IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

A.SCHULMAN, INC.,	:	
Appellant/Cross-Appellee, (Now Appellee)	:	
	:	Case No. 06-1944
v.	:	
	:	Appeal from BTA
WILLIAM W. WILKINS, TAX COMMISSIONER OF OHIO,	:	Case No. 2004-B-370
Appellee/Cross-Appellant. (Now Appellant)	:	

MEMORANDUM IN OPPOSITION TO A. SCHULMAN, INC.'S MOTION FOR RECONSIDERATION

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FILED
JAN 03 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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MEMORANDUM IN OPPOSITION TO A. SCHULMAN, INC.'S MOTION FOR RECONSIDERATION

The Tax Commissioner hereby opposes A. Schulman, Inc.'s (Schulman's) Motion for Reconsideration of this Court's order dated December 19, 2006. Pursuant to its December 19, 2006 order, the Court dismissed Schulman's notice of appeal in the captioned case, and held the Commissioner's cross-appeal to be the sole remaining appeal. The Court reasonably and lawfully held that the notice of appeal that Schulman timely filed with the Court on October 19, 2006 was not perfected, and was properly dismissed, because Schulman failed to dual file its notice of appeal with the Board of Tax Appeals (BTA) within the thirty-day limitations period running from the BTA's issuance of its decision and order on September 22, 2006 and ending on October 23, 2006.

Now Schulman erroneously claims that the attachment to its "Notice of Corrected Service" filed with the Court and the BTA on November 2, 2006 should be considered a "cross-appeal" which was assertedly timely perfected within the statutory limitations period for filing a

cross-appeal, as set forth in R.C. 5717.04. That is, when Schulman filed its "Notice of Corrected Service" on November 2, 2006 it attached a copy of the Notice of Appeal that it had earlier filed with the Court on October 19, 2006. Schulman now asserts that the Notice of Appeal it attached to its "Notice of Corrected Service" constitutes a timely perfected "cross-appeal," but this contention should fail for two fundamental reasons.

First, Schulman ignores that the Commissioner's filing was itself a "cross-appeal." Thus, Schulman is impermissibly seeking to file a cross-appeal from a cross-appeal. By its express terms, R.C. 5717.04 permits a cross-appeal only to a party *other than* the party which has first timely filed a notice of appeal, 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 the 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. *****
>
> ***
>
> ***** Unless waived, notice of the appeal shall be served on all appellees by certified mailed. *****
>
> **(Emphasis and italics added.)**

By filing its notice of appeal timely with the Court on October 19, 2006, Schulman then had until on or before October 23, 2006 within which to perfect that timely filed notice of appeal. Schulman could have perfected its appeal by dual filing with the BTA and serving the Commissioner by certified mail within that thirty-day period. But, unfortunately for Schulman, it failed to file with the BTA within the thirty-day period, and thus failed to perfect its appeal, as this Court's December 19th order correctly found.

To summarize, because Schulman timely filed its Notice of Appeal with the Court, the Commissioner's subsequent filing on October 23, 2006 was a "cross-appeal." Thus, Schulman is now seeking to file a cross-appeal from a cross-appeal, and this is not permitted under the plain language of R.C. 5717.04.

But even supposing that it would be reasonable and lawful to somehow ignore Schulman's initial timely filing of its Notice of Appeal with this Court on October 19, 2006, Schulman's subsequent filing of a Notice of Appeal with the BTA and the Court on November 2, 2006 would be jurisdictionally defective for an independent reason. Specifically, Schulman served the Commissioner only with the "Notice of Corrected Service" itself. In serving only the "Notice of Corrected Service," Schulman failed to serve the Commissioner with a copy of the Notice of Appeal at that time, or at any time thereafter. See, the Certificate of Service to the Notice of Corrected Service so providing, Appx. 2, and the Commissioner's Memorandum in Support of his Motion to Dismiss reciting that no such service of the Notice of Appeal was effectuated. Under Schulman's claim now, November 2, 2006 would have been the last day for timely making such service.

This Court has had very recent occasion to again hold that a party's service of its notice of appeal on the Tax Commissioner within the statute of limitations period provided in R.C. 5717.04 is a mandatory, jurisdictional requirement. That is, the failure of a party to serve the Commissioner by certified mail within the statutory period is a jurisdictionally fatal defect, requiring dismissal. *Berea City School District Bd. of Edn. v. Cuyahoga Ct. Bd. of Revision* (2006), 111 Ohio St. 1219, citing *Olympic Steel, Inc. v. Cuyahoga Cty. Bd. of Revision* (2006), 110 Ohio St.3d 1242, as follows:

> We now hold that the certified-mail service required by R.C. 5717.04 must be initiated within the thirty day period prescribed by R.C. 5717.04 for the filing

> of an appeal. For purposes of complying with this requirement, service is "initiated" when the notice of appeal is placed in the mail. In this case, appellant initiated certified mailing of the notice of appeal to the Tax Commissioner after the expiration of the thirty day period, and that act failed to comply with the jurisdictional requirement of service under R.C. 5717.04.

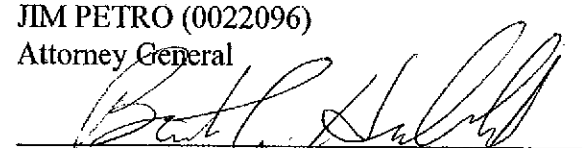
Berea at ¶2, citing *Olympic Steel*, supra.

In its memorandum in support of its motion for reconsideration, Schulman suggests that the dual filing requirement of R.C. 5717.04 applies only to appeals and not to cross-appeals, but this Court has expressly rejected that contention, as we noted in our memorandum in support of our motion to dismiss. *Mid-States Terminal, Inc. v. Lucas County Board of Revision* (1996), 76 Ohio St.3d 79, 82-83 (dismissing cross-appeal for cross-appellant's failure to have filed notice of cross-appeal with the BTA within the statutorily prescribed ten-day cross-appeal period). Likewise, the service-on-the-Commissioner requirement of R.C. 5717.04 applies to cross-appeals, as well as to appeals. Thus, even if Schulman's filing of a Notice of Appeal on November 2, 2006 were erroneously considered to be a "cross-appeal," Schulman's failure to serve the Commissioner by certified mail with that "cross-appeal," within the ten-day appeal period would be a fatal jurisdictional defect, in any event.

For these reasons, the Court should deny Schulman's motion for reconsideration of this Court's December 19, 2006 order dismissing Schulman's notice of appeal.

Respectfully submitted,

JIM PETRO (0022096)
Attorney General



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FILED/RECEIVED
OF TAX APPEAL
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Appellant,	:	Case No. 06-1944
v.	:	
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Appellee.	:	Appeal from BTA Case No. 2004-B-370

NOTICE OF CORRECTED SERVICE

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FILED
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MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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COUNSEL FOR APPELLEE WILLIAM W. WILKINS
TAX COMMISSIONER OF OHIO

Notice of Corrected Service

Now comes Appellant, A. Schulman, Inc. through its undersigned Counsel of Record and gives Notice of Corrected Service in the above captioned case. On November 1, 2006 Appellant's Counsel of Record was notified by the Ohio Board of Tax Appeals that the Board could not locate a copy of the Notice of Appeal filed in the instant case by Appellant in its records. Counsel of Record hand delivered a copy of the same on November 2, 2006 to the Ohio Board of Tax Appeals along with a copy of this Notice of Corrected Service. A copy of the foregoing Notice of Corrected Service was also delivered to the counsel for the Tax Commissioner, Attorney General Jim Petro, by Barton A. Hubbard, Assistant Attorney General, on November 2, 2006.

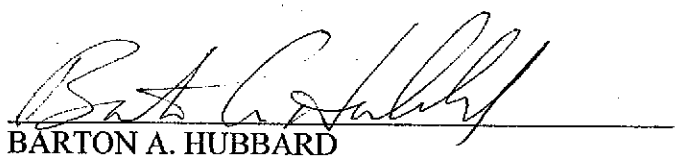
Respectfully submitted,

Leonard A. Carlson, Counsel of Record

COUNSEL FOR APPELLANRT
A. SCHULMAN, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Memorandum in Opposition to A. Schulman, Inc.'s Motion for Reconsideration was sent by regular U.S. mail to Leonard A. Carlson, 2700 East Main Street, Suite 111, Columbus, Ohio 43209, and Raymond D. Anderson and Kevin M. Czerwonka, Vorys, Sater, Seymour and Pease, LLP, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216-1008, counsel for Appellant/Cross-Appellee (now Appellee), on this 3rd day of January, 2007.



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