IN THE SUPREME COURT OF OHIO

SHILOH AUTOMOTIVE, INC.,	)	
	)	Appeal from the Ohio
Appellant,	)	Board of Tax Appeals
	)	
	)	BTA Case 2004-M-380 and 1283
-vs-	)	
	)	Supreme Court Case 2006-1384
WILLIAM W. WILKINS,	)	
TAX COMMISSIONER OF OHIO,	)	
	)	
Appellee.	)	
	)	
	)	

Brief of Appellant

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GLOSSARY

In this brief certain names and terms have been abbreviated. These abbreviations are listed below, along with the page at which they first appear.

Reference Name	Actual Name	Page
APB 16	Accounting Principles Board Opinion 16	15
Asset Purchase Agreement	Asset Purchase Agreement among Shiloh Industries, Inc., Shiloh Automotive, Inc. and MTD Products, Inc. dated as of June 21, 1999	3
Baird	Robert Baird & Associates, Inc.	8
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STATEMENT OF CASE

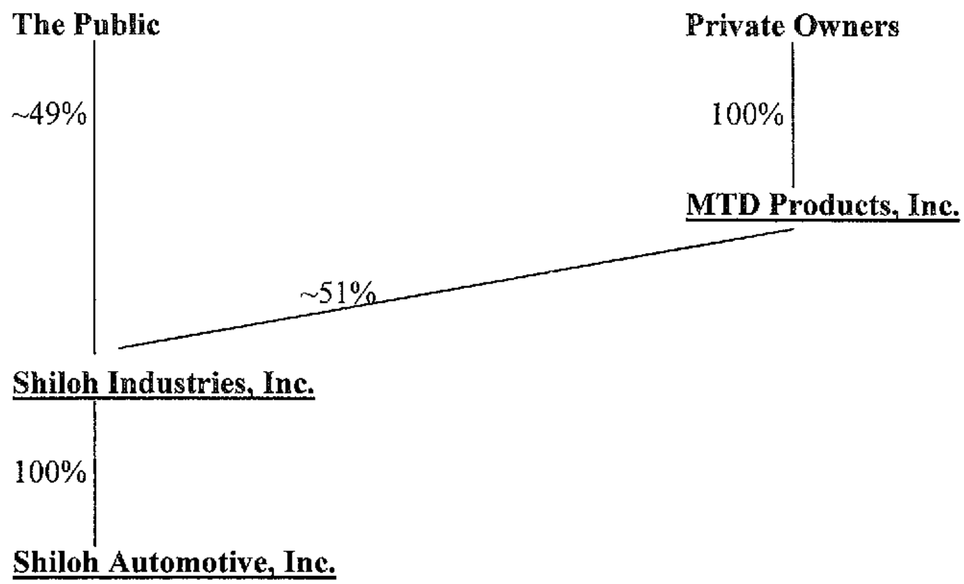
The Tax Commissioner of Ohio ("Commissioner") issued Final Determinations with regard to Shiloh Automotive, Inc.'s ("Shiloh Automotive") Ohio personal property tax liability for the 2001 and 2002 tax years. Shiloh Automotive appealed the Commissioner's Final Determinations to the Ohio Board of Tax Appeals ("Board"). The appeal relating to the 2001 tax year was docketed as BTA Case No. 2004-M-380. The appeal relating to the 2002 tax year was docketed as BTA Case No. 2004-M-1283.

On July 7, 2006, the Board issued a single Decision and Order relating to BTA Case Nos. 2002-M-380 and 2004-M-1283, affirming in part and modifying in part the Commissioner's Final Determinations. On July 21, 2006, Shiloh Automotive appealed the Board's Decision and Order to this Court. The principal issue presented in Shiloh Automotive's Notice of Appeal concerns whether the company's purchase of the assets associated with the MTD Automotive Division of MTD Products, Inc. ("MTD") was an arm's length transaction.

It is noted that on May 3, 2005, the Board conducted a hearing to receive evidence relating to the allegations of error set forth in Shiloh Automotive's Notice of Appeal to the Board. At this hearing, Shiloh Automotive offered the testimony of five witnesses and introduced into evidence 22 exhibits. References to such evidence will be to the Supplement ("Supp. ___"). When considered helpful, an additional reference to the transcript of evidence certified by the Commissioner relating to BTA Case No. 2004-M-380 ("St.380 ___"), the transcript of evidence certified by the Commissioner relating to BTA Case No. 2004-M-1283 ("St.1283 ___"), and the exhibits received into evidence during the Board's May 3, 2005 hearing ("Exhibit ___") will be provided.

STATEMENT OF FACTS

On November 1, 1999, pursuant to the terms of an Asset Purchase Agreement among Shiloh Industries, Inc., Shiloh Automotive, Inc. and MTD Products, Inc. dated as of June 21, 1999 ("Asset Purchase Agreement"), MTD sold the assets of its Automotive Division to Shiloh Automotive.[1] The relationship of the parties immediately before the sale is depicted below.



The Board held that because of MTD's ownership interest in Shiloh Industries, Inc. ("Shiloh"), its consequent knowledge of Shiloh's long-range plans, and its pre-sale access to Shiloh's management, MTD's sale to Shiloh Automotive could not be considered an arm's length transaction. The Commissioner had not cited these factors as support for his contention that the sale was not conducted at arm's length. Anticipating that the Commissioner has not

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1 Exhibit 1 (Supp. 309-355) is a document commonly referred to as the Proxy Statement relating to Shiloh Automotive's purchase of substantially all of the assets of MTD's Automotive Division. It includes as Appendix A a copy of the Asset Purchase. (Supp. 356-380).

abandoned his arguments, this Statement of Facts will be a bit more comprehensive than that needed to address the narrow issue presented by the Board's conclusion.

The Parties to the Agreement

Shiloh is a publicly owned corporation, the shares of which are traded on the NASDAQ Exchange. Historically, it was a vertically integrated steel processor that served primarily as a Tier II supplier of high quality blanks, stampings and processed steel to the automotive and other industries. Shiloh also designed and manufactured precision tools and dies for use in its own blanking and stamping operations as well as for sale to other industrial customers. In addition, Shiloh performed a variety of value added intermediate steel processing services, such as pickling hot rolled steel and slitting, edging, roller leveling and cutting to length hot and cold rolled steel. (Supp. 18-19, 21-22, 317, 336, 348, 383).

Shiloh Automotive is a wholly owned subsidiary of Shiloh. It was formed on June 16, 1999 to serve as an acquisition vehicle for the assets of MTD's Automotive Division. Prior to November 1, 1999, it engaged in no business activity. (Supp. 18, 309).

MTD is a privately held corporation. Historically, it engaged in three lines of business: (a) the Consumer Products Division manufactured outdoor power equipment, (b) the Mechanical Systems Group Division manufactured transmissions for appliances and small equipment, and (c) the Automotive Division operated as a Tier I supplier of engineered metal stampings, assemblies and compression molded plastic parts for automotive original equipment manufacturers.[2] (Supp. 20, 22-23, 136, 343, 348).

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2 The distinction between a Tier I supplier (one who supplies an original equipment manufacturer -- "OEM") and a Tier II supplier (one who supplies components to a Tier I supplier for incorporation into a product supplied to an OEM) was described during the Board's May 3, 2205 hearing. (Supp. 22-23).

Ownership of Shiloh Before the Agreement

On July 17, 1999, the date on which Shiloh's independent directors approved the acquisition of MTD's Automotive Division, there were 13,080,563 shares of Shiloh stock issued and outstanding. Of that amount, 6,707,735 (51%) were owned or controlled, directly or indirectly, by MTD, its shareholders, or its pension fund. (Supp. 18-19, 320, 352).

Ownership of Shiloh After the Agreement

Pursuant to the Asset Purchase Agreement, Shiloh Automotive purchased MTD Products' Automotive Division for cash and a certain amount of Shiloh stock. Immediately after Shiloh Automotive's purchase of the Automotive Division, MTD, its shareholders, or its pension fund owned, directly or indirectly, 8,136,306 (56%) of Shiloh's issued and outstanding shares. (Supp. 21, 318).

Selling the Automotive Division -- MTD's Perspective

As previously noted, MTD, historically, was engaged in 3 businesses. The Automotive Division accounted for approximately $175 million of its annual sales and represented 10 to 15 percent of MTD's overall business. In the late 1990s, the Automotive Division competed against 200 or so other companies. (Supp. 136, 139-140).

At that time, certain trends were effecting the automotive industry. These trends were addressed by Theodore Zampetis, Shiloh's President, Chief Operating Officer, and a member of the company's board of directors. They were also addressed by Ronald Houser, formerly the Executive Vice President and Chief Financial Officer of MTD. Both men explained that the trends were threefold. First was the move among automotive manufacturers to so-called full service suppliers -- those capable of moving a project from the design phase to production -- as opposed to mere Tier II suppliers. Second, and a trend that flows from the first, was the move toward suppliers of significant size -- those with sales of $1 billion or more. Third was the move to suppliers that had production and distribution outlets strategically distributed from a geographic perspective. (Supp. 27-28, 134, 138-140, 321).

To compete in this environment, MTD would have had to grow significantly. To do that, it would have had to make new and extremely large capital investments in equipment. But, as a privately held company, MTD's access to capital funds was limited. Moreover, MTD wanted to concentrate its limited investment capital in its larger outdoor power equipment business and its transmission business. For these reasons, a sale of the Automotive Division was considered desirable. (Supp. 110, 136-140).

MTD's Initial Steps Toward Selling the Automotive Division

MTD began to seriously consider selling its Automotive Division in late 1997 or early 1998. At that time, with the assistance of PriceWaterhouseCoopers, it began the process of carving out financial information relating to the Automotive Division as a means of determining the Division's value. Based on this carved out financial information, MTD preliminarily determined that it then could hope to receive up to $55 million for the Automotive Division. (Supp. 42-43).

Preparation and Circulation of Offering Memorandum

In September 1998, MTD retained PricewaterhouseCoopers Securities LLC ("PwCS") to assist it in the sale of the Automotive Division and in the preparation of an Offering Memorandum (Exhibit 14 – Supp. 413-474). In November 1998, the Offering Memorandum was presented to Shiloh. The decision to limit circulation of the Offering Memorandum was based on MTD's belief that Shiloh, among all potential suitors, was most likely to be interested in acquiring the Division and the suitor most likely to pay top dollar for the Division. A secondary consideration was MTD's desire to limit (and, perhaps, avoid altogether) the significant additional expense and business disruption that would be associated with the due diligence process undertaken by other companies that might be asked to consider acquiring the Division. (Supp. 30, 144, 148-149, 151-152, 201).

Shiloh as Suitor

The case for combination with Shiloh, as envisioned by MTD, is set forth in Exhibit 14 at pages 47-52 (Supp. 464-469). Based on the factors referenced on those pages, which Mr. Houser discussed during the Board's May 3, 2005 hearing, MTD concluded that no other entity would be as interested in acquiring the Automotive Division, or willing to pay more for the Division, than Shiloh. (Supp. 31-35, 49-50, 105, 148-149, 151-157, 168).

Briefly stated, and as diagramed in Exhibit 14 at page 52 (Supp. 469), the business attributes of Shiloh and MTD's Automotive Division were complimentary, not duplicative, and taken together were expected to create synergies that would enable the combined entity to grow. In contrast, the business attributes of MTD's Automotive Division duplicated many of the attributes already possessed by other potential suitors. (Supp. 144, 153-157).

Moreover, as diagramed in Exhibit 14 at page 51 (Supp. 468), adding the Automotive Division to Shiloh's existing attributes was expected to create a company that could compete as a Tier I supplier to the automotive industry -- despite the fact that the Division had been losing money on a regular basis. (Supp. 151-157).

The foregoing factors, MTD believed, made its Automotive Division more attractive and more valuable to Shiloh than any other potential suitor.[3] (Supp. 149-150). Still, if Shiloh was

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[3] According to Mr. Houser, compared to Shiloh, other potential suitors were likely to reduce EBITDA and/or the multiplier applied to EBITDA, thereby reducing the price they would be willing to pay for the Automotive Division. (Supp. 150-151). An explanation of EBITDA is presented at pages 10 and 11 of this brief.

unwilling to purchase the Automotive Division, or would do so only for an amount that was unacceptably low to MTD, MTD was prepared to shop the Division to other potential buyers -- although there were very few likely prospects. (Supp. 149-151, 157, 200, 202).

Shiloh's Deliberative Process

In July 1998, in light of the previously referenced trends effecting the automotive industry, Robert Grissinger (then Shiloh's Chairman, President & CEO) and David Hessler (a member of Shiloh's board) discussed the possibility of pursuing an acquisition of MTD's Automotive Division. (Supp. 26, 321). Thereafter, at the August 13, 1998 meeting of Shiloh's board of directors, Mr. Grissinger recommended to the board that Shiloh consider purchasing the Automotive Division. (Supp. 28-29, 321).

Three months later, in November 1998, MTD's Offering Memorandum was presented to Shiloh. Thereafter, on an unspecified date in December 1998, MTD made a presentation to Shiloh's executive staff regarding the strategic benefits of combination.[4] A similar presentation was made to Shiloh's board on December 10, 1998. Based on MTD's presentations, Shiloh's board authorized its management to conduct a due diligence review to evaluate the merits of the proposed acquisition. (Supp. 31-35, 321; Exhibit 15).

Shiloh Retains Advisors

For purposes of evaluating MTD's Offering Memorandum and the possible acquisition of MTD's Automotive Division, Shiloh retained outside legal counsel. Shiloh also retained Ernst & Young to help it evaluate financial and accounting matters relating to the potential acquisition and otherwise assist in its due diligence efforts. Finally, Shiloh retained Robert Baird & Associates, Inc. ("Baird") to advise on a reasonable purchase price for the Automotive Division.

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4 The strategic benefits are presented in Exhibit 14 at pages 47 through 52 (Supp. 464-469).

Shiloh hired these independent advisors because its directors wanted to insure that whatever decisions they made were made prudently and protected the interests of Shiloh's minority shareholders. (Supp. 36-37, 86-88, 321).

Due Diligence Progresses

Between December 18, 1998 and February 1, 1999, meetings were held by representatives of Shiloh and MTD to discuss various issues relating to the Automotive Division and the impact of Shiloh's acquisition of the division. The parties focused on the Automotive Division's revenue stream; its steel purchasing policies; the tooling component of the division's business; and the division's history of losses and its potential for future earnings. (Supp. 39, 322).

On February 1, 1999, Shiloh's due diligence team met to discuss the information obtained as of that date and concluded that additional work needed to be done to properly value the Automotive Division. As of that date, Shiloh had not determined an amount it would be willing to pay for MTD's Automotive Division if it concluded acquisition of the Division was consistent with its business strategy. (Supp. 39-40, 322).

On February 18, 1999, Shiloh's management informed its board of directors that the process of review was ongoing. This was 6 months after the board of directors was first advised that Shiloh should consider purchasing the Automotive Division. The board authorized additional due diligence and instructed its management to be in a position to make a formal presentation to the board regarding the possible acquisition of the Automotive Division at its scheduled March 25, 1999 meeting. (Supp. 40, 322; Exhibit 16).

Between February 18 and March 25, 1999, Shiloh's due diligence work continued. Based on this work, Shiloh's management began to arrive at a value for the Automotive Division.

(Exhibit 9 and 10). During this period, Shiloh was also still attempting to decide whether MTD's Automotive Division was a prudent acquisition from a business strategy perspective. (Supp. 41-47, 322; Exhibit 13).

At Shiloh's March 25, 1999 board meeting, a formal presentation regarding the Automotive Division was presented. Before this presentation was made, Shiloh's legal advisors reviewed the duties and responsibilities of the directors. Based on the advice of Shiloh's legal advisors, the members of Shiloh's board designated by MTD left the meeting before the presentation was made. (Supp. 47-48, 322, 404-412).

After the March 25, meeting, Shiloh's board still was not prepared to make a decision with regard to the acquisition of the Automotive Division. The board asked its management team to address certain lingering concerns it had with respect to (1) a change in Shiloh's strategy, (2) the timing of this change, (3) the appropriateness of the Automotive Division as a vehicle to enhance Shiloh's Tier I business, (4) the Automotive Division's historical operating performance, and (5) Shiloh's ability to integrate the Division. The board also asked its management team to inquire whether any cost reduction efforts had been undertaken by MTD and to explore that possibility. Each of these concerns was addressed by Mr. Zampetis during the Board's May 3 hearing. (Supp. 52-53, 54-59, 167, 322; Exhibit 12).

Price Negotiations

Attachment II of Exhibit 11 (which is part of the Agenda for Shiloh's March 25, 1999 board meeting – Supp. 411) indicates that the Offering Memorandum (Exhibit 14, presented in November 1998) set forth the Automotive Division's restated EBITDA at $9,786,000.[5]

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[5] EBITDA stand for earnings before interest, taxes, depreciation, amortization and other non-recurring expenses. (Supp. 60).

EBITDA, when multiplied by a factor, produces an amount at which a business is typically valued. The multiplier in this case was 4.9. Accordingly, as of November 1998, based on MTD's calculation of EBITDA, the amount MTD was asking for its Automotive Division was $47,951,400. (Supp. 58-61).

Attachment II of Exhibit 11 also indicates that by March 19, 1999, MTD had changed its view with regard to EBITDA -- increasing it to $10,514,000 and the amount it was asking for its Automotive Division to $51,518,000. (Supp. 62).

As of March 19, 1999, Shiloh considered the Automotive Division's EBITDA to be $5,124,000.[6] Based on EBITDA of $5,124,000 and a multiplier of 4.9, Shiloh considered an appropriate price for the Automotive Division to be $25,108,000. Accordingly, in March of 1999, the spread in purchase price the companies were faced with was approximately $26 million -- $25 million in Shiloh's view and $51 million in MTD's view. (Supp. 62-63, 163).

On April 28, 1999, representatives of Shiloh and MTD met to discuss MTD's proposed purchase price for the Automotive Division and Shiloh agreed to have its due diligence team review it once again. At that time, the parties had not provided for any purchase price adjustments that would be triggered if the Automotive Division's performance proved to be better or worse than anticipated by the parties. (Supp. 63, 68-69, 323).

On May 7, 1999, Shiloh's management agreed to support the proposed transaction at a price of $40 million, subject to certain price adjustments that could either increase or decrease that amount depending on the Automotive Division's performance. Thereafter, on May 20, 1999, Shiloh's board met to consider the proposal, but did not approve it. The disinterested directors

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6 The reasons for the parties difference of opinion with regard to EBITDA were addressed by Mr. Zampetis and Mr. Houser during the Board's May 3, 2005 hearing. (Supp. 63-64, 163, 166).

remained unpersuaded that the pricing formula was adequate and had additional questions. (Supp. 69-70, 323).

Through June 17, 1999, the parties met to negotiate the Asset Purchase Agreement, agreeing to additional protections for Shiloh should certain customer price concessions and capital expenditures exceed projected amounts. (Supp. 71-72, 127-129, 324).

On June 17, 1999, Shiloh's disinterested directors again met to consider the Asset Purchase Agreement. At this meeting, the company's legal advisors reviewed the terms and conditions of the agreement with the disinterested directors. Baird also presented the financial terms of the proposed transaction as well as its report and a written fairness opinion indicating that the consideration to be paid by Shiloh for the Automotive Division was fair from a financial point of view. (Supp. 72-73, 324; Exhibit 20).

The disinterested directors approved the purchase of the automotive division at the June 17 meeting. Their reasons are recapped at page 8 of the Proxy Statement. (Supp. 72-75, 324).

The Purchase Price

Pursuant to § 2.2 of the Asset Purchase Agreement (Supp. 360), the purchase price negotiated for MTD's Automotive Division had, initially, 3 components:

> (1) $20 million in cash, plus
>
> (2) a number of shares of Shiloh common stock that, pursuant to a formula, turned out to be 1,428,571 shares -- determined by dividing 20,000,000 by the greater of (a) $14 or (b) the average closing price of the shares, and
>
> (3) the assumption of certain liabilities. (Supp. 75-76).

§ 2.3 Price Adjustments

Pursuant to § 2.3 of the Asset Purchase Agreement (Exhibit 1, pg. A-3), the purchase price could be adjusted downward if closing net working capital as of the closing date, determined by reference to an audit done 90 days after the closing, was less than initial net working capital. That set of circumstances presented itself and the purchase price was adjusted to $48,340,479. (Supp. 76, 78, 403).[7]

§ 2.8 Price Adjustments

Pursuant to § 2.8 of the Asset Purchase Agreement, depending on Shiloh Automotive's earnings before interest, income tax, depreciation, and amortization expense over the 12 month period from November 1, 1999 through October 31, 2000, the purchase price could be increased by as much as $28 million or decreased by as much as $15 million. A positive adjustment was made under § 2.8 on October 31, 2000 in the amount of $5,761,814. (Supp. 78-79, 361, 403).

§ 4.4 Price Adjustments

Pursuant to § 4.4 of the Asset Purchase Agreement, in certain circumstances the purchase price could be decreased because of customer price concessions -- §4.4(b), or excess capital expenditures -- §4.4(d).[8] On October 31, 2000, a negative adjustment was made under §4.4(b) in the amount of $819,373 and a negative adjustment was made under §4.4(d) in the amount of $1,000,740, for a total adjustment of $1,820,113. On October 31, 2001, a negative adjustment was made under §4.4(d) in the amount of $1,326,000. On October 31, 2002, a negative adjustment was made under §4.4(d) in the amount of $1,472,395. Thus, the final purchase price for the Automotive Division, as finally determined under the Asset Purchase Agreement, was $49,483,786. This was significantly more than the $25 million Shiloh had argued for, and only slightly less than the amount MTD sought. (Supp. 79-82, 162, 193-195, 403).

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7 Exhibit 4 (Supp. 403) is a spreadsheet that sets forth the amount and allocation of the purchase price paid for the assets of MTD's Automotive Division. It is based on the permanent books and records of Shiloh Automotive. (Supp. 76, 209).

8 Mr. Zampetis explained the adjustments relating to customer price concessions and excess capital expenditures during the Board's May 3, 2005 hearing. (Supp. 44-47).

Loan Agreements

MTD had entered into a Loan Agreement with certain unrelated financial institutions on December 23, 1997.[9] This Loan Agreement was the only agreement MTD had with outside lenders in 1998 and 1999. As of mid 1999, approximately $500 million had been borrowed under this Loan Agreement. (Supp. 168).

On June 19, 1999, MTD executed a First Amendment to the December 23, 1997 Loan Agreement. (Supp. 475-480) Under the terms of Section 1.9 of First Amendment to the December 23, 1997 Loan Agreement, MTD was prohibited from selling its Automotive Division for less than fair market value. If it had done so, its outstanding loans would have been called. (Supp. 170, 477).

Under the terms of terms of Section 1.9 of First Amendment to the December 23, 1997 Loan Agreement, the unrelated financial institutions specifically required a "fairness opinion" from an investment banking firm acceptable to the financial institutions indicating that MTD's sale of the Automotive Division was for fair market value. (Supp. 170-171, 478). Baird's opinion satisfied the financial institutions.

Arm's Length Transaction

Mr. Zampetis testified that Shiloh Automotive's purchase of MTD's Automotive Division was vigorously negotiated for about one-half year, with each side represented by a battery of legal and financial advisors, and that the arm's length nature of the negotiations is evidenced by the more than 60 documents associated with the transaction. (Supp. 83-85; Exhibit 2). Indeed,

9 This Loan Agreement was later amended pursuant to letter agreements dated January 9, 1998, April 17, 1998, July 28, 1998, and November 5, 1998. (Supp. 169; Exhibit 21).

the Commissioner's Audit Manager wrote: "The consensus of the agent and audit manager is that this was an 'arm's-length' transaction for financial statement purposes." (Emphasis added.) (Supp. 82, 494).

Albert Vondra, a partner with PricewaterhouseCoopers and a recognized expert with regard to Accounting Principles Board Opinion 16 ("APB 16"), testified that if the transaction had not been considered arm's length, it would have been accounted for under APB 51 instead of APB 16. (Supp. 258-261).

Allocation of Purchase Price

While the Board did not address the allocation of the amount paid by Shiloh Automotive for the assets of MTD's Automotive Division, the following facts are considered noteworthy.

Stephen Graham, Shiloh's Chief Financial Officer, identified and explained Exhibit 4 (Supp. 403), a spreadsheet that sets forth the amount and allocation of the purchase price paid for the assets of MTD's Automotive Division. As Mr. Graham noted, the purchase price on November 1, 1999, increased by the appropriate § 2.3 adjustment, was $48,340,479. (Supp. 206, 208-213).

Mr. Graham also identified and explained Exhibit 3, which is a copy of APB 16. APB 16 dictates the accounting treatment to be accorded Shiloh Automotive's purchase of MTD's Automotive Division. It also addresses how the amount paid for an acquired company, the assets of the Automotive Division in this case, is to be allocated among such assets. (Supp. 213-214, 244-245, 258).

Pursuant to APB 16, the purchase price paid for an acquired company is to be allocated among identifiable assets based on the fair value of the assets. APB 16 also provides guidance with regard to the method of determining fair value for given categories of assets. (Supp. 214).

- APB 16 doesn't specifically address cash, but assets such as cash and general deposit accounts held in banks, savings and loan associations, and other depository institutions are valued on a dollar for dollar basis. (Supp. 214-215, 247).
- Accounts receivable are to be valued at the present value of the amount to be received, less an allowance for uncollectible accounts and collection costs. (Supp. 215, 247).
- Finished goods inventory are to be valued at estimated selling price, less cost of disposal and reasonable profit (this is, essentially, cost to produce). Work in progress is to be valued at estimated selling price, less cost to complete, cost of disposal and a reasonable profit (this is, essentially, cost to produce through the date of sale). Raw Materials are to be valued at current replacement cost. (Supp. 215-216, 248).
- Prepaid items are to be valued at their appraised value. (Supp. 216, 248).
- Land is to be valued at its appraised value. (Supp. 216-217, 249).
- Buildings and machinery used in business are to be valued at current replacement cost. (Supp. 217, 249).

Shiloh Automotive's Valuation Methods

Applying APB 16, Shiloh Automotive set the value of cash and cash equivalents acquired from MTD at their face amount. (Supp. 217).

Shiloh Automotive set the value of accounts receivable acquired from MTD at their face amount, but, according to generally accepted accounting principles, that amount was reduced by the portion of the receivables that was not expected to be collected. (Supp. 217-218).

Shiloh Automotive determined the value of finished goods acquired from MTD by taking a physical inventory and then multiplying the number of any given item in inventory by the cost of material, labor, and overhead attributed to the code number assigned to the item. This produced the cost to produce the finished goods. The value of work in progress acquired from MTD was determined by taking a physical inventory of the work in progress and then multiplying the number of any given item in inventory by the cost of material, labor, and overhead attributed to the code number assigned to the item that had been incurred to date. The value of raw materials acquired from MTD was set at cost. (Supp. 218-221).

Shiloh Automotive acquired a limited amount of prepaid items from MTD. Specifically, it acquired a pension fund and a modest amount of insurance policies and miscellaneous items. The value of the pension fund was determined by an appraiser hired to value the fund. The value of the insurance and other items was set at cost less the amount amortized to date. (Supp. 221-223).

The cash and equivalents, accounts receivable, inventory, and prepaid items acquired from MTD are all considered current assets under generally accepted accounting principles. Land, buildings and machinery used in business are considered non-current assets under generally accepted accounting principles. (Supp. 223).

Pursuant to APB 16, the November 1, 1999 value attributed to the current assets acquired by Shiloh Automotive was allocated to those assets on a dollar for dollar basis on the books of the company. The residual purchase price was allocated among the non-current assets based on their relative net book values. Because the amount to be apportioned among the non-current assets was relatively small, it was not considered necessary to base the apportionment on an appraisal of such assets. (Supp. 223-225, 233-235, 238-239, 252-253, 262).

Adjustments

As of October 31, 2000, the first wave of purchase price adjustments resulted in a net $3,941,702 increase in the price paid for MTD's Automotive Division. Pursuant to APB 16, these adjustments increased the amount allocated to each of the non-current assets. They did not have any effect on the amounts allocated to current assets. (Supp. 225-227, 228, 403).

As of October 31, 2001, the second wave of purchase price adjustments resulted in a $1,326,00 decrease in the price paid for MTD's Automotive Division. These adjustments decreased the amount allocated to each of the non-current assets. They did not have any effect on the amounts allocated to current assets. (Supp. 227, 403).

As of October 31, 2002, the third and final wave of purchase price adjustments resulted in a $1,472,395 decrease in the price paid for MTD's Automotive Division. These adjustments decreased the amount allocated to each of the non-current assets. They did not have any effect on the amounts allocated to current assets. (Supp. 227, 403).

Final Booked Amount

Ultimately (as of October 31, 2002), $49,483,784 was recorded in Shiloh Automotive's financial books and records as the cost of the Automotive Division assets acquired from MTD. Of that amount, $1,254,301 was attributed to machinery and equipment and $47,913 was attributed to office equipment. (Supp. 213, 228, 403).

Certification of Records

Mr. Vondra reviewed Shiloh Automotive's books for the years ending October 31, 2000, 2001 and 2002 for the purpose of determining whether the company followed the requirements of APB 16 insofar as they relate to the allocation of the purchase price paid for the assets of

MTD's Automotive Division. In his expert opinion, Shiloh Automotive adhered to the requirements of APB 16. (Supp. 240-241, 243-244, 249-253, 256).

Mr. Vondra further testified that Shiloh Automotive's financial statements are based on its books and records and that PricewaterhouseCoopers certified that the company's financial statements issued after the acquisition of MTD's Automotive Division, up to and including the financial statement issued for the period ending October 31, 2002, conformed to generally accepted accounting principles. (Supp. 253).

2001 and 2002 Tax Returns

Richard Steiner, Shiloh's Director of Corporate Tax, testified that the amounts set forth on Shiloh Industries' 2001 and 2002 Ohio Personal Property Tax Returns were based on the company's financial books and records as they existed on the dates the returns were prepared. He further explained that as the purchase price for MTD's Automotive Division was adjusted on October 31, 2000 and 2001, transitional adjustments were reflected on the company's 2001 and 2002 returns. (Supp. 265-266, 267-288).

ARGUMENT

Proposition of Law 1

MTD's 51% ownership interest in Shiloh did not preclude the parties from dealing at arm's length when negotiating the sale of MTD's Automotive Division to Shiloh Automotive.

At issue in this case is the true value, as of October 31, 2000 and 2001, of certain property acquired by Shiloh Automotive from MTD on November 1, 1999 -- i.e., the assets of MTD's Automotive Division. The controlling provisions of law are set forth below.

Pursuant to R.C. § 5711.18:

> In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money.

Pursuant to O.A.C. 5703-3-10:

> (B) Application of the composite annual allowance procedure provided for in rule 5703-3-11 of the Administrative Code shall determine the prima facie true value of depreciable tangible personal property used in business. The prima facie valuations can be rebutted by probative evidence of higher or lower valuation.
>
> (1) <u>When an item of tangible personal property is acquired in an arm's-length transaction, its true value at the time of purchase is the acquisition cost,</u> including all costs incurred to put the property in place and make it capable of operation, which are normally capitalized in accordance with generally accepted accounting principles. (Emphasis added)

Pursuant to O.A.C. 5703-3-11:

> (A) To assist taxpayers in returning the true value of depreciable tangible personal property used in business in this state, as required by Chapter 5711. of the Revised Code and rule 5703-3-10 of the Administrative Code, and to assist in the efficient administration of the personal property tax, the tax commissioner shall determine a composite annual allowance procedure for use in computing the true value of such property. The application of the

> composite annual allowance procedure to the original cost of tangible personal property may be referred to as the "true value computation" or the "302 computation."
>
> (B) The valuation determined by the true value computation shall be the prima facie true value in money of taxable tangible personal property.

Given the foregoing provisions of law, the true value of property used in business is generally either the property's depreciated book value on the appropriate tax listing date or, more commonly, the product of a formula that takes into account (a) the cost of the property to the taxpayer and (b) the appropriate true value percent as set forth in the Commissioner's 302 computation directive.

Shiloh Automotive Followed the Law

Consistent with O.A.C. 5703-3-10(B)(1), Shiloh Automotive determined the November 1, 1999 true value of the property it acquired from MTD by reference to the amount it paid (cost) for such property. The aggregate amount paid was then allocated among the acquired assets in the manner directed in APB 16. The amount allocated to personal property used in business was used to determine the true value of the property listed in the company's 2000 personal property tax return.

In the personal property tax returns filed for subsequent years, consistent with O.A.C. 5703-3-10 and 11, Shiloh Automotive determined the true value of the property it acquired from MTD by multiplying the portion of the purchase price allocated to any given item by the appropriate true value percent set forth in the Commissioner's 302 computation directive.

Aggregate Cost

With regard to Shiloh Automotive's use of the amount it paid for the property acquired from MTD as the true value of such property as of November 1, 1999, the Court in *State, ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, wrote:

> The best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so. Paragraph two of the syllabus in *In re Estate of Sears,* 172 Ohio St. 443, 178 N. E. (2d), 240. This without question, will usually determine the monetary value of the property. *Id.* at 412.

Thus, at least as far back as 1961, the year in which *In re Estate of Sears* was decided, the Court has recognized the amount paid for property purchased in an arm's length transaction to be the best evidence of the property's value on the date of sale. The Court has repeatedly acknowledged this fact ever since. Indeed, as reflected by O.A.C. 5703-3-10(B)(1), the Commissioner embraces this fact as well.

Allocated Cost

With regard to Shiloh's use of APB 16 to allocate the amount it paid for the property acquired from MTD, *Buckeye International, Inc. v. Limbach* (1992), 64 Ohio St.3d 264, is instructive.

In December 1979, Worthington Industries, Inc. set in motion the purchase of Buckeye International for cash and stock. In reporting the economic substance of this purchase to its shareholders, Worthington Industries allocated the amount paid for Buckeye International among the latter's assets according to APB 16. That is to say (1) the cash, (2) the over-the-counter market price of the stock issued, and (3) the value of Buckeye International's current and long-term liabilities that were either paid, issued or assumed by Worthington Industries -- the amount paid for Buckeye International -- was allocated under APB 16 among the categories of assets owned by Buckeye International.

Even though the amount allocated to Buckeye International's personal property was greater than the historic book value of such property, in its 1982, 1983, and 1984 tax returns the company determined the true value of the property by reference to historic net book value.

On audit, the Commissioner increased the cost of Buckeye International's property to the amount paid by Worthington Industries for the company, to the extent such amount was allocated under APB 16 to personal property used in business. Buckeye International appealed, alleging that the amount allocated under APB 16 overstated the value of its personal property used in business. The Court responded as follows.

> According to *Tele-Media Co. of Addil v. Lindley* (1982), 70 Ohio St.2d 284, 24 O.O.3d 367, 436 N.E.2d 1362, syllabus:
>
> > The best evidence of the "true value in money" of tangible personal property is the proper allocation of the purchase price of an actual, recent sale of the property in an arm's-length transaction. (*Conalco, Inc. v. Monroe Cty. Bd. of Revision* [1977], 50 Ohio St.2d 129 [4 O.O.3d 309, 363 N.E.2d 722], approved and followed.)
>
> Thus, if the sale is arm's length, actual and recent, and the purchase price is properly allocated, the BTA may adopt the allocation as the true value.
>
> Buckeye's witnesses admitted that the transaction was arm's length. <u>The arm's-length nature of the sale was a precondition for Worthington Industries' application of APB 16</u>. The sale was actual and recent since it occurred one year prior to the valuation date. Finally, <u>Buckeye admitted that the allocation was proper since it reported the sale on this basis to its shareholders in its annual report</u>. Thus, the BTA reasonably and lawfully valued the property. *Id.* at 266. (Emphasis added)

The same circumstances exist in the matter at hand.

The "Problem" Perceived by the Commissioner

Prior to November 1, 1999, the net book value of the assets that make up the Automotive Division, as recorded on MTD's books, was significantly higher than the amount paid for the assets by Shiloh Automotive. <u>For this reason</u>, the Commissioner concluded "the applicant's [i.e., Shiloh Automotive's] reported book cost did not reflect true value". (Supp. 482). The Commissioner left no room for the possibility (indeed, the not uncommon occurrence) that the assets had declined in value at a much greater pace than the rate of depreciation allowed for financial reporting purposes.

Commissioner Opts for Historic Net Book Value

Working backward from his conclusion, the Commissioner contends that the true value of the property acquired by Shiloh Automotive from MTD on November 1, 1999 should be determined by reference to the net book value of such property as recorded by MTD immediately prior to the sale. He does so notwithstanding his agent's admission that such net book value does not reflect the properties' true value on November 1, 1999. (Supp. 487). Moreover, in several cases the Commissioner has argued against the position he is currently advocating.

In *Tele-Media Co. of Addil, et al. v. Lindley* (1982), 70 Ohio St. 2d 284, the taxpayer, Tele-Media Co. of Lake Erie ("Lake Erie"), acquired the assets of two cable television systems. Lake Erie then allocated the lump sum price it paid for the systems to the acquired property. Nevertheless, when reporting the value of such property for tax purposes, Lake Erie reported the net book value of such property as recorded by the previous owner immediately prior to the sale. In these circumstances the Court wrote:

> In the case *sub judice*, the Tax Commissioner found that the true value of the tangible personal property was to be taxpayer's book value based upon the purchase price as allocated. This is the proper indicator of true value, as mandated by the statute and as determined by the Tax Commissioner.
>
> This conclusion is supported by our previous decision in *Conalco v. Bd. of Revision* (1977), 50 Ohio St. 2d 129. *Conalco* concerned a determination of the true value of the acquired assets and involved an arm's-length sale for a lump-sum purchase price. Subsequently, the purchased assets were appraised and the purchase price was allocated to the real and personal property. The syllabus in that case, states:
>
> "1. The best evidence of the 'true value in money' of real property is an actual, recent sale of the property in an arm's length transaction. (*State, ex rel. Park Investment Co., v. Bd. of Tax Appeals,* 175 Ohio St. 410, approved and followed.)
>
> "2. In valuing real property sold within three days of the tax lien date in an arm's-length transaction, the best evidence of 'true value in money' is the proper allocation of the lump-sum purchase price and not an appraisal ignoring the contemporariness sale."

> In the case *sub judice,* the sales were followed by an allocation of the purchase price to the assets. The taxpayers do not dispute the fact that these were arm's-length transactions and that the allocations of the purchase prices were based upon replacement costs. Applying *Conalco,* the book value based upon the recent sale price, properly allocated, is the best evidence of true value. See, also, *Grabler Mfg. Co. v. Kosydar* (1975), 43 Ohio St. 2d 75. *Id.* at 286.

See also Chillicothe Cablevision v. Limbach, (Fourth Dist. Ct. of App. Case No. 1341 - March 11, 1988), *aff'g* BTA Case No. 84-G-39 (May 16, 1986). In *Chillicothe Cablevision* the appellant purchased a ten year old cablevision system from the Chillicothe Telephone Company on December 11, 1974. The appellant allocated the amount paid for the cablevision system among the assets of the system. Rather than reporting the allocated values in its 1975 and 1976 personal property tax returns, the appellant reported the values the previous owner had recorded on its book for each of the assets.

In the circumstances described above, the Commissioner argued that the allocated purchase price was the best evidence of the system's true value. The Board agreed, noting that in *Tele-Media*, the court held the best evidence of true value is an arm's-length sale between a willing seller and a willing buyer properly allocated among the acquired assets.

Commissioner's Reliance on Walters

Not surprising, in the matter at hand the Commissioner made no attempt to justify his substitution of the historic net book value of the property in question for the amount paid for such property. There is no justification. As the Court noted in *Buckeye International, supra*, "book values may have little relation to current values." *Id* at 267.[10]

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[10] Stated a bit differently, net book value reflects nothing more than the original cost of an asset reduced by a specified amount of depreciation determined by reference to the age of the asset. Depending on the asset and the nature of the business in which it is employed, at any point in time the asset may be worth more than its original cost, less than its depreciated book value, or anywhere in between. For this reason, historic net book value is of little significance when determining the current value of an item of property. (Supp. 93).

What the Commissioner did in an attempt to distance himself from the mandate of O.A.C. 5703-3-10(B)(1) -- "When an item of tangible personal property is acquired in an arms-length transaction, its true value at the time of purchase is the acquisition cost" -- is argue that Shiloh Automotive's purchase of MTD's Automotive Division was not an arm's length sale. This argument is advanced in his Final Determination even though the agent and audit manager assigned to this case conceded that "this was an 'arm's-length' transaction for financial statement purposes." (Supp. 82, 264, 494).

The Commissioner's argument seems to be that in order to be arm's length for Ohio tax purposes, a sale must be an "open market" transaction. In his Final Determination, the Commissioner cites *The Grabler Mfg. Co. v. Kosydar* (1975), 43 Ohio St.2d 75, the syllabus of which reads:

> For personal property tax purposes, the best method of determining value is the actual sale of such property on the open market and at arm's length, between one who is willing to sell, but not compelled to do so, and one who is willing to buy, but not compelled to do so. (*In re Estate of Sears,* 172 Ohio St. 443, approved and followed.)

The *Grabler* decision does not define what constitutes an arm's length transaction. However, fourteen years later, the Court, in *Walters v. Knox Cty. Bd. of Revision,* (1989), 47 Ohio St.3d 23, wrote:

> [A]n arm's-length sale is characterized by these elements: it is voluntary, i.e., without compulsion or duress; it *generally* takes place in an open market; and the parties act in their own self-interest. *Id.* at 25. (Italics added)

Justice Douglas, in a concurring opinion, wrote:

> I am concerned with the majority's definition of "arm's-length" sale. To include in the definition the term "open market" might very well lead to the interpretation and conclusion that a *private* sale could never be at "arm's length." "Open market" seems to have the indicia of advertising, bidding and/or negotiations with the world at large.

> This *is not* and should not be the law. Private sale transactions which are at arm's length occur every day. For us to now take upon ourselves the redefining of the term "arm's length" from its currently accepted meaning only causes unnecessary confusion. We should avoid such activity. *Id* at 26-27.

Since these cases were decided, no Ohio court or administrative tribunal has held that advertising or marketing to the public at large is a necessary element of an arm's length sale. Indeed, based on the definition of an "arm's length sale" set forth in *Walters*, the Board wrote in Columbus Bd. of Educ. v. Franklin County Bd. of Revision, B.T.A. No. 88-C-1105, 1990 Ohio Tax LEXIS 174, *12 (Feb. 16, 1990):

> [W]e *** find that the subject property was purchased by the taxpayer pursuant to an arm's-length transaction as that term is used and defined in [Walters.] We are not required to reach a different decision even though the subject property was not advertised for sale to the general public and was purchased pursuant to a private sale. This type of transaction is common place and was clearly contemplated by the Court when it defined "arm's-length" in Walters.

More recently, in MACQ Inc., v. Marion County Bd. of Revision, B.T.A. No. 96-K-1457, 1998 Ohio Tax LEXIS 1236 (Sept. 11, 1998), the Board wrote:

> As pointed out by the court in *Walters*, *** arm's -length sales "*generally*" occur in the open market ***. [W]e rejected the notion that sales must always occur in such a manner ***. [M]erely because the subject property was not openly advertised as being for sale does not mandate a finding that it was other than arm's-length.[11]

Board's Focus on MTD

The Board didn't embrace the Commissioner's argument that Shiloh Automotive's purchase of MTD's Automotive Division failed as an arm's length sale because the Division was not marketed to the public at large. Instead, the Board focused on the parties to the transaction.

---

11 Since its MACQ decision, the Board has frequently reconfirmed its holding that an arm's length transaction need not take place in an open market setting.

> We now consider the relationship between Shiloh Industries, Inc. and MTD. MTD is the majority shareholder of Shiloh, owning or controlling 51 percent of the shares prior to the sale and 56 percent after. Five persons related to MTD sit on Shiloh's nine-person board of directors. We acknowledge that the directors related to MTD did not participate in Shiloh's decision to purchase the MTD Automotive Division. However, the record does not contain the same evidence with respect to MTD's decision to sell. In fact, because of the close relationship to Shiloh, MTD's board of directors was aware of Shiloh's long-range plans, was able to have informal discussions with the corporation even before the formal proposal was completed, and was able to tailor its proposal to attract Shiloh's interest. Because of this symbiotic relationship between the purchaser and the seller, the board must agree with the Tax Commissioner that the sale itself does not meet the definition of a qualifying sale for valuation purposes. (Appendix page 15).

In response, this Court has not adopted as part of the definition of an arm's length sale a requirement that the parties be unrelated – only that they act without compulsion or duress and in their own self-interest. *Walters v. Knox Cty. Bd. of Revision*, 47 Ohio St.3d at 25. And given the facts presented in this case, it defies logic to suggest that MTD's board of directors might have acted under compulsion or duress or in a manner that is inconsistent with the best interests of the company and its shareholders. Consider the following facts, each of which is relevant to the Board's analysis.

Shiloh Most Favorable Suitor

The reason for the transaction in question, from MTD's perspective, was offered my Mr. Houser. He testified that in the late 1990's MTD's management decided to sell its Automotive Division. After consulting with PwCS, MTD's management made an informed business judgment that no other entity would be as interested in acquiring its Automotive Division as Shiloh, or willing to pay more for the Division than Shiloh. (Supp. 31-35, 49-50, 105, 148-149, 151-157, 168).

Repeating portions of the Statement of Facts, the business attributes of Shiloh and MTD's Automotive Division were complimentary, not duplicative, and taken together were expected to create synergies that would enable the combined entity to grow. In contrast, the business attributes of MTD's Automotive Division duplicated many of the attributes already possessed by other potential suitors. (Supp. 144, 153-157). Moreover, adding the Automotive Division to Shiloh's existing attributes was expected to create a company that could compete as a Tier I supplier to the automotive industry -- despite the fact that the Division had been losing money on a regular basis. (Supp. 151-157). The foregoing factors, MTD believed, made its Automotive Division more attractive and more valuable to Shiloh than any other potential suitor. (Supp.149-150).

Still, if Shiloh was unwilling to purchase the Automotive Division, or would do so only for an amount that was unacceptably low to MTD, MTD was prepared to shop the Division to other potential buyers -- although there were very few likely prospects. And with regard to those few prospects, MTD expected that the amount any one of them might be willing to pay for the Automotive Division, if they proved to be interested in acquiring the Division in the first place, would be less than the amount Shiloh would be willing to pay. (Supp. 149-151, 157, 200, 202).

Director Participation in Vote

Given this context, consider the Board's statement that:

> We acknowledge that the directors related to MTD did not participate in Shiloh's decision to purchase the MTD Automotive Division. However, the record does not contain the same evidence with respect to MTD's decision to sell.

Who on MTD's board would the Board have abstain from the decision to sell the Automotive Division? Those that held an interest in MTD and, therefore, an indirect interest in Shiloh? If so, there would have been no one left to vote.

MTD Would Not Have Negotiated a Bargain Purchase Price

More to the point, why should any of MTD's directors have abstained? Implicit in the Board's decision is the notion that because of MTD's investment in Shiloh, the directors might have agreed to accept a bargain purchase price for the assets of MTD's Automotive Division. But that notion is demonstrably unreasonable. If the directors were to have done so, they would have acted contrary to the financial interest of MTD and its shareholders – including themselves. To illustrate this point, assume that immediately before the sale of the Automotive Division:

- Shiloh had a value of $170,000,000, and
  Shiloh's public shareholders held $83,300,000 (49%) in Shiloh shares, and
  MTD held $86,700,000 (51%) in Shiloh shares.

- MTD had a value of $623,700,000, of which
  $86,700,000 was attributable to Shiloh shares,
  $75,000,000 was attributable to its Automotive Division, and
  $462,000,000 was attributable to other assets.

In these circumstances, if MTD sold the assets of its Automotive Division to Shiloh for less than $75,000,000 (say $50,000,000), immediately after the sale:

- Shiloh would have a value of $195,000,000[12], and
  Shiloh's public shareholders would hold $95,550,000 in Shiloh shares[13], and
  MTD would hold $99,450,000 in Shiloh shares.[14]

- MTD would have a value of $611,450,000, of which
  $99,450,000 would be attributable to Shiloh shares, and
  $512,000,000 would be attributable to other assets.[15]

---

12 [($170,000,000) – ($50,000 paid for the Automotive Division) + (the $75,000,000 value of the Automotive Division)] = $195,000,000.

13 [($195,000,000) x (49%)] = $95,550,000.

14 [($195,000,000) x (51%)] = $99,450,000.

After the sale, Shiloh would be worth $25,000,000 more ($195,000,000 - $170,000,000) than before the sale; MTD would be worth $12,250,000 less ($623,700,000 - $611,450,000) than before the sale; and Shiloh's public shareholders would be worth $12,250,000 more ($95,550,000 - $83,300,000) than before the sale. More to the point, the $25,000,000 discount granted by MTD would have resulted in a permanent shift of $12,250,000 in value from MTD to Shiloh's other shareholders. It is unreasonable to conclude that anyone would act contrary to their financial interest by granting such a discount.

Tailoring Proposal

Consider next the Board's statement that:

> MTD's board of directors was aware of Shiloh's long-range plans, was able to have informal discussions with the corporation even before the formal proposal was completed, and was able to tailor its proposal to attract Shiloh's interest.

From the start, MTD was intent on selling the assets of its Automotive Division for the highest price it could obtain. That said, its not clear what the Board was referring to when it suggests that MTD "tailor[ed] its proposal to attract Shiloh". Presumably, the Board is referring to those portions of the Offering Memorandum that highlight the synergies that would exist if Shiloh were to acquire the Automotive Division. If that is the case, there is nothing unusual about working diligently to tailor a proposal to attract <u>any</u> potential suitor – particularly one such as Shiloh, whose management had expressed an interest in investigating a possible acquisition of the Division. To do so is just common business sense. Stated a bit differently, to highlight the positive aspects of a proposed transaction is just good marketing, not an indication that the ensuing negotiations are not at arm's length.

(continued…)

15 [($462,000,000) + ($50,000,000 paid for the Automotive Division)] = $512,000,000.

On the other hand, if the Board was referring to concessions made by MTD and Shiloh during the course of their negotiations, it seems obvious that to attempt to accommodate the desires and demands of the other party in a potential transaction is an indication that neither party dictates the terms of the transaction and that the terms have meaningful consequences to both parties. Simply put, its evidence of arm's length negotiations, not the opposite as the Board suggests.

Purchase Price Approved by Unrelated Parties

The seriousness with which the parties approached and conducted their arm's length negotiations is evidenced by the fact that it took more than 6 months to reach an agreement. It also bears repeating that the purchase price negotiated by the parties was blessed by Baird, an independent investment banking firm, which issued its opinion that the amount paid by Shiloh for the assets of MTD's Automotive Division was fair.

Moreover, MTD's lenders, who looked to the assets of the Automotive Division as collateral for the loans they had extended to MTD, and who prohibited a sale of the assets for less than fair market value, specifically acknowledged Baird's opinion as evidence that MTD's sale of the Automotive Division was for fair market value. (Supp. 170-171).

Given the circumstances presented in this case, the Board's determination that the sale of MTD's Automotive Division to Shiloh Automotive was not an arm's length transaction simply because of MTD's ownership interest in Shiloh is unreasonable both as a matter of fact and law. The Court is respectfully requested to so rule.

Proposition of Law 2

The amount paid for the assets of MTD's Automotive Division that were acquired by Shiloh Automotive on November 1, 1999 was properly allocated among such assets under APB 16.

The Commissioner has also suggested that the amount paid by Shiloh Industries for the assets of MTD's Automotive Division, if fair in the aggregate, was not properly apportioned among such assets. This suggestion was refuted by Stephen Graham, Shiloh's Chief Financial Officer, and Albert Vondra, a partner with the accounting firm PricewaterhouseCoopers. Both men testified that Shiloh Automotive apportioned the amount paid for the assets of MTD's Automotive Division among such assets in a manner that was consistent with APB 16. Mr. Vondra, who was recognized as an expert with regard to the interpretation and application of APB 16, further testified that PricewaterhouseCoopers had rendered its opinion that the financial books and records of Shiloh for the years ending October 31, 2000, 2001 and 2002, which reflected Shiloh's allocation of the amount paid for the assets of MTD's Automotive Division among such assets, was consistent with APB 16 and generally accepted accounting principles. See also *Buckeye International, supra,* wherein the Court stated that the APB 16 allocation then in question "*** was proper since [the taxpayer] reported the sale on this basis to its shareholders in its annual report." *Id.* at 266.

For his part, the Commissioner offered no evidence to rebut the testimony of Mr. Graham and Mr. Vondra. His argument is only that he doesn't like the result of the proper application of APB 16.

CONCLUSION

For all of the reasons set forth in this Brief of Appellant, the Court is urged to find that: Shiloh Automotive's November 1, 1999 purchase of the assets of MTD's Automotive Division was an arm's length transaction; that the November 1, 1999 true value of the assets of MTD's Automotive Division was appropriately determined by reference to the amount paid by Shiloh Automotive for such assets; and that the amount paid for the assets of MTD's Automotive Division was properly allocated by Shiloh Automotive among such assets under APB 16.

Respectfully submitted

Charles M. Steines
Counsel for Appellant

IN THE SUPREME COURT OF OHIO

<table>
<tr><td>SHILOH AUTOMOTIVE, INC.,

Appellant,

-vs-

WILLIAM W. WILKINS,
TAX COMMISSIONER OF OHIO,

Appellee.</td><td>)
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)</td><td>Appeal from the Ohio
Board of Tax Appeals

BTA Case 2004-M-380 and 1283

Supreme Court Case 2006-1384</td></tr>
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Appendix to Brief of Appellant

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IN THE SUPREME COURT OF OHIO

06-1384

SHILOH AUTOMOTIVE, INC., Appellant, -vs- WILLIAM W. WILKINS, TAX COMMISSIONER OF OHIO, Appellee.	)	Appeal from the Ohio Board of Tax Appeals BTA Case No. 2004-M-380 BTA Case No. 2004-M-1283

FILED
JUL 21 2006
BOARD OF TAX APPEALS
COLUMBUS, OHIO

NOTICE OF APPEAL OF SHILOH AUTOMOTIVE, INC.

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SUPREME COURT OF OHIO

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IN THE SUPREME COURT OF OHIO

SHILOH AUTOMOTIVE, INC.,	)	Appeal from the Ohio Board of Tax Appeals
Appellant,	)	BTA Case No. 2004-M-380 BTA Case No. 2004-M-1283
-vs-	)	
WILLIAM W. WILKINS, TAX COMMISSIONER OF OHIO,	)	
Appellee.	)	

NOTICE OF APPEAL OF SHILOH AUTOMOTIVE, INC.

Shiloh Automotive, Inc. ("Shiloh") hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, from the Decision and Order of the Board of Tax Appeals journalized in BTA Case Nos. 2002-M-380 and 2004-M-1283 on July 7, 2006. A true copy of the Decision and Order of the Board of Tax Appeals being appealed is attached hereto and incorporated herein by reference.

Shiloh complains of the following errors in the Decision and Order of the Board of Tax Appeals:

1. The Board of Tax Appeals unreasonably, unlawfully and incorrectly held that Shiloh's purchase of the assets associated with the MTD Automotive Division of MTD Products, Inc. ("MTD") was not an arm's length transaction.

2. The Board of Tax Appeals unreasonably, unlawfully and incorrectly concluded that, solely because of MTD's ownership interest in Shiloh Industries, Inc., Shiloh's parent

corporation, Shiloh's purchase of the assets associated with the MTD Automotive Division of MTD did not qualify as an arm's length transaction.

3. The Board of Tax Appeals unreasonably, unlawfully and incorrectly concluded that insufficient evidence supported Shiloh's contention that the amount paid MTD by Shiloh for the assets associated with the MTD Automotive Division and recorded by Shiloh in its financial books and records as Shiloh's investment in such property reflected the true value of such property as of the date of Shiloh's acquisition of such property.

4. The Board of Tax Appeals unreasonably, unlawfully and incorrectly concluded that, while the amount paid by Shiloh for the assets of the MTD Automotive Division that was allocated to personal property used in business in Ohio and recorded by Shiloh in its financial books and records as Shiloh's investment in such property may reflect the true value of such property as of the date of Shiloh's acquisition of such property, the Tax Commissioner's deviation from such value in favor of the net book value of such property on the books of MTD immediately prior to the acquisition was not inappropriate.

5. The Board of Tax Appeals unreasonably, unlawfully and incorrectly affirmed the Tax Commissioner's determination that the net book value of the assets of the MTD Automotive Division, as recorded on the books of MTD as of April 30, 1999, reflects the true value of such property as of the date of Shiloh's acquisition of such property.

6. The Board of Tax Appeals unreasonably, unlawfully and incorrectly held that: "We agree with the Tax Commissioner that MTD's historical costs are a more probative basis for the value of the [assets of the MTD Automotive Division]" despite the Tax Commissioner's audit manager's admission that: "[While MTD's net book value] may not be reflective of true value, ***we should issue [final determinations based on such value] and allow the matter to be appealed by the taxpayer."

7. The Board of Tax Appeals unreasonably, unlawfully and incorrectly affirmed the Tax Commissioner's deviation from the provisions of O.A.C. § 5703-3-10 and 11 in that the Commissioner determined the true value (in Shiloh's hands) of the assets acquired by

Shiloh from MTD by reference to the net book value of such assets as recorded on the books of MTD as of April 30, 1999 -- not by the application of the appropriate true value schedule to Shiloh's recorded acquisition cost of such property -- without any evidence that the net book value of the assets as recorded on the books of MTD as of April 30, 1999 accurately reflected the true value of such assets at such time or at any time thereafter.

Shiloh respectfully requests the Court to reverse the Decision and Order of the Board of Tax Appeals journalized in BTA Case No. 2004-M-380 and 2004-M-1283 and the final determinations of the Tax Commissioner each addresses.

Respectfully submitted on behalf of Shiloh by:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing Notice of Appeal was hand delivered to counsel for Appellee, Barton Hubbard, Assistant Attorney General, at his office located in the Rhodes State Office Tower, 30 East Broad Street, Columbus, Ohio 43216 on July 21, 2006.

C M Steines
Charles M. Steines

OHIO BOARD OF TAX APPEALS

Shiloh Automotive, Inc.,	)	CASE NOS. 2004-M-380
	)	2004-M-1283
Appellant,	)	
	)	(PERSONAL PROPERTY TAX)
vs.	)	
	)	DECISION AND ORDER
William W. Wilkins,	)	
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

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Entered July 7, 2006

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

These causes and matters come to be considered by the Board of Tax Appeals upon two notices of appeal filed on April 27, 2004 and November 22, 2004. Appellant challenges a final determination of the Tax Commissioner, appellee, dated March 5, 2004 and final assessment certificates dated October 29, 2004, respectively. For tax year 2001, the appellant, Shiloh Automotive, Inc. ("SAI"), applied for final assessment pursuant to R.C. 5711.26. The Tax Commissioner's final determination concluded that the value of certain items of personalty reported by SAI on its 2001 personal property tax report were not correct. Instead, the Tax Commissioner concluded that the property was more accurately valued in accordance with booked costs reported by a previous owner. SAI also challenges value assessed to the same property through the Tax Commissioner's Final Assessment Certificates of Valuation for tax year 2002.

While the procedure by which the matters have been brought before the board are slightly different, the specifications of error are essentially the same. SAI claims that the Tax Commissioner has overvalued certain assets obtained by SAI through the purchase of a division of MTD Products, Inc. ("MTD").

The matters have been consolidated and are considered upon the notices of appeal, the statutory transcripts certified by the Tax Commissioner, the evidence adduced at the evidentiary hearing held before this board, and the briefs filed by the parties. At the hearing, the board accepted the testimony of certain witnesses, which is discussed, infra. Additionally, certain exhibits were introduced and will be considered as a part of the record.

The basic facts surrounding these appeals are not disputed. SAI is a subsidiary of Shiloh Industries, Inc., ("Shiloh"), a publicly traded corporation and the parent of a number of Ohio-based subsidiaries. The automotive subsidiary was incorporated in 1999 and began business later that year when the parent company purchased the automotive division of MTD. The assets of MTD's automotive division were transferred to and became the business of the newly formed automotive corporation.

This purchase is at the heart of the controversy before this board. SAI argues that the purchase of MTD's automotive division was an arm's-length transaction and, as such, the value of the machinery and equipment purchased was established by the sale. The Tax Commissioner argues that the purchase did not meet the indices of an arm's-length transaction and, therefore, SAI's reliance on the sale price as the indication of value of the property purchased is misplaced.

As the determination whether the purchase constituted an arm's-length transaction is essentially a factual one, it is critical to review the events leading up to the sale. There is no dispute that Shiloh and MTD had a business relationship prior to the sale of the automotive division. According to Mr. Theodore Zampetis, Shiloh's president and chief executive officer, prior to the sale 51 percent of Shiloh stock was owned and controlled, directly or indirectly, by MTD, its shareholders and its pension fund. H.R. at 19. After the sale, MTD's percentage of ownership increased to 56 percent. H.R. at 21. Of the nine Shiloh directors, five were either owners of, or affiliated with, MTD. While testimony at hearing revealed that those Shiloh directors affiliated with MTD did not take part in discussions or ultimately vote to purchase the automotive division, it was clear that those directors affiliated with MTD were aware of Shiloh's long-range plans. According to Mr. Ronald Houser, MTD's executive vice president, chief financial officer and board member during the transaction, at the time the MTD board considered selling its automotive division, it compared Shiloh's position as a supplier to major auto manufacturers to other participants in the automotive industry, ultimately concluding that MTD's automotive division offered more to Shiloh with fewer duplicative competencies than the division offered Shiloh's competitors. Mr. Houser testified that MTD's board believed Shiloh would be willing to pay a higher price than other competitors because of the complementary nature of the two businesses. That belief led MTD to direct its offering memorandum prepared by PricewaterhouseCooper Securities LLC only to Shiloh. The offering memorandum was introduced at hearing as Exhibit 14. The memorandum itself acknowledges that the MTD board of directors was aware of Shiloh's goals. Appellant's Ex. 14 at 2, 47-49.

Testimony at hearing revealed that informal discussions regarding the sale of the automotive division began even before a formal presentation to Shiloh's board of directors occurred. H.R. at 26. Once a formal presentation was made, negotiations began in earnest. Negotiations continued from mid-1998 through March 1999, when a second formal presentation was made to Shiloh's board of directors. MTD's initial offering price was "in the low-50s range." H.R. at 162. However, the Shiloh board did not believe the price was supported by the information uncovered during the due diligence phase of the negotiations. Based upon that due diligence, the Shiloh board members without a relationship to MTD were willing to pay approximately $25,000,000 for the automotive division. H.R. at 163. After further negotiations, the non-related directors agreed to purchase MTD's division for $40,000,000, subject to certain price adjustments which would occur after the transfer of the division. Appellant's Ex. 1 at 15. Shiloh's board of directors also obtained a "fairness opinion" from Robert W. Baird & Co. ("Baird"). That opinion indicated that the payment of $20,000,000 in cash, the assumption of certain liabilities, and the transfer of $20,000,000 of Shiloh stock were all a part of the purchase transaction. The Baird opinion letter also acknowledged that either the purchaser or the seller could be obligated to pay or cause to be paid an additional amount based upon the amount of money earned by the automotive division for the first three years after transfer. Appellant's Ex. 1, appendix B; Appellant's Ex. 20.

The import of the Baird opinion letter, according to Mr. Zampetis, was to assure the board of directors that the actions taken were in the best interests of the shareholders. H.R. at 88. The Baird fairness opinion provided assurance to the Shiloh board of directors that the payment for the transaction was fair, from a financial point of view, to Shiloh and its shareholders. Mr. Zampetis testified that the fairness opinion was based solely on financial information dealing with revenue and did not consider the value of the assets acquired. Mr. Zampetis testified:

> "The function of Baird is to look objectively at all the financial performance of a particular company, to look at the stream of revenues, the stream of cash flow generated by it and to advise the Board that based on this particular operating business – realities – this is what this business should be worth; don't pay more, don't pay less." H.R., at 90.

The transaction closed in November 1999. At that time allocations were made to SAI's books, allocating the purchase price of $48,340,479.21 to cash, accounts receivables, inventory, prepaid items (collectively called "current assets") and to land, buildings, machinery and equipment, and office equipment (collectively called "fixed assets"). Adjustments as negotiated in the sales agreement took place on

October 31, 2000, October 31, 2001, and October 31, 2002. After all adjustments, the total purchase price increased to $49,483,785.61. Appellant's Ex. 4.

According to Albert Vondra, a partner with PricewaterhouseCoopers, the accounting firm that assisted SAI in preparing its original books and records, SAI properly accounted for the purchase under Accounting Principles Board Opinion ("APB") 16, which governs a business combination when there has been a transfer of assets. According to Mr. Vondra, the cost paid would be allocated to the net assets. First, the fair market value of "identifiable assets" would be allocated. H.R. at 245. To the extent that there was residual value, that amount would be recorded as goodwill.

Mr. Vondra testified that the appropriate allocation method would be to "go down the balance sheet" of identifiable assets and allocate value based upon the fair market value. H.R. at 246. While cash is not mentioned in ABP 16, Mr. Vondra testified that cash and cash-like assets would be recorded on a dollar-per-dollar basis. Accounts receivables would be based upon the present value less any allowance for doubtful accounts or collection costs. H.R. at 247. Inventories are classified into three types: raw materials, work in progress, and finished goods. According to Mr. Vondra, raw materials are valued on replacement cost and finished goods at selling cost. Finally, prepaid items, such as prepaid insurance or pension, would be valued in accordance with an appraisal. H.R. at 248.

Mr. Vondra testified that his review of the books and records prepared at the time of the transaction indicated that SAI complied with the requirements of

APB 16. However, the purchase price was less than MTD's historically booked costs for all of the assets transferred. Mr. Vondra testified that under APB 16, there is a priority to allocating the purchase price, first to current assets and then, the residual to non-current assets.

On cross-examination, Mr. Vondra testified that if the entities being combined were under common control, or if the seller of the assets owned a majority of the shares of the purchaser, another standard for accounting for the assets may control. H.R. at 259. Mr. Vondra also testified that no appraisal of land, building, machinery, and equipment was performed; the allocation of the purchase price was done on a pro rata formula based upon MTD's historical book values. H.R. at 261.

It is SAI's position that Shiloh's purchase of MTD's automotive division met the indices of an arm's-length transaction. SAI claims that only non-interested directors participated in the negotiations and the transaction took place in the "open market." Additionally, SAI argues, the fairness of the transaction was sanctioned by independent professionals. By virtue of the nature of the transaction, SAI argues, the amount paid should be accepted as the value of the items sold.

The syllabus of *Grabler Mfg. Co. v. Kosydar* (1975), 43 Ohio St.2d 75, provides: "For personal property tax purposes, the best method of determining value is the actual sale of such property on the open market and at arms length, between one who is willing to sell, but not compelled to do so, and one who is willing to buy, but not compelled to do so."

In *Conalco, Inc. v. Monroe County Board of Revision* (1977), 50 Ohio St.2d 129, the court held in a real property valuation matter that the best evidence of "true value in money" is the proper allocation of the lump sum purchase price garnered in an arm's-length transaction. However, in *Heimerl v. Lindley* (1980), 63 Ohio St.2d 309, the court considered the effect of an allocation to personal property after a business transferred through an arm's-length sale. There, the court found that an allocation after an arm's-length sale that resulted in a distortion of value was not a valid indication of value for personal property tax purposes.

In *Tele-Media Co. v. Lindley* (1982), 70 Ohio St.2d 284, the court again faced a situation in which the allocated purchase price resulted in a higher value for personal property than the value for the same property as carried on the seller's books. The Tax Commissioner assessed in accordance with the higher value and the Supreme Court agreed. The court first cited R.C. 5711.18. That statute provides in pertinent part:

> "In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money."

The court held that R.C. 5711.18 is mandatory and it is the intent of the General Assembly that only the Tax Commissioner, as assessor, may place a value other than book value on personalty. The court noted that the arm's-length nature of the transfer was not in dispute; thus a proper allocation of the sales price was the best indication of value of the personalty.

In *Buckeye Internatl., Inc. v. Limbach* (1992), 64 Ohio St.3d 264, the court again considered the value of personal property after an arm's-length sale. Again, the book value of the property after the sale was greater than the value for the same property as carried on the seller's books. The court held that "if the sale is arm's length, actual and recent, and the purchase price is properly allocated, the BTA may adopt the allocation as the true value." Id. at 266. In *Buckeye Internatl.*, the allocation was prepared according to APB 16, the same method employed in the present matter.

Thus, case law instructs that if a business is sold in an arm's-length sale, then personal property included in the sale may be valued in accordance with a proper allocation of the sale price. In the present matter, however, the Tax Commissioner denies that the transaction between Shiloh Industries, Inc. and MTD met the definition of an arm's-length sale.

While the concept of an arm's-length sale has been relied upon in personal property valuation appeals, the elements of an arm's-length sale have been crystallized through real property valuation law. "An arm's length sale is characterized by these elements: it is voluntary, *i.e.* without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest." *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio St.3d 23, 25. As is relevant to the issue in this matter, the Franklin County Court of Appeals held in *Columbus Bd.*

of Edn. v. Franklin Cty. Bd. of Revision (Jan. 18, 1990), Franklin App. No. 89AP-448, unreported:

> "Both of the above definitions correctly include the conditions of an 'open-market' transaction between 'unrelated parties.' The term 'arm's-length transaction' connotes more than just lack of compulsion on the part of the buyer and seller. It means that the willing parties have disinterested interests; i.e., that they stand separate from each other. The reasons for this principle are apparent. *Closely related parties transfer property between themselves for various reasons, and the sales price frequently is not freely negotiated but, rather, is based upon factors between the parties not connected with the value of the property being transferred.* While often such transfers are for less than market value, they may also be for more than market value ***." (Emphasis added.)

We now consider the relationship between Shiloh Industries, Inc. and MTD. MTD is the majority shareholder of Shiloh, owning or controlling 51 percent of the shares prior to the sale and 56 percent after. Five persons related to MTD sit on Shiloh's nine-person board of directors. We acknowledge that the directors related to MTD did not participate in Shiloh's decision to purchase the MTD Automotive Division. However, the record does not contain the same evidence with respect to MTD's decision to sell. In fact, because of the close relationship to Shiloh, MTD's board of directors was aware of Shiloh's long-range plans, was able to have informal discussions with the corporation even before the formal proposal was completed, and was able to tailor its proposal to attract Shiloh's interest. Because of this symbiotic relationship between the purchaser and the seller, the board must agree with the Tax

Commissioner that the sale itself does not meet the definition of a qualifying sale for valuation purposes.

This board acknowledges that APB 16 has been accepted as a proper method to allocate value to personal property when the value of the personalty on the books of the purchaser was greater than the value of the same personalty on the books of the seller. *Buckeye Internatl., Inc.,* supra. However, in the cited cases, the arm's-length nature of the transaction was accepted. In the present matter, we cannot find that the sale met the indices of an arm's-length sale.

This board does not suggest that the price paid by Shiloh for the automotive division was more or less than the automotive division would have garnered on the "open market." Indeed, related parties can and do effect transfers at fair market prices. However, a sale must be arm's length if it is used to establish value. *Grabler,* supra; *Tele-Media Co.,* supra. In the present case, SAI attempts to establish value through the use of a sale that is between related parties.

It thus becomes incumbent upon this board to review the record in order to determine whether other evidence of value exists outside the purchase price that is both competent and probative of value. In essence the burden upon SAI is the same as that upon any taxpayer claiming that its book value does not represent the true value of its property. *Youngstown Sheet & Tube Co. v. Kosydar* (1975), 44 Ohio St.2d 96. To support a claim that the Tax Commissioner, as assessor, has overvalued its property, proponents submit appraisals that are often performed concurrent with or immediately after a sale in order to properly value personal property for accounting purposes. However, Mr. Vondra testified that the values used for accounting purposes in the present transaction were derived from a pro rata allocation of the purchase price remaining after allocation to current assets.

SAI argues that the fairness opinion by Baird supports the purchase price paid by Shiloh for the assets in issue. However, the opinion indicates that it was based upon financial considerations independent of the fair market value of the personalty. Thus this board does not find that the Baird fairness opinion speaks to the value of the personalty purchased.

Without other evidence of value this board is unable to determine, as a matter of law, that the appellant provided competent and probative evidence that the values assessed by the Tax Commissioner are unlawful.

As a separate proposition of law, Shiloh argues that it should have been permitted to utilize a Tax Commissioner Inter-Office Communication commonly known as the "Dudgeon Report." The board has previously described the Dudgeon Report as a logical method by which to adjust the class-life system for used equipment. *J & L Specialty Steel, Inc. v. Lawrence* (Aug. 16, 2002), BTA Nos. 1999-M-665, unreported. While the report is used to adjust the class-life system in a lump-sum asset purchase, the report is also intended to be utilized in other transactions when a revaluation is presented on the books of a new owner.

In the present case, it appears that the Tax Commissioner has valued all property owned by SAI and obtained from MTD as if it were acquired in 1999. Thus, while the property is used property, the Tax Commissioner has assessed the property as if it were new property in 1999. S.T., BTA No. 2004-M-380, at 318-321 and S.T., BTA No. 2004-M-1283, at 37-40. We agree with the Tax Commissioner that MTD's historical costs are a more probative basis for the value of the property. However, the effect of such a determination is the recognition that the MTD property was used property at the time of acquisition. Therefore, the matter must be remanded to the Tax Commissioner so that he may properly apply depreciation rates in accordance with MTD's acquisition history.

While not identified as a proposition of law, SAI does raise as an assignment of error the violation of the equal protection and due process clauses of the 14th Amendment to the U.S. Constitution and Sec. 2, Article 1 of the Ohio Constitution. This board is without jurisdiction to consider such claims. *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405; *Herrick v. Kosydar* (1975), 44 Ohio St.2d 128; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229. We are a recipient of evidence with regard to constitutional challenges. *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195.

Considering the record in these matters, the statutes, and case law, it is the order of the Board of Tax Appeals that Tax Commissioner's final determination and final assessment certificates are modified in accordance with the determination herein.

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LEXSEE 1987 OHIO APP. LEXIS 7325

Chillicothe Cablevision Plaintiff-Appellant v. Joanne Limbach Tax Commissioner of Ohio Defendant-Appellee

No. 1341

Court of Appeals of Ohio, Fourth Appellate District, Ross County

1987 Ohio App. LEXIS 7325

June 5, 1987, Decided

DISPOSITION: [*1]

DECISION AFFIRMED.

COUNSEL:

Shelby V. Hutchins, for Appellant.

Anthony J. Celebrezze, Jr., Attorney General and Mark A. Engel, Assistant Attorney General for Appellee.

JUDGES:

ABELE, J: Grey, P.J.: Concur in Judgment & Opinion. Stephenson, J.: Concur in Judgment & Opinion.

OPINION BY:

ABELE

OPINION:

OPINION & JUDGMENT ENTRY

ABELE, J.:

This is an appeal from the Board of Tax Appeals pursuant to R.C. 5717.04. Appellant purchased a ten year old cablevision system in Chillicothe, Ohio from the Chillicothe Telephone Company on December 11, 1974. At the time, appellant allocated the purchase price among the assets of the system. Rather than reporting the allocated values with its 1975 and 1976 personal property tax returns, appellant reported the values the previous owner had kept on its books for each of the assets.

The Tax Commissioner rejected appellant's claims that it could use the prior owner's "depreciated book value" rather than the best evidence of the true value, which best evidence in this case is the recent purchase price. The commissioner also rejected appellant's claim that the values of the interior "housedrops" should not be included. The commissioner found appellant failed to [*2] show what parts of the housedrops were in the house walls and what parts were outside the house, such the cables from the utility poles, ground rods, clamps, and ground wires.

Although appellant asserted the labor costs involved in tree trimming and rearranging utilities on the poles should not be included in the value of its assets, the commissioner noted that the labor costs represent part of the installation costs, and hence represent part of the value of the assets.

The Commissioner also rejected appellant's claims with regard to the value computations made by the commissioner. While appellant argued the one-half annual allowance for the 1974 cost was unfair, the commissioner pointed out that appellant only owned the property for twenty days in 1974. While appellant argued the assets became obsolete very quickly after the 1974 sale, the commissioner pointed out the best evidence of the value of the assets was the 1974 sale price. The commissioner noted that appellant failed to file a written claim pursuant to R.C. 5711.18 requesting deduction from book value, and, as a result, the commissioner had no jurisdiction to now consider appellant's claims with regard to a deduction from [*3] book value.

Lastly, the commissioner rejected appellant's claims that certain abandoned property should not have been included. The commissioner pointed out that appellant's mere assertion of abandonment, without explanation of the circumstances surrounding the abandonment, will not support an abandonment claim.

The Board of Tax Appeals affirmed the commissioner's decision. The board noted the Ohio Constitution requires property to be taxed at its true value, and R.C. 5711.18 defines "true value" as "book value less depreciation." In Tele-Media v. Lindley (1982), 70 Ohio St. 284, the court held the best evidence of true value is an arm's-length sale between a willing seller and a willing buyer. The court further held that the burden lies on the taxpayer to prove the allocated purchase price of personal property in a recent sale is not the best evidence of true value.

In the case at bar, the board noted appellant failed to meet its burden of proving the allocated purchase price was not the best evidence of true value. The board rejected appellant's assertions that it 1.) allocated the values solely for federal income tax purposes and 2.) failed to include the value of the [*4] franchise when allocating the value. The board noted it was too late for appellant to raise vague and unsupported objections concerning its allocation of the December 11, 1974, purchase price.

The board, like the commissioner, rejected appellant's claims with regard to abandonment, depreciation, obsolescence, tree trimming and pole work costs, and the housedrops. Both the board and the commissioner agreed appellant failed to follow R.C. 5711.18 which requires taxpayers to file written requests for deductions from book value at the time they file their tax returns.

The board noted that although appellant contends that housedrops are not personal property but become attached to their customers' realty, appellant lists the housedrops on its books as its personal property. The board also noted testimony in the record which shows the reason appellant leaves the housedrops in place after discontinuation of service to a customer is because the housedrops are too costly to remove. Appellant reuses the same "abandoned" housedrops when service is requested again for the same house.

The board found the commissioner's depreciation calculations to be reasonable. The commissioner allowed appellant [*5] a 5 % depreciation deduction for 1975, even though appellant owned the property for only twenty days in 1974, and allowed appellant a 15 % depreciation deduction for 1976. Appellant continued to use the property until the system was replaced in 1981, seven years after purchase. The board noted that there was no evidence "but that appellant could have used the property longer" than those seven years. The Board accordingly found nothing unjust or unreasonable with the commissioner's use of the 10 % composite depreciation allowance, which projects a useful life of ten years.

R.C. 5717.04 provides in pertinent part:

"If upon hearing and consideration of such record and evidence the court decides that the decision on the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification. (Emphasis Added)

We must affirm where we find the decision of the Board of Tax Appeals was reasonable and lawful.

We affirm.

ASSIGNMENT OF ERROR I

"THE BOARD OF TAX APPEALS [*6] ERRED IN FAILING TO DEDUCT THE VALUES OF "HOUSE DROPS"."

Appellant contends the housedrops are attached to the customer's realty, and hence are not personal property. Appellant cites Telerama, Inc., (January 8, 1975), Tax Commissioner Certificate of Determination No. 13269, where the commissioner held the "set connectors" (similar to the housedrops in the case at bar) became part of the real property occupied by the subscribers. In that case, however, the company made no claim of ownership to or control over the set connector. In the case at bar, appellant lists the housedrops on its books as personal property of the business, and reuses the housedrops if a later tenant of the real property wishes to subscribe.

Appellant attempts to distinguish Communication Properties, Inc. v. Lindley, (August 15, 1978), Bd. of Tax App. Case No. 77-C-60, unreported, from the case at bar. In that case, the company specifically reserved ownership in the property in question. While we agree appellant made no specific reservation of ownership in the case at bar, appellant cites no authority which would require such a specific reservation of ownership in order for the housedrops to remain [*7] appellant's personal property.

In Zangerle v. Republic Steel Corp. (1945), 144 Ohio St. 506, paragraph two of the syllabus, the court held personalty may become a fixture if 1.) there is an actual annexation to the land, 2.) the personalty is put to its intended use, and 3.) it is intended that the personalty be permanently annexed to the realty. See, also PBI Industries, Inc. v. Lindley (1983), 6 Ohio St. 3d 203, 205. We find no error with the board's findings that the housedrops were listed on appellant's books are personal property, appellant presented insufficient evidence of intent to relinquish ownership of the housedrops, and the housedrops were left in place not due to ownership by the subscriber, but due to the fact it would cost too much to remove the housedrops after each termination of service.

Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE BOARD OF TAX APPEALS ERRED IN FAILING TO DEDUCT LABOR COSTS FOR TREE TRIMMING, REARRANGING UTILITY FACILITIES AND OTHER RELATED MATTERS."

In Alcoa v. Kosydar (1978), 54 Ohio St. 2d 477, the court held that the true value of personal property included the expenses incurred [*8] in creating the property. In Gruen Watch Co. v. Evatt (1944), 143 Ohio St. 461, the court included import duties in the value of personal property. In Marc Lance Ford, Inc. v. Porterfield (1969), 18 Ohio St. 2d 219, the court included the manufacturer's federal excise tax in the value of personal property held by an auto dealer. See, also Twyman Films, Inc. v. Lindley (1978), 54 Ohio St. 2d 176.

We do not find the commissioner's and the board's decision to include the costs of tree trimming and rearranging utilities to be an unreasonable or unlawful decision. Accordingly, we overrule appellant's second assignment of error.

ASSIGNMENT OF ERROR III

"THE BOARD OF TAX APPEAL ERRED IN APPLYING THE 10 % COMPOSITE PRIMA FACIE ANNUAL DEPRECIATION RATE (302 COMPUTATION) NOTWITHSTANDING UNUSUAL AND SPECIAL CIRCUMSTANCES. ITS RIGID APPLICATION IN THE INSTANT CASE CREATED AN UNJUST AND UNREASONABLE RESULT."

ASSIGNMENT OF ERROR IV

"THE BOARD OF TAX APPEALS ERRED IN TREATING THE PROPERTY PURCHASED BY THE TAXPAYER IN THIS CASE AS "NEW PROPERTY" FOR PURPOSES OF APPLYING THE TAX COMMISSIONER'S 302 COMPUTATION."

In Tele-Media, Co. v. Lindley [*9] (1982), 70 Ohio St. 2d 284, the court explained the 302 computation:

"* * * This refers to the directive published by the Tax Commissioner for the purpose of promoting industry-wide uniformity in determining the true value of depreciable property used in business. The directive prescribes composite annual depreciation allowances to be used in lieu of book depreciation. * * *"

The Ohio Supreme Court has approved the directive as practical, reasonable, and lawful. PPG Industries v. Kosydar (1981), 65 Ohio St. 2d 80, 83. The 302 computation, however, is only prima facie evidence for determining the true value of personal property. When a taxpayer challenges the method, the board must determine 1.) if special or unusual circumstances exist which indicate the computation is inappropriate and 2.) if the computation creates an unjust or unreasonable result in the case. Tele-Media, Co., supra.

We do not believe the commissioner's or the board's use of the 302 computation was unreasonable or unlawful. Although appellant argues the computation does not take into account the obsolescence of the system, we note appellant continued to use the system for seven years after [*10] the 1974 purchase. The seven year actual period of use is only three years short of the ten years projected in the 302 computation used by the commissioner. See, also, our discussion under appellant's sixth assignment of error, where he again raises the obsolescence issue.

In the fourth assignment of error, appellant argues the "302" computation of depreciation does not allow the property's depreciation between the 1964 construction of the system and the 1974 sale to appellant. We agree with the board that while the computation does not allow for accumulated depreciation, the price, and hence value, of the property in 1974 reflects accumulated depreciation. Certainly appellant did not pay full price in 1974 for a system built in 1964.

Appellant's third and fourth assignments of error are overruled.

ASSIGNMENT OF ERROR V.

"THE BOARD OF TAX APPEALS ERRED IN FINDING (sic) TO DEDUCT THE VALUE OF ABANDONED PROPERTY FROM THE ASSESSED VALUES."

We have reviewed the record below and find insufficient evidence to support appellant's claim that a housedrop is abandoned each time a customer decides to discontinue appellant's service. Quite to the contrary, the record reveals appellant [*11] reuses the same "abandoned" housedrops when service is requested again for the same house.

Appellant fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

"THE BOARD OF TAX APPEALS ERRED IN REFUSING TO ALLOW FUNCTIONAL OBSOLESCENCE AS A FACTOR IN DETERMINING THE TRUE VALUE IN MONEY OF THE PROPERTY IN QUESTION."

Appellant cites Standard Oil Co. v. Glandor (1951), 155 Ohio St. 61, paragraph three of the syllabus, where the court held obsolescence and functional depreciation are essential factors in the determination of the value of property for tax purposes. In both Standard Oil and B.F. Keith Columbus Co. v. Bd. of Revision (1947), 148 Ohio St. 253, where the court quoted and followed Standard Oil, the court dealt with obsolescence and functional depreciation which had already occurred at the time in question. In the case at bar, appellant wishes the commissioner and the board to predict obsolescence and functional depreciation, and worse yet, appellant wishes us to use the hindsight of twelve years when deciding the case.

In Hatchadorian v. Lindley (1986), 21 Ohio St. 3d 66, 71, the court held that determination of value [*12] are issues of fact, not issues of law. When reviewing the facts below, we find appellant bought the property in 1974. The commissioner used a 10 % composite depreciation allowance, which permitted depreciation over a ten year period. Although appellant submitted a 1981 "expert's report" on the obsolescence of the property, the report was written five and six years after the period of the tax returns in question. We find nothing unreasonable or unlawful with the commissioner's or the board's decisions concerning the value of appellant's personal property.

Appellant's sixth assignment of error is overruled.

ASSIGNMENT OF ERROR VII

"THE BOARD OF TAX APPEALS ERRED IN FINDING THAT THE TAXPAYER HAD NOT MADE WRITTEN CLAIM FOR DEDUCTION FROM NET BOOK VALUE."

ASSIGNMENT OF ERROR VIII

"THE BOARD OF TAX APPEALS ERRED IN FAILING TO FIND THAT THE TAX COMMISSIONER ASSESSED SOMETHING OTHER THAN APPELLANT'S "BOOK VALUE" OF TAXABLE PROPERTY."

R.C. 5711.18 provides in pertinent part:

"In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value of such property, unless [*13] the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from net book value of accounts receivable or depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return."

Where the taxpayer fails to submit a written claim, the board may not consider the argument that the true value of the personal property is less than its depreciated book value. Willys-Overland Motors, Inc. v. Evatt (1943), 141 Ohio St. 402; Wright Aeronautical Corp. v. Gander (1949), 151 Ohio St. 29.

Appellant argues it listed the "book value less book depreciation" when it listed the prior owner's book value on the return. Appellant further argues his explanatory letter to the county auditor which he sent along with its tax return constitutes a written claim and thus satisfies the requirements of the statute. Appellant cites in Sun Chemical Corp. v. Lindley, Bd. of Tax App. No. F-918 (Jan. 11, 1984), unreported, where appellant alleges the board held that sending a letter constitutes sufficient compliance with the statute.

Appellant further [*14] contends that before we can reach the issue of whether it filed a written claim for deduction pursuant to the statute, we must first ask whether the commissioner has assessed "book value" or some other value to appellant's personal property. Appellant argues that if the commissioner has assessed something other than book value, then appellant may file an application for review and redetermination of his claims. In this regard, appellant cites R.C. 5711.31 which states that an application for review and redetermination may be filed where the "assessor assesses property listed in the return by the taxpayer in excess of value so listed in the return."

We do not believe the language of R.C. 5711.31 permits circumvention of the clear R.C. 5711.18 requirements that 1.) the taxpayer list the "book value less book depreciation" of the property and 2.) the taxpayer file a written claim for deduction at the time of filing his return if the taxpayer wishes a deduction from the "book value less book depreciation."

In the case at bar, appellant did not satisfy R.C. 5711.18. Appellant clearly failed to list its "book value less book depreciation" of the personal property on its return. We do not [*15] believe appellant's explanatory letter to the county auditor, when viewed in light of appellant's failure to list the proper values on the returns, constitutes a written claim as required by the statute.

Appellant's seventh and eighth assignments of error are overruled.

ASSIGNMENT OF ERROR IX

"THE BOARD OF TAX APPEALS ERRED IN NOT FINDING THAT THE TAXPAYER'S ALLOCATION OF PURCHASE PRICE WAS DONE SOLELY FOR THE PURPOSE OF REDUCING APPLICANT'S FEDERAL INCOME TAX LIABILITY AS PERMITTED BY THE INTERNAL REVENUE CODE AND RELATED REGULATIONS."

Appellant cites Heimerl v. Lindley (1980), 63 Ohio St. 2d 209, where the court found evidence that personal property in that case was overvalued for federal income tax purposes, and thus permitted the use of a lower value for personal property tax purposes. Appellant argues that while the correction sheets prepared in 1974 by the county auditor for the prior owner of the personal property in the case at bar valued the property at $ 47,823.00, the commissioner and the board have determined that the same property is worth $ 1,442,790.00 the next year, 1975. Appellant further contends that when allocating the purchase price of the [*16] system, appellant failed to allocate any amount for the value of the franchise.

We find no error with the board's decision. The best indicator of true value is a recent sale price. Tele-Media, supra. The board considered the price appellant paid for the system twenty days before the start of the 1975 tax year. Questions of value are questions of fact. Hatchadorian, supra. Appellant presented the board with insufficient evidence regarding its assertion that its allocation of purchase price was improper. We find the decision of the board to be lawful and reasonable.

Appellant's ninth assignment of error is overruled.

LEXSEE

Columbus Board of Education, Appellant, vs. Franklin County Board of Revision; Grange Mutual Casualty Co., Appellees.

CASE NO. 88-C-1105 (Real Property Taxation)

STATE OF OHIO -- BOARD OF TAX APPEALS

1990 Ohio Tax LEXIS 174

February 16, 1990

[*1]

APPEARANCES:

For the Appellant - Teaford, Rich, Belskis Coffman & Wheeler, By: Gary Dicker, 20 East Broad Street, Columbus, Ohio 43215

For the Appellee Board of Revision - Michael Miller, Franklin County Prosecutor, By: James A. Gorry, Assistant, 410 South High Street, Columbus, Ohio 43215

For the Appellee Grange Mutual Casualty Company - David Roark, Assistant General Counsel, Grange Mutual Casualty Company, 650 South Front Street, Columbus, Ohio 43216

OPINION:

DECISION AND ORDER

This appeal was filed with the Board of Tax Appeals on December 7, 1988 by the Columbus Board of Education (appellant). Appellant appeals from a decision of the Franklin County Board of Revision whereby said body passed upon a complaint concerning the true value of certain real property owned by Grange Mutual Casualty Company (taxpayer) for tax year 1987. By its decision, the Board of Revision determined that on January 1, 1987, the subject property had the following fair market and taxable values:

	FAIR MARKET VALUE		TAXABLE VALUE
Building	$ -0-	Building	$ -0-
Land	$ 107,600	Land	$ 37,660
Total	$ 107,600	Total	$ 37,660

In its notice of appeal, the Board of Education states that [*2] the subject property had a fair market value of $ 325,000 and a taxable value of $ 113,750.

The subject property is located at 677 South High Street in Columbus, Franklin County, Ohio. It appears upon the Franklin County Auditor's records as permanent parcel number 10-22767.

The tax lien date involved in this appeal is January 1, 1987. On that date, the subject property was comprised of a house and garage situated on a lot measuring 52.116 feet by 187.50. The house and garage were razed in late February and early March, 1987, subsequent to the tax lien date. Hence, contrary to the determination of the Board of Revision, we must assign a value to the house and garage as well as the land.

The taxpayer purchased the subject property on November 21, 1986 (approximately 41 days before the involved tax lien date) from the Estate of Katherine Elizabeth Hostettler for the sum of $ 325,000. This fact is evidenced by the deed of transfer and the "Real Property Conveyance Fee Statement of Value and Receipt" which are part of the statutory transcript provided by the Board of Revision.

This matter is submitted to the Board of Tax Appeals upon the notice of appeal and the statutory transcript [*3] provided by the Board of Revision. The statutory transcript includes two (2) tape recordings of the proceedings held before the Board of Revision. Also, the statutory transcript includes the appraisal report of Mr. Tom Wilhelm, the expert appraiser of the taxpayer. We also have the evidence adduced during the evidentiary hearing held before this Board on January 4, 1990.

Where one by appeal to the Board of Tax Appeals complains about the taxable value placed upon real property by a county board of revision, this Board is charged to determine the correct taxable value. R.C. Section 5717.03. To make this determination, we first must determine the fair market or true value of the subject property, as taxable value is the product of fair market value multiplied by the applicable common level of assessment. R.C. Section 5713.03.

The determination of the fair market value of real property is a question of fact which is primarily within the province of this Board to make. Board of Revision v. Fodor (1968), 15 Ohio St. 2d 52, syllabus. Even so, we are not vested with unfettered discretion. In fact, this Board is constrained to determine the market value of real [*4] property in view of the guidelines set forth by the Ohio Supreme Court (Court) in several pertinent decisions. We review these decisions in the paragraphs below.

In the case of Park Investment Company v. The Board of Tax Appeals (1964), 175 Ohio St. 410, the Court had this to say, at page 412, about fair market value:

"It is clear that under the Ohio law all real property, regardless of its nature or use, may be assessed and taxed only by a uniform rule on the basis of value.

"Thus, the determinative issue is: What is the value or true value in money of real property?

"In the last analysis the value or true value in money of any property is the amount for which that property would sell on the open market by a willing seller to a willing buyer. In essence, the value of property is the amount of money for which it may be exchanged, i.e., the sales price.

"Respondent urges that the sales price is only one of many things which must be taken into account in determining value.

"The confusion in the area of valuation arises from a failure to differentiate between the ultimate result which is sought to be attained, namely, the value of the property in question, and the methods [*5] which may be used to determine such value in the absence of an actual sale.

"The best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so. Paragraph two of the syllabus in In re Estate of Sears 172 Ohio St., 443, 178 N.E. (2d), 240. This without question, will usually determine the monetary value of the property. However, such information is not usually available, and thus an appraisal becomes necessary. It is in this appraisal that the various methods of evaluation, such as income yield or reproduction cost, come into action. Yet, no matter what method of evaluation is used, the ultimate result of such an appraisal must be to determine the amount which such property should bring if sold on the open market.

"Therefore, the value, or true value in money of property for the purpose of taxation, is that amount which should result from a sale of such property on the open market."

(Emphasis added by the Board)

In the later case of Conalco v. Bd. of Revision (1977), 50 Ohio St. 2d 129, the Court [*6] expressed its view of the use of a sale to establish the fair market value of real property. In paragraph one of the syllabus, the Court stated:

"The best evidence of the 'true value in money' of real property is an actual, recent sale of the property in an arm's length transaction. (State, ex rel. Park Investment Co., v. Bd. of Tax Appeals, 175 Ohio St. 410, approved and followed.)"

Then, in Ratner v. Stark Cty. Bd. of Revision (1986), 23 Ohio St. 3d 59, the Court refined its prior holdings in Park Investment Company, supra, and Conalco, supra. In Ratner, the court definitively ruled that fair market value is not synonymous with the sale price. In fact, at page 61, the Court stated that "although the sale price is the 'best evidence' of true value of real property for tax purposes, it is not the only evidence." For, the Court indicated that where an inference is raised that the sale price may not reflect true value, this Board must at least consider and review other probative evidence which may rebut the presumption that the sale price reflects true value, regardless of any provisions of R.C. Section 5713.03 to the contrary. The Court expressly stated [*7] that we should consider and review matters such as evidence presented by independent real estate appraisers, the mode of payment, sale-lease agreements, abnormal economic conditions, below-market financing, evaluation of the cash equivalency of the sale price and all other evidence which may rebut the presumption that the sale price reflects true value.

The Court's decisions of Park Investment Company, supra, Conalco, supra, and Ratner, supra, should be viewed in light of the Court's decision of Cardinal Federal Savings & Loan Association v. Board of Revision (1975), 44 Ohio St. 2d 13. In the syllabus of that case, the Court stated:

"2. The Board of Tax Appeals is not required to adopt the valuation fixed by any expert or witness. * * *.

"3. The Board of Tax Appeals is vested with wide discretion in determining the weight to be given to evidence and the credibility of witnesses which come before the board. * * *."

It is within the light of the foregoing decisions of the Court that we consider and resolve the merits of the instant appeal. Our discussion follows in the paragraphs below.

Here, again, the subject property was purchased by the taxpayer for $ [*8] 325,000 on November 21, 1986, about 41 days prior to the tax lien date of January 1, 1987. The Board of Education relies upon the Court's decisions in Ratner, supra, and Conalco, supra, and urges this Board to conclude that the sale price constitutes the best evidence of the fair market value of the subject property. The Board of Education alleges that the record before this Board supports the conclusion that the November 21, 1986 sale was recent, actual and constituted an arm's-length transaction. Hence, the Board of Education maintains that on January 1, 1987, the fair market value of the subject property was $ 325,000.

Additionally, the Board of Education rules upon our Decision and order in Grange Mutual Casualty Co. v. Franklin County Board of Revision et al. (6-30-88), Board of Tax Appeals Case No. 87-C-1217 (hereinafter "Grange I". In Grange I, we had to determine whether the November 21, 1986 sale of the subject property constituted the best evidence of the fair market value of the subject property for tax year 1986. We found that the sale was recent, actual and constituted an arm's-length transaction. As such, we further found that the sale price [*9] was the best evidence and ordered the Franklin County Auditor to list and assess the subject property at a fair market value of $ 325,000.

For its part, the taxpayer contends that the November 21, 1986 sale, though recent and actual, was not an arm's-length transaction. The taxpayer attempted to rebut the presumption that the sale price is the best evidence of fair market value by presenting the testimony of its employees and an appraiser, Mr. Tom Wilhelm. The taxpayer's employees, none of which were actually involved in negotiating the purchase of the subject property, testified that the taxpayer purchased the subject property under duress at an inflated price. In his appraisal report, Mr. Wilhelm alleged that the subject property sold for much more than comparable properties. Using the market data appraisal approach, Mr. Wilhelm concluded that the subject land had a fair market value of only $ 97,800 as of January 1, 1987. Mr. Wilhelm did not appraise the house and garage as they had been razed at the time that he conducted his appraisal.

The taxpayer is an insurance company. It owns property which surrounds the subject property. The taxpayer's home office is [*10] located at 650 South Front Street which is in the rear of and across the street from the subject property. The taxpayer also owns the property located at 761 South High Street which is within three feet of the south boundary of the subject property. Presently, this property is leased to and used as Capital University Law School.

Prior to its acquisition of the subject property, the taxpayer had resolved that within the next ten years, it would have to develop the site leased to Capital University to accommodate its expansion plans. The proposed expansion plans were drafted with the assumption that the taxpayer would eventually acquire title to the subject property. Alternative plans were drafted to allow for expansion in the event that the taxpayer was not able to acquire the subject property.

The taxpayer contends that its desire and expected need to develop the property surrounding the subject property caused it to pay too much for the subject property. The taxpayer contends that it purchased the subject property under duress and compulsion. Accordingly, the taxpayer concludes that the purchase transaction was not on arm's-length transaction.

In Walters v. Knox Cty. [*11] Bd. of Revision (1989), 47 Ohio St. 3d 23, the Court set forth the definition of an arm's-length sale. At page 25, the Court stated:

"In sum, an arm's-length sale is characterized by these elements; it is voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest."

Hence, a voluntary sale between parties acting in their own self-interest which generally, but not necessarily, takes place in an open market constitutes an arm's-length transaction.

Here, we find that the Estate of Katherine Elizabeth Hostettler and the taxpayer acted in their own self-interest when they negotiated and consumated the sale of the subject property. The Estate of Katherine Elizabeth Hostettler negotiated the highest sale price that it could negotiate. Even though the taxpayer resolved that the purchase price was too high, the taxpayer determined it prudent to pay the purchase price. The parties voluntarily consumated the transfer of the subject property to the taxpayer. Neither party was legally compelled to consummate the sale. In fact, the taxpayer indicated that it had other alternatives, though less desirable, [*12] to purchasing the subject property.

In consideration of the foregoing, we hereby find that the subject property was purchased by the taxpayer pursuant to an arm's-length transaction as that term is used and defined in Walter's, supra. We are not required to reach a different decision even though the subject property was not advertised for sale to the general public and was purchased pursuant to a private sale. This type of transaction is common place and was clearly contemplated by the Court when it defined "arm's-length sale" in Walters, supra.

Ratner, supra, requires this Board to at least consider and review other probative evidence which may rebut presumption that the sale price reflects true value. The taxpayer relies upon the testimony of its employees and the appraisal of Mr. Wilhelm to support its contention that the sale price is not the best evidence of the true value of the subject property. We have considered and reviewed all of the evidence properly before this Board. While it is clear from the testimony of taxpayer's employees and Mr. Wilhelm's appraisal that the taxpayer may have paid a higher price for the subject property than others paid [*13] for surrounding property, we do not accept the taxpayer's conclusion that this evidence rebuts the presumption that the sale price is the best evidence in this instance. We are not persuaded to adopt the taxpayer's position in this matter.

Giving consideration to the entire record before this Board, the applicable statutes and cases, and the findings of this Board, it is the Decision and Order of the Board of Tax Appeals that as of January 1, 1987, the subject property had the following fair market and taxable values.

	Fair Market Value		Taxable Value
Land	$ 307,500	Land	$ 107,620
Building	17,500	Building	6,120
Total	$ 325,000	Total	$ 113,740

The Franklin County Auditor is ordered to list and assess the subject property in conformity with this Decision and Order.

LEXSEE

MACQ Inc., an Ohio Corp., Appellant, vs. Marion County Board of Revision and the Marion County Auditor, Appellees.

CASE NO. 96-K-1457 (REAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

1998 Ohio Tax LEXIS 1236

September 11, 1998

[*1]

APPEARANCES:

For the Appellant - Todd W. Sleggs, Todd W. Sleggs & Associates, 1015 Euclid Avenue, Third Floor, Cleveland, Ohio 44115

For the County Appellees - Jim Slagle, Marion County Prosecuting, Attorney, By: Susan M. Bruder, Assistant Prosecuting Attorney, 133 1/2 Center Street, Marion, Ohio 43215

OPINION:

DECISION AND ORDER

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed on November 1, 1996 on behalf of appellant, MACQ Inc., an Ohio Corp. Appellant appeals a decision of the Marion County Board of Revision ("BOR"), mailed on October 4, 1996, in which it determined that the subject property had a total taxable value of $ 444,740 as of tax lien date January 1, 1995.

The subject property is located in the Marion City, Marion City School District taxing district and appears in the records of the Marion County Auditor ("Auditor") as parcel numbers 12-383040-0700 and 12-383040-0800. Both the Auditor and the BOR determined that the subject property had the following true and taxable values as of tax lien date:

Parcel No. 12-383040-0700

	TRUE VALUE		TAXABLE VALUE
Land	$ 39,310	Land	$ 13,760
Building	362,830	Building	126,990
Total	$ 402,140	Total	$ 140,750

[*2]

Parcel No. 12-383040-0800

	TRUE VALUE		TAXABLE VALUE
Land	$ 39,310	Land	$ 13,760
Building	3,290	Building	1,150
Total	$ 42,600	Total	$ 14,910

In its notice of appeal, n1 appellant claims that the current market value of both parcels comprising the subject property is $ 160,000 with a total taxable value of $ 56,000. In advancing this claim, appellant has attributed $ 144,000 of true value to parcel number 12-383040-70 with the remaining $ 16,000 being attributed to 12-383040-0800.

n1 Included as an attachment to its notice of appeal, counsel for appellant makes the following assertion:

"Appellant says that the correct taxable value is less than 35% of current market value for the tax year(s) 1995, 1996 and 1997. Evidence of the common level of assessment will be presented to the Board on or before the hearing. Accordingly, though 35% was used in this Notice of Appeal, it is believed that such common level is less than 35% based on the most recent sales ratio studies pursuant to Section 5715.19(F) Ohio Rev. Code."

This is an issue which counsel has continued to raise before this Board, county boards of revision and common pleas courts. See, e.g., Hickman v. Franklin Cty. Bd. of Revision (July 28, 1995), B.T.A. Case Nos. 94-K-1151, et seq., unreported; Central Benefits Mutual Ins. Co. v. Franklin Cty. Bd. of Revision (Dec. 20, 1996), B.T.A. No. 96-K-1, unreported; Kenney, Trustee v. Franklin Cty. Bd. of Revision (Mar. 21, 1997), B.T.A. No. 96-K-259, unreported. Despite his representation that "evidence of the common level of assessment will be presented to the Board," counsel has not done so in this case or in any of the preceding cases. Presumably, his reluctance to do so is predicated upon decisions of the Supreme Court of Ohio and the Tenth District Court of Appeals expressly holding that such evidence is not properly submitted to either the Board of Tax Appeals or a court of common pleas because neither tribunal has jurisdiction to respond to such arguments. See Columbus Bd. of Edn. v. J.C. Penney Properties, Inc. (1984), 11 Ohio St.3d 203. See, also, J.C. Penney Properties, Inc. v. Franklin Cty. Bd. of Revision (Aug. 27, 1992), Franklin App. Nos. 91AP-872, et seq., unreported, motion to certify overruled, (Jan. 20, 1993), Sup. Ct. No. 92-2156, unreported. Based upon the preceding decisions, no further discussion will be directed to this "argument."

[*3]

Although the parties were accorded an opportunity to present additional evidence at a hearing before this Board, they have elected to waive hearing and have the matter submitted upon the existing record and their written arguments. Accordingly, we now proceed to consider this appeal based upon appellant's notice of appeal, the statutory transcript certified by the Auditor and the briefs which have been filed by counsel. n2

n2 Attached to the brief filed by counsel for the county appellees, but not included within the statutory transcript, are copies of a newspaper article and a quit claim deed. Although appellant has not raised any objections to these documents being submitted in this fashion, this Board sua sponte strikes from consideration these two attachments. See Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision (1996), 76 Ohio St.3d 13, 16 ("After the BTA hearing, Nestle submitted a copy of a resolution and quitclaim deed by the Franklin County Commissioners. Because these documents were not part of the original record from the BOR and were submitted after the BTA hearing, they must be disregarded by the BTA.")

In an appeal filed pursuant to R.C. 5717.01, there [*4] exists no presumption that the values found by a county board of revision are correct. Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (1994), 68 Ohio St.3d 336, 337, and Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision (1994), 68 Ohio St.3d 493, 495. Nevertheless, an appellant bears the burden of presenting evidence in support of the value which it has asserted. Western Industries, Inc. v. Hamilton Cty. Bd. of Revision (1960), 170 Ohio St. 340, 342. Once competent and probative evidence of value has been presented, then the other parties to the appeal have the burden of providing evidence which rebuts that of the appellant. Id.; Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision (1988), 37 Ohio St.3d 318, 319. While this Board may ultimately find that a property has the same value as that previously determined by a county board of revision, either because the evidence supports such a conclusion or the appellant has failed to prove otherwise, see, e.g., Westlake Med. Investors, L.P. v. Cuyahoga Cty. Bd. of Revision (1996), 74 Ohio St.3d 547, 549; National Church Residence v. Licking Cty. Bd. of Revision (1995), 73 Ohio [*5] St.3d 397, such a conclusion will be the result of an independent, de novo, determination which is predicated upon the preponderance of the evidence.

The sole issue which is presented in this appeal is whether the BOR improperly rejected, as the best evidence of value for ad valorem tax purposes for tax year 1995, the price at which the subject property sold on November 21, 1994. In support of its claim that the subject's true value was its November 21, 1994 sale price, appellant presented the BOR with evidence, in the form of a conveyance fee statement, a warranty deed, a purchase agreement and testimony, that the subject property transferred from Aqua Tech Environmental Laboratories, Inc. to appellant for $ 160,000.

In considering the parties' arguments, we first refer to the requirements imposed by virtue of R.C. 5713.03:

> "The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon ***. In determining the true value of any tract, lot, or parcel of real estate under this section, if [*6] such tract, lot or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes. ***" (Emphasis added.)

In paragraph one of its syllabus in Conalco v. Bd. of Revision (1977), 50 Ohio St.2d 129, the Supreme Court acknowledged the reliability of a "qualifying" sale for ad valorem tax purposes:

> "The best evidence of the 'true value in money' of real property is an actual, sale of the property in an arm's-length transaction. (State, ex rel. Park Investment Co., v. Bd. of Tax Appeals, 175 Ohio St. 410, approved and followed.)" (Emphasis added.)

In its syllabus in Walters v. Knox Cty. Bd. of Revision (1989), 47 Ohio St.3d 23, the Supreme Court succinctly described an arm's-length sale as follows:

> "An arm's length sale is characterized by these elements: it is voluntary, i.e. without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest."

Elaborating within the body [*7] of its opinion, the court stated:

> "We have never defined 'arm's-length sale.' *** In its opinion below, the BTA defined it as '*** one which encompasses bidding and negotiation on the open market between a ready, willing and able buyer, and a ready, willing and able seller, both being mentally competent, and neither acting under duress or coercion.' According to Black's Law Dictionary (5 Ed. 1979) 100, in an arm's-length transaction '*** each [party] acts in his or her own self interest ***.' In sum, an arm's-length sale is characterized by these elements: it is voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest. ***" Id. at 25. (Footnote omitted.)

According to the county appellees, the BOR properly rejected the sale of the subject property in determining its value for tax purposes for four reasons: (1) the property was not offered on the open market prior to its sale; (2) the seller was acting under compulsion; (3) the parties to the sale were related; and (4) the price for which the property sold was one "assigned" it by the parties, in essence, amounting to an allocation of value [*8] of several different property interests. We now dispense with each of these arguments.

As pointed out by the court in Walters, supra, arm's-length sales "generally" occur in the open market. In Bd. of Edn. of Plain Local Schools v. Franklin Cty. Bd. of Revision (June 9, 1995), B.T.A. No. 94-S-361, unreported, we rejected the notion that sales must always occur in such a manner:

> "The county appellees assert that this sale was not an arm's length transaction because the property was not offered for sale on the open market. We disagree. While the lack of advertisement on the open market may have influenced the price paid for the subject property, it does not necessitate a finding that the subject sale was not arm's length in nature." Id. at 10.

See, also, Dublin City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision (May 5, 1995), B.T.A. No. 93-T-1107, unreported, affirmed (Mar. 7, 1996), Franklin App. No. 95APH06-718, unreported. Accordingly, merely because the subject property was not openly advertised as being for sale does not mandate a finding that it was other than arm's-length.

The county appellees next assert that the seller was acting under [*9] compulsion when it sold the subject property. Appellant's treasurer testified before the BOR that the former owner, as well as two other entities, had once been subsidiaries of the same parent company. Apparently, these entities were later established as independent corporations. Shortly thereafter, the subject sale occurred. The county appellees assert that the seller was compelled to sell the subject property in order to allow the former subsidiaries to "go their separate ways." Aside from the county appellees' argument that a restructuring of business entities is akin to a dissolution or divorce, there exists no evidence in the record before this Board which would support a finding that the seller was economically, or otherwise, compelled to dispose of the subject property. See, generally, Lakeside Ave. L.P. v. Cuyahoga Cty. Bd. of Revision (1996), 75 Ohio St.3d 540.

The county appellees also claim that the buyer and seller were related. The only evidence cited as support for this assertion is the testimony of appellant's treasurer before the BOR that, at one time prior to the November 21, 1994 sale, the principals of appellant worked for a sister company of the seller. When [*10] this remote relationship is considered in light of the remainder of the treasurer's testimony that the buyer and seller were unrelated entities, we are unable to find otherwise.

Finally, the county appellees argue that the sale price is not reflective of the subject's true value because it reflected a division of tangible and intangible property interests between the seller and its former sister corporation. Even assuming that the county appellees had presented evidence to support this claim, which they did not, it is unclear how the reliability of the sale price is called into question. The county appellees seem to suggest that appellant is obligated to present evidence which corroborates the sale price, e.g., an independent appraisal. However, it is due to the fact that a recent arm's-length transaction has occurred that there exists no need to resort to such valuation methods. See State, ex rel. Park Investment Co. v. Bd. of Tax Appeals (1964), 175 Ohio St. 410, 412 ("The best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but [*11] not compelled to do so.")

Based upon the foregoing, we find the November 21, 1994 sale to be the best evidence of the subject property's value as of tax lien date. n3 Cf. Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision (1997), 78 Ohio St.3d 325. Accordingly, it is the decision of the Board of Tax Appeals that the subject property had the following true and taxable values as of January 1, 1995:

n3 Appellant has not provided this Board with a means by which to allocate the sale price between the land and building values for each of the two parcels involved in this appeal. Accordingly, in an effort to comply with the court's mandate in Youngstown Sheet & Tube Co. v. Bd. of Revision (1981), 66 Ohio St.2d 398, paragraph three of the syllabus, we allocate the sale price between the two parcels using the percentages of value previously attributed to these parcels by both the Auditor and the BOR.

Parcel No. 12-383040-0700

	TRUE VALUE		TAXABLE VALUE
Land	$ 14,150	Land	$ 4,950
Building	130,530	Building	45,690
Total	$ 144,680	Total	$ 50,640

Parcel No. 12-383040-0800

	TRUE VALUE		TAXABLE VALUE
Land	$ 14,150	Land	$ 4,950
Building	1,170	Building	410
Total	$ 15,320	Total	$ 5,360

[*12]

It is therefore the order of this Board that the Marion County Auditor list and assess the subject property in accordance with our decision as announced herein.

§ 5711.18. Valuation of accounts and personal property; procedure; income yield.

In the case of accounts receivable, the book value thereof less book reserves shall be listed and shall be taken as the true value thereof unless the assessor finds that such net book value is greater or less than the then true value of such accounts receivable in money. In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from net book value of accounts receivable or depreciated book value of personal property must be made in writing by the taxpayer at the time of making the taxpayer's return; and when such return is made to the county auditor who is required by sections 5711.01 to 5711.36, inclusive, of the Revised Code, to transmit it to the tax commissioner for assessment, the auditor shall, as deputy of the commissioner, investigate such claim and shall enter thereon, or attach thereto, in such form as the commissioner prescribes, the auditor's findings and recommendations with respect thereto; when such return is made to the commissioner, such claim for deduction from depreciated book value of personal property shall be referred to the auditor, as such deputy, of each county in which the property affected thereby is listed for investigation and report.

Any change in the method of determining true value, as prescribed by the tax commissioner on a prospective basis, shall not be admissible in any judicial or administrative action or proceeding as evidence of value with regard to prior years' taxes. Information about the business, property, or transactions of any taxpayer obtained by the commissioner for the purpose of adopting or modifying any such method shall not be subject to discovery or disclosure.

HISTORY: RS § 2739; 83 v 80; GC § 5389; 114 v 715; 115 v 565; 116 v PtII, 253; 118 v 657; 119 v 34; 123 v 777; Bureau of Code Revision, 10-1-53; 129 v 582(957) (Eff 1-10-61); 148 v H 612. Eff 9-29-2000.

000032

5703-3-10 Tangible personal property tax; true value of depreciable assets; application of "true value" or "302" computation.

(A) Tangible personal property used in business in this state must be returned, for purposes of the personal property tax, at its true value in money. The true value of depreciable tangible personal property is its book cost less book depreciation, unless the tax commissioner finds that the depreciated book value is greater or less than the true value of such property.

(B) Application of the composite annual allowance procedure provided for in rule 5703-3-11 of the Administrative Code shall determine the prima facie true value of depreciable tangible personal property used in business. The prima facie valuations can be rebutted by probative evidence of higher or lower valuation.

(1) When an item of tangible personal property is acquired in an arms-length transaction, its true value at the time of purchase is the acquisition cost, including all costs incurred to put the property in place and make it capable of operation, which are normally capitalized in accordance with generally accepted accounting principles.

(2) The true value in money of any tangible personal property may be proved by establishing the amount for which the property would sell in an open market by a willing seller to a willing buyer in an arm's-length transaction. If market value is estimated by an appraisal, the property must be appraised as part of an ongoing business unless the taxpayer can demonstrate that the property is more accurately appraised on the basis of piecemeal liquidation or disposal.

(3) If a taxpayer believes that the composite annual allowance procedure as determined by the commissioner does not accurately reflect the true value in money of the taxpayer's depreciable tangible personal property on hand, the taxpayer may establish more accurate annual allowances by probative evidence.

(a) Such evidence must show that the published composite annual allowance procedures are inappropriate because they cause an unjust or unreasonable result, or must be modified because of special or unusual circumstances.

(b) Such evidence may include, but is not limited to, an aging of disposals study and any other studies, data, or documentation the taxpayer wishes to submit for consideration by the commissioner.

(c) Such evidence must cover a sufficient number of years to demonstrate a pattern in the history of the useful life of the subject property.

(C) A taxpayer must file a claim for deduction from book value for every tax return on which depreciable tangible personal property is returned at a value less than depreciated book value. Such claim must be made in writing at the time of filing the return on form 902, as prescribed by the commissioner, or in a format containing substantially all information as required on form 902.

HISTORY: Eff 2-21-86

Rule promulgated under: RC 5703.14
Rule authorized by: RC 5703.05
Rule amplifies: RC 5711.02, 5711.03, 5711.09, 5711.18

000033

5703-3-11 Tangible personal property tax; "true value" or "302" computation.

(A) To assist taxpayers in returning the true value of depreciable tangible personal property used in business in this state, as required by Chapter 5711. of the Revised Code and rule 5703-3-10 of the Administrative Code, and to assist in the efficient administration of the personal property tax, the tax commissioner shall determine a composite annual allowance procedure for use in computing the true value of such property. The application of the composite annual allowance procedure to the original cost of tangible personal property may be referred to as the "true value computation" or the "302 computation."

(B) The valuation determined by the true value computation shall be the prima facie true value in money of taxable tangible personal property.

(C) The composite annual allowance procedure shall take into consideration the type of business conducted, the types and classes of property, the useful life of the property in such classes, physical deterioration, functional and economic obsolescence, repair and maintenance practices, salvage value of property assigned to such classes, and any other factors that the commissioner considers proper in determining the true value of depreciable tangible personal property used in business in this state.

(D) The commissioner shall publish and make available the composite annual allowance procedure, with such instructions and examples as the commissioner deems useful or necessary to assist taxpayers in computing their proper tax liability.

(E) The commissioner shall review and, if necessary, modify the composite annual allowance procedure, from time to time, to assure that such allowance procedure reflects current technology and business experience.

HISTORY: Eff 2-21-86

Rule promulgated under: RC 5703.14
Rule authorized by: RC 5703.05
Rule amplifies: RC 5711.03, 5711.18, 5711.21, 5711.22

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Brief of Appellant was served on Barton A. Hubbard, Deputy Attorney General, 30 East Broad Street, Columbus, Ohio 43215, counsel for the Tax Commissioner, this 7th day of November, 2006.

C M Steines

Charles M. Steines