

IN THE SUPREME COURT OF OHIO

A. Schulman, Inc., :
 :
Appellant, : Case No. 06-1944
 :
v. :
 :
William W. Wilkins, : Appeal from the Ohio
Tax Commissioner of Ohio, : Board of Tax Appeals
 :
Appellee. :

MOTION OF APPELLANT TO LIFT STAY IN BRIEFING SCHEDULE

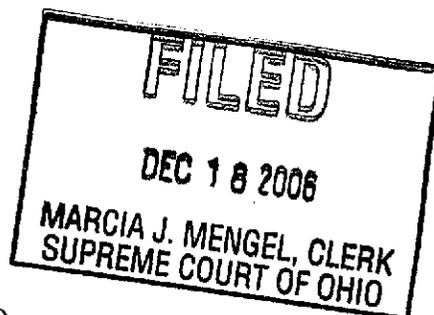
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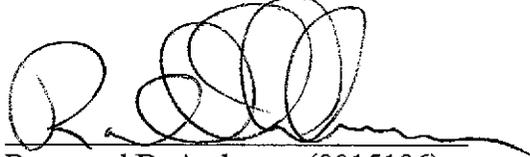
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WILLIAM W. WILKINS, TAX COMMISSIONER OF OHIO



Pursuant to Section 4(A) of Rule XIV of the Rules of Practice of the Supreme Court of Ohio, Appellant respectfully requests that the Court lift its stay of briefing and proceed to the merits of Appellant's appeal.

The attached memorandum sets forth an important legal analysis that is not otherwise addressed in the pleadings and that the Court might not reach sua sponte. In this regard, it is fundamental that subject matter jurisdiction issues may be raised and argued at any time during proceedings before the Court.

Respectfully submitted,

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Raymond D. Anderson (0015196)
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CO-COUNSEL FOR APPELLANT,
A. SCHULMAN, INC.

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**APPELLANT’S MEMORANDUM IN SUPPORT OF ITS
MOTION TO LIFT STAY IN BRIEFING SCHEDULE**

On September 22, 2006, the Board of Tax Appeals issued a Decision and Order styled *A. Schulman, Inc. v. William W. Wilkins, Tax Commissioner of Ohio*, Case No. 2004-B-370. On October 19, 2006, the taxpayer in that case, A. Schulman, Inc. (“Schulman”), filed a Notice of Appeal with this Court. On October 23, 2006, the Tax Commissioner filed a Notice of Cross-Appeal with this Court and the Board.

On November 1, 2006, Schulman was advised by the Board that it could not locate a copy of Schulman’s Notice of Appeal as filed with the Court. On November 2, 2006, Schulman hand delivered a copy of its Notice of Appeal to the Board, and filed a Notice of Corrected Service with the Court. On November 13, 2006, the Tax Commissioner filed a Motion to Dismiss Schulman’s Notice of Appeal, arguing that the Court has no jurisdiction over that appeal because Schulman failed to timely file its Notice of Appeal with the Board. On November 27, 2006 Schulman filed a Memorandum Contra the Motion to Dismiss. All of the foregoing events are reflected in the pleadings filed to date with this Court. On December 13, 2006, the Court ordered, sua sponte, “that briefing in this case is stayed.”

The applicable appeal statute, R.C. 5717.04, provides in relevant part as follows:

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal. (Emphasis added.)

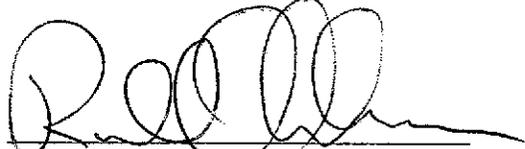
The first sentence of this language requires a notice of appeal to be filed with both the Court and the Board. Unless and until that happens, no appeal has been taken.

Schulman's filing on October 19 did not meet this standard because the notice of appeal apparently was not filed with the Board at that time. Rather, the first party to take an appeal within the meaning of the first sentence was the Tax Commissioner, when he filed his notice of appeal with both the Court and the Board on October 23. Once that appeal had been taken, the second sentence of the above language came into play for the "other party" (*i.e.*, Schulman). Pursuant to this second sentence, ". . . [Schulman] may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later." This means that Schulman had until November 2 to file, or perfect, its appeal. Because Schulman

filed its notice of appeal with both the Court (October 19) and the Board (November 2) by this deadline, its appeal was timely and this Court's jurisdiction was invoked.¹

Because the Tax Commissioner perfected his appeal first, on October 23, the Tax Commissioner's appeal should be treated as the initial appeal **and Schulman's appeal should be treated as a cross-appeal that was timely filed with this Court and the Board by the November 2 deadline.** The Court should lift its stay of the briefing schedule and proceed to the merits of Appellant's appeal.

Respectfully submitted,

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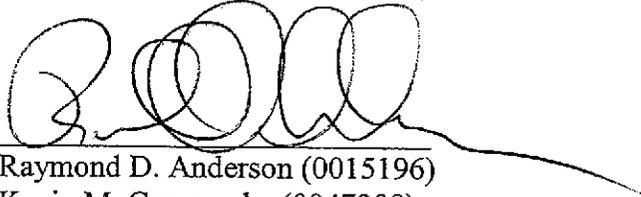
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A. SCHULMAN, INC.

¹ Unlike the first sentence of the quoted statutory language, there is no express requirement in the second sentence that Schulman file its notice of appeal with the Board. The absence of such a requirement may be due to the fact that the Board would receive sufficient notice that an appeal of its decision had been made as a result of the prior filing that would be made under the first sentence. However, even if Schulman were required to file a copy of its notice of appeal with the Board, it timely did so on November 2, *i.e.*, the last day of the 10-day period set forth in R.C. 5717.04.

Certificate of Service

I certify that a copy of this Motion of Appellant to Lift Stay in Briefing Schedule, along with accompanying Memorandum in Support of its Motion to Lift Stay in Briefing Schedule, was sent via facsimile (614-466-8226) to counsel for Appellee, Jim Petro, Attorney General of Ohio, c/o Barton A. Hubbard, Assistant Attorney General, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215 on December 18, 2006.

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