

IN THE SUPREME COURT OF OHIO

St. Bernard Self Storage, LLC,

Appellant,

vs.

Hamilton Cty. Bd. of Revision

et al,

Appellees.

: Case No. 06-884

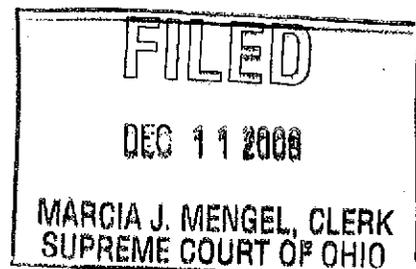
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: Appeal from the Ohio
: Board of Tax Appeals

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: Board of Tax Appeals
: Case No. 2003 -T-1532

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The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by disregarding the recent arm's length sale of the subject property, contrary to established precedent. (Decision and Order of BTA entered April 28, 2006.)

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Where real property has been the subject of a recent arm's length sale between a willing seller and a willing buyer, the sale price of the real property shall be the true value for taxation purposes. 14

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II. STATEMENT OF FACTS

This case involves the real estate tax valuation of the real property and improvements owned by St. Bernard Self Storage, LLC at 1020 Kieley Place in the City of St. Bernard, Hamilton County, Ohio, as of the tax lien date of January 1, 2002.

A. The land and improvements.

The subject property is located at the end of Kieley Place, a dead-end street, accessible only by easement across the prior owners' adjacent property (Supp. 281, 285, T.p. 10/28/04 p. 60-61, 76). The City of St. Bernard is a small municipality surrounded by the City of Cincinnati, in the industrial Mill Creek Valley area of Hamilton County. The prior owners William and Carol Schmidter and James and Margaret Schrimpf owned a larger tract on Kieley Place, including a warehouse building. They constructed the self-storage facility in the late 1990's on a residual area at the rear of the property (Supp. 285, 295, T.p. 10/28/04, p. 76, 116).

Kieley Place is an old industrial street of C-type buildings, mostly industrial, including a concrete company, a bus service depot, a commercial moving company, a building supply distribution warehouse, a woodworking shop, and a steel company warehouse. (Supp. 280, T.p. 10/28/04 p. 57-58; Supp. 272-3, T.p. 11/08/04 p. 25-29). The maps and aerial photograph, Exhibit 16 and 17 (Supp. 40-42), display that the subject property is just to the east of Interstate Highway 75 (I-75) and immediately south of the railroad tracks that run along the south side of State Route 562 ("the Norwood Lateral").¹ However, the subject property is significantly lower in elevation, such that it is not visible from the Norwood Lateral, and has no visual exposure

¹ Before the BOR, the witnesses also referred to a large aerial photograph, Ex. 22, similar to Ex. 17 but too large to be included in the Supplement.

from I-75 when leaves are on the trees (Supp. 280-1, T.p. 10/28/04 p. 58-59).

It is not possible to access the property directly from the highways. The circuitous route to the rear of Keiley Place requires several turns and winding past Keiley Place's hodge-podge of uses (Supp. 281, T.p. 10/28/04 p. 59). It confounded even a professional appraiser, who testified that it took him 20 minutes to locate the property from the interstate (Supp. 343, T.p. 10/28/04 at 308). As Mr. James Olman of St. Bernard Self Storage, LLC explained, "[W]e have no traffic count. We have no pedestrian traffic, we are a destination location." (Supp. 483, T.p. 11/08/04 p. 26). In other words, the only reason to be near the site is if one is going there specifically to visit St. Bernard Self Storage. A customer does not pass Appellant's business when driving by other high traffic volume-attracting businesses.

The physical constraints of this location make this self-storage facility atypical among self-storage facilities and at a distinct disadvantage. Because of its isolation (especially compared to high traffic count corridors in which many self-storage facilities are located, *see* Supp. 313, T.p. 10/28/04 p. 188), St. Bernard Self Storage has cultivated clientele in its local marketplace in the St. Bernard community. It uses word-of-mouth and "grass roots" local advertising such as community newsletters, church bulletins, and sponsoring booths at local festivals. (Supp. 283-4, T.p. 10/28/04, p.70-71). The business is staffed by on-site management including three full time and two part time employees who have substantial interaction with its customers (Supp. 302, T.p. 10/28/04, p. 143-6).

Most self-storage facilities are constructed of concrete block on large well-paved lots (Supp. 284, T.p. 10/28/04, pp. 71). The prior owners, the Schmidter/Schrimpf, simply installed concrete pads on the land and bolted movable metal storage buildings to the concrete slabs

(Supp. 284, 295, T.p. 10/28/04, pp. 72, 115). These structures can actually be unbolted, disassembled and moved (Ibid). Possible users of the improvements are limited by the fact that the pavement is driveway-type two-inch thickness that will only support passenger cars, pickup trucks and panel vans, but not semi-trailers or other over-the-road vehicles (Supp. 281, T.p. 10/28/04, p. 61-2). Only every other building has electricity, and the units are not climate controlled (Supp.284, 344, T.p. 10/28/04 p. 71, 314). The completed facility has 352 non-climate controlled units on pavement and 63 marked outside unpaved spaces for vehicular storage (Supp. 294-5, T.p. 10/28/04, p. 114-116). The office is also a bolted-down metal building (Supp. 295, T.p. 10/28/04, pp. 116). In sum, the improvements at the site are below standard of self-storage facilities in the current marketplace.

B. St. Bernard Self Storage LLC purchased the going concern through an arm's length sale proximate to the tax lien date for the specified price of the real estate at \$975,000, as consistently stated in the Contract to Purchase, the Closing Statement, and the Conveyance Fee Statements.

Mr. James Olman, managing member of St. Bernard Self Storage, LLC, is a real estate broker and businessman with over 36 years of experience (Supp. 279, T.p. 10/28/04, p. 54). He has specialized in a broad range of commercial real estate, including retail, warehouse, and office, and encompassing uses from tractor supply to parking lots and a post office (Ibid). Appellant St. Bernard Self Storage, LLC purchased the real property and the business from William and Carol Schmidter and James and Margaret Schrimpf by contract dated June 30, 2000 (Supp. 3, Ex. 2).

The Contract for Purchase specifically states that Appellant was purchasing the business as well as the real property, and sets forth what was being purchased and the price for each

component. Paragraph 2 of the Contract and certain incorporated exhibits, "Exhibit A, A-1, A-2 and A-3", describe the 4.04 acres of real estate and the access easement over the adjoining property retained by the Sellers (Supp. 8-12). Paragraph 3 of the Contract (Supp. 3) states that the sale includes "the following personal property and intangibles," and incorporates "Exhibit B," listing these items as follows:

1. All equipment located at or used in the operation of St. Bernard Self Storage ("the Business");
2. All inventory of the Business as of June 30, 2000;
3. All intellectual property of the Business, including without limitation, trade names, trademarks, service marks, and the right to use the name "St. Bernard Self Storage"
4. The phone and fax numbers that are currently being used by the Business;
5. The goodwill of the Business (the "Goodwill");
6. Any prepaid rentals for periods beyond June 30, 2000 and all security deposits currently being held by Seller; and
7. Any other personal property that is located at or used in the operation of the Business, including, without limitation, the items listed on Attachment B-1 to Exhibit B. (Supp. 13)

Attachment B-1 to the Contract lists specific office equipment, kitchen equipment, tools, repair parts inventory and inventory for sale (Supp. 14). These items of equipment and inventory were valued on the closing statement at \$25,000 (Supp. 15).

Significantly, Paragraph 15 of the Contract (Supp. 4) states the proration of the contract price among the foregoing components:

15. ALLOCATIONS: The Purchase Price shall be prorated as follows: (a) **Real Estate and Personal Property** (other than Goodwill) - **\$1,000,000**, and (b) Goodwill - **\$950,000**. (Emphasis added).

Thus, the parties to the contract valued the real estate (described in Exs. A, A-1, A-2 and A-3 to the contract) and personal property other than goodwill (described in Ex. B-1 to the contract) at a total of \$1,000,000. The goodwill intangibles listed on Ex. B, constituting the business value of St. Bernard Self Storage, were valued at \$950,000 by the parties to the contract.

Because the sellers needed time to subdivide the sellers' original property, in order to consolidate the new parcels, and to create a series of access easements, the closing was delayed for several months. During this period, Appellant rented the real estate for \$8,760.00 per month and managed the business under a Management Agreement which was executed as part of the Contract (Supp. 3, Ex. 2, Paragraph 6; Supp. 21, Ex. 6).

The transaction closed on August 15, 2000. The Closing Statement (Supp. 15-20, Ex. 3), sets forth the assets being sold and the arm's length-negotiated price for each component:

ASSETS BEING SOLD	(1)	Real estate consisting of a .79 acre parcel ("the Outside Storage Parcel") and a 3.252 acre parcel (the "Subdivided Parcel") . . .
	(2)	Certain tangible and intangible personal property more particularly described in <u>Exhibit B</u> owned by Sellers and used in connection with the operation of a business known as St. Bernard Self Storage

I. PURCHASE PRICE

Real Estate	\$975,000.00
Tangible Personal Property	\$ 25,000.00
Goodwill	<u>\$950,000.00</u>
	\$1,950,000.00

(Supp. 15, Ex. 3 emphasis added; Supp. 286-7, T.p. 10/28/04, pp. 81-83).

Appellant filed the two official forms entitled "Real Estate Conveyance Fee Statement of Value and Receipt" with the County Auditor on August 15, 2000 for the two parcels acquired in

this transaction. These certify the \$975,000 paid for the two parcels of real estate: \$912,000 for the 3.252 parcel including the metal self-storage buildings (\$937,000 less \$25,000 in personalty), and \$63,000 for the .7906 acre parcel used for outside storage (Supp. 32-3, Ex. 9, Conveyance Statements dated August 15, 2000; Supp. 289-90, T. p. 10/28/04, pp. 94-99). The sales price for each item was separately negotiated at arm's length (Supp. 286, 291, T. p. 10/28/04, pp. 82, 99).

Mr. Olman testified that he arrived at the sales price for the real estate based on his own investigations of the cost to replicate the existing facility by purchasing land and then building the improvements. He based the land value on his knowledge as a broker for 36 years and the cost of building the metal structures on the property, concluding that it would cost about \$900,000 to replicate in the area. (Supp. 285-6, 309, T.p. 10/28/04 p. 78-79, 173-74). He further determined that the going concern of St. Bernard Self Storage, with its localized name and canine logo, had a positive reputation and a customer base which would be built on with improved management practices, such that it was more desirable to buy the going concern than to start from scratch where it might take two to three years to construct a facility, assemble a workforce, and attract customers to get to the operating levels which St. Bernard Self Storage had at the time of the purchase. (Supp. 286-7, 310, 10/28/04 p. 80-83, 176). As a result, Appellant agreed to pay \$950,000 for the business factors, including the intangible goodwill, trade name and mark, local reputation, and customer base, all as listed in Ex. B to the Contract to Purchase, and \$25,000 for the personal property listed in Ex. B-1 (Supp. 286, 289, 309, T. p. 10/28/04, pp. 79, 92-93, 171).

James Olman also testified that Appellant St. Bernard used these values in the ordinary course of its business. At the time of the purchase in August, 2000, Appellant purchased a title insurance policy only on the value of the real estate, insuring it for \$1,000,000 (Supp. 295, T. p.

10/28/04, p. 118; Supp. 45, Ex. 18 ¶7). Certified Public Accountant and certified valuation analyst James Rippe testified before the Board of Tax Appeals. He stated that he reviewed the company's books and records, and that the separate values of the real estate and the intangibles were reflected in the books and records of St. Bernard Self Storage, LLC and in its depreciation/amortization schedules filed with the Internal Revenue Service (Supp. 428-9, 439, 447, T.p. 10/29/04, pp. 212-213, 254-255, 288-289). In accordance with tax regulations, it used different periods for depreciating the real estate improvements over 39 years and amortizing the intangible assets over 15 years (Supp. 400, 405, T.p. 10/28/04, pp. 100, 118-119). Mr. Olman testified concerning IRS Form 4562, the Amortization and Depreciation schedule for tax year 2000, reflecting these allocations. This exhibit was proffered when the Hearing Examiner refused to admit the exhibit, without stating any reason. (Supp. 494-5, 498, T.p. 11/08/04, pp. 68-69, 86). The tax treatment of the real estate and goodwill consistent with the purchase contract has been accepted by the Internal Revenue Service (Supp. 296, T. p. 10/28/04, p. 119).

C. The County Auditor raised the value of the subject property three times between June and October, 2002, from \$1,012,200 to \$1,352,400, and then to \$1,719,200, and St. Bernard Self Storage, LLC accordingly appealed to the Board of Revision.

The parties stipulated to Exhibit 25 (Supp. 220), the Value History card for the subject property from the County Auditor's website (Supp. 447, 474; T.p. 10/29/04, pp. 288, 395).

Exhibit 25 reflects that as of June 26, 2002, the Auditor valued the facility as follows:

LAND	IMPROVEMENTS	TOTAL
\$193,100	\$819,100	\$1,012,200

(Supp. 220, Ex. 25; Supp. 448, T.p. 10/29/04, p. 290). However, when the tax bill for the tax

lien date of January 1, 2002 was mailed in January 2003, the value of the improvements had been raised by over \$700,000:

LAND	IMPROVEMENTS	TOTAL
\$193,100	\$1,526,100	\$1,719,200

Indeed, the Auditor's Value History shows that between June and October, 2002, the Auditor raised the value twice: first from \$1,012,200 to \$1,352,400, and then from \$1,352,400 to \$1,719,200 (Supp. 220, Ex. 25). This latter value was billed to Appellant for the tax lien date of January 1, 2002.

After paying the tax bill in accordance with the law, St. Bernard Self Storage, LLC filed a complaint with the Hamilton County Board of Revision on January 31, 2003 (Supp. 1, Ex. 1). The complaint requested that the value be restored to the June, 2002 figure of \$1,012,200, and stated as its basis: "Arm's length sale of subject property on August 15, 2000 of \$975,000. Copy of Purchase Contract and Closing Statement are attached." (Supp. 1, Ex. 1).² The Board of Education for the St. Bernard-Elmwood Place School District filed a countercomplaint to maintain the \$1,719,200 value without asserting any reasons. (Supp. 2, Ex. 1).

When Appellant went before the Board of Revision, it presented the complete documentation of the sale and Mr. Olman's testimony. Because of the arm's length sale

² Appellee Auditor has frequently scoffed at the fact that the taxpayer's Complaint to the Board of Revision sought the Auditor's valuation of \$1,012,200 rather than the lower \$975,000 sale price, suggesting that the owner did not "believe" in his own sale price. This is quite preposterous. The owner, perhaps naively, assumed that it would be easier to use the Auditor's June 26, 2002 value, even if it was \$37,200 over the fair market value established by the sale (a difference of less than 4%). Appellant never dreamed that his failure to seek that additional \$37,200 reduction would be cited as a reason to deny him any relief for an increase to almost twice the sale price.

proximate to the tax lien date, Appellant did not present any appraisal testimony to the Board of Revision. The Auditor, however, ignored the sale and offered the appraisal of staff appraiser Doug Thoreson, who was "mass-appraising all of the self storage facilities in the County" (Supp. 448, T. p. 10/29/04, p. 291). After Appellant filed its complaint on the valuation of \$1,719,200, Mr. Thoreson appraised the property on August 6, 2003, and proposed the even higher number of \$1,925,000. (Supp. 213, Ex. 24).

Although the BOR stated that it did not doubt the arm's length nature of the sale or the allocations between real property and goodwill made between the buyer and seller (Supp. 263-4, BOR Transcript at 36-37), it disregarded those numbers and raised the valuation from \$1,719,200 to Thoreson's appraisal of \$1,925,000. It took the position that the business value could not be separated from the taxable real property. The BOR decision is reflected on the Auditor's records as follows:

LAND	IMPROVEMENTS	TOTAL
\$242,400	\$1,682,600	\$1,925,000.

(Supp. 220, Ex. 25). St. Bernard Self Storage filed a timely appeal to the Board of Tax Appeals.

D. St. Bernard Self Storage, LLC appealed to the Board of Tax Appeals.

At the Board of Tax Appeals, Appellee Auditor and Appellee St. Bernard/Elmwood Place Board of Education argued without evidence that the sale was not arm's length and should be disregarded (Appendix A-10-14, BTA Decision at 5-9). As noted in the BTA's decision, the Appellees presented no witnesses to counter the testimony regarding the arm's length nature of the transaction. The Auditor presented two witnesses: a staff appraiser and a professor of finance. Staff appraiser Mr. Thoreson did a second appraisal after the appeal, this time raising the value to

\$2,000,000 (Supp. 221, Appellee Ex. A). This is over twice the \$975,000 amount listed in the sales contract and conveyance fee statements for the sale price of the real estate, and nearly twice the Auditor's own valuation of \$1,012,200 originally set on June 26, 2002. The only other witness was University of Cincinnati professor Norman Miller, who expressed no opinion as to either the value of the real estate or the value of the business conducted thereon. Indeed, he admitted that he was not qualified to express an opinion of value on either component (Supp. 403, 418, T.p. 10/29/04 p.112-13, 171). Rather, he espoused his theoretical opinion that the real estate "captures" the value of any business conducted thereon (Supp. 393, T.p. 10/29/04 p. 71).

Appellant St. Bernard Self Storage again presented the documentation of the arm's length sale and the testimony of the willing buyer through its managing member Mr. James Olman. In addition, it presented independent expert testimony that would allow the BTA to evaluate the parties' arm's length allocation of the real estate and non-real estate components of the sale. First, certified public account, certified valuation analyst, and experienced business advisor James L. Rippe presented his report and testimony regarding the value of the business conducted on the property, to separate it from the real estate in the aggregate price of \$1,950,000 (Supp. 51-65, Ex. 19; Supp. 315-322, T.p. 10/28/04 p. 196-225). Second, highly qualified and experienced appraiser Jerry C. Fletcher, MAI, ASA (Member of the Appraisal Institute and a senior member of the American Society of Appraisers), appraised the property as a going concern and then used several methods to separate the real estate factors and the business factors (Supp. 66-212, Ex. 20; T.p. 10/28/04 p. 303-359). Both of these experts produced values slightly different from the arm's length sale, but both approaches yielded a real estate value within 10-

15% of the contract price of \$975,000.³ Their analyses, while unnecessary in view of the arm's length sale specifying the price for the real estate and improvements, confirmed that the prices negotiated by the willing seller and the willing buyer were consistent with independent expert evaluations.

Like the BOR, the BTA concluded that the transaction was arm's length, and that "neither the Auditor nor the BOE refute this testimony." (Appendix A-10, BTA Decision at 5). Indeed, the BTA spent much of its decision validating Mr. Olman's testimony that none of the specific characteristics of the transaction (access easement, management agreement, partial seller financing, right of first refusal to the seller's adjacent property) negated the arm's length nature of the transaction (Appendix A-10-14). Nonetheless, the BTA adopted Dr. Miller's theory that the business was part of the real estate, and adopted a value of \$1,925,000.00 as of the tax lien date of January 1, 2002 (Appendix A-18).

E. The Hamilton County Auditor appealed the Decision of the Board of Tax Appeals to the Supreme Court, and then dismissed its appeal.

The Auditor filed an appeal to this Court, and St. Bernard Self Storage filed a cross-appeal (Appendix A-1). Inexplicably, the Auditor dismissed its appeal (Application for Dismissal filed June 27, 2006, granted July 3, 2006, Appendix A-5), and then moved to dismiss the cross-appeal of the property owner, now Appellant (Motion to Dismiss filed August 22, 2006). This Court denied the Motion to Dismiss (Order of November 1, 2006).

³ Details of these reports are discussed in the appropriate portion of the Argument, *infra*.

STANDARD OF REVIEW

In the recent decision of *Knust v. Wilkins* (2006), 111 Ohio St. 3d 331, P11, 2006-Ohio-5791, this Court confirmed that it will reverse a decision of the Board of Tax Appeals that is based on an incorrect legal conclusion.

In reviewing a BTA decision, this court must determine whether that decision was "reasonable and lawful." *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 497, 2001 Ohio 5, 739 N.E.2d 783; R.C. 5717.04. The court "will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion." *Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino* (2001), 93 Ohio St.3d 231, 232, 2001 Ohio 1335, 754 N.E.2d 789.

While the BTA is responsible for determining factual issues, the record must contain "reliable and probative support" for its determinations for the Court to affirm them. *Ibid.*

Appellant St. Bernard Self Storage, LLC is hopeful that the Supreme Court "will not hesitate" to reverse the BTA decision as it is based on incorrect legal conclusions. Hence, this appeal is confined to purely legal matters, as the BTA made incorrect legal conclusions in reaching its decision. As explained below, the decision of the BTA in this case is not reasonable and lawful, and is based on incorrect legal conclusions contrary to this Court's precedents. The BTA agreed that the sale was arm's length, and the Auditor has dismissed his appeal of that finding. The unrebutted evidence is that the parties negotiated and closed an arm's length sale of the real estate for \$975,000. The BTA nonetheless disregarded the sale price contrary to this Court's rule of law that the arm's length sale price of the property shall be "the true value for taxation purposes." *Lakota Local School Dist. v. Butler Cty. Bd. of Revision* (2006), 108 Ohio St.3d 310, 2006-Ohio-1059, 843 N.E.2d 757; *Berea City School Dist Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005), 106 Ohio St.3d 269, 2005-Ohio-4979, 834 N.E.2d 782.

The BTA's decision to disregard the parties' negotiated values for each component of real estate, tangible personal property, and intangible personal property in the sale of an ongoing business is also an incorrect legal conclusion. *Conalco v. Bd. of Revision* (1978), 54 Ohio St.2d 330; *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129, 132; *Buckeye International, Inc. v. Limbach* (1992), 64 Ohio St. 3d 264, 266, 1992-Ohio-55, 595 N.E.2d 347.

Recently, this Court held that when real property is being valued for tax purposes, the business factors and the real-property factors must be separated. *Higbee Co. v. Bd. of Revision* (2006), 107 Ohio St. 3d 325, 334, 2006 Ohio 2 ¶44; 839 N.E.2d 385, reconsideration denied by *Higbee Co. v. Cuyahoga Cty Bd. of Revision*, 108 Ohio St. 3d 1490, 2006-Ohio-962, 843 N.E.2d 795, 2006 Ohio LEXIS 617. The BTA's failure to separate these factors, despite substantial and reliable proof thereof, was another incorrect legal conclusion. **Article XII, Section 2** of the Ohio Constitution authorizes the taxation of "land and improvements," not a business operated thereon and separable from the land. The BTA thus erred as a matter of law by aggregating the real estate value of \$975,000 with the business value of \$950,000, when it should have used the values which the parties negotiated at arm's length to separate the business factors and the real-property factors. This was an incorrect legal conclusion.

Finally, the Board of Tax Appeals failed to follow this Court's ruling in *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493, by deferring to the Board of Revision and by failing to require the Appellees to present any reliable and probative evidence to rebut Appellant's evidence establishing the separate value of the real estate. There was overwhelming reliable and probative evidence to determine these separate values (including the sale documents, the testimony of the owner, an MAI real estate appraiser, and a certified

business valuation analyst). Nonetheless, the BTA accepted the opinion of a professor, a person not qualified to value either the real estate or the business, who claimed that “there is no business” to be valued, and who did not value the real estate. That determination is not supported by reliable and probative evidence in the record and is contrary to rules of law established by this Court’s holdings in numerous prior cases.

III. ARGUMENT

First Assignment of Error:

The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by disregarding the recent arm’s length sale of the subject property, contrary to established precedent. (Decision and Order of BTA entered April 28, 2006.)

Appellant’s Proposition of Law No. 1

Where real property has been the subject of a recent arm’s length sale between a willing seller and a willing buyer, the sale price of the real property shall be the true value for taxation purposes.

This Court’s decisions in *Lakota* and *Berea, supra*, clarify that where there is an arm’s length sale close in time to the tax lien date, the sale price “shall be . . . the true value for taxation purposes.” R.C. 5713.03. That is to say, once the arm’s length nature of the negotiated terms has been established and not refuted, neither the Auditor, the BOR, nor the BTA is to substitute its opinion for the value negotiated at arm’s length between a willing seller and a willing buyer. These decisions departed from the Court’s earlier holding in *Ratner v. Stark Cty. Bd. of Revision* (1986), 23 Ohio St.3d 59, 61, 491 N.E.2d 680, which directed consideration of independent appraisals where the sale price may not reflect true value.

The appeals by Appellant St. Bernard Self Storage, LLC to the BOR, to the BTA, and finally to this Court have always been based on the fact that Appellant purchased the real property at 1020 Kieley Place in August, 2000 in an arm's length sale for \$975,000. This sum is thoroughly documented in the transaction and in the history of this case. (Original Purchase Contract dated June 30, 2000 (Supp. 3, Ex.2), Closing Statement (Supp. 15, Ex. 3) and Conveyance Fee Statements (Supp. 32, Ex. 9) dated August 15, 2000).

At the BOR, the owner presented the evidence of the arm's length sale and thus did not offer an appraisal. The BOR ignored the negotiated sale price and adopted the value of the Auditor's staff appraiser, Mr. Thoreson, a value significantly higher than value established by the Auditor for the subject tax bill. Because of what the Auditor and the BOR did, St. Bernard appealed to the Board of Tax Appeals and obtained two appraisals - one by Mr. Jerry C. Fletcher, MAI, ASA, of the real property, and one by Mr. Joseph Rippe CPA, CVA, of the business. St. Bernard continued to insist, however, that the arm's length sale for \$975,000 was the true value of the real property as of January 1, 2002, and that the BTA need look no further.

The Board of Tax Appeals agreed that it was an arm's length sale in which each item was negotiated, and agreed that Appellees had not refuted that conclusion (Appendix A-13, BTA decision at 8). The BTA's opinion should have ended at that point with a reduction in the value to the actual sale price paid for the real estate.

Instead, the BTA proceeded to make several erroneous steps. Rather than following the terms of the sales contract as to price for the real estate, for personal property, and for intangibles, the BTA aggregated these contemporaneously negotiated values, and stated, "the subject property was sold for \$1,950,000 in an arm's length sale on August 21, 2000. We further find that the sale

is recent for valuation purposes.” (Appendix A-14). The BTA then stated that “we remind St. Bernard that the BOR concluded that the full amount of the purchase price, with an exception paid for personalty, was for real property. Thus the burden rests with St. Bernard to demonstrate the right to an allocation of business value.” (Appendix A-14, BTA decision at 9).

The BTA’s reasoning is wrong in three respects. First, the parties to the sale had agreed upon a price of \$975,000 for the real estate in a sale which the BTA found was arm’s length and proximate to the tax lien date. St. Bernard did not have to “demonstrate the right to an allocation” because the allocation was present in the negotiated sales contract. Under this Court’s decisions, the BTA cannot ignore the parties’ negotiated price in an arm’s length sale. Second, the BTA wrongly deferred to the decision of the BOR that “the full amount of the purchase price was for real property.” The BTA is required to make a *de novo* determination that does not presume that the BOR’s value is correct. Third, the BTA incorrectly placed the burden on the property owner, when in fact the owner had met its burden to prove an arm’s length sale for the price of \$975,000 for the real estate. No further evidence was warranted under the *Berea*, *Lakota* and *Conalco* cases. If it were, the BTA nevertheless ignored the evidence presented by three witnesses on Appellant’s behalf, and this evidence was not rebutted by any facts from Appellees.

Second Assignment of Error:

The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by ignoring the sale price of the real property and relying upon Appellee’s appraisal which ignored the contemporaneous sale of the subject real property, contrary to established precedent. (Decision and Order of BTA entered April 28, 2006.)

Appellant’s Proposition of Law No. 2

Where there is a sale of real property recent to 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 between the real property and the personal property sold in this transaction, and not an appraisal ignoring the contemporaneous sale.

Where the parties to a sale of a business including real estate make an allocation of the price among the real estate and non-real estate components of the transaction, it is reversible error for the BTA to ignore that recent sale and the allocated purchase price for the real estate. *Conalco v. Bd. of Revision* (1978), 54 Ohio St.2d 330; *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129, 132, syllabus ¶2; *Consolidated Aluminum Corp. v. Monroe County Bd. of Revision* (1981), 66 Ohio St. 2d 410. While the taxpayer in *Conalco* was only partially successful because the allocation occurred after the sale for accounting purposes rather than as part of the negotiated sale itself,⁴ this trilogy of Supreme Court cases well recognizes the principle that a sale with a contemporaneous allocation is highly credible and cannot be disregarded. This Court recognized the same principle in the context of allocation for personal property in *Buckeye International, Inc. v. Limbach* (1992), 64 Ohio St.3d 264, 266, 1992-Ohio-55, 595 N.E.2d 347, stating, "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."

In this case, the BOR stated that it did not doubt the arm's length nature of the sale or the

⁴ In the final case of *Consolidated Aluminum Corp. v. Monroe County Bd. of Revision* (1981), 66 Ohio St. 2d 410, this Court affirmed the BTA decision which split the difference between the taxpayer's and Auditor's values after two remands.

validity of the contractual allocation by the parties between real estate and non-real estate components.⁵ Other than the fact the Auditor's representative on the BOR did not speak in complete sentences in announcing the BOR's decision, it is apparent that the BOR believed there was an arm's length sale, that it disregarded the allocation by the parties to that arm's length sale, and that it instead relied on the appraisal of the Auditor's staff appraiser, Mr. Thoreson, who also disregarded the terms of the arm's length sale (Supp. 223). In short, the BOR did exactly what *Berea, Lakota* and the *Conalco* cases reject, and the BTA endorsed the BOR's error.

The BTA explained its action by acknowledging that it has recognized business value as separable from real estate in a single transaction, but stating that it had rejected it "when valuing self-storage units." (Appendix A-14). In actuality, the BTA has accepted a contractual allocation among real estate, tangible personal property and goodwill in valuing real property used for a self-storage facility. *Willoughby-Eastlake City School Dist. v. Lake County Bd. of Revision*, (April 20, 2001), 98-R-509, 98-R-518, 2001 Ohio Tax LEXIS 553 (Appendix A-29). This case is essentially on all fours with the case *sub judice*. There, a 5.8 acre self storage facility was purchased as part of a bulk sale close to the tax lien date. As in the instant case, the sales documents made a specific allocation among real estate, goodwill, and personal property, plus a

⁵ In announcing the decision of the BOR, the Auditor's representative said: "We're not perfect in this opinion. We sit up here and make decisions based on evidence that we have before us, but . . . appears we have an arm's length sale, it appears that the presentation, although respected as far as the allocation. Not really backed up specifically as to this kind of facility, but there is case law of other kinds of facility. Hard to adopt that for this kind of facility because it has not been done before but based upon how values of property are figured it hasn't been done before.

. . . So we're really in a position without considering the allocation aspect of looking at the sale if the property all inclusive and Mr. Thoreson's recommendation, that he came up with at \$1,925,000 . . . on your income approach." (Supp. 263, BOR Transcript at 36, Emphasis added).

non-compete agreement. The value listed in the contract for the real estate was \$1,585,000 (Appendix A-36), while the gross price for real property, goodwill, and personal property was \$2,310,000.⁶ As here, the allocated values were scheduled in the contract. As in the instant case, the conveyance fee statement reflected the same amount allocated for the real estate in the contract (Appendix A-36; Supp. 32-3). The BTA insisted on following the allocated sales price for the real estate, even though the Board of Education and the property owner both argued for different values:

The BOE's contention that the value of the subject property should be based on the gross sale price is not well taken. The purchase contract and conveyance fee statement both clearly reflect that assets other than real estate were acquired in this transaction. Further, the contract and conveyance fee statement reflect a value for the real estate.

On the other hand, although the bulk sale may have influenced the sales price, Sovran did not present competent, probative evidence to show how the sale price was directly affected. . . .

In this Board's opinion, sufficient evidence has not been presented to overcome the sale price allocated to the real estate in the conveyance fee statement and determined by the BOR. In conclusion, we find that a preponderance of the evidence before us supports a conclusion that the sale is the best evidence of the subject property's true value, less the value allocated for goodwill, personal property, and the noncompete agreement. . . . (Appendix A-36-7, emphasis added).

Accordingly, the result here should be exactly as in *Willoughby-Eastlake*: the best evidence of value is the arm's length sale's allocation between real estate and non-real estate elements as stated in the purchase contract and conveyance fee statements. The amount paid for

⁶ The allocation attributed amounts equal to 67% of the gross transaction to real estate, 31% to goodwill, 1.5% to personal property, and .5% to the non-competition covenant. (Appendix A-36).

the real estate is \$ 975,000. Although both sides cited *Willoughby-Eastlake* in their briefs to the BTA,⁷ the BTA's decision does not even mention the case, even though it is directly on point.

Instead, the BTA cited several cases which are not comparable to the instant case. It cited *George Martin v. Franklin Cty. Bd. of Revision*, (February 10, 1988), 87-J-655, 1988 Ohio Tax LEXIS 208, a case decided before *Willoughby-Eastlake, supra*. In *George Martin*, however, there was no contractual allocation in the sales contract, closing statement and conveyance fee statement, unlike *Willoughby-Eastlake* and the instant case. There, the property owner had a purchase contract and conveyance fee statement with the full, unallocated contract price for the real estate, personalty and business value, and the Board refused to depart from the contract.

The BTA also cited *Worthington City Schools Bd. of Ed v. Franklin Cty. Bd. of Revision* (January 27, 2006), BTA No. 2004-M-1211, (unreported).⁸ This case involved a sale of an eight-bay, self-serve car wash and 81 self-storage units. As in *George Martin*, and unlike the instant case and *Willoughby-Eastlake*, there was no contractual allocation in the sales contract among the real estate and non-real estate components of the sale. Rather, the purchaser attempted, unsuccessfully, to argue that it was not an arm's length sale and that the BTA should accept his appraiser's value for the real estate. In the instant case, the sales contract and all related documents at the time of sale specifically segregated the real estate value of \$975,000. In

⁷ Appellee Auditor has suggested that the *Willoughby-Eastlake* case was not "challenged." This is not true. The BOE originally filed the case to raise the value. When the BOR raised it to the portion of the sale price allocated to the real estate and improvements, both the BOE and property owner appealed: the latter seeking a value lower than the allocated amount for the real property, and the BOE seeking to raise it higher. The BTA issued a 9-page decision that thoroughly reviewed the applicable law and the facts in the record.

⁸ BTA decisions are reported by date of decision at bta.ohio.gov/decide.

short, among the BTA decisions, only *Willoughby-Eastlake* is factually analogous to the instant case and consistent with the rules of law stated by this Court in *Berea, Lakota, and Conalco*.

These cases require the taxing authorities to accept as the true value in money the parties' agreement as to the value of the real estate in an arm's length sale close in time to the tax lien date. Since the BTA found that this was an arm's length sale, and was close enough in time to the tax lien date, \$975,000 is the true value in money of the subject real estate as of January 1, 2002.

Third Assignment of Error:

The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by failing to separate the business factors and the real property factors in the sale of the subject property, contrary to established precedent. (Decision and Order of BTA entered April 28, 2006.)

Appellant's Proposition of Law No. 3

When real property is being valued for taxation purposes, the business factors and the real property factors must be separated.

- a. **The Ohio Constitution and the statutes of the State of Ohio authorize taxation of real property based upon the fair market value of the land and the improvements thereon.**

In another decision this year, this Court stated that the contribution of business factors must be separated in valuing real property for tax purpose. In *Higbee Co. v. Bd. of Revision*, 107 Ohio St. 3d 325, 334, 2006-Ohio-2 ¶44,⁹ this Court reversed a decision of the BTA which relied on an approach for measuring the external obsolescence of real estate used as a department store

⁹ *Reconsideration denied by Higbee Co. v. Cuyahoga County Bd. of Revision*, 108 Ohio St. 3d 1490, 2006-Ohio-962.

by comparing retail sales per square foot between the subject and other stores. The Court explained:

When real property is being valued for tax purposes, the business factors and the real-property factors must be separated.

If it is the real property that is being valued, its valuation cannot be made to vary depending on the success or lack thereof of the businesses located on the property. Admittedly, the location of a property may influence the sales made by a merchant at that property. However, the merchant's business practices may also influence sales. **The business factors and the real-property factors must be separated when the real property is being valued for tax purposes.** How the business factors and the real-property factors are separated in valuing real property is a matter of proof. (Emphasis added).

Higbee at 334, ¶44. Even before *Higbee*, this Court made clear in *Dublin Senior Community Ltd. Pshp. v. Franklin County Bd. of Revision* (1997), 80 Ohio St. 3d 455, 461, that difficulty in separating real estate and business factors does not justify failing to do so:

The answer that it is difficult to accurately separate the income and expenses between business and real estate activities is not a sufficient reason not to separate them; it must be done, because we tax real estate in this case.

Moreover, while the use of net income figures that include both the business and the real estate net income may result in a value which equals or exceeds the value determined on the basis of the real estate net income alone, such procedure would not be proper. We are valuing real estate; the addition or subtraction of business income and expenses may distort the valuation of the real estate, and such income and expenses must be deleted.

.....
[A]s explained above, a valuation which includes business income and expenses is not acceptable for real estate valuation purposes. (Emphasis added).

The BTA's adoption of Professor Miller's thesis that the business cannot be separated from the real estate is in direct conflict with this rule of law of the State of Ohio, Professor

Miller's alleged genius notwithstanding. Indeed, the mandate to separate business factors from real property factors in real property taxation arises naturally and logically from Ohio's constitutional and statutory authority to tax real estate. **Article XII, Section 2** of the Ohio Constitution (Appendix A-19) states:

[L]and and improvements thereon shall be taxed by uniform rule according to value (Emphasis added).

R.C. 5713.01(B) authorizes the auditor to assess "all the real estate," and to appraise "at its true value in money, each lot or parcel of real estate, including land devoted exclusively to agricultural use, and the improvements located thereon. . . .in accordance with . . . Section 2, Article XII, Ohio Constitution...." (Appendix A-20). **R.C. 5713.03** directs that the auditor in determining the value of any tract, lot, or parcel of real estate under this section . . . the auditor shall consider the sale price. . . to be the true value for taxation purposes." (Appendix A-23). Nothing in the Constitution or in these statutes permits the taxation of the value of a business which is operated on the real estate.

"There is no provision in the Constitution for a classification of real property according to use, rather the rule is that all real property must be taxed according to its value." *State ex rel. Park Inv. Co. v. Board of Tax Appeals* (1964), 175 Ohio St. 410, 412. As this Court held in *Higbee, supra*, the "valuation [of real estate] cannot depend on the success or lack thereof of the business located on the property." 2006-Ohio-2, ¶44.

The need to separate real estate and business values is also recognized by the appraisal profession. Real property taxes are based on the value of the unencumbered fee simple estate.

Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision (1988), 37 Ohio St. 3d 16, 523 N.E.2d 826.

The Appraisal of Real Estate, 12th Ed (2001), p. 643-44, explains the appraiser's obligation to separate the business value from the real estate:

When the appraiser is asked to value the real estate component only, use of the cost approach is relatively straightforward, although quantifying depreciation can be an obstacle. In contrast, the sales comparison and income capitalization approaches involve complex analysis. . . .The difficulty of these assignments does not relieve the appraiser of the responsibility to treat the tangible and intangible personalty properly. Not to do so produces either use value or the value of TAB [total assets of the business]; neither is the market value of the fee simple estate in real property. USPAP, among other authorities, mandates that appraisers analyze the effect that non-realty components have on value. (Emphasis added).

This text also distinguishes real estate value from "going concern value." It describes the difference as follows:

Going-concern value includes the incremental value associated with the business concern, which is distinct from the value of the real property. The value of the going concern includes an intangible enhancement of the value of the operating enterprise, which is produced by the assemblage of the land, buildings, labor, equipment, and the marketing operation. This assemblage creates an economically viable business that is expected to continue. The value of the going concerns refers to the total value of the property, including both the real property and the intangible personal property attributed to business enterprise value. (Id. at 27, Emphasis added).

Appellant's witnesses did analyze and value the non-realty component, while none of Appellees' did. Appellee Auditor's witness Professor Norman Miller makes a core hypothesis that is directly contrary to this Court's ruling in *Higbee* for purposes of real estate taxation. His entire philosophy postulates "the absence of a business component for retail property," an article

he wrote in 1995 to try to correct “errors” he thought appraisers (and apparently, this Court) were making (Supp. 393, T.p. 10/29/2004 p. 69-70). The Auditor’s staff appraiser Mr. Thoreson also stated that he views the going concern value as part of the fee simple estate, directly contrary to this Court’s rulings and *The Appraisal of Real Estate* (Supp. 460, T.p. 10/29/04, p. 340). Accordingly, he made absolutely no effort to segregate the value of the business enterprise from the real estate.

b. The Appellant taxpayer met its burden of properly valuing the real property by separating the real property factors and the business factors.

i. The Contract to Purchase and the Management Agreement.

As the *Higbee* Court stated, how business factors and real estate factors are separated “is a matter of proof.” 107 Ohio St. 3d 325, 334, 2006-Ohio-2 ¶44. In the instant case, Appellant alone provided the proof necessary to separate values of business factors and real property factors, and did so by several means. First, as discussed extensively above, the contract, the closing statement, and the conveyance fee statements accurately stated the negotiated price of the real estate and separated it from the personal property and the intangible business values negotiated in this arm’s length sale. Under this Court’s precedents and the BTA’s prior decision in *Willoughby-Eastlake, supra*, this should have been determinative.

In addition, Mr. Olman testified how he had valued the real property, evidence admissible under the owner-opinion rule and consistent with Mr. Olman’s three decades of experience as a commercial real estate broker. As the Court said in *Higbee* :

The testimony in this case clearly indicates that the economics of real-property transactions involving anchor stores and mall developers is different from the usual types of real estate transactions. Nevertheless, **for ad valorem tax purposes the property still must be valued on the basis of what a willing buyer would pay a willing seller for the real property.** (Emphasis added).

107 Ohio St. 3d at 335, ¶46.

Another method of proof from the parties' arm's length sale is provided by the rental price for the entire land and improvements that was part of the Contract to Purchase. Mr. Olman testified concerning the fair rental value of the real estate paid to the Sellers pursuant to the Management Agreement from the June 30, 2000 contract date until the August 15, 2000 closing. The Management Agreement was signed at the time of the purchase contract because of the need for sellers Schmidter and Schrimpf to have the separate parcel created and the access easements approved for the portion of the tract to be conveyed to the buyer.

Economic rental value of commercial real property is an indicium of valuation for ad valorem real property taxation purposes. *Wynwood Apartments, Inc. v. Bd. of Revision* (1979), 59 Ohio St. 2d 34, 391 N.E.2d 346. The rental rate for the entire real estate, not the rental rates for each storage space of the self storage business, would form the proper basis for an income-based approach for valuing the subject property. St. Bernard paid the sellers rent of \$8,760 per month to use the subject real property, both the land and the improvements thereon, while the parcel cut-up was being processed (Supp. 21, Ex. 6; T.p. 10/28/04, pp. 88-90). Thus, \$8,760 per month represents the return on the real estate to the property owner. Capitalizing this annualized

income at an O.A. R (over-all rate) of 10.76% yields a value of \$976,951.¹⁰ This compares very closely to the \$975,000 value of the land and improvements in the contract. Thus, the negotiated rental value of the real estate between the parties to this arm's length sale establishes a value for the land and improvements that is completely consistent with the taxpayer's other evidence.

ii. The Certified Public Accountant and Business Analyst.

In addition, St. Bernard put on the testimony before the BTA by certified public accountant and certified business valuation analyst Joseph L. Rippe. Mr. Rippe is a highly experienced professional involved in valuing businesses for investors, as well as in buying, selling and managing real estate (Supp. 315-6, T.p. 10/28/2004 p. 197-202). He independently valued the self-storage business using standard techniques in his profession. Mr. Rippe concluded that the value of the business alone was \$752,916 as of January 1, 2002. (Supp. 51, Ex. 19; Supp. 319-322, 339, T.p. 10/28/04, pp. 212- 225, 293-94). Adding the \$100,000 financing premium, the resulting \$852,916 closely compares to the net \$850,000 which Mr. Olman testified is the value of the business factors (Supp. 321. T.p. 10/28/04, p. 219).¹¹ The contract price of \$1,950,000 for the going concern of real estate and business, less Mr. Rippe's business value of \$852,916 and the \$25,000 for the personal property set forth in the contract, leaves a value of \$1,072,084 for the real estate.

¹⁰ An O.A.R. of 10.76% is the midpoint of the two appraisers' rates of 10.14% (Thoreson, Supp. 225) and 11.38% (Fletcher, Supp. 137), which would produce values of \$1,036,686 and \$923,725, respectively, based on the rental rate of \$8,760.

¹¹ Mr. Olman subtracted this \$100,000 which he considered to be the value of seller financing from the purchase contract business value of \$950,000.

In other words, the result of subtracting Mr. Rippe's valuation of the business from the contract price for the going concern yields a real estate value of just 10% more than the arm's length sale real estate price of \$975,000, and very close to the Auditor's June 26, 2002 value of \$1,012,200 value as of June 26, 2002 (Ex. 25). This evidence was clearly probative of the validity of the negotiated sale price as representing the real estate's true value in money.

iii. The MAI Appraiser.

Appellant's MAI appraiser, Jerry C. Fletcher, also valued the real estate by separating the business factors and the real estate factors. Mr. Fletcher used all three approaches to value, with the sale comparison and income approaches valuing the entire going concern. He then separated the value of the business factors from the real estate value using several methodologies (Supp. 350, 355; T.p. 10/29/04 p. 337, 357). He compared warehouse rents for real estate similar to Appellant's self storage rents as a method of separating the real estate value from the business value (Supp. 141-42, Ex. 20; Supp. 352-3, T.p. 10/28/04, pp. 345-8). In this approach, Mr. Fletcher compared market rents for industrial warehouse facilities at \$3.60/ square foot to the subject's gross rental income of \$7.20/square foot from the self-storage business. The former compares the rental value of the real property, while the latter includes the value attributed by the business services.

This is very similar to the methodology approved by the BTA to separate real estate and business factors in *WEC 99C-12 LLC v. Montgomery Cty. Bd. Of Revision*, (May 14, 2004), 2002-T-1095, 2004 Ohio Tax LEXIS 753 and *Chippewa Place Dev. Co. v. Cuyahoga Ct. Bd. of Revision* (September 24, 1993), 91-P-245, 1993 Ohio Tax LEXIS 1580. In *WEC*, the BTA

approved the appraiser's use of apartments for the real estate-only component of an assisted living facility. In *Chippewa Place*, apartments were used as rent comparables for a congregate care center. The apartment comparable eliminated the business component and was the best equivalent to a real estate-only value.

Mr. Fletcher's comparison of warehouse rents and the subject's rents produced a ratio of approximately 50% for each -- very similar to the sales contract's allocation of \$975,000 for the real estate and \$950,000 for goodwill. Thus, what the Auditor has ridiculed as "The Fletcher Method" is in fact an approved methodology for separating real estate and business factors.

Mr. Fletcher also used the cost approach as a method of separating the real estate-only value, as recommended by *The Appraisal of Real Estate*, p. 643. Mr. Fletcher calculated the cost of the land and improvements including entrepreneurial profit -- i.e., the value of the land and improvements before any business existed. Mr. Fletcher used land sale comparables with similar warehouse/industrial locations and surrounding character (i.e., not the high traffic retail vicinity properties used by Mr. Thoreson in his appraisal) (Supp. 106-108, Ex. 20 p. 25-27).¹² Using the breakdown method of depreciation, he adjusted for physical depreciation and external obsolescence. (Supp. 365, T.p. 10/28/04, pp. 395).

Mr. Fletcher concluded that the true value of the real estate as of January 1, 2002 was \$1,120,000, consisting of \$260,000 for the land and \$860,000 for the improvements (Supp. 144; Supp. 355, T.p. 10/28/04, p. 357). This value is very close to the Auditor's June 2002 value of

¹² Mr. Olman confirmed in his rebuttal testimony that there had been two sales of property close to the tax lien date very proximate to St. Bernard Self Storage with values much closer to Mr. Fletcher's than to Mr. Thoreson's (Supp. 488-9, T.p. 11/08/04, pp. 48-49).

\$1,012,400 (Supp. 220). It is also within 15% of \$975,000, the true value in money of the real estate established by the sales contract. Although Appellant was willing to accept this number, the Auditor continued to push for \$2,000,000, higher than the gross sales price for both the real estate and the business.

Furthermore, each of Appellant's witnesses presented competent testimony that the business of a self-storage enterprise can be sold separate from the real estate. This completely negates Appellee's unfounded claim that the real estate and business are "inextricably intertwined." Mr. Olman testified that he could purchase other real estate within the immediate market area, particularly more visible real estate. He testified that he could move the business enterprise to that location while maintaining the existing customers (Supp. 300, T.p. 10/28/04 p. 137-8). Noting the movable nature of the structures on this location, he explained that the structures could be sold with the enterprise, or the enterprise could be bought alone. Mr. Rippe described the structures as "metal movable buildings" which are "transportable" (Supp. 53; Supp. 323, T.p. 10/28/04, p. 229-30). He testified that the business alone could be sold for his valuation of about \$752,000, describing that the current real estate would be sold with a covenant not to compete, preventing the buyer from setting up a competing facility in the same market (Supp. 324, 333, T.p. 10/28/04 p. 234-36, 267-69). Mr. Fletcher testified to the same effect (T.p. 10/29/04, pp. 231-32).

In fact, Mr. Fletcher was personally aware of specific self-storage transactions in which the real estate and the business had been sold separately (Supp. 420, T.p. 10/29/04, pp. 179-80). Because the improvements other than the movable metal buildings on the subject site are limited

(concrete slabs, limited electricity, and lightweight blacktop), the 1020 Kieley Place real estate could be readily converted to other uses consistent with its industrial neighborhood.

Appellees produced no rebutting or conflicting evidence. Even Professor Miller conceded that the business could be moved from the real property at 1020 Kieley Place, although, despite evidence to the contrary, he believed an owner would not do so (Supp. 408, T.p. 10/29/04, p. 131-2). Dr. Miller testified that mobility is a characteristic of a business, and this is not true of real estate (Supp. 394, T.p. 10/29/04, p. 75), which supports Appellant's position. The testimony of Mr. Olman, Mr. Rippe, and Mr. Fletcher, all with direct experience and knowledge, is more credible, and both Appellee Auditor and the BOE (which presented no witnesses) failed to put on any rebutting evidence.

Appellant St. Bernard thus met its burden under *Higbee* to separate the value of the real estate from other factors in the sale of a going concern including real estate. It presented the sale of the real property for \$975,000 which the BTA held to be arm's length and sufficiently recent. This value was specifically set forth in the contract, the closing statement, the conveyance fee statements, and even in the title insurance policy. The value established by the price was corroborated. The rent paid to the former owner under the Management Agreement pending the closing yields a capitalized value very close to the sales price. Appellant presented the testimony of an experienced MAI appraiser, Mr. Fletcher, who performed all approaches to value and separated real estate and business components. Appellant also presented the testimony of a certified public accountant and certified valuation analyst, Mr. Rippe, who separately valued the business factors only. Their conclusions for the real estate were within 10% and 15%,

respectively, of the real estate sales price. All of this testimony indicated that the BTA's decision of \$1,925,000 exceeds the true value of the real estate as of January 1, 2002 by an amount between \$805,000 and \$950,000.

In summary, Appellant's evidence was both internally and externally consistent, while Appellee lacked evidence and ignored the applicable rules of law and the appraisal practice.

- c. By adopting a sales tax on revenues from self storage facilities, the Ohio Legislature recognizes that the business income of a self storage facility is taxed as sales of goods and services, while the land and improvements are taxed as real estate.

The Ohio Legislature passed **R.C. 5739.01(B)(8)**, effective August 1, 2003,¹³ providing that "all transactions by which tangible personal property is or is to be stored" are "sales" subject to sales tax under Chapter 5739 (Appendix A-24). Counsel for Appellant, for Appellee Auditor, and for Appellee BOE stipulated before the BTA that the sales tax is an excise tax, whereas the real estate tax is an ad valorem tax (Supp. 377-8, T.p. 10/29/04, pp. 7-9). The real estate tax is levied on land and improvements, and the sales tax is not. The witnesses testified that real estate rental income for apartments, offices, warehouses or retail outlets is not subject to sales tax. (Supp. 296, 328, 431, T.p. 10/28/04, pp. 119 (Olman), 247 (Rippe), T.p. 10/29/04, pp. 222-24 (Fletcher)).

Conversely, a sales tax is levied on "sales" of goods and services. The statutory addition of self-storage to the list of "sales" demonstrates that in the common sense (and revenue-oriented) determination of the State Legislature, self-storage is a retail business of selling goods

¹³ This section is now **R.C. 5739.01(B)(9)** (Appendix A-24).

and services, not just "managing real estate," as Appellees have claimed. Indeed, the administrative regulation defining "Transactions where tangible personal property is or is to be stored" is illuminating as to the thinking of the taxing authorities. OAC 5703-9-05 (Appendix A-26). The regulation puts self storage sales in the same category as a bank's "provision of safe deposit boxes" and a marina's "dry-dockage" services for watercraft:

(D) "Tangible personal property is or is to be stored" includes, but is not limited to, the following and similar transactions related to:

- (1) Except as provided in paragraph (E) of this rule, the holding of tangible personal property for the consumer for which there is a charge;
- (2) The short-term or long-term holding of clothing for a consumer in a vault or other facility;
- (3) Any other bailment of personal property for which a fee is charged;
- (4) The provision of a locker, self-storage unit, building, or other property, both real and personal, for the lessee's or renter's use in storing tangible personal property;**
- (5) The provision of dry-dockage or of out-of-water storage for watercraft;
- (6) The provision of safe deposit boxes;
- (7) Except for parking as provided in paragraph (E)(2) of this rule [residential, public and private parking facilities], the holding of, or provision of space to keep a motor vehicle: or
- (8) Airplane storage. "Airplane storage" is an aircraft at rest, either in a hangar or by tie-downs, during which the engine of the aircraft is not maintained in an active or operational condition . . . (Emphasis added).

Surely, not even the Auditor would suggest that real estate owned and occupied by a bank should be valued based on the income from its safe deposit boxes. But that is exactly the argument made by Appellee Hamilton County Auditor herein. This legislation and the regulations adopted

pursuant thereto demonstrate that the Hamilton County Auditor's effort to tax the business income stream as both retail sales and as real estate is incorrect and illegal.¹⁴

Fourth Assignment of Error:

The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by failing to require the Appellee to rebut the sale price of the subject real property in its recent arm's length sale, which is the best evidence of true value, contrary to established precedent. (Decision and Order of BTA entered April 28, 2006.)

Appellant's Proposition of Law No. 4

Once the taxpayer has presented competent, reliable, and probative evidence of the true value of the real property by the sale price in a recent arm's length transaction specifying the value of the real property, other parties asserting a different value have the burden to rebut the taxpayer's evidence by proving with competent, reliable, and probative evidence that the sale price is not the best evidence of true value.

Appellant St. Bernard had the burden of going forward at the BTA, and it met this burden. The BTA erred first by failing to follow the contract, as discussed at length above. It then further erred by giving a presumption of validity to the decision of the BOR. Compounding this error, it failed to recognize that once Appellant had met its burden to present competent and probative evidence of the real estate value, the opposing parties had the burden to present evidence sufficient to rebut it. In *Springfield Local Bd. of Edn.v. Summit Cty. Bd. of Revision*

¹⁴ Moreover, the Legislature has now adopted the commercial activity ("CAT") tax, which Appellant pays on its income from the sale of its goods and services. This is further evidence that the income from sales should not be used as a basis for taxes on land and improvements.

(1994), 68 Ohio St.3d 493, 494, this Court corrected the BTA on both of its mistakes in this case, apparently to no avail.

The BTA stated on page 9 of its Decision in this case:

We remind St. Bernard that the BOR concluded that the full amount of the purchase price, with the exception paid for personalty, was for real property. Thus, the burden rests with St. Bernard to demonstrate its right to an allocation of business value. *Lakota*, supra.

The decision of the county board of revision is not entitled to a presumption of validity at the BTA. In *Springfield*, 68 Ohio St.3d at 495, this Court criticized the BTA's reference to the "presumption of validity" of a BOR decision:

In *Mentor*, also, we did not refer to any presumption of validity. We stated:

"* * * Once the school board had presented evidence that the property's value was different from that determined by the board of revision, [the landowners/taxpayers], who were the appellees before the BTA, should have rebutted the school board's evidence. The taxpayers had the obligation to prove their right to a reduction in value. *Western Industries v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340, 342, 10 O.O.2d 427, 164 N.E.2d 741, 743 * * *." *Mentor*, 37 Ohio St.3d at 319, 526 N.E.2d at 65. In *Mentor*, we resolved issues of the burden of proof and the burden of going forward with the evidence, when we required the landowners to present evidence to rebut the school board's evidence as to value. (Emphasis added).

The BTA correctly stated this rule in a 2000 decision, *Bd. of Ed. of Groveport Madison Local School Dist. v. Franklin Ct. Bd. of Revision* (June 30, 2000), Case No. 98-701, p. 3:

Once an appellant has presented competent and probative evidence of true value, other parties asserting a different value then have a corresponding burden of providing sufficient evidence to rebut the appellant's evidence. *Springfield Local Bd. Of Edn., supra; Mentor Exempted Village Bd. Of Edn, supra.*

In this case, the BTA erred by improperly presuming the validity of the BOR's decision, and by failing to follow the correct burden of proof. Since Appellant presented competent and probative evidence supporting its value, the burden shifted to the Auditor to rebut Appellant's evidence. It failed to do so.

As stated above, the BTA rejected arguments by the Appellee Auditor and the BOE and concluded that the sale was both arm's length and close in time to the tax lien date. The Auditor called its staff appraiser of four years, Mr. Doug Thoreson, and a university finance professor, Dr. Norman Miller. The Board of Education called no witnesses. Neither Mr. Thoreson nor Dr. Miller presented evidence to support a real estate-only value of \$1,925,000.

Appraiser Thoreson completely ignored the allocation in the sale, and made absolutely no effort to determine the value of the intangibles sold with the real property. (Supp. 460-1; T.p. 10/29/04, p. 340-1). His position was that there is no business enterprise - - an easy way to avoid the required task! Moreover, he stated that he views the going concern value as part of the fee simple estate, directly contrary to *The Appraisal of Real Estate* and this Court's statements in *Higbee, supra*.

Mr. Thoreson's lack of appraisal experience outside of the Auditor's office (Supp. 218) showed in his work. His entire report was disjointed, incomplete and riddled with mistakes. For example, he did not even interview Mr. Olman (Supp. 453, T.p. 10/29/04, p. 310), and conducted no investigation about the arm's length nature of the allocations in the purchase contract. He missed one of the two August, 2000 conveyance fee statements for the real property, and completely ignored the sales prices reported thereon (Supp. 214, 223). He treated 50% of the

structures as being built in 2001, when in fact, all structures had been constructed on the property prior to 2000, errors he would not have made if he had spoken with the owner (Supp. 453, 489, T.p. 10/29/04, pp. 310-312, T.p. 11/8/04, pp. 50-51). He ignored that the actual economic occupancy of the facility was much less than the "sticker price" schedule due to concessions, and that the subject property's expenses were greater than his assumptions, which were based on survey data from other parts of the country (Supp. 349, 464-5, T.p. 10/28/04, p. 334; T.p. 10/29/04, pp. 353-55, 357).

Incredibly, after missing a decimal point in his first appraisal for the BOR, such that his tax additur was .19 when it should have been 1.9 (*compare* Supp. 216 and Supp. 225), Mr. Thoreson juggled all of the other numbers in his "stabilized operating statement" to make the result come out similar for the same tax lien date: he reduced the expense ratio from 35% to 30%, and lowered the capitalization rate from 9.5% to 8.25% (*compare* Supp. 216 and Supp. 225) He used non-comparable land sales in "big box" high-traffic retail areas even though he acknowledged that the subject real estate is in a completely dissimilar area, with no traffic across its frontage, and inconsistent with the current model in the self-storage industry. (Supp. 457, 460, T.p. 10/29/04, 325-27, 338-39). Mass appraisals such as he performed are specifically criticized by *The Appraisal of Real Estate, 12th Ed* (2001), p. 648. In short, his testimony was neither reliable nor probative.

The only other witness for the Auditor was Dr. Norman Miller. Dr. Miller is not an appraiser, not an owner of commercial real estate, or a businessman. Dr. Miller's academic expertise is admittedly limited to real estate-related finance. He did no valuation of the real

estate, and was called solely to critique Mr. Rippe's report. It is ironic that Dr. Miller, who describes himself as a real estate-related finance expert, was called not to value the real estate factors or the business factors included in the sale, but rather to evaluate the report of an expert in business valuation - a discipline in which he admits he has no training or experience whatsoever.

Hence, Dr. Miller made it clear that he does not have an opinion as to the value of *either* the real estate or the business, or any commonly accepted credentials in either area. Dr. Miller stated that he had relinquished a general appraisal license soon after obtaining it. He "didn't want to be burdened with having to do a full-blown feasibility study and market analysis" and knew he could not comply with USPAP (Supp. 392, 404, T.p. 10/29/04 p. 67, 113-14). Apparently, this frees him in his own mind to express theories without the obligations or potential liabilities of professional real estate appraisers.

Dr. Miller condescendingly referred to Mr. Rippe's Certified Valuation Analyst (CVA) credential as a "merit badge" with which he was not familiar (Supp. T.p. 10/29/04 p. 127). Dr. Miller repeatedly insisted that Mr. Rippe was valuing the real estate at 1020 Kieley Place, even to the point of declaring that "Rippe's conclusion on the property values are extreme; they insult my intelligence." (Supp. 405, T.p. 10/29/04 p. 120). Mr. Rippe's report, which he was allegedly critiquing, specifically states that it was examining "the purchase price of the business (excluding the real estate)." (Supp. 53, Ex. 19, p. 1). The report expressly concluded a value of the business only. (Supp. 56, Ex. 19, p. 4). Mr. Rippe reiterated on the stand that he was not valuing the real estate, but rather only the business based on its income production and comparing that business value to the value in the sales contract allocated to goodwill (Supp. 317, 320, 339, T.p. 10/28/04

p. 205, 218, 294). Mr. Rippe also testified that the business could be relocated from this real estate and sold independently (Supp. 333, T.p. 10/29/06 p.267-9).

Indeed, it is clear that the central position of Dr. Miller's testimony is inconsistent with Ohio law and this Court's pronouncements of the valuation of real estate for purposes of taxation. The title of Dr. Miller's article "The Absence of a Business Component for Retail Property" declares unequivocally that Dr. Miller's thesis is at odds with the law in Ohio. This quote is typical of his testimony (as prompted by the Auditor's counsel):

Q. You stated that there is no business value at this site; is that correct?

A. That's correct.

G: So logically there's no way to value the value of a business that doesn't exist; is that right?

A: That's correct. (Supp. 400, T.p. 10/29/04 p. 97)

Then on cross examination, Dr. Miller testified as follows:

Q. You don't consider this a business?

A. No, this is not a business, this is a real property.

Q. So you're saying that there's no business with regard to St. Bernard Self Storage, LLC?

A. No business at all. (Supp. 407, T.p. 10/29/04 p. 128)

In contrast, this Court has stated that business factors and the real-property factors must be separated for real property taxation, *Higbee, supra*, 2006 Ohio 2 ¶44, and that the "difficult[y] to accurately separate the income and expenses between business and real estate activities is not a sufficient reason not to separate them; it must be done, because we tax real estate in this case."

Dublin Senior, supra, 80 Ohio St. 3d at 461. Dr. Miller's testimony was of no probative value to

counter the arm's length sale price for the real estate and should not have been relied upon by the BTA.

IV. CONCLUSION

Appellant St. Bernard Self Storage, LLC respectfully requests the Supreme Court of Ohio to reverse the decision of the Board of Tax Appeals as a matter of law because the Board of Tax Appeals violated well established precedents of this Court requiring real property to be valued based upon the recent arm's-length sale of the subject real property. As a matter of justice, Appellant has been victimized by the taxing authorities for apparent ulterior motives unrelated to the specifics of this property. Appellant negotiated in good faith to acquire the subject property to operate a small business thereon, only to experience increase upon increase upon increase by the County Auditor and then disregard of the rule of law by the Board of Revision and by the Board of Tax Appeals at the urging of the County Auditor.

Accordingly, Appellant St. Bernard Self Storage, LLC respectfully asks the Supreme Court to find that the true value of the subject real property as of the tax lien date of January 1, 2002 is based upon the sale price of the real estate of \$975,000, as confirmed by the transaction documents in the record pertaining to the recent arm's-length sale of this property.

Respectfully submitted,

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V. PROOF OF SERVICE

I hereby certify that a copy of the foregoing "Merit Brief of Appellant St. Bernard Self Storage, LLC" was served by ordinary U. S. Mail, postage prepaid, this 11th day of December, 2006 upon the following:

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VI. APPENDIX

Date-stamped Notice of Cross-Appeal dated May 15, 2006 to the Ohio Supreme Court, Case No. 06-884 A-1

Judgment Entry dated July 3, 2006, Case No. 06-884 granting Auditor’s Application for Dismissal and ordering that St. Bernard Self Storage proceed as Appellant A-5

Decision and Order of the Board of Tax Appeals entered April 28, 2006 in St. Bernard Self Storage LLC vs. Hamilton County Board of Revision, et al., BTA Case No. 2003-T-1532 A-6

Ohio Constitution Article XII, §2 A-19

R.C. 5713.01 A-20

R.C. 5713.03 A-23

R.C. 5739.01(B)(9) [formerly (B)(8)] A-24

OAC 5703-9-05 A-26

Decision and Order of the Board of Tax Appeals entered April 20, 2001 in Willoughby-Eastlake City School District Board of Education vs. Lake County Board of Revision, et al., BTA Case Nos. 98-R-509 and 98-R-518, (2001 Ohio Tax LEXIS 553) A-29

IN THE SUPREME COURT OF OHIO

St. Bernard Self Storage, LLC,

Appellant,

vs.

Hamilton Cty. Bd. of Revision
et al,

Appellees.

Case No. 06-884

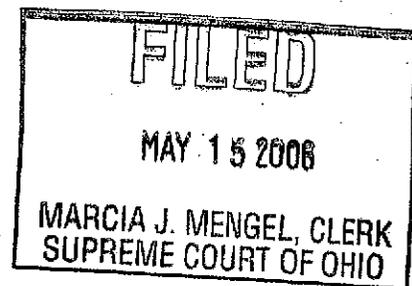
Appeal from the Ohio
Board of Tax Appeals

Board of Tax Appeals
Case No. 2003 -T-1532

NOTICE OF CROSS-APPEAL OF CROSS-APPELLANT
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Cross-Appellant St. Bernard Self-Storage, LLC hereby gives notice of its cross appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Board of Tax Appeals, journalized in Case No. 2003-T-1532 on April 28, 2006, and appealed by Hamilton County Auditor Dusty Rhodes on May 4, 2006. A true and accurate copy of the Decision and Order of the Board is attached hereto and incorporated herein by reference.

Cross-appellant complains of the following errors in the Decision and Order of the Board of Tax Appeals:

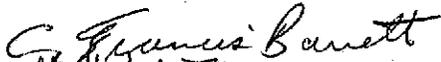
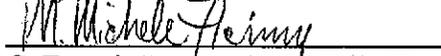
1. The Board of Tax Appeals erred in valuing the subject real property based on its use rather than on the real estate.
2. The Board of Tax Appeals erred in failing to allocate the sales price of the subject real estate in an arm's-length transaction to the real estate to

determine value by improperly including intangible personal property, such as the value of the business, in the value of the subject real estate.

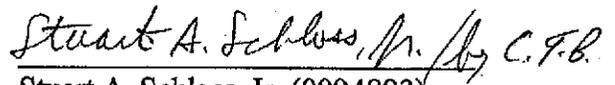
3. The Board of Tax Appeals erred in applying the proper burden of proof where the Appellant Auditor and Appellee School Board offered no evidence to rebut the allocation of the sales price or the valuation of the business.

4. The Board of Tax Appeals erred in failing to consider the only competent evidence of valuation presented by Appellee/Cross-Appellant property owner's experts.

Respectfully submitted,

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 C.F.B.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Cross Appeal of Appellant St. Bernard Self-Storage, LLC. was served by certified U.S. mail this 15th day of May, 2006 upon the following:

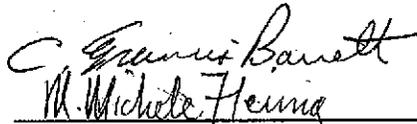
Thomas J. Scheve (0011256)
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Tax Commissioner of Ohio
Ohio Department of Taxation
30 E. Broad Street
Columbus, Ohio 43215-3414

Ohio Board of Tax Appeals
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The Supreme Court of Ohio

FILED

JUL 03 2006

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

St. Bernard Self-Storage LLC

Case No. 06-884

v.

JUDGMENT ENTRY

Hamilton County Board of Revision,
Hamilton County Auditor, and
St. Bernard/Elmwood Place School
District Board of Education

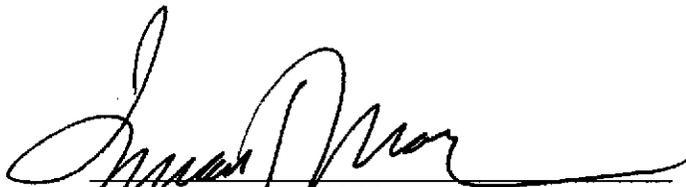
APPEAL FROM THE
BOARD OF TAX APPEALS

This cause is pending before the Court as an appeal from the Board of Tax Appeals. Upon consideration of appellant/cross-appellee's application for dismissal,

IT IS ORDERED by the Court that the application for dismissal is granted.

IT IS FURTHER ORDERED that the cross-appeal of St. Bernard Self-Storage, LLC, remains pending. St. Bernard Self-Storage, LLC, shall proceed as appellant herein and shall file its merit brief within 40 days of the date of this entry. The remaining parties shall proceed as appellees and otherwise comply with S.Ct.Prac.R. VI.

(Board of Tax Appeals; No. 2003T1532)



THOMAS J. MOYER
Chief Justice

OHIO BOARD OF TAX APPEALS

St. Bernard Self-Storage LLC,)
)
 Appellant,)
)
 vs.) CASE NO. 2003-T-1532
)
) (REAL PROPERTY TAX)
 Hamilton County Board of Revision,)
 Hamilton County Auditor, and) DECISION AND ORDER
 St. Bernard/Elmwood Place School)
 District Board of Education,)
)
 Appellees.)

APPEARANCES:

For the Appellant - Barrett & Weber, L.P.A.
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For the Bd. of Edn. - David C. DiMuzio, Inc.
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Cincinnati, Ohio 45202

Entered **APR 28 2006**

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

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by St. Bernard Self-Storage LLC. St. Bernard appeals from a decision of the Hamilton County Board of Revision, in which the BOR determined the true value

of certain real property to be \$1,925,000 for tax year 2002. St. Bernard claims that the correct true value should be \$1,012,200.

The Hamilton County Auditor's records list the subject property as permanent parcel number 582-0003-0073. The subject is comprised of approximately 4.04 acres of land. The land is improved with eight one-story metal buildings on concrete slabs. The buildings were erected between 1997 and 2001. The total size of the improvements is approximately 51,625 square feet, of which approximately 660 square feet is used for a general office area. The remainder of the space is operated as a self-storage facility. In addition, there is an outside area available for the storage of large vehicles and boats. Other improvements include asphalt parking and drive, chain-link fencing, and an electronic security gate. Easements also exist for ingress and egress.

St. Bernard purchased the subject on August 21, 2000¹ for a total consideration of \$1,950,000. In its complaint to the BOR, St. Bernard argued that the purchase price should be allocated, with \$975,000 for real estate, \$25,000 for tangible personal property, and \$950,000 for "goodwill." St. Bernard asserted that this allocation, contained in the purchase contract, represented separate and fully negotiated prices for the real estate and the business. Thus, St. Bernard argued that the true value assessed by the county should be \$975,000. Upon review, the BOR found the sale to be arm's length. In addition, the BOR concluded that any goodwill, or business value, was "inextricably intertwined as to the value of the property, because

¹ The parties have also referred to the sale date as June 30, 2000. The June date is the date upon which the purchase contract was executed. The actual transfer of the subject took place on August 21, 2000. See Appellant's Ex. 6 and S.T., BOR Hearing Transcript, at 3.

the real estate is what's producing the value to the property." S.T., BOR Hearing Transcript, at 36. The BOR did allow a deduction for tangible personal property, but otherwise determined that the value of the subject was \$1,925,000 based upon the sale price.

On appeal, St. Bernard again argues that the sale price is the best evidence of value and that the price should be allocated between property and business value. In the alternative, St. Bernard has offered into evidence appraisals, which offer opinion of values for both the real estate and the business. The county and the board of education (BOE) both argue that the sale should not be relied upon because it was not made at arm's length. They have instead offered appraisal evidence, which they assert shows a true value for the subject of \$2,000,000.²

We begin our review of the evidence by noting that "[w]hen cases are appealed from a board of revision to the BTA, the burden of proof is on the appellant, whether it be a taxpayer or a board of education, to prove its right to an increase or decrease from the value determined by the board of revision." *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564, at 566. See, also, *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059. In determining value, we will determine the weight and credibility to be accorded the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

² To the extent that each of the parties has renewed, through brief, its motions to exclude the testimony of each other's witnesses, we hereby affirm the rulings of our attorney examiner and accept the testimony and related documents into evidence. See *Higbee Co. v. Cuyahoga Cty. Bd. of Revision*, 107 Ohio St.3d 325, 2006-Ohio-2, at ¶ 31.

It is not enough, however, to simply come forward with some evidence of value. Neither is it sufficient to grant the requested increase or decrease merely because no evidence is offered to challenge the claim. *Western Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340; *Hibschman v. Bd. of Tax Appeals* (1943), 142 Ohio St. 47. An appellant must present competent and probative evidence to make its case. *Columbus*, supra, at 566.

The BOR concluded that the August 21, 2000 sale was an arm's-length transaction and accepted it as the value of the subject property. While St. Bernard challenges the BOR's decision to not allocate the sale price, St. Bernard, as appellant, agrees that the sale is arm's length in nature. The auditor and the BOE, however, dispute the BOR's conclusion, arguing that the transaction was not an arm's-length sale in that the sale (1) included favorable financing provided by the seller, (2) included easements that were not part of the subject property, (3) included a management contract, and (4) was tied to the right of first refusal to purchase additional properties.

It is long established that the "best evidence of 'true value in money' of real property is an actual, recent sale of the property in an arm's-length transaction." *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129, at the syllabus; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410. R.C. 5713.03 further provides:

"In determining the true value of any tract, lot or parcel of real property under this section, if 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 tax lien date, the auditor shall consider the sale price of such tract, lot or parcel to be the true value for taxation purposes.”

The court recently reaffirmed the provisions of R.C. 5713.03, holding that “when the property has been the subject of a recent arm’s-length sale between a willing seller and a willing buyer, the sale price of the property shall be ‘the true value for taxation purposes.’” *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, at ¶ 13. See, also, *Lakota*, supra.

St. Bernard has, before both the BOR and this board, provided the testimony of James A. Olman in support of the arm’s-length nature of the sale. Mr. Olman is St. Bernard’s managing partner and a real estate broker. Mr. Olman testified that he learned of the subject property from another real estate broker who had been doing other work with the sellers, William and Carol Schmidter and James and Margaret Schrimpf. H.R., Vol. I, at 75. Mr. Olman testified that the purchase price was fully negotiated between the buyer and sellers and that he considered the transaction to be arm’s length. H.R., Vol. I, at 75, 83. Neither the auditor nor the BOE refute this testimony. *Lakota*, supra. We thus conclude that the sale was an arm’s-length transaction.

Both the auditor and the BOE nevertheless specify that the transaction cannot be relied upon because the sellers provided financing. Mr. Olman testified that the negotiation of the financing was made at arm’s length, H.R., Vol. I, at 76, and we can find nothing in the record that would lead us to conclude that the financing has affected the arm’s-length nature of the sale itself. In addition, the court in *Berea*,

supra, has held that the true value of a parcel of property "shall" be the arm's-length sale price. Id. at ¶ 13. In so doing, the *Berea* court overruled previous case law that permitted this board to look beyond the sale in order to adjust the price to reflect both the price paid for real property and the price paid for any favorable financing. Id. at ¶ 13. Recently, in *Lakota*, supra, the court reiterated its position, stating that "**** *Berea* held that evidence of financing was not to be considered if the property had recently been sold in an arm's-length transaction." *Lakota*, at ¶ 24.

Next, the auditor and the BOE assert that the sale cannot be relied upon because it included the purchase of easements. Mr. Olman testified that the subject property was, at the time it was offered for sale, part of a larger parcel owned by the Schmidters and the Schrimps. H.R., Vol. I, at 77, 87. The storage facility was located at the rear of the larger parcel and had no direct access to the public roads. In order to sell just the storage facility, the parties concluded that it was necessary to split the storage facility into a separate parcel. In order for St. Bernard to have access to the subject property, it was also necessary that the Schmidters and the Schrimps grant St. Bernard an easement over the property still retained by the sellers:

"So the cut up [parcel split] was required to take these parcels out of the larger parcel *** and that also necessitated an easement for access over the remaining property so that we could actually get to the [subject] property." H.R., Vol. I, at 87.

Mr. Olman also testified that the easement had no impact on the purchase price but was considered an issue of how to effect the transfer. H.R., Vol. I, at 182.

The auditor and the BOE argue that the inclusion of the easement resulted in the sale of something other than real property. Thus, they contend, the sale cannot be relied upon. We disagree.

R.C. 5701.02 (A) defines real property as follows:

“‘Real property,’ ‘realty,’ and ‘land’ include land itself, whether laid out in town lots or otherwise, all growing crops, including deciduous and evergreen trees, plants, and shrubs, with all things contained therein, and, unless otherwise specified in this section or section 5701.03 of the Revised Code, all buildings, structures, improvements, and fixtures of whatever kind on the land, *and all rights and privileges belonging or appertaining thereto.* ***”
(Emphasis added.)

In construing the foregoing, the Ohio Supreme Court has held, “It is undisputed that an easement constitutes a right and privilege belonging or appertaining to the dominant estate.”³ *Ross v. Franko* (1942), 139 Ohio St. 395, at 397. Thus, an easement is considered part of the real property. This concept is also recognized in appraisal practice. The Appraisal of Real Estate (12th Ed. 2001), at 85, states that an “easement is an interest in real property.” Moreover, easement rights transfer with the dominant estate, and easements themselves are not usually valued. *Id.* at 86. Accordingly, we find the appellees’ contention that the inclusion of the easement in the sale before us resulted in the transfer of something in addition to real property to be without merit.

³ Generally, a property that enjoys the benefit of an easement gains additional rights, while a property that is subject to an easement is burdened. The property that enjoys the additional rights is known as the dominant estate. The property that is subject to the easement is called the servient estate. The Appraisal of Real Estate (12th Ed. 2001), at 85.

Finally, the appellees argue that the sale cannot be relied upon because it included a management contract and a right of first refusal for other property. At hearing, Mr. Olman testified that the management agreement was executed contemporaneously with the sale contract but that the management agreement did not affect the sale price. H.R., Vol. I, at 86-88. Mr. Olman testified that the management agreement was entered into because the sellers had not been able to acquire the parcel split at the time of the sale. The agreement allowed the sellers to operate the subject property only until such time as the parcel split was effectuated and clear title could be transferred to St. Bernard. At that time, it expired. H.R., Vol. I, at 85-86. As to the right of first refusal, Mr. Olman testified that the remainder of the sellers' property, over which St. Bernard had an easement, had warehouse space. Mr. Olman stated that "it would make sense that if and when the Schmidters decided to sell it, that we would have first crack at it." H.R., Vol. I, at 183. Mr. Olman testified that the right of first refusal was fully negotiated at arm's length and that it was not a factor in determining the sale price of the subject property. H.R., Vol. I, at 184.

We do not find the management agreement or the right of first refusal to be factors that invalidate the arm's-length nature of the August 21, 2000 sale. The appellees have provided nothing beyond conjecture as to the impact of these items on the sale, and Mr. Olman's testimony that they did not affect the sale or the price paid is uncontroverted by the record. Moreover, it is common for a purchase agreement to contain a right of first refusal for related property. Such does not disqualify the sale as arm's length.

Based upon all of the foregoing, we find that the subject property was sold for \$1,950,000 in an arm's-length transaction on August 21, 2000. We further find, upon review of the record, that the sale is recent for valuation purposes.

St. Bernard, however, further alleges that the amount paid for the subject included not only an amount for the realty and personalty but also an amount paid for the business. The appellees counter that any business value is intertwined with the realty and cannot be separated.

Initially, we respond to St. Bernard's argument that the burden rests with the appellees to prove that its allocation, as set forth in the purchase contract, is in error. We remind St. Bernard that the BOR concluded that the full amount of the purchase price, with an exception paid for personalty, was for real property. Thus, the burden rests with St. Bernard to demonstrate its right to an allocation of business value. *Lakota*, supra. Upon review, we can find no support for such an allocation.

We have previously recognized that a sale price may include value for an ongoing business. *Bd. of Edn. of the Groveport Madison Local School Dist. v. Franklin Cty. Bd. of Revision* (June 30, 2000), BTA No. 1998-N-701, unreported. Nevertheless, we have specifically rejected the theory when valuing self-storage units. In *Martin v. Franklin Cty. Bd. of Revision* (Feb. 10, 1988), BTA No. 1987-J-655, unreported, we rejected the property owner's argument that \$80,000 of his \$500,000 purchase price should have been allocated to the purchase of a storage business.

As previously stated, Ohio defines real property to include "all rights and privileges belonging or appertaining thereto." R.C. 5701.02. This includes something

more than just the land and physical improvements. "Real property includes all interests, benefits, and rights inherent in the ownership of physical real estate. *** The total range of ownership interests in real property is called the bundle of rights. *** The bundle of rights contains all the interests in real property, including the right to use the real estate, sell it, lease it, enter it, and give it away ***." The Appraisal of Real Estate, at 8. Therefore, the issue in any situation in which an owner claims that intangible personal property, such as business value, should be deducted is: to determine whether the value appertains to the real property, and is thus transferable with the real property, or whether it is detached from real property and can either be transferred independently or remain with the seller. Other Ohio courts agree. See *Harvard Refuse, Inc. v Cuyahoga Cty. Bd. of Revision* (Feb. 5, 1987), Cuyahoga App. Nos. 51634 through 51677, unreported (holding that "the alleged intangible personal property had no value separate from the real property unless it could be sold separately").⁴

Although St. Bernard argues that the self-storage business is carried out independently of the real estate, and is thus transferable, we find no support for this in the record.⁵ St. Bernard's business is to lease space. This clearly appertains to the real property and would be transferred to anyone who purchases the facility. *Martin,*

⁴ Courts in states with a definition of "real property" similar to Ohio's have reached analogous conclusions. See, e.g., *Waste Management v. Kenosha Cty. Bd. of Review* (1994) 17 Wis. 2d 257, *State of Wisconsin ex rel N/S Assoc. v. Bd. of Review* (1991), 164 Wis.2d 31; *Heritage Cablevision v. Bd. of Review* (Iowa 1990), 457 N.W.2d 594, and *Madonna v. Cty. of San Luis Obispo* (1974) 39 Cal. App.3d 57.

⁵ St. Bernard argues that it has an independent business because R.C. 5739.01(B)(8) places sales tax on "all transactions by which tangible personal property is or is to be stored." We find this argument to be without merit. The General Assembly's decision to tax an income stream does not invalidate the conclusion that a person is paying to utilize physical space.

supra. We recently reiterated this position in *Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Jan. 27, 2006), BTA No. 2004-M-1211, unreported, holding, "Like apartment or office buildings, consideration of the income earned from storage units and car washes is a valid method of valuing the realty and improvements thereon. The property owners have not brought forth sufficient evidence that a business separate from the realty and improvements was included in the purchase price. See *Dublin Senior Community L. P. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455." Id. at 7.

Similarly, at hearing the auditor offered the testimony of Dr. Norman Miller, a PHD in finance and chair of the real estate department at the University of Cincinnati. Dr. Miller persuasively described how the subject property has no intangible business value independent of the real property:

"Developers make entrepreneurial profit all the time. But you capture that entrepreneurial value, and the question is, 'where does it go?' It goes to the land because it comes in the form of rent. *** When you pass it along you don't say well, it only cost me a million-and-half to build and its worth 2 million to build it. I'm going to give it to you for a million-and-half and you can have the benefits of getting an entrepreneurial value. I'm not going to give it to somebody if I don't have to. I'm going to pass it for fair market value. I'm going to capture the whole thing.

"What are they paying for? They are paying for the income stream of that property. That's, in fact, what is deriving value. So where do we assign that entrepreneurial profit? It is, in fact, now embedded in the real estate. *** they have to pay market value and there's no windfall passed on, so there is no business value ** passed on to the second owner." H.R., Vol. II, at 99.

Upon review of all the evidence before this board, we conclude that the subject property was sold in an arm's-length sale for \$1,950,000. We do recognize that tangible personal property purchased as a part of a real property transaction may be excluded from the sale price for ad valorem tax purposes. *Bd. of Edn. of the Kettering-Moraine City School Dist. v. Montgomery Cty. Bd. of Revision* (Sept. 1, 2000), Montgomery App. No. 18223, unreported; *Streetsboro City School Dist. Bd. of Edn. v. Portage Cty. Bd. of Revision* (Nov. 10, 2005), BTA No. 2004-K-600, unreported. The record contains sufficient evidence that \$25,000 worth of personalty was purchased through the August 21, 2000 sale. We thus conclude that the record supports a value of the subject property, based on an arm's-length sale, of \$1,925,000. *Berea and Lakota, supra.*

In reaching our determination, we note that the auditor has also provided this board with appraisal evidence showing a value for the subject of \$2,000,000.⁶ Although we cannot consider appraisal evidence, given that there is a valid sale before us, see *Berea and Lakota, supra*, we note only that the appraisal corroborates St. Bernard's purchase price.

Therefore, the Board of Tax Appeals finds, upon a preponderance of the evidence, that the true and taxable values of the subject property are as follows for tax year 2002:

⁶ St. Bernard also provided appraisal evidence. We decline to give that evidence weight, however, as it took into consideration the separation of business value from the subject property. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

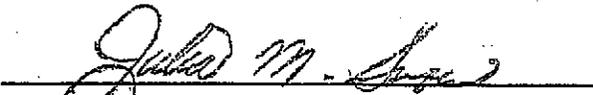
Parcel 582-0003-0073	TRUE VALUE	TAXABLE VALUE
LAND	\$ 242,400	\$ 84,840
BUILDINGS	<u>\$1,682,600</u>	<u>\$588,910</u>
TOTAL	\$1,925,000	\$673,750

The Auditor of Hamilton County is hereby ordered to list and assess the subject property in conformity with this board's decision and order and to carry forward the determined values in accordance with law.

BOARD OF TAX APPEALS			
RESULT OF VOTE	YES	NO	DATE
Ms. Margulies	plm		4/21/06
Mr. Eberhart	RH		4-13-06
Mr. Dunlap	WED		4-7-06

SLS

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.


 Julia M. Snow, Board Secretary

CONSTITUTION OF THE STATE OF OHIO
ARTICLE XII. FINANCE AND TAXATION

Oh. Const. Art. XII, § 2 (2006)

§ 2. Limitation on tax rate; exemption

No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. **Land and improvements thereon shall be taxed by uniform rule according to value**, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of permanently and totally disabled residents, residents sixty-five years of age and older, and residents sixty years of age or older who are surviving spouses of deceased residents who were sixty-five years of age or older or permanently and totally disabled and receiving a reduction in the value of their homestead at the time of death, provided the surviving spouse continues to reside in a qualifying homestead, and providing for income and other qualifications to obtain such reduction. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law. (Emphasis added)

HISTORY:

(Adopted November 6, 1990).

(Amended, effective July 1, 1975; HJR No.59.)

TITLE 57. TAXATION
CHAPTER 5713. ASSESSING REAL ESTATE

ORC Ann. 5713.01 (2006)

§ 5713.01. County auditor shall be assessor; assessment procedure

(A) Each county shall be the unit for assessing real estate for taxation purposes. The county auditor shall be the assessor of all the real estate in the auditor's county for purposes of taxation, but this section does not affect the power conferred by Chapter 5727. of the Revised Code upon the tax commissioner regarding the valuation and assessment of real property used in railroad operations.

(B) **The auditor shall assess all the real estate situated in the county at its taxable value in accordance with sections 5713.03, 5713.31, and 5715.01 of the Revised Code** and with the rules and methods applicable to the auditor's county adopted, prescribed, and promulgated by the tax commissioner. The auditor shall view and appraise or cause to be viewed and **appraised at its true value in money, each lot or parcel of real estate**, including land devoted exclusively to agricultural use, **and the improvements located thereon** at least once in each six-year period and the taxable values required to be derived therefrom shall be placed on the auditor's tax list and the county treasurer's duplicate for the tax year ordered by the commissioner pursuant to *section 5715.34 of the Revised Code*. The commissioner may grant an extension of one year or less if the commissioner finds that good cause exists for the extension. When the auditor so views and appraises, the auditor may enter each structure located thereon to determine by actual view what improvements have been made therein or additions made thereto since the next preceding valuation. The auditor shall revalue and assess at any time all or any part of the real estate in such county, including land devoted exclusively to agricultural use, where the auditor finds that the true or taxable values thereof have changed, and when a conservation easement is created under *sections 5301.67 to 5301.70 of the Revised Code*. The auditor may increase or decrease the true or taxable value of any lot or parcel of real estate in any township, municipal corporation, or other taxing district by an amount which will cause all real property on the tax list to be valued as required by law, or the auditor may increase or decrease the aggregate value of all real property, or any class of real property, in the county, township, municipal corporation, or other taxing district, or in any ward or other division of a municipal corporation by a per cent or amount which will cause all property to be properly valued and assessed for taxation **in accordance with Section 36, Article II, Section 2, Article XII, Ohio Constitution, this section, and sections 5713.03, 5713.31, and 5715.01 of the Revised Code.**

(C) When the auditor determines to reappraise all the real estate in the county or any class thereof, when the tax commissioner orders an increase in the aggregate true or taxable value of the real estate in any taxing subdivision, or when the taxable value of real estate is increased by the application of a uniform taxable value per cent of true value pursuant to the order of the commissioner, the auditor shall advertise the completion of the reappraisal or equalization action in a newspaper of general circulation in the county once a week for the three consecutive weeks next

preceding the issuance of the tax bills. When the auditor changes the true or taxable value of any individual parcels of real estate, the auditor shall notify the owner of the real estate, or the person in whose name the same stands charged on the duplicate, by mail or in person, of the changes the auditor has made in the assessments of such property. Such notice shall be given at least thirty days prior to the issuance of the tax bills. Failure to receive notice shall not invalidate any proceeding under this section.

(D) The auditor shall make the necessary abstracts from books of the auditor's office containing descriptions of real estate in such county, together with such platbooks and lists of transfers of title to land as the auditor deems necessary in the performance of the auditor's duties in valuing such property for taxation. Such abstracts, platbooks, and lists shall be in such form and detail as the tax commissioner prescribes.

(E) The auditor, with the approval of the tax commissioner, may appoint and employ such experts, deputies, clerks, or other employees as the auditor deems necessary to the performance of the auditor's duties as assessor, or, with the approval of the tax commissioner, the auditor may enter into a contract with an individual, partnership, firm, company, or corporation to do all or any part of the work; the amount to be expended in the payment of the compensation of such employees shall be fixed by the board of county commissioners. If, in the opinion of the auditor, the board of county commissioners fails to provide a sufficient amount for the compensation of such employees, the auditor may apply to the tax commissioner for an additional allowance, and the additional amount of compensation allowed by the commissioner shall be certified to the board of county commissioners, and the same shall be final. The salaries and compensation of such experts, deputies, clerks, and employees shall be paid upon the warrant of the auditor out of the general fund or the real estate assessment fund of the county, or both. If the salaries and compensation are in whole or in part fixed by the commissioner, they shall constitute a charge against the county regardless of the amount of money in the county treasury levied or appropriated for such purposes.

(F) Any contract for goods or services related to the auditor's duties as assessor, including contracts for mapping, computers, and reproduction on any medium of any documents, records, photographs, microfiche, or magnetic tapes, but not including contracts for the professional services of an appraiser, shall be awarded pursuant to the competitive bidding procedures set forth in *sections 307.86 to 307.92 of the Revised Code* and shall be paid for, upon the warrant of the auditor, from the real estate assessment fund.

(G) Experts, deputies, clerks, and other employees, in addition to their other duties, shall perform such services as the auditor directs in ascertaining such facts, description, location, character, dimensions of buildings and improvements, and other circumstances reflecting upon the value of real estate as will aid the auditor in fixing its true and taxable value and, in the case of land valued in accordance with *section 5713.31 of the Revised Code*, its current agricultural use value. The auditor may also summon and examine any person under oath in respect to any matter pertaining to the value of any real property within the county. (Emphasis added)

HISTORY:

GC § 5548; 107 v 29; 108 v PtI, 557; 111 v 418; 120 v 466; 122 v 380; Bureau of Code Revision, 10-1-53; 125 v 903(1044) (Eff 10-1-53); 127 v 65; 128 v 410 (Eff 11-4-59); 131 v 1325 (Eff 11-1-65); 131 v 1327 (Eff 11-5-65); 134 v S 455 (Eff 6-28-72); 135 v S 423 (Eff 7-26-74); 136 v H 920 (Eff 10-11-76); 138 v H 504 (Eff 3-14-80); 139 v H 201 (Eff 12-31-82); 140 v H 260 (Eff 9-27-83); 144 v S 243. Eff 8-19-92; 151 v H 66, § 101.01, eff. 6-30-05.

TITLE 57. TAXATION
CHAPTER 5713. ASSESSING REAL ESTATE

ORC Ann. 5713.03 (2006)

§ 5713.03. Taxable valuation of real property

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** and the current agricultural use value of land valued for tax purposes in accordance with *section 5713.31 of the Revised Code*, in every district, according to the rules prescribed by this chapter and *section 5715.01 of the Revised Code*, and in accordance with the uniform rules and methods of valuing and assessing real property as adopted, prescribed, and promulgated by the tax commissioner. He shall determine the taxable value of all real property by reducing its true or current agricultural use value by the percentage ordered by the commissioner. **In determining the true value of any tract, lot, or parcel of real estate under this section, if 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.** However, the sale price in an arm's length transaction between a willing seller and a willing buyer shall not be considered the true value of the property sold if subsequent to the sale:

(A) The tract, lot, or parcel of real estate loses value due to some casualty;

(B) An improvement is added to the property. Nothing in this section or *section 5713.01 of the Revised Code* and no rule adopted under *section 5715.01 of the Revised Code* shall require the county auditor to change the true value in money of any property in any year except a year in which the tax commissioner is required to determine under *section 5715.24 of the Revised Code* whether the property has been assessed as required by law.

The county auditor shall adopt and use a real property record approved by the commissioner for each tract, lot, or parcel of real property, setting forth the true and taxable value of land and, in the case of land valued in accordance with *section 5713.31 of the Revised Code*, its current agricultural use value, the number of acres of arable land, permanent pasture land, woodland, and wasteland in each tract, lot, or parcel. He shall record pertinent information and the true and taxable value of each building, structure, or improvement to land, which value shall be included as a separate part of the total value of each tract, lot, or parcel of real property. (Emphasis added)

HISTORY:

RS § 2790; S&C 1450; 77 v 130; 87 v 76; GC § 5554; 107 v 29; Bureau of Code Revision, 10-1-53; 127 v 65; 128 v 410 (Eff 11-4-59); 131 v 1329 (Eff 11-5-65); 135 v S 423 (Eff 7-26-74); 136 v H 920 (Eff 10-11-76); 137 v H 1 (Eff 8-26-77); 140 v H 260. Eff 9-27-83.

TITLE 57. TAXATION
CHAPTER 5739. SALES TAX

ORC Ann. 5739.01 (2006)

§ 5739.01. Definitions

As used in this chapter:

(A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.

(B) "**Sale**" and "**selling**" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, **whether for a price or rental**, in money or by exchange, and by any means whatsoever:

* * * * *

(9) **On and after August 1, 2003, all transactions by which tangible personal property is or is to be stored**, except such property that the consumer of the storage holds for sale in the regular course of business.

Except as provided in this section, "sale" and "selling" do not include transfers of interest in leased property where the original lessee and the terms of the original lease agreement remain unchanged, or professional, insurance, or personal service transactions that involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made. (Emphasis added)

* * * * *

HISTORY:

GC § 5546-1; 115 v PtII, 306; 116 v 41; 116 v 248; 116 v PtII, 69; 116 v PtII, 323; 119 v 389; 121 v 247; 122 v 439; 122 v 725; Bureau of Code Revision, 10-1-53; 125 v 305 (Eff 10-13-53); 126 v 157; 128 v 421; 128 v 1303 (Eff 7-29-59); 129 v 582(973) (Eff 1-10-61); 129 v 1164 (Eff 1-1-62); 132 v S 350 (Eff 9-1-67); 132 v H 919 (Eff 12-12-67); 135 v S 241 (Eff 10-30-73); 135 v S 161 (Eff 11-21-73); 135 v S 244 (Eff 6-13-74); 135 v S 544 (Eff 6-29-74); 136 v H 1 (Eff 6-13-75); 136 v H 1347 (Eff 8-27-76); 136 v H 1005 (Eff 8-27-76); 137 v H 1 (Eff 8-26-77); 138 v S 16 (Eff 10-29-79); 138 v H 904 (Eff 12-14-79); 138 v H 1032 (Eff 10-1-80); 139 v H 275 (Eff 8-1-81); 139 v H 694 (Eff 11-15-81); 139 v H 694, § § 205, 206 (Eff 8-1-82); 139 v H 552 (Eff 11-24-81); 139 v H 552, § § 25, 26 (Eff 8-1-82); 139 v H 671 (Eff 12-19-81); 139 v H 671, § § 3, 4 (Eff 8-1-82); 139 v S 530 (Eff 6-25-82); 139 v S 530, § § 28, 29 (Eff 8-1-82); 140 v H 291 (Eff 7-1-83); 140 v H 794 (Eff 7-6-84); 140 v S 112 (Eff 1-10-85); 141 v H 335 (Eff 12-11-85); 141 v H 54 (Eff 9-17-86); 142 v H 159 (Eff 3-13-87); 142 v H 171 (Eff 7-1-87); 142 v S 92 (Eff 10-20-87); 142 v H 274 (Eff 7-20-87); 142 v H 689 (Eff 2-25-88); 142 v S 386 (Eff 3-29-88); 143 v H 111 (Eff 7-1-89); 143 v H 531

(Eff 7-1-90); 143 v H 365 (Eff 4-1-90); 144 v H 298 (Eff 8-1-91); 144 v S 361 (Eff 7-1-93); 144 v H 791 (Eff 3-15-93); 144 v H 904 (Eff 1-1-93); 145 v S 122 (Eff 6-30-93); 145 v H 152 (Eff 7-1-93); 145 v H 715 (Eff 4-22-94); 145 v H 632 (Eff 7-22-94); 146 v H 61 (Eff 10-25-95); 146 v S 266 (Eff 11-20-96); 147 v H 215 (Eff 9-29-97); 147 v S 173 (Eff 1-1-2000); 148 v H 612 (Eff 9-29-2000); 149 v H 94 (Eff 9-5-2001); 149 v H 405 (Eff 12-13-2001); 149 v S 143 (Eff 6-21-2002); 149 v H 524 (Eff 6-28-2002); 149 v S 200. Eff 9-6-2002; 150 v H 95, § 1, eff. 6-26-03; 150 v S 37, § § 1, 3, eff. 10-21-03; 151 v S 26, § 1, eff. 6-2-05; 151 v H 66, § 101.01, eff. 6-30-05, 7-1-05, 1-1-06.

5703 DEPARTMENT OF TAXATION
Chapter 5703-9 Sales and Use Tax

OAC Ann. 5703-9-05 (Anderson 2006)

5703-9-05 Transactions where tangible personal property is or is to be stored.

(A) A transaction in which "tangible personal property is or is to be stored" under division (B)(8) of section 5739.01 of the Revised Code means transactions involving any keeping or holding of another's tangible personal property or any provision of space that is used to store another's tangible personal property.

(B) **In a transaction in which "tangible personal property is or is to be stored" pursuant to division (B)(8) of section 5739.01 of the Revised Code, it is not relevant whether the storage of the tangible personal property is at a location that constitutes personal property or real property.** The tax must be charged on the full fee or charge for the transaction. Accordingly, the tax imposed under that division is not subject to division (A)(2) of section 5739.02 of the Revised Code, or division (A)(2) of section 5741.02 of the Revised Code.

(C) Transactions are taxable when payment, relating to storage on or after August 1, 2003, is made on or after August 1, 2003.

(D) **"Tangible personal property is or is to be stored" includes, but is not limited to, the following and similar transactions related to:**

(1) Except as provided in paragraph (E) of this rule, the holding of tangible personal property for the consumer for which there is a charge;

(2) The short-term or long-term holding of clothing for a consumer in a vault or other facility;

(3) Any other bailment of personal property for which a fee is charged;

(4) **The provision of a locker, self-storage unit, building, or other property, both real and personal, for the lessee's or renter's use in storing tangible personal property;**

(5) The provision of dry-dockage or of out-of-water storage for watercraft;

(6) The provision of safe deposit boxes;

(7) Except for parking as provided in paragraph (E)(2) of this rule, the holding of, or provision of space to keep a motor vehicle: or

(8) Airplane storage. "Airplane storage" is an aircraft at rest, either in a hangar or by tie-downs, during which the engine of the aircraft is not maintained in an active or operational condition pursuant to the directives found in the Pilot's Operating Handbook for the aircraft.

(E) "Tangible personal property is or is to be stored" does not include the following and similar transactions related to:

(1) Transactions where the tangible personal property being stored by or for the

consumer is held by the consumer for sale in the regular course of the consumer's business, including raw materials and works-in-progress;

(2) Parking provided as an adjunct to residential accommodations and parking in a public or private commercial facility or lot, used for the parking of vehicles. Parking of vehicles is to be distinguished from the storage of vehicles. Examples of parking would include parking at an airport and parking in a parking lot where the fee is paid on a monthly basis. An example of storage would include the storing of a collectible automobile that is occasionally removed and returned;

(3) The in-water moorage of watercraft at a dock or pier;(4) The kenneling or boarding of an animal where the true object of such service involves animal care that includes additional services such as the care and feeding of the animal and the charges for such additional services are not separately stated; The provision of private mail boxes; or

(5) The provision of private mail boxes; or

(6) Bailments where no fee is imposed as a condition of the bailment, even if tipping is permitted.

(F) (1) Determination of the tax due on currency or coin-operated storage modules, such as coin-operated lockers, shall be made either by using the pre-determined method provided in this paragraph or by a method approved by the tax commissioner under section 5739.05 of the Revised Code. Vendors using the following predetermined method do not need to apply to the tax commissioner for authorization:

(a) The average charge per transaction is broken down into two components, one representing price and the other representing sales tax.

(b) The average charge per transaction for the reporting period shall be determined and divided by the sum of one plus the percentage total rate of tax applicable in the taxing jurisdiction which the storage space is located to arrive at the "price component" of the average charge per transaction. Any fraction of a cent included in such price shall be dropped.

(c) The average charge per transaction minus the "price component" determined under paragraph (F)(1)(b) of this rule yields the "sales tax component."

(d) The total receipts for the reporting period shall be divided by the average charge per transaction to arrive at the number of transactions.

(e) The number of transactions as determined under paragraph (F)(1)(d) of this rule shall be multiplied by the "sales tax component" determined under paragraph (F)(1)(c) of this rule. This result is the amount to report as the tax on such sales for the reporting period. Taxable sales for the reporting period is total receipts less the sales tax.

(2) The following is an example of the procedure to be used pursuant to paragraph (F)(1)(b) to (F)(1)(e) of this rule:

(a) The average charge per transaction is fifty cents and the rate for the taxing jurisdiction is seven per cent. The resulting calculation under paragraph (F)(1)(b) of this rule is \$0.46728972. (\$0.50/1.07) The fractions of a cent are dropped, yielding a "price component" of forty-six cents for the average charge per transaction.

(b) The forty-six-cent "price component" of the transaction is subtracted from the fifty-cent average charge per transaction, resulting in the "sales tax component" of four cents included in each fifty-cent charge.

(c) The total receipts of \$1.025.25 are divided by the fifty-cent average charge to arrive at 2.050.5, the number of transactions.

(d) The 2.050.5 transactions are multiplied by the "sales tax component" of four cents per transaction, resulting in the amount to report as the tax on such sales of \$82.02.
(Emphasis added)

HISTORY

Eff 7-31-03 (Emer.); 10-19-03; 1-16-04

Rule promulgated under: RC 5703.14

Rule authorized by: RC 5703.05

Rule amplifies: RC 5739.01, 5739.02, 5741.07

RC 119.032 review date: 10/19/08

OHIO BOARD OF TAX APPEALS

Willoughby-Eastlake City School)	
District Board of Education,)	CONSOLIDATED
)	CASE NOS. 98-R-509
Appellant,)	98-R-518
)	
vs.)	
)	(REAL PROPERTY VALUE)
Lake County Board of Revision,)	
Lake County Auditor, and)	
Sovran Acquisition, Ltd.,)	DECISION AND ORDER
)	
Appellees.)	

APPEARANCES:

For the
Board of Education

- Wayne Petkovic, Esq.
840 Brittany Drive
Delaware, OH 43015

For the County
Appellees

- Charles B. Coulson, Esq.
Lake County Prosecuting Attorney
By: Michael Brown, Esq.
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For the
Property Owner

- Todd W. Sleggs, Esq.
Todd W. Sleggs & Associates
1015 Euclid Avenue, Third Floor
Cleveland, OH 44115

ENTERED: April 20, 2001
Mr. Johnson, Ms. Jackson, and Ms. Margulies concur.

This matter is before the Board of Tax Appeals upon a notice of appeal filed by the Willoughby-Eastlake City School District Board of Education ("BOE") and a notice of appeal filed by Sovran Acquisition, Ltd. ("Sovran"). Both the BOE and Sovran appeal from

a decision of the Lake County Board of Revision ("BOR") on a complaint filed by the BOE. In its final determination, the BOR determined the taxable value of the subject property for tax year 1997.

The Lake County Auditor determined the true and taxable values of the subject property to be:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Land	\$ 67,500	\$ 23,630
Building	<u>\$ 711,800</u>	<u>\$ 249,130</u>
Total	\$ 779,300	\$ 272,760

The BOR determined that the true and taxable values of the subject property should be increased to:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Land	\$ 67,500	\$ 23,630
Building	<u>\$1,517,500</u>	<u>\$ 531,120</u>
Total	\$1,585,000	\$ 554,750

In its notice of appeal, the BOE requests that the true and taxable values of the subject property be further increased to:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Land	\$ 80,000	\$ 28,000
Building	<u>\$2,230,000</u>	<u>\$ 780,500</u>
Total	\$2,310,000	\$ 808,500

Sovran, on the other hand, contends that the BOR has overvalued the subject property and that the true and taxable values as of the tax lien date are as follows:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Land	\$ 67,500	\$ 23,630
Building	<u>\$ 711,800</u>	<u>\$ 249,130</u>
Total	\$ 779,300	\$ 272,760

The subject property is located in the Eastlake taxing district, Lake County, Ohio, and is identified in the auditor's tax records as parcel number 34A-0120-00-009-0. The subject property is improved with a twenty year-old, multi-storage facility, situated on 5.8 acres. It is located at 1100 Erie Road in Eastlake, Ohio.

The matter was submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcript certified by the BOR ("S.T."), and the brief of Sovran's counsel.¹

In an appeal from a board of revision valuation, this Board must determine the true value of the subject property. R.C. 5717.03. While the action of a county board of revision is given a presumption that it was taken in good faith and reflects sound judgment, the decision of a county board of revision regarding the value of property is not to be accorded a presumption of correctness. *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493. Accordingly, the Board of Tax Appeals must make an independent, *de novo*, determination of a property's true value, predicated upon the preponderance of the evidence. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120, 122.

A party appealing a decision of a county board of revision has the burden of coming forward with evidence in support of the value that it has asserted. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336; *Crow v. Cuyahoga Cty. Bd. of Revision* (1990), 50 Ohio St.3d 55; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318. Thus, the party challenging the decision of a board of revision must come forward and offer evidence that demonstrates its right to the value

¹ The parties waived hearing before this Board, but desired to file briefs in this matter. Although a briefing schedule was assigned, the only brief filed with the Board to date has been Sovran's.

sought. *Cleveland Bd. of Edn., supra; Springfield Local Bd. of Edn., supra.* It is not enough, however, to simply come forward with some evidence of value. Neither is it sufficient to grant the requested increase or decrease merely because no evidence is adduced in contradiction to the claim. *Western Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340. In other words, there is a burden of persuasion that rests with the appealing party to convince this Board that it is entitled to the value that it seeks. *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325.

Once competent and probative evidence of true value has been presented by the appellant, the other party to the appeal has a corresponding burden of providing evidence to rebut the appellant's evidence. *Springfield Local Bd. of Edn., supra; Mentor Exempted Village Bd. of Edn., supra,* at 319.

Accordingly, this Board must examine the available record and then determine value based upon the evidence before it. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120; *Clark v. Glander* (1949), 151 Ohio St. 229. In so doing, we determine the weight and credibility to be accorded the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13. Where the Board of Tax Appeals either rejects the evidence before it as not being competent, or sufficient evidence has not been presented by the party appealing, the Board may approve the BOR without further evidence. *Simmons v. Cuyahoga Cty. Bd. of Revision* (1998), 81 Ohio St.3d 47.

In the present instance, the BOE relies upon a sale as support for its contention of the subject property's value. According to the record before us, the sale occurred on January 9, 1997, nine days after tax lien date. (S.T. Exhs. A, B, D, E, & F) Further, the gross purchase price was \$2,310,000. *Id.*

It is long established that the "best evidence of 'true value in money' of real property is an actual, recent sale of the property in an arm's length transaction." *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129, at the syllabus; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410. Further, R.C. 5713.03 provides:

“In determining the true value of any tract, lot or parcel of real estate under this section, if 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 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.)

Thus, where there is an actual sale of real property, which is both recent and arm’s-length, the county auditor, as well as this Board, must consider such a sale as the best evidence of the property’s true value. *Conalco and Park Investment, supra*.

While the sale may be the “best evidence” of value, it is not the only evidence. Consequently, the Supreme Court of Ohio has held that there exists a rebuttable presumption that a recent, arm’s-length sale is reflective of true value. *Ratner v. Stark Cty. Bd. of Revision* (1986), 23 Ohio St.3d 59, 61. Where the inference is raised that the sale price does not reflect true value, we must at least consider and review other probative evidence of the subject property’s true value. *Rucinski v. Cuyahoga Cty. Bd. of Revision* (Mar. 5, 1999), BTA No. 98-S-155, unreported, at 4. The burden rests with the opposing party, the owner in this instance, to present evidence to rebut the presumption that the sale price reflects true value. *Cincinnati Bd. of Edn., supra*, at 327.

Upon review of the record, we conclude that the sale is recent for purposes of determining value. The information contained in the record fails to establish any relationship between the buyer and seller that would lead us to conclude that the sale was not arm’s-length in nature.

However, Sovran argues in its brief that the sale price, although recent and arm’s-length, is not indicative of true value for several reasons. First, the subject property was purchased in a bulk sale of nine self-service, mini-storage facilities. (S.T. Exh. F) Second, the gross sale price included more than the sale of real property; it also included the purchase of goodwill, personal property, and a non-compete agreement as well. (*Id.*) Thus,

according to Sovran, the sale price cannot be used for purposes of establishing the value of the subject real property.

In *WB Storage Assoc. v. Franklin Cty. Bd. of Revision* (Oct. 23, 1998), B.T.A. No. 97-N-148, unreported, this Board was faced with a similar problem. The property owner purchased eight plants in five states and "all of the machinery, equipment, inventory, raw materials, and all other assets" in each plant. The Board of Tax Appeals found that the property owner had presented insufficient evidence to overcome the presumption that the purchase price was not a fair indicator of true value in that case. The Board pointed to the fact that the additional items that did not relate directly to real estate were not accounted for on the conveyance fee statement or on the detailed settlement statement.

Soon thereafter, the Board considered another similar issue and fact pattern in *MFI Partners Ltd. Partnership v. Franklin Cty. Bd. of Revision* (Feb. 12, 1999), B.T.A. No. 96-S-1137, unreported. In *MFI Partners*, the property owner purchased twenty-six Fairfield Inns throughout the United States. In response to the property owner's argument that the sale price was not indicative of value, the Board of Tax Appeals opined that this Board is not required in every instance to accept as true value an allocation of a portion of a lump sum purchase price paid for a group of assets. However, the Board also pointed out that the mere fact that a sale occurs as part of a bulk transaction does not require the Board to automatically reject the sale price either. Based on the evidence before it, the Board found that the property owner failed to establish that the sale price was not indicative of value, nor did it come forward with credible evidence of a different value.

The Supreme Court of Ohio addressed the issue of the valuation of individual parcels that are part of a bulk sale in *Pingue v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St.3d 62. In *Pingue*, the taxpayer purchased forty-four, essentially identical, noncontiguous condominium units in an arm's-length transaction thirteen months before tax lien date. The property owner argued that the true value of each unit was the gross sale price divided by

the number of units purchased, or \$57,500. The BOE maintained that the value of each unit was \$74,500, the previous sale price of other individual condominium units in that project.

The Supreme Court emphasized that R.C. 5713.03 *requires* the auditor to consider the sale price as the true value for taxation purposes if the property has been sold in a recent, arm's length sale. However, the Court also indicated that when the purchase price does not reflect the true value, extraneous factors can be considered, such as special financing, a pending bankruptcy, a distress sale, coercion, lease arrangements, or "other factors that would cast suspicion on the sale price as representative of true value."

The Supreme Court found that the evidence did not demonstrate that the bulk sale of these condominium units involved extraneous factors that would affect the sale price. Therefore, the Supreme Court held that the sale price of \$57,500 represented true value.

After *Pingue*, this Board applied these principles in *Tacohio Dev. L.L.C. v. Franklin Cty. Bd. of Revision* (Dec. 8, 2000), B.T.A. No. 98-T-431, *et seq.*, unreported. In *Tacohio*, the subject property was part of a lump sum purchase of fifty-three properties. These properties were located across the state. The BOE relied on a conveyance fee statement showing a sale price of \$500,000 for the subject property. The property owner maintained that the conveyance fee statement was in error and produced a purchase agreement showing an allocation for the subject property of \$658,039, \$448,640 attributable to the real property and the remainder to equipment and intangibles.

This Board distinguished *Pingue*, noting that these parcels were located across the state in differing markets, and the properties were not identical, varying in age, size, layout, and condition. Additionally, the record was clear that the purchase included not only real estate, but also personal property and intangibles, such as goodwill. Based on these facts, the Board of Tax Appeals found that the property owner had successfully rebutted the presumption in favor of the sale price as true value and that reliance on the conveyance fee statement was inappropriate without corroborating evidence supporting that value.

In analyzing whether or not the sale price is indicative of value in the present appeal, the Board must look at the existing record. Reviewing the portion of the purchase contract and accompanying exhibits contained in the statutory transcript, Exhibit F, the Board observes that nine properties of differing ages and sizes were purchased as part of this transaction. Further, this exhibit indicates that the gross sale price for the nine properties was \$23,265,000, including not only a value for the real estate of \$15,745,000, but also \$7,150,000 for goodwill, \$360,000 for personal property, and \$10,000 for a non-compete agreement. (Exh. B, attached to S.T. Exh. F) In addition, Schedule A, also contained in the statutory transcript's Exhibit F, allocates the gross sale price among the nine properties, indicated a separate value for real property, goodwill, and personal property. The value allocated for the subject property was \$1,585,000.

The Board also notes that the conveyance fee statement for the subject property reflects that the gross sale price was reduced for items other than real property. (S.T. Exh. D) In fact, the conveyance fee statement reflects that the sale price of the real property was \$1,585,000. (*Id.*)

The BOE's contention that the value of the subject property should be based on the gross sale price is not well taken. The purchase contract and the conveyance fee statement both clearly reflect that assets other than real estate were acquired in this transaction. Further, the contract and conveyance fee statement reflect a value for the real estate.

On the other hand, although the bulk sale may have influenced the sales price, Sovran did not present competent, probative evidence to show how the sale price was directly affected. Rather, Sovran simply submits in counsel's brief that the Board of Tax Appeals should reject the sale price completely and return to the lower value as determined by the county auditor.

In this Board's opinion, sufficient evidence has not been presented to overcome the sale price allocated to the real estate as indicated in the conveyance fee statement and determined by the BOR. In conclusion, we find that a preponderance of the evidence

before us supports a conclusion that the sale is the best evidence of the subject property's true value, less the value allocated for goodwill, personal property, and the non-compete agreement for tax year 1997. Therefore, the Board of Tax Appeals finds the true and taxable values of the subject property to be as follows as of January 1, 1997:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Land	\$ 67,500	\$ 23,630
Buildin g	<u>\$1,517,500</u>	<u>\$ 531,120</u>
Total	\$1,585,000	\$ 554,750

Accordingly, the Lake County Auditor is hereby ordered to list and assess the subject property in conformity with this Board's decision and order and to carry forward the determined values in accordance with law.