kal Kan.

The most important part of the opinion is the Court’s rejection of the Tax Commissioner’s argument that the services necessarily met the supervision or

control of another part of the definition because Kal Kan maintained control of its manufacturing process. The Court rejected this overly-broad view of supervision or control, stating that “the supervision or control exercised must be specific to the work or labor performed by the provided personnel—not to an overall production process.”

### **ZHF Observations**

The real importance of the opinion is that it rejected a long-disputed position of the Tax Commissioner that the fact that a purchaser of staffing services performs general oversight of its operations at which the staffing personnel perform services is sufficient to meet the requirement of the definition of “employment service” that the personnel perform their work under the supervision or control of another. Rather, as the Court made clear, the focus must be on the supervision or control of the work performed by the personnel.

Seaton is yet another Ohio Supreme Court decision in a string of decisions that have substantially rejected the Tax Commissioner’s interpretation as to what qualifies as taxable employment services. Businesses using staffing services should immediately review their facts and circumstances to determine if those staffing services actually qualify as employment services or are subject to one of the five exclusions.

Our experience has been that many sellers and purchasers of staffing services do not fully understand the taxation and exclusions related to staffing services. In light of these recent favorable rulings by the Court, we have developed a process to analyze a business’ staffing services situation to determine if a business is overpaying sales tax or can take advantage of available exclusions available to reduce tax or claim refunds.

If you would like to discuss the impact this case may have on your business, please contact [John Trippier](#), [Rich Farrin](#), or [any of the other professionals](#) at Zaino Hall & Farrin LLC.

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