IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

SHILOH AUTOMOTIVE, INC.,	:	
	:	
Appellant/Cross Appellee,	:	
	:	Case No. 2006-1384
v.	:	
	:	Appeal from BTA
WILLIAM W. WILKINS, TAX COMMISSIONER OF OHIO,	:	Case Nos. 2004-M-380, 2004-M-1283
	:	
	:	
Appellee/Cross-Appellant.	:	

BRIEF OF APPELLEE/CROSS-APPELLANT

CHARLES M. STEINES (0011242)
Jones Day
(Counsel of Record)
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-7211
Facsimile: (216) 579-0212
cmsteines@jonesday.com

ATTORNEYS FOR APPELLANT/CROSS-APPELLEE

JIM PETRO (0022096)
Attorney General of Ohio
BARTON A. HUBBARD (0023141)
Assistant Attorney General
(Counsel of Record)
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-5967
Facsimile: (614) 466-8226
bhubbard@ag.state.oh.us

ATTORNEYS FOR APPELLEE/CROSS-APPELLANT

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B. The Commissioner's valuation methodology utilized MTD's pre-sale net book values for the production machinery and office equipment at issue and to those values the Commissioner applied his prescribed true value allowances for depreciation and obsolescence based upon the estimated remaining useful lives of those assets 2

C. The BTA rejected SAI's valuation and ordered the Commissioner to modify his own. The Commissioner fully agrees with the BTA's order, and has filed a cross-appeal only to assure that the BTA's order is not misinterpreted. Pursuant to the BTA's directive, the Commissioner shall apply his prescribed true value computation methodology by utilizing MTD's original acquisition costs for the various items of machinery and equipment, aggregate such acquisition costs by the particular year in which each was purchased by MTD, and then apply the Commissioner's prescribed true value allowance percentages to those original acquisition costs as aggregated by the fixed assets' original acquisition years 3

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E. A majority of the machinery and equipment transferred to SAI pursuant to the related-party November 1, 1999 sale constituted newly acquired items of robot welders and other technologically-superior machinery and equipment which were purchased and installed by MTD over the previous four years, including nearly $11.2 million-worth in the taxable year preceding the November 1, 1999 sale date 7

F. Generally Accepted Accounting Principles (GAAP), as set forth in APB 16, paragraph five, prohibited any use by the appellant subsidiary SAI, its immediate parent Shiloh Industries, and/or its ultimate parent MTD of the November 1, 1999 sale to restate the acquisition costs of the assets from the original acquisition costs paid by the ultimate parent, MTD. 8

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K. SAI's allocation of its purchase price estimate to the various asset classes did not entail a "fair value" determination of the various assets at all: to determine the "current assets" share of the allocation, SAI simply used the book values for these assets as reported by MTD, i.e., at *100%* of the reported MTD book value. After these book value amounts were then subtracted from the total estimated purchase price, the residual, *de minimus* amount that remained was allocated pro rata to the fixed and non-current assets, resulting in new net book values for the machinery and equipment and real property at less than *5%* of MTD's reported net book values for that property 15

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I:

The Tax Commissioner's true value computation methodology, under which he applies composite annual true value allowances for depreciation and obsolescence, as prescribed by industry, to the original, arm's-length acquisition costs of the property as aggregated by acquisition year, is presumptively true value. *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71; *W.L. Harper Co. v. Peck* (1954), 161 Ohio St. 300; *Gahanna Heights, Inc., v. Porterfield* (1968), 15 Ohio St. 2d 189; *Alcoa v. Kosydar (*1978), 54 Ohio St. 2d 477; *Westinghouse Electric Corp. v. Lindley* (1980), 64 Ohio St. 2d 31; *Campbell Soup Co. v. Tracy* (2000), 88 Ohio St.3d 473, 477, followed 17

PROPOSITION OF LAW NO. II:

The Tax Commissioner's finding that a bulk sale of business assets and liabilities between a parent corporation and its majority-owned subsidiary was not an arm's-length transaction is presumptively valid absent a demonstration that the finding is clearly unreasonable or unlawful. The BTA acts reasonably and lawfully in upholding the Commissioner's finding in the absence of such demonstration. *Satullo v. Wilkins* (2006), 111 Ohio St. 3d 399, at ¶15; *Nusseibeh v. Zaino* (2003), 98 Ohio St.3d, 292, at ¶10; *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, paragraph one of the syllabus, followed 18

PROPOSITION OF LAW NO III:

The best evidence of true value is a recent arm's-length sale of the subject property in the open market, with neither the seller nor buyer under a compulsion to sell or buy. A closed sale of a business division between a parent corporation and its majority-owned subsidiary is not an arm's-length transaction for purposes of *ad valorem* Ohio property tax law under the "best evidence" principle. *In re Estate of Sears* (1961), 172 Ohio St. 443; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 412; *Grabler Mfg. Co. v. Kosydar* (1975) 43 Ohio St.2d 75; *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Oho St.3d 23 followed; Accord *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Jan. 18, 1990), Franklin App. No. 89AP-448, unreported 21

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The BTA acts reasonably and lawfully in rejecting such non-arm's-length sale as sufficient evidence to overcome the presumptive correctness of the true value resulting under the Commissioner's "302 computation," particularly where, as here, the following factors militate even further against the use of such sale:

(1) the appellant subsidiary's (SAI's) valuation of the machinery and equipment at issue as of the November 1, 1999 sale date of only \$1.3 million constitutes only a minuscule *1.8%* of the \$72.3 million in original acquisition costs previously paid in arm's length transactions for that fixed asset property by the subsidiary's ultimate parent (MTD), and a correspondingly tiny *4.2%* of MTD's pre-sale net book value for those assets of \$39.9 million;

(2) the majority of the machinery and equipment transferred to SAI pursuant to the non-arm's length sale constituted newly acquired items of robot welders and other technologically-advanced fixed asset property which had been purchased and installed by MTD in arm's-length transactions over the previous four years, including nearly \$12 million-worth in the taxable year preceding the November 1, 1999 sale date;

(3) none of the assets subject to the related-party, November 1, 1999 sale, whether on an individual basis, an asset-class basis, or collectively, as part of a bulk sale of all of MTD's automotive division's assets, were offered for sale by MTD to anyone other than SAI's immediate parent corporation;

(4) accepting as true MTD's asserted expectation that its automotive division assets would be significantly enhanced in value by reason of their November 1, 1999 transfer to the subsidiary, MTD would have had every reason to sell those assets pursuant to the November 1, 1999 transaction at a "bargain price," far lower than it would have sought from an unrelated entity;

(5) SAI failed to present any independent evidence of the value of the taxable fixed assets at issue (relying exclusively on the allocation of an estimated purchase price to the fixed assets at issue, which allocation was a derived, residual number, unsupported by any appraisal or inspection of any of the taxable fixed assets at issue);

(6) Generally Accepted Accounting Principles (GAAP) and SEC guidelines expressly *prohibited* any use by the appellant subsidiary, its immediate parent, and/or its ultimate parent of such November 1, 1999 sale between such related entities to restate the acquisition costs of the assets from the originally acquisition costs paid by the ultimate parent as reflected on the ultimate parent's books;

(7) the consideration paid for the purchase of the automotive division assets, included two kinds of non-cash consideration for which the

record lacks sufficient probative evidence of monetary value: (i) the assumption of various liabilities for which the evidentiary record contains no evidence of true value other than their previously stated book value on MTD's books, and (ii) shares of stock of the appellant's immediate parent corporation, Shiloh Industries, for which a derived value was determined based upon piece-meal, small-lot, individual-share transactions;

(8) the transfer of the assets to the appellant subsidiary included various kinds of property not subject to Ohio property taxation including accounts receivables and other intangible property for which the evidentiary record contains no evidence of true value, other than their previously stated book value on the ultimate parent's books; and

(9) SAI's allocation of its purchase price estimate to the various asset classes did not entail a "fair value" determination of the various assets at all: to determine the "current assets" share of the allocation, SAI simply used the book values for these assets as reported by MTD, i.e., at *100%* of the reported MTD book value. After these book value amounts were then subtracted from the total estimated purchase price, the residual, *de minimus* amount that remained was allocated pro rata to the fixed and non-current assets, resulting in new net book values for the machinery and equipment and real property at less than *5%* of MTD's reported net book values for that property 29

PROPOSITION OF LAW NO. V:

Under the circumstances and for the reasons detailed under the previous four propositions of law, the BTA acts reasonably and lawfully in ordering the Commissioner to apply his true value computation methodology as set forth in O.A.C. 5703-3-10 and -11. Namely, the Commissioner shall:

(1) ascertain the historical acquisition costs that the ultimate parent (MTD) incurred for the various items of the taxable production machinery and office equipment transferred to appellant ;

(2) aggregate such costs by acquisition year, using the acquisition years that such property costs were incurred by MTD; and

(3) apply the true value allowances for depreciation and obsolescence prescribed for the property under that computation (i.e., for the Schedule 4 property, Class Live III percentages; and for the Schedule 2 property, Class Life V percentages) 32

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STATEMENT OF CASE AND FACTS

A. In this personal property tax case, at issue are the true values of production machinery and office equipment owned by the appellant subsidiary (SAI) that were previously directly owned by its ultimate parent corporation (MTD), and which were transferred to the appellant subsidiary pursuant to a related-party sale on November 1, 1999 between MTD and SAI's immediate parent (Shiloh Industries). The November 1, 1999 sale was a "related-party sale" because, at that time, MTD owned 51% of the outstanding shares of Shiloh Industries, and Shiloh Industries owned 100% of the outstanding shares of SAI.

In this *ad valorem* personal property tax appeal, at issue is whether the BTA reasonably and lawfully determined that the appellant subsidiary, Shiloh Automotive, Inc. (SAI), failed to provide sufficient evidence to support its own valuations, and to rebut the Commissioner's valuations, of certain of its production machinery and office equipment located and used in business at its two automotive plants in Parma and Valley City, Ohio. For the 2001 and 2002 tax years at issue, SAI sought reduced valuations from the amounts assessed by the Commissioner for those items of machinery and equipment that previously had been directly owned by SAI's ultimate parent corporation, MTD Products, Inc. (MTD). SAI asserted that the transfer of these assets constituted an arm's-length transaction, a contention expressly rejected by the Commissioner and the BTA below.

As of November 1, 1999, as part of a corporate restructuring, the assets at issue were transferred from MTD to SAI pursuant to a related-party "asset purchase agreement" between MTD and SAI's immediate parent corporation, Shiloh Industries, Inc. (Shiloh Industries). At the time of the November 1, 1999 sale, MTD held 51% of the outstanding shares of Shiloh Industries, and Shiloh Industries, in turn, owned 100% of the outstanding shares of the appellant corporation, SAI.

In fact, SAI was formed at the time of the November 1, 1999 sale for the purpose of owning and operating the automotive division business assets previously directly owned by MTD. Because part of the consideration MTD received for the transaction included shares of stock in Shiloh Industries, after this related-party sale, MTD's ownership increased from 51% to 56% of the outstanding shares of Shiloh Industries, which continued to own 100% of the shares of SAI. The evidentiary record does not reflect any further ownership interest changes at any time from November 1, 1999 through the applicable tax listing dates (October 31, 2000, and October 31, 2001, respectively).

B. The Commissioner's valuation methodology utilized MTD's pre-sale net book values for the production machinery and office equipment at issue and to those values the Commissioner applied his prescribed true value allowances for depreciation and obsolescence based upon the estimated remaining useful lives of those assets.

Upon audit of SAI's personal property tax returns for the 2001 and 2002 tax years, the Tax Commissioner issued amended assessment certificates increasing the valuations reported by SAI. He did so by, among other things, increasing the reported values of the machinery and equipment transferred to SAI from its ultimate parent corporation, MTD. This involved a two-step process. Specifically, for the acquisition costs of the MTD machinery and equipment the Commissioner used the net book values for that property as shown on MTD's financial books and records as of the end of the accounting period preceding the November 1, 1999 sale. See, the auditing agent's field audit report at S. Supp. 15-24, and his supporting workpapers for same, S. Supp. 25.

Second, to those acquisition costs, the Commissioner then applied his annual true value allowances as prescribed for SAI's industry (metal stamping) in order to account for the property's depreciation and obsolescence, using 1999 as the year of acquisition of those assets. Id.

C. **The BTA rejected SAI's valuation and ordered the Commissioner to modify his own. The Commissioner fully agrees with the BTA's order, and has filed a cross-appeal only to assure that the BTA's order is not misinterpreted. Pursuant to the BTA's directive, the Commissioner shall apply his prescribed true value computation methodology by utilizing MTD's original acquisition costs for the various items of machinery and equipment, aggregate such acquisition costs by the particular year in which each was purchased by MTD, and then apply the Commissioner's prescribed true value allowance percentages to those original acquisition costs as aggregated by the fixed assets' original acquisition years.**

The BTA rejected SAI's valuation of the machinery and equipment at issue as being based exclusively on a related-party, bulk sale transaction (the November 1, 1999 "related-party" asset purchase agreement between MTD and Shiloh Industries). Specifically, the BTA affirmed the Commissioner's finding that the transaction was not at "arm's length," and was unsupported by appraisals or other independent evidence of the value at which the property would sell in an arm's-length transaction in the open market. *BTA Decision and Order* at 9-12.

In so holding, the BTA "further agree[d] with the Commissioner that MTD's historical costs are a more probative basis for the value of the property," and remanded the case to the Commissioner so that "he may properly apply depreciation rates in accordance with MTD's acquisition history." *Id.* at 13. Following the BTA's issuance of its July 7, 2006 Decision and Order, seven days later, on July 14, 2006 the Commissioner filed with the BTA a motion for clarification "in order to avoid or minimize the potential argumentation upon remand or appeal by the appellant as to the meaning of the directive." He asked the BTA to amplify this directive and proposed model language to that end, as follows:

> *** [T]he Commissioner shall undertake the following steps under application of his prescribed "true value computation" methodology. First, the Commissioner shall ascertain the historical acquisition costs that MTD incurred for the various items of the appellant's taxable Schedule 2 and 4 property [production machinery and office equipment, respectively]. Next, for each of these two Schedules, in accordance with that prescribed methodology, the Commissioner shall aggregate such costs by acquisition year, using the acquisition year that such property costs were incurred by MTD. Finally, the Commissioner shall apply the true value allowances for depreciation and obsolescence prescribed for the property under that computation (i.e., for the Schedule 4 property, Class Life III percentages; and for the Schedule 2 property, Class Life V percentages. In all other respects the assessments shall stand as previously issued.

Appx. at 14-15.

Before the BTA could issue an order granting or declining consideration of the Commissioner's Motion for Clarification, however, SAI filed its appeal with this Court, one week later on July 21, 2006. Accordingly, we have filed this protective cross-appeal to support here what we believe the BTA's directive has required us to do, as set forth in the model language above. We believe that the amplification we set forth above provides a more explicit, detailed instruction reflecting the clear import of the broader language employed by the BTA.

D. The starting point of SAI's valuations of the production machinery and office equipment at issue is Shiloh Industries' allocation to those assets of the total *estimated* sales price of MTD's automotive division assets as of the November 1, 1999 transaction date. Shiloh Industries' allocation to the machinery and equipment at issue was only $1.3 million, which represented a minuscule *1.8%* of the $72.3 million in original acquisition costs previously paid in arm's length transactions for that machinery and equipment by MTD, and a correspondingly tiny *4.2%* of MTD's pre-sale net book value of those assets.

In the proceedings before the Tax Commissioner and BTA below, SAI sought valuations for the production machinery and office equipment at issue far, far lower than the arm's length sales prices, collectively over $72.3 million, that MTD had incurred to acquire and install that equipment in the Parma and Valley City plants. SAI asserted that the proper acquisition costs to use for the production machinery and equipment that had been transferred to SAI from MTD should be $1,302,214, and that the Commissioner's annual true value allowance percentages for depreciation and obsolescence should then be applied to that total acquisition cost using a 1999 acquisition year, resulting in even lower valuations as of the October 31, 2000 and 2001 tax listing dates. See the Tax Commissioner's final determination. S. Supp. 1, and SAI's initial merit brief at 18 (noting that of the total of $1,302,214, the production machinery portion was $1,254,301, and the office equipment portion was $47,913).

The appellant's $1.3 million-estimate of the true value of this taxable fixed asset property represented less than 1.8% of the $72,399,962 of acquisition costs that MTD originally had incurred in order to purchase this machinery and equipment and make it operable, in place, at the Parma and Valley City plants. The $72 million-plus of acquisition costs are evidenced directly by the applicable "true value computation" Tax

Commissioner Forms 937 attached by MTD to its personal property tax return for the 2000 tax year[1]. See the Forms 937 attachments to that return as identified and authenticated pursuant to the Certification Statement of the Tax Commissioner's current Administrator of the Personal Property Tax Division, John Nolfi, Appx. 68-77.

Under the Commissioner's prescribed "true value computation" methodology, as detailed in Ohio Adm. Code 5703-3-10, personal property taxpayers, using the Commissioner's prescribed Forms 937, must report the acquisition costs of their taxable fixed asset property purchased in "arm's-length transactions" by year of acquisition. See R.C. 5703-3-10(B) (2), Appx. 2. Thus, the Forms 937 that MTD attached to its 2000 tax year personal property tax return, on their face, represent that the acquisition costs shown thereon were incurred pursuant to arm's-length transactions over the course of MTD's ownership and operation of the Parma and Valley City plants, and no evidence was adduced by SAI to rebut that presumption.

The $1.3 million estimate of the value of the MTD production machinery and office equipment likewise represented only a tiny fraction (4.2%) of the pre-sale net book values for the property as set forth on MTD's books and records as reported for SEC purposes on November 1, 1999. See, the worksheet attached to the Tax Commissioner's agents' field audit report reflecting MTD's pre-sale total net book values for the Schedule 2 production machinery (Class Life V property) of $29,801,150 and the Schedule 4 non-

[1] The $72 million-plus total acquisition cost figure is the sum of the acquisition cost figures set forth on the various individual Forms 937 for each of the taxing districts in which the MTD-assets were located. Specifically, MTD filed eleven (11) Forms 937 for the 2000 tax year reporting its various Schedule 2 production machinery and equipment and Schedule 4 non-production equipment for the Parma and Buckeye School Districts by year of acquisition. The total acquisition costs, for all acquisition years, as reported by MTD on each of the eleven Forms 937, is the sum of the "cost as of 8/1/98" column figures and the figures in the next column headed "additions."

production equipment (Class Life III property) of $1,195,815, for a combined total of $30,996,995. S. Supp. 25.

Moreover, the age of the machinery and equipment that MTD had acquired for use in its automotive division plants is further determinable by examining the Forms 937 in detail to see when the various items of property were acquired. And the nature of the equipment is revealed by consulting the pertinent commentary in the Tax Commissioner's agents' field audit report. We discuss this pertinent data and commentary in the following sub-section.

E. A majority of the machinery and equipment transferred to SAI pursuant to the related-party November 1, 1999 sale constituted newly acquired items of robot welders and other technologically-superior machinery and equipment which were purchased and installed by MTD over the previous four years, including nearly $11.2 million-worth in the taxable year preceding the November 1, 1999 sale date.

The machinery and equipment transferred from MTD to SAI was largely newly-acquired and technologically advanced, including numerous robotic welders. See, ¶¶ 21, 24 of the Statement of Facts and Conclusions for the audit authored by then-Audit Manager (now Personal Property Tax Administrator) John Nolfi, S. Supp. 9; and the Tax Commissioner's field audit report at pages four and five detailing the tours of the two plant facilities, S. Supp. 18-19. Indeed, as Audit Manager Nolfi noted, in the four years preceding the November 1, 1999 sale date, MTD had acquired $30, 673,001-worth of "newer technology" production machinery. Id. Such significant, recent expenditures constituted over half of the total acquisition costs of these two plants' production machinery (i.e., Class Life V) cost. See MTD's Forms 937 at Appx. 68-70. In fact, in just the taxable year preceding the November 1, 1999 sale date alone, MTD had acquired $11,165,618 of such production machinery. Id.

Suddenly, under SAI's submission in this case, as of November 1, 1999, all of MTD's automotive division production machinery and office equipment would be reduced to relative worthlessness (for all items, both new and old, collectively only $1,302,204). Despite all of MTD's pre-November 1, 1999 substantial expenditures for robot welders and other superior-technology equipment, the sale price allocation to that machinery and equipment would prevail. In the immediately following sub-sections we discuss many fundamental problems with the valuation methodology employed by SAI's immediate parent corporation to arrive at such a drastically low $1.3 million figure.

F. Generally Accepted Accounting Principles (GAAP), as set forth in APB 16, paragraph five, prohibited any use by the appellant subsidiary SAI, its immediate parent Shiloh Industries, and/or its ultimate parent MTD of the November 1, 1999 sale to restate the acquisition costs of the assets from the original acquisition costs paid by the ultimate parent, MTD.

To support the validity of its use of the $1.3 million figure as the true value of the MTD-transferred production machinery and office equipment, SAI relies upon the assertion that the use of the November 1, 1999 related-party sale to restate the acquisition costs of the transferred assets would be in accordance with Generally Accepted Accounting Principles (GAAP), but the opposite is true. Rather, the very GAAP authority relied upon by SAI expressly prohibits such use, where, as here, the sale is between a parent corporation (MTD) and a subsidiary (Shiloh Industries) in which the parent owns more than 50% of the outstanding shares of the voting stock of the subsidiary.

In the evidentiary proceedings before the BTA, SAI's witness Albert Vonda identified Accounting Principles Board Opinion 16 (APB 16), as the authority for the use of the November 1, 1999 sale to restate the acquisition costs of the machinery and equipment at issue from the amounts stated on MTD's financial books and records. Supp. 244-245, 258-259. See also the text of APB 16, Supp. 32-60. In so doing, however, Mr. Vonda did not identify any particular paragraph citation of APB 16, despite referring to "ARB 51." Supp. 258-259. In fact, numbered paragraph 5 of APB 16 expressly addresses the issue, in pertinent part, as follows:

> The term **business combination** in this Opinion **excludes** *** a **transfer of net assets** or exchange of shares **between companies under common control** (control is defined in paragraph 2 of ARB No. 51), **such as between a parent corporation and its subsidiary** ***. (Parenthetical language in the original, emphasis added.)

S. Supp. 34 (APB 16, paragraph 5, BTA Ex. 3).

As the emphasized language of paragraph 5 of APB 16 expressly provides, the term "business combination" (the subject matter to which APB 16 applies), expressly excludes from the purview of APB 16 "transfers of net assets between companies under common control, such as between a parent corporation and its subsidiary." Mr. Vonda's testimony upon cross-examination, Supp. 259, alludes to the "common control" and to "ARB 51" language of paragraph 5, but fails to identify paragraph 5 expressly. In alluding to this issue, however, Mr. Vonda fails to acknowledge the plain meaning of paragraph 5 of APB 16: at the time of the November 1, 1999 sale, MTD was the parent, and Shiloh Automotive was a more-than-50%-controlled subsidiary. Thus, under GAAP, MTD and Shiloh Automotive were under "common control," and therefore the November 1, 1999 transfer of assets between them was not subject to APB 16.

This conclusion is confirmed by reference to the GAAP authority referenced in paragraph 5 of APB 16, namely, Accounting Research Bulletin No. 51, as amended pursuant to paragraph 13 of Statement of Financial Accounting Standards No. 94, effective October, 1987, as follows:

13. Paragraphs 2 and 3 of ARB 51 are amended to read:

> 2. The usual condition for a controlling financial interest is ownership of a majority voting interest, and, therefore, as a general rule ownership by one company, directly or indirectly, of over fifty percent of the outstanding voting shares of another company is a condition pointing toward consolidation. However, there are exceptions to this general rule. A majority-owned subsidiary shall not be consolidated if control is likely to be temporary or if it does not rest with the majority owner (as, for instance, if the subsidiary is in legal reorganization or in bankruptcy or operates under foreign exchange restrictions, controls, or other governmentally imposed uncertainties so severe that they cast significant doubt on the parent's ability to control the subsidiary).
>
> 3. *All majority-owned subsidiaries – all companies in which a parent has a controlling financial interest through direct or indirect ownership of a majority voting interest – shall be consolidated except those described in the last sentence of paragraph 2.* (Italics added.)

Appx. 41.

Finally, the treatment to apply when there is a transfer of net assets between companies under "common control" is expressly set forth under GAAP in paragraph D12 of Financial Accounting Standard No. 141, superseding APB16 effective June 2001, as follows:

> D12. When accounting for a transfer of assets or exchange of shares between entities under common control, the entity that receives the net assets or the equity interests shall initially recognize the assets and liabilities transferred at their carrying amounts in the accounts of the transferring entity at the date of transfer.

Appx. 62.

In other words, when the transfer is between entities under common control, no change from the transferor's book values is made on the books of the transferee; rather the then-"carrying value" of the assets and liabilities as were set forth on the transferor's books are reported by the transferee on its book.

To summarize this sub-section, the related-party November 1, 1999 sale transaction constituted a sale of assets between "commonly controlled" entities within the meaning of APB 16, paragraph 5. This conclusion necessarily follows because, at that time: (i) Shiloh Industries was a "majority-owned subsidiary" of MTD within the meaning of paragraph 2 of ARB 51, as amended pursuant to paragraph 13 of FAS 94; and (ii) none of the exceptions set forth therein to the general rule that "majority-owned subsidiaries" are under common control with their parent corporation were applicable. Namely, Shiloh Industries was not undergoing bankruptcy reorganization. Nor was it under "foreign exchange restrictions, controls, or other governmentally imposed uncertainties so severe that they cast significant doubt on the parent's ability to control the subsidiary." Thus, under the pertinent paragraph of APB 16 and the related GAAP authorities, no change in the acquisition costs of the machinery and equipment as set forth on MTD's books was warranted or permitted for financial statement purposes under GAAP.

G. The SEC financial disclosure guidelines dovetail with the proper GAAP treatment, prohibiting the use of the November 1, 1999 related-party sale to restate the acquisition costs of the transferred MTD automotive division assets.

The meaning of "common control," as used for purposes of the United States Securities and Exchange Commission (SEC) financial statement disclosure guidelines dovetails with GAAP's financial disclosure requirements. That the SEC applies this same standard is shown from the Financial Accounting Standards Board's (FASB's) Emerging Issues Task Force (EITF) Issue No. 02-5, offering further interpretative guidance as to the meaning of "common control" as used in APB 16, and FAS No. 141. Specifically, paragraph 3a of the EITF pronouncement provides as follows:

> 3. The FASB staff understand that the SEC staff has indicated that common control exists between (or among) separate entities only in the following situations:
>
> a. An individual or enterprise holds more than 50 percent of the voting ownership of each other entity.

Appx. 64.

H. None of the assets subject to the November 1, 1999 sale, whether on an individual basis, an asset-class basis, or collectively, as part of a bulk sale of all of MTD's automotive division's assets, were offered for sale by MTD to anyone other than Shiloh Automotive, its 51%-owned subsidiary.

The evidentiary record does not show any efforts by MTD, prior to the November 1, 1999 sale, to sell any of the assets comprising its automotive division to anyone other than Shiloh Industries. In fact, a careful review of the testimony and documentary evidence in this case reveals that MTD simply made the untested assumption that the best use of its automotive division assets would be to transfer those assets as a collective whole to SAI, as a newly-created, wholly-owned subsidiary of Shiloh Industries, supposedly based upon "synergies." See, the same citations to the BTA hearing transcript referenced in SAI's initial merit brief at 7. Supp. 30, 144, 148-149, 151-152, 201.

In other words, the machinery and equipment and the other business assets of the MTD automotive division were never held out to anyone else, whether in the "open market" or in a "closed" one. Instead, they were transferred "in-house" to MTD's controlled subsidiary without any such efforts being taken. Thus, the consideration paid for by Shiloh Industries to acquire the automotive division assets of MTD lacked any corroboration in the market.

It would be an odd result indeed, however, if the perceived "synergies" between MTD and Shiloh Industries would cause machinery and equipment purchased by MTD for millions and millions of dollars in recent arm's-length transactions to suddenly lose almost all of its value! Yet, that is precisely what SAI is asking this Court to accept here. Instead, a far more reasonable and logical conclusion is justified if we accept as true the assertion that, at the time of the November 1, 1999 sale, MTD and Shiloh anticipated substantial benefits of the transfer in the form of "synergies."

I. Accepting as true that MTD expected that its automotive division assets would be significantly enhanced in value by reason of their November 1, 1999 transfer, then MTD would have had every reason to sell those assets to Shiloh Industry at a "bargain price," far lower than it would have sought from an unrelated entity.

By charging less than a market price, MTD, nonetheless, could be made whole in the "long run" through the increased productivity and income-generation of the transferred assets in the hands of its subsidiary. Such greater productivity and income generation presumably would yield greater profits for MTD than it otherwise would receive, i.e., if the automotive division assets remained under its direct control. Such "win-win" arrangements are uniquely the province of related entities.

Given the existence of such synergies, a less-than-market, bargain sales price certainly would be "fair" to Shiloh Industries, consistent with the opinion of Robert Baird & Associates solicited by Shiloh Industries [the so-called "Baird Report"] (S. Supp. 12-14). And it likewise could be "fair" to MTD, given that MTC continued to hold a controlling financial interest in Shiloh Industries and SAI following the sale, so that the enhanced earnings from those assets in SAI's hands would be shared by MTD. But, use of such a reduced, less-than-market, bargain price for *ad valorem* property tax purposes would not be "fair" to the school districts and other local governments that are the recipients of the personal property tax revenues. Such a less-than-market, bargain price simply would not reflect "true value."

J. The consideration Shiloh Industries paid for the purchase of MTD's automotive division assets included non-cash consideration for which the record lacks any supporting evidence of fair value including for: (i) the assumption of various liabilities for which the evidentiary record contains no evidence of true value, and (ii) shares of stock of Shiloh Industries for which a derived value was determined based upon piece-meal, small-lot, individual-share transactions.

In addition to the inherent problems arising from the related-party nature of the November 1, 1999 sale, the evidentiary record reflects several deficiencies in the estimation procedure utilized to arrive at the November 1, 1999 valuation for the production machinery and office equipment of only $1.3 million. For example, SAI presented no evidence in support of the "fair value" determination of the liabilities it assumed pursuant to the November 1, 1999 asset purchase agreement. The record does not establish how that determination was made, or what documentation was used for that purpose. Similarly, the valuation of the shares of stock transferred to MTD by Shiloh Industries was never substantiated with any probative evidence as to whether the various price ranges and pricing dates used for the stock truly reflected its monetary value to MTD, which thereby cemented its controlling shareholder interest.

Nor does reference to the "Baird" fairness report aid SAI in this regard, for the report expressly disclaims any investigation or inquiry into the value of the assumed liabilities, or stock, or any of the other assets or liabilities of either MTD's automotive division or Shiloh Industries, as follows:

"We have assumed, with your consent, that: (i) all material assets and liabilities (contingent or otherwise, known or unknown) of the Company [Shiloh Industries] and the Division [the automotive division of MTD] are as set forth in their respective financial statements ***. *** In conducting our investigation **we have not undertaken any independent evaluation or appraisal of any of the assets or liabilities (contingent or otherwise) of the Company or Division.** *** We express no opinion as to the price or trading ranges for any securities of the Company (including the Company Common stock) at any time." (Emphasis added.)

Baird Report at B-1, S. Supp. 13.

K. SAI's allocation of its purchase price estimate to the various asset classes did not entail a "fair value" determination of the various assets at all: to determine the "current assets" share of the allocation, SAI simply used the book values for these assets as reported by MTD, i.e., at *100%* of the reported MTD book value. After these book value amounts were then subtracted from the total estimated purchase price, the residual, *de minimus* amount that remained was allocated pro rata to the fixed and non-current assets, resulting in new net book values for the machinery and equipment and real property at less than *5%* of MTD's reported net book values for that property.

As the BTA correctly found, the allocation of the total estimated purchase price of the MTD automotive division assets to the fixed asset personalty and realty was a "derived" value. *BTA Decision and Order* at 12. Specifically, the valuation of the fixed asset property was in the words of SAI's own witness, Mr. Vonda, a "residual" figure, Supp. 252, derived after deducting the stated book values for all of the "current assets," including cash, accounts receivable, inventories, and pre-paid insurance, all of which were valued at their stated book values on MTD's books. See testimony of Mr. Vondra at Supp. 250-253, in which he explained that his APB allocations for these "current assets" were the stated book values as reflected on MTD's records.

In this regard, SAI's failure to substantiate the reasonableness of using the book value of the accounts receivable as their "fair value" is particularly troubling. During the audit, despite being requested to do so, SAI failed to provide any breakdown detailing the nature of those accounts receivable, which had a stated book value of $19,366,000. See the Tax Commissioner's final determination at 4, S. Supp. 4; Agent Sansonetti's December 5, 2003 letter at page 3, S. Supp. 28; and Audit Manager Nolfi's March 1, 2004 memo at page 1, noting that SAI stated that they are "not providing any of the information requested" in the December 5, 2003 letter [erroneously referred to in the memo as the December 5, 2002 letter], S. Supp. 29.

Perhaps just as significantly, in contrast to the allocated values for the fixed asset property, none of the valuations of these other asset classes would be relevant for Ohio property taxation purposes. Because Ohio does not impose an intangibles tax, none of the cash, accounts receivable or pre-paid insurance assets were or are subject to Ohio property taxation. Similarly, as to the inventory on hand as of November 1, 1999, it is unlikely that much of it would have remained on hand on the applicable tax listing dates here. Thus, the allocation of the purchase price was almost exclusively to assets which escaped the annual *ad valorem* property tax for the years at issue, and which will continue to do so in the future.

Any further facts will be referenced directly to the evidentiary record in the Law and Argument section which follows.

LAW AND ARGUMENT

PROPOSITION OF LAW No. I:

The Tax Commissioner's true value computation methodology, under which he determines true value by applying composite annual true value allowances for depreciation and obsolescence, as prescribed by industry, to the original, arm's-length acquisition costs of the property as aggregated by acquisition year, is presumptively correct. *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71; *W.L. Harper Co. v. Peck* (1954), 161 Ohio St. 300; *Gahanna Heights, Inc., v. Porterfield* (1968), 15 Ohio St. 2d 189; *Alcoa v. Kosydar (*1978), 54 Ohio St. 2d 477; *Westinghouse Electric Corp. v. Lindley* (1980), 64 Ohio St. 2d 31; *Campbell Soup Co. v. Tracy* (2000), 88 Ohio St.3d 473, 477, **followed.**

This case raises issues respecting the value of machinery and equipment at SAI's Parma and Valley City, Ohio plants and the respective roles of the Tax Commissioner, the BTA and this Court in the valuation process. The polestar of this process is R.C. 5711.18. That statute requires the Tax Commissioner to assess such property at its net book value, unless he determines that book value is greater or less than true value.

In making this determination, the Tax Commissioner has developed what is known as the "302 computation" or "true value computation." Under the 302 computation, true value is calculated based on original cost as adjusted by annual allowances during the useful life determined for equipment in the taxpayer's industry.

In a long series of decisions, the 302 computation has been repeatedly upheld as a reasonable method which produces a true value figure that is *prima facie* correct. *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71; *W.L. Harper Co. v. Peck* (1954), 161 Ohio St. 300; *Gahanna Heights, Inc., v. Porterfield* (1968), 15 Ohio St. 2d 189; *Alcoa v. Kosydar* (1978), 54 Ohio St. 2d 477; *Westinghouse Electric Corp. v. Lindley (1980), 64 Ohio St. 2d 31*; *Campbell Soup Co. v. Tracy* (2000), 88 Ohio St.3d 473, 477.

Since 1986, the Tax Commissioner has applied the 302 computation pursuant to Ohio Adm. Code 5703-3-10 and Ohio Adm. Code 5703-3-11. In accordance with sub-division (1) of Division (B) of O.A.C. 5703-3-10, the acquisition costs to be utilized as the starting point in the computation, are to be determined using arm's-length transactions as follows:

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

In the present case, in applying O.A.C. 5703-3-10(B)(1), the Tax Commissioner determined that the November 1, 1999 bulk sale transaction relied upon by SAI was not at arm's length and that SAI had provided no other evidence to support its valuation of the machinery and equipment that previously had been directly owned by MTD. Accordingly, the Commissioner upheld his auditing agents' rejection of SAI's valuation. In so doing, the Commissioner issued his final determination in the matter providing detailed analysis supporting those findings. S. Supp. 1-5. In fact, our detailed Statement of Case and Facts reflects much of that analysis and we commend that analysis to the Court here. We now proceed with a discussion of the standard of review of the Commissioner's findings.

PROPOSITION OF LAW No. II:

The Tax Commissioner's finding that a bulk sale of business assets and liabilities between a parent corporation and its majority-owned subsidiary was not an arm's-length transaction is presumptively valid absent a demonstration that the finding is clearly unreasonable or unlawful. The BTA acts reasonably and lawfully in upholding the Commissioner's finding in the absence of such demonstration. *Satullo v. Wilkins* (2006), 111 Ohio St. 3d 399, at ¶15; *Nusseibeh v. Zaino* (2003), 98 Ohio St.3d, 292, at ¶10; *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, paragraph one of the syllabus, **followed**.

In the proceedings below at the BTA, SAI continued to rely exclusively upon the November 1, 1999 sale to support its valuation of the production machinery and office equipment it owned and used in business that were previously directly owned by its ultimate parent, MTD. As we detailed in the Statement of Case and Facts, supra, SAI asserted that its estimate of the total purchase price of that transaction, and SAI's allocation of that purchase price to the machinery and equipment at issue, in themselves, provide a valid basis for its valuation of the transferred machinery and equipment as of November 1, 1999 of only $1.3 million dollars.

Significantly, at no time has SAI ever attempted to explain how that same machinery and equipment, when earlier purchased by MTD for over $72 million dollars (including MTD's purchase of $11.2 million-worth in the taxable year preceding November 1, 1999 alone) could, on the November 1, 1999 sale date, suddenly become worth only $1.3 million. As to the nature, condition, and age of the property, SAI failed to rebut the Tax Commissioner's audit findings which were based in part upon his agents' own plant inspections of the property. As the tax agents' field audit investigation discovered, the machinery and equipment at issue consisted of millions of dollars of robot welders and other technologically advanced fixed asset property which SAI has continued to use in its business on the applicable tax listing dates (October 31, 2000 and 2001) and beyond.

Indeed, in its initial merit brief, SAI studiously avoids any discussion of the acquisition costs that MTD paid for the machinery and equipment, and likewise fails to comment on or note the property's technological state, age, or condition as of the November 1, 1999 sale or at any time thereafter.

SAI makes no effort to explain how such drastic reduction in value as it urges could even conceivably be reasonable. It would be hard to imagine how the machinery and equipment could possibly lose so much value. Even if the Parma and Valley City plant facilities had simultaneously suffered direct-tornado hits, floods, or like casualties, it would be difficult to imagine that the damage, even in those events, would have been so extensive that the net book values of the machinery and equipment at the facilities would "presto chango" drop by over 95%.

Yet, despite SAI's failure to provide any such independent evidence in its presentation at the BTA, it bore a substantial affirmative burden of proof to rebut the Commissioner's findings. As this Court's decisional law has long recognized, and as recently reiterated in *Nusseibeh v. Zaino,* supra, the Commissioner's findings are entitled to great weight:

> In *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213 [parallel citation omitted] we stated that "when an assessment is contested, the taxpayer has the burden '* * * to show in what manner and to what extent * * *' the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect." (Ellipses sic.) Id., quoting *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, 141.Thus, the Tax Commissioner's findings are presumptively valid, **absent a demonstration that those findings are clearly unreasonable or unlawful.** *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, paragraph one of the syllabus. (Emphasis added.)

Nusseibeh at ¶10.

As will be discussed under the following proposition of law, the Commissioner's rejection of the November 1, 1999 sale as an "arm's-length" transaction follows the established case law precedent of this Court, which has never recognized such related-party transactions as the "best evidence of true value." This should be so particularly where, as here, the valuation urged by SAI is not only not at arm's length but is also: (a) based upon an unsubstantiated, estimated purchase price for that sale, and (b) an unsubstantiated, arbitrary allocation of that estimated purchase price to the machinery and equipment at issue.

PROPOSITION OF LAW No. III:

The best evidence of true value is a recent arm's-length sale of the subject property in the open market, with neither the seller nor buyer under a compulsion to sell or buy. A closed sale of a business division between a parent corporation and its majority-owned subsidiary is not an arm's-length transaction for purposes of *ad valorem* Ohio property tax law under the "best evidence" principle. *In re Estate of Sears* (1961), 172 Ohio St. 443; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 412; *Grabler Mfg. Co. v. Kosydar* (1975) 43 Ohio St.2d 75; *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Oho St.3d 23 **followed**; Accord *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Jan. 18, 1990), Franklin App. No. 89AP-448, unreported.

A. The "best evidence of true value is an arm's length sale" principle pervades property tax valuation issues.

Perhaps the most "bedrock" of property tax valuation principles is that the "best method of determining value is the actual sale of *** [the subject property] *** on the open market and at arms length, between one who is willing to sell, but is not compelled to do so, and one who is willing to buy, but is not compelled to do so." *Grabler*, supra, syllabus. We rely on the cited authorities immediately above for they provide a broad, historical range of case law precedent setting forth that very principle. This principle pervades property tax valuation.

B. The Commissioner's 302 computation quintessentially embodies this principle.

The Commissioner's prescribed, judicially-blessed methodology for determining true value, his "302 computation," quintessentially embodies this principle. That is, the starting point in the Commissioner's method for valuing fixed asset personal property is the property's original, arm's length purchase price, to which he then applies his prescribed allowances for depreciation and obsolescence, based upon the remaining estimated useful life of the property.

Moreover, the typical purchases of property subject to the 302 computation are of the purest "arm's length, open-market" kind. Specifically, they are typically paid for in cash or cash equivalents, are entered in the ordinary course of business, and are negotiated between vendors and consumers having completely separate financial interests. They, therefore, do not typically require any estimation of the monetary value of the consideration paid for the item. Nor, typically, do they require any allocation of the purchase price as between taxable and exempt property, or as between different items of taxable property.

C. MTD's acquisition history, as revealed by an examination of its "302 computation" Forms 937, provides the purest kinds of "arm's-length sales" to which the "best evidence" principle applies.

As we have emphasized in our Statement of Case and Facts, the acquisition history of SAI's ultimate parent, MTD, as shown on its Forms 937 for the 2000 tax year, Appx. 67-77, directly evidences MTD's substantial, regular investment in new machinery and equipment over time. See particularly, MTD's Form 937 (the Tax Commissioner's prescribed "302 computation" forms) for its production machinery at its Parma plant, Appx. 67. In fact, in the taxable year preceding the November 1, 1999 sale date, for that plant alone, MTD invested $10,803,690 in newly-acquired production machinery. Id.

Under the "best evidence of true value is a recent arm's-length sale" principle, therefore, MTD's purchases of $10,803,690 of production machinery should rate very highly as the "best evidence" of their true value as of the November 1, 1999 sale date. Similarly, MTD's substantial purchases of production machinery for the Parma plant in the immediately preceding three years of $4,615,498; $3,937,992; and $1,816,631, respectively, would be probative of the value as of November 1, 1999, but not as probative as MTD's subsequent purchase of $10,803,690-worth because of their further distance in time from November 1, 1999.

This Court's acceptance of the valuation urged by SAI for MTD's production machinery and office equipment as of the November 1, 1999 sale date of only $1,302, 214, would therefore appear on its face to directly violate the "best evidence" principle. At a minimum, the drastic difference between MTD's actual, arm's-length acquisition costs for the production machinery and office equipment at issue vs. SAI's restatement of those acquisition costs should, in itself, cast serious doubt on SAI's claim.

The problems with using SAI's valuation are several-fold. In the remaining discussion under this proposition of law, however, we discuss only two aspects of SAI's derived, residual allocation of an estimated purchase price from a closed, parent/ majority-controlled-subsidiary transaction. We consider here the significance of the parent/majority-controlled subsidiary nature of the transaction, and the absence of any attempt by MTD to sell any of the automotive division assets, either collectively or individually, to anyone other than its majority-controlled subsidiary, Shiloh Industries.

D. Under this Court's property tax valuation jurisprudence, related-party transactions have never been considered at "arm's-length" for purposes of the "best evidence of true value is a recent arm's length sale" principle.

This Court has long considered related-party transactions to be properly excluded from the "best evidence" principle. In fact, in *Park Investment*, supra, the Court directly addressed this issue in the context of the Board of Tax Appeals' valuation of parcels of real property for purposes of a tax-assessment role (tax equalization) that the General

Assembly now assigns to the Commissioner. In providing guidance to the BTA in its performance of that tax-equalization function, the Court noted with approval the BTA's methodology for identifying the relevant recent sales to compare in determining whether the various county auditors are complying with the Ohio constitutional requirement of uniform valuation of property throughout the state, as follows:

> *** [T]he value, or true value in money of property for the purpose of taxation, is that amount which should result from a sale of such property on the open market. The board [BTA], in compiling the sales prices, refined them in order to more closely approximate true market value. **All** forced sales, sales from or to a political subdivision and **sales between related persons were excluded.** (Emphasis added.)

Following *Park Invstment*, this Court then further cemented the inapplicability of the "best evidence" principle to related-party transactions by expressly embracing the Black's Law Dictionary, 5th Edition, definition of "arm's length sale." *Walters*, 47 Ohio St.3d at 25. The Court quoted from that definition as follows:

> According to Black's Law Dictionary 5 Ed. 1979) 100, in an arm's-length transaction " *** each [party] act[s] **in his or her own self interest** ***." (Emphasis added.)

Thus, entities, such as Shiloh Industries and MTD, which are related to one another by corporate ownership as parent and majority-controlled subsidiary, or other like affiliation, simply do not meet the "self-interest" requirement; they necessarily act in concert. In fact, reference to the full Black's Law Dictionary (5th Edition) definition of "arm's length sale" even more clearly elucidates this point, as applied specifically to parent and subsidiary corporations:

> **Arm's length transaction**. Said of a transaction negotiated by **unrelated parties**, each acting in his or her own self interest; the basis for a fair market value determination. **Commonly applied in areas of taxation when there are dealings between related corporations, e.g., parent and subsidiary**. *Inecto,*

> *Inc. v. Higgins*, D.C.N.Y., 21 F. Supp. 418. The standard under which **unrelated parties, each acting in his or her own best interest, would carry out a particular transaction.** For example, if a corporation sells property to its sole shareholder for $10,000, in testing whether $10,000 is an "arm's length" price it must be ascertained for how much the corporation could have sold the property to a **disinterested** third party in a bargained transaction. (Emphasis added.)

More recently, as the BTA noted in its decision below, the Franklin County Court of Appeals, held that a real estate sale entered into between the general partner of a limited partnership and the limited partnership itself did not meet the requirements of an "arm's-length transaction" for purposes of the best evidence principle. *BTA Decision and Order* at 10, citing *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Jan. 18, 1990), supra, Appx. 4-7. Just as had this Court in *Walters*, supra, the Franklin County Court of Appeals embraced the Black's Law Dictionary (5th Ed.) definition, under which arm's length transactions are defined as being between "unrelated parties." *Columbus Bd. of Edn.* at 5.

Moreover, as the BTA likewise noted below, the Court went further in its analysis by articulating a powerful rationale for its holding, as follows: "Closely related parties transfer property between themselves for various reasons, and the sales price frequently is not feely negotiated but, rather, is based upon factors between the parties not connected with the value of the property being transferred." *BTA Decision and Order* at 10, quoting *Columbus Bd. of Edn.* at 7.

This rationale has direct application to the present case. Putting aside a myriad of other possible reasons for MTD and Shiloh Industries to agree to a purchase price less than market value (including substantially reducing their real and personal property taxes), MTD's own stated reason for entering the November 1, 1999 sales transaction provides a powerful basis for considering the transaction not to be at arm's length.

Accepting as true that MTD expected that its automotive division assets would be significantly enhanced in value by reason of their November 1, 1999 transfer, then MTD would have had every reason to sell those assets to Shiloh Industry at a "bargain price," far lower than it would have sought from an unrelated entity. By charging less than a market price, MTD, nonetheless, could be made whole in the "long run" through the increased productivity and income-generation of the transferred assets in the hands of its subsidiary. Such greater productivity and income generation presumably would yield greater profits for MTD than it otherwise would receive, i.e., if the automotive division assets remained under its direct control. See also, the further discussion of this point under Section I of the Statement of Case and Facts, supra.

To summarize this sub-section of this proposition of law, the parent/majority-owned-subsidiary relationship between the parties to the November 1, 1999 sale should by itself provide an ample basis for rejecting SAI's characterization of the sale as "arm's-length." But this is not all. The completely "closed" nature of the sale makes such claim doubly dubious. We discuss this aspect immediately below in the following sub-section.

E. The failure of MTD to offer its automotive division assets, either individually or collectively, on the open market or otherwise, to anyone but its majority-controlled subsidiary, Shiloh Industries, renders the transaction even more clearly non-arm's length.

In its initial merit brief, in support of its position that the November 1, 1999 sale should be considered at "arm's length," SAI submits the relative modest position that a "private" sale can qualify as "arm's length," citing to Justice Douglas' concurring opinion in *Walters*, supra, and *MACQ Inc. v. Marion Cty. Bd. of Revision* (Sept. 11, 1998), BTA Case No. 96-K-1457, unreported. SAI Br. at 26-27. Yet, this modest claim should not advance SAI's cause here because SAI ignores the nature of the "private" sale at issue here. Unlike in *Walters*, or in the BTA's *MACQ* decision, the private sale here is between related parties. This makes a huge difference because the absence of any non-related-party involvement in the sales offering does not afford any basis upon which the reasonableness of the sales price as a measure of fair market value could be tested. See the last sentence of the Black's Law Dictionary (5th Ed.) definition of "arm's length sale," supra.

Indeed, much more appropriately cited is the Franklin County Court of Appeals decision in *Columbus Bd. of Edn.*, supra. Specifically, in addition to affirming the BTA's finding that the real estate sale therein at issue was not at arm's length because of the related nature of the seller and buyer, the Court embraced the BTA's further buttressing reason for holding the transaction not to be at arm's length: that the real estate "was not offered to other buyers." Id. at 7.

For all the reasons set forth under this proposition of law three, the BTA's decision rejecting SAI's claim that the November 1, 1999 sale was at arm's length should be affirmed. Under the following proposition of law, however, we first identify the full range of factors compelling rejection of SAI's valuation, including those discussed under this proposition of law as well as in proposition of law two. Then we discuss in more detail the lack of evidentiary support for SAI's estimated purchase price, and the lack of probative evidence to support its allocation of that estimated purchase price to the machinery and equipment at issue.

PROPOSITION OF LAW No. IV:

The BTA acts reasonably and lawfully in rejecting such non-arm's-length sale as sufficient evidence to overcome the presumptive correctness of the true value resulting under the Commissioner's "302 computation," particularly where, as here, the following factors militate even further against the use of such sale:

(1) the appellant subsidiary's (SAI's) valuation of the machinery and equipment at issue as of the November 1, 1999 sale date of only $1.3 million constitutes only a minuscule *1.8%* of the $72.3 million in original acquisition costs previously paid in arm's length transactions for that fixed asset property by the subsidiary's ultimate parent (MTD), and a correspondingly tiny *4.2%* of MTD's pre-sale net book value for those assets of $39.9 million;

(2) the majority of the machinery and equipment transferred to SAI pursuant to the non-arm's length sale constituted newly acquired items of robot welders and other technologically-advanced fixed asset property which had been purchased and installed by MTD in arm's-length transactions over the previous four years, including nearly $12 million-worth in the taxable year preceding the November 1, 1999 sale date;

(3) none of the assets subject to the related-party, November 1, 1999 sale, whether on an individual basis, an asset-class basis, or collectively, as part of a bulk sale of all of MTD's automotive division's assets, were offered for sale by MTD to anyone other than SAI's immediate parent corporation;

(4) accepting as true MTD's asserted expectation that its automotive division assets would be significantly enhanced in value by reason of their November 1, 1999 transfer to the subsidiary, MTD would have had every reason to sell those assets pursuant to the November 1, 1999 transaction at a "bargain price," far lower than it would have sought from an unrelated entity;

(5) SAI failed to present any independent evidence of the value of the taxable fixed assets at issue (relying exclusively on the allocation of an estimated purchase price to the fixed assets at issue, which allocation was a derived, residual number, unsupported by any appraisal or inspection of any of the taxable fixed assets at issue);

(6) Generally Accepted Accounting Principles (GAAP) and SEC guidelines expressly *prohibited* any use by the appellant subsidiary, its immediate parent, and/or its ultimate parent of such November 1, 1999 sale between such related entities to restate the acquisition costs of the assets from the original acquisition costs paid by the ultimate parent as reflected on the ultimate parent's books;

(7) the consideration paid for the purchase of the automotive division assets, included two kinds of non-cash consideration for which the record lacks sufficient probative evidence of monetary value: (i) the assumption of various liabilities for which the evidentiary record contains no evidence of true value other than their previously stated book value on MTD's books, and (ii) shares of stock of the appellant's immediate parent corporation, Shiloh Industries, for which a derived value was determined based upon piece-meal, small-lot, individual-share transactions;

(8) the transfer of the assets to the appellant subsidiary included various kinds of property not subject to Ohio property taxation including accounts receivable and other intangible property for which the evidentiary record contains no evidence of true value, other than their previously stated book value on the ultimate parent's books; and

(9) SAI's allocation of its purchase price estimate to the various asset classes did not entail a "fair value" determination of the various assets at all: to determine the "current assets" share of the allocation, SAI simply used the book values for these assets as reported by MTD, i.e., at *100%* of the reported MTD book value. After these book value amounts were then subtracted from the total estimated purchase price, the residual, *de minimus* amount that remained was allocated pro rata to the fixed and non-current assets, resulting in new net book values for the machinery and equipment and real property at less than *5%* of MTD's reported net book values for that property.

The foregoing factors outlined under sub-paragraphs (1) through (9) of this proposition of law provide ample grounds upon which to affirm the Commissioner's and BTA's rejection of SAI's valuation of the production machinery and office equipment at issue. In the Statement of Case and Facts, we provide a detailed discussion of each of these considerations. Additionally, the discussion in the previous four propositions of law further amplifies many of those factors. To this analysis, we add a few further analytical points here.

Because the purchase price paid by Shiloh Industries under the November 1, 1999 sale terms included the assumption of liabilities, the total purchase price estimate used by SAI necessarily included an estimate of the fair value of the liabilities. Yet, the evidentiary record provides no explanation for how this was done, or what records were used, other than MTD's stated book values for the liabilities. If, in fact, the stated book value of the liabilities was lower than their actual value, however, the estimated purchase price would understate the actual amount of consideration paid by Shiloh Industries to acquire the assets.

In its initial brief, SAI relies heavily on the existence of a fairness opinion by Robert Baird & Associates (the "Baird Report") for its assertion that the November 1, 1999 sale was at arm's length, yet that opinion expressly does not cover the very issue we raise here concerning the fair value of the liabilities. In plain terms, the Baird Report states that the parties' determination of the value of the assumed liabilities was correct; and that it therefore did not "independently verify" any such figures. Further, Baird had not "undertaken nor obtained an independent evaluation or appraisal of any of the assets or liabilities ***." S. Supp. 13.

Because the Baird Report expressly disclaims any opinion concerning the value of the various assets and liabilities transferred from MTD to Shiloh Industries as a result of the sale, the Baird Report offers no support for the allocation of the purchase price to the production machinery and office equipment at issue. Instead, as the Commissioner's Audit Manager Nolfi and the BTA both correctly noted, the fairness opinion is based upon financial considerations independent of the fair market value of the personalty at issue. *BTA Decision and Order* at 12; Audit Manager Nolfi's Statement of Facts and Conclusions at ¶30, S. Supp. 10-11.

Finally, the allocation of the estimated purchase price to the production machinery and office equipment should be rejected under the authority of this Court's decision in a real property tax valuation case in which the reasonableness of an allocation of the purchase price as between two **taxable** parcels of real estate was rejected because it was unsubstantiated in the evidentiary record. *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of Revision* (1998), 82 Ohio St.3d 297. Here, as admitted by SAI's own witness, Mr. Vonda, for the allocation to the current assets of the total estimated purchase price, he simply used the stated book value, i.e., all of the book value reported by MTD was carried over to Shiloh Industries' books. Other than consult MTD's accounting records, he did nothing else to determine the fair value of those assets. Notably, as we detailed infra under Section K of the Statement of Case and Facts, these current assets are largely excluded from Ohio property taxation. But, as for the fixed assets at issue here (all of which are subject to Ohio property taxation), the allocation resulted in the carry-over to Shiloh Industries' books of only 4.2% of the net book value reported by MTD.

In other words, SAI's failure in the evidentiary record to support the reasonableness of its allocation is far more egregious than the situation in *Corporate Exchange* because it results in such a disparate allocation between taxable and exempt assets. That situation simply was not present in *Corporate Exchange*, as Justice Stratton's dissenting opinion cogently noted. Thus, this case presents a much easier one for the Court to hold in the Commissioner's and BTA's favor than was presented in that case.

PROPOSITION OF LAW No. V:

Under the circumstances and for the reasons detailed under the previous four propositions of law, the BTA acts reasonably and lawfully in ordering the Commissioner to apply his true value computation methodology as set forth in O.A.C. 5703-3-10 and -11. Namely, the Commissioner shall:

> **(1) ascertain the historical acquisition costs that the ultimate parent (MTD) incurred for the various items of the taxable production machinery and office equipment transferred to appellant ;**
>
> **(2) aggregate such costs by acquisition year, using the acquisition years that such property costs were incurred by MTD; and**
>
> **(3) apply the true value allowances for depreciation and obsolescence prescribed for the property under that computation (i.e., for the Schedule 4 property, Class Life III percentages; and for the Schedule 2 property, Class Life V percentages).**

Under this proposition we proceed with a discussion of the BTA's directive to the Commissioner upon remand. Specifically, the BTA set forth the following instruction:

> We agree with the Tax Commissioner that MTD's historical costs are a more probative basis for the value of the property. However the effect of such a determination is the recognition that the MTD property was used property at the time of acquisition. Therefore, the matter must be remanded to the Tax Commissioner so that he may properly apply depreciation rates in accordance with MTD's acquisition history.

BTA Decision and Order at 13.

As the BTA had previously correctly noted in its decision, the Commissioner had, in fact, assessed the production machinery and office equipment at issue as if it were "purchased new" in 1999. *BTA Decision and Order* at 12. More specifically, the Commissioner had determined the true value of those assets by utilizing MTD's net book values for that property as of the November 1, 1999 sale date and then applying his prescribed true value allowances for depreciation and obsolescence using 1999 as the acquisition year for the computation.

The BTA has ordered the Commissioner *not* to use MTD's net book values – which were based on MTD's acquisition costs less MTD's reported accumulated depreciation. Instead, the Commissioner is to use MTD's historical acquisition costs, but then to apply to them his own true value allowance percentages for depreciation and obsolescence, taking into account the actual acquisition history of MTD.

The methodology we set forth in this fifth proposition of law precisely follows the BTA's directive in the most accurate possible way. It uses MTD's "historical costs" as a starting point and then takes into account the acquisition history of the various items of machinery and equipment by applying the true value allowance percentages for each of the items of machinery and equipment from the original acquisition years in which those assets were acquired by MTD.

Moreover, this methodology simply applies the Commissioner's 302 computation the same as if the machinery and equipment at issue remained directly owned by MTD. Thus, this methodology is in exact congruence with the BTA's and Commissioner's rejection of the November 1, 1999 sale as arm's-length transaction. If the transfer of ownership had never taken place, under the Commissioner's 302 computation, MTD would be reporting these assets in exactly the way outlined in this proposition of law. Thus, such methodology is reasonably and lawfully applied here.

CONCLUSION

For all of the above reasons, the BTA's and Commissioner's rejection of the appellant's valuation of the machinery and equipment at issue should be affirmed. Moreover, in accordance with our cross-appeal, the Court should clarify the BTA's directive to the Commissioner upon remand as we have set forth in this brief under our fifth and final proposition of law.

Respectfully submitted,

JIM PETRO (0022096)
Attorney General

BARTON A. HUBBARD (0023141)
Assistant Attorney General
30 East Broad Street 16th Floor
Columbus, Ohio 43215
Telephone: (614) 466-5967
Facsimile: (614) 466-8226

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellee/Cross-Appellant was sent by regular U.S. mail to Charles M. Steines, Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190, counsel for appellant/Cross-Appellee, on this 28th day of December, 2006.

BARTON A. HUBBARD
Assistant Attorney General