

IN THE SUPREME COURT OF OHIO

SHILOH AUTOMOTIVE, INC.,)
)
Appellant/Cross Appellee,)
)
)
-vs-)
)
WILLIAM W. WILKINS,)
TAX COMMISSIONER OF OHIO,)
)
Appellee/Cross Appellant.)

Appeal from the Ohio
Board of Tax Appeals
BTA Case 2004-M-380 and 1283
Supreme Court Case 2006-1384

Third Merit Brief of Appellant/Cross Appellee

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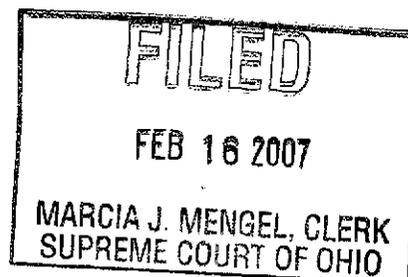


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GLOSSARY

In the Brief of Appellant and in this brief certain names and terms have been abbreviated or assigned a shorthand name. These abbreviations and shorthand names are listed below, along with the page of the Brief of Appellant at which they first appear.

Reference Name	Actual Name	Page
APB 16	Accounting Principles Board Opinion 16	15
Asset Purchase Agreement	Asset Purchase Agreement among Shiloh Industries, Inc., Shiloh Automotive, Inc. and MTD Products Inc. dated as of June 21, 1999	3
Baird	Robert Baird & Associates, Inc.	8
Board	Board of Tax Appeals	2
Commissioner	Tax Commissioner of Ohio	2
MTD	MTD Products, Inc.	2
PwCS	PricewaterhouseCoopers Securities LLC	6
Shiloh	Shiloh Industries, Inc.	3
Shiloh Automotive	Shiloh Automotive, Inc.	2

STATEMENT OF CASE AND FACTS

The Statement of Case and Facts set forth at pages 1 through 16 of the Brief of Appellee/Cross Appellant (hereinafter referred to as the “Commissioner’s Brief”) includes several statements that can not be traced to the record and/or are incorrect. The more significant among them will be addressed below.

Reliance on Information Not in the Record

- At page 5 of the Commissioner’s Brief, the Commissioner first states that the assets that make up MTD’s Automotive Division were acquired over the years at a cost of over \$72 million. This statement is repeated throughout the Commissioner’s Brief as the premise for one argument or another. The problem is, the evidence relied on by the Commissioner as support for his contention is not found in the record.

Going outside the record, and possibly violating the confidentiality provisions of R.C. 5703.21 in the process, the Commissioner refers to and relies on information purportedly gleaned from MTD’s Ohio Personal Property Tax Return for the 2000 tax year. Inasmuch as this information was not introduced as evidence at the Board’s hearing, much less explained or subject to cross-examination, it can not be presented now as fact. Indeed, it should not be considered at all. As the Court has previously held: “It is axiomatic that a reviewing court cannot add matter to the record before it, which was not part of the trial court’s proceedings.” *In re Contested Election of November 2, 1993*, 72 Ohio St. 3d 411, 413, 1995-Ohio-16; (striking portions of appellee brief appendix containing documents not in the record); see also *State ex rel. Duncan v. Chippewa Twp. Trs.*, 73 Ohio St. 3d 728, 730, 1995-Ohio-272 (“A reviewing court cannot add matter to the record before it, which was not a part of the trial court’s proceedings, and then decide the appeal on the basis of the new matter.”); and *State ex rel. Schwaben v. Sch.*

Employees Ret. Sys., 76 Ohio St. 3d 280, 283 n.4, 1996-Ohio-48 (“[A]s a reviewing court, this court will not add matter to the record that was not part of the proceedings before the lower court.”).¹

- At page 7 of the Commissioner’s Brief, the Commissioner first states that MTD’s “recent expenditures constituted over half of the total acquisition costs of [the Automotive Division]” and that the assets of the Automotive Division transferred by MTD to Shiloh Automotive were “largely newly-acquired and technologically advanced, including numerous robotic welders.” Here again, the Commissioner relies on information purportedly gleaned from MTD’s Ohio Personal Property Tax Return for the 2000 tax year.

Misstatements of Fact

- At pages 1 and 2 of the Commissioner’s Brief, the Commissioner first states that MTD is Shiloh Automotives’ “ultimate parent corporation” and that “MTD held 51% of the outstanding shares of Shiloh Industries ***.” The fact is, MTD is not Shiloh Automotives’ ultimate parent corporation -- directly, indirectly, or any other way.

On July 17, 1999, the date on which Shiloh's independent directors approved the acquisition of MTD's Automotive Division, there were 13,080,563 shares of Shiloh stock issued and outstanding. Of that amount, 6,707,735 (51%) were owned or controlled, directly or indirectly, by MTD, its shareholders and its pension fund. Significantly, the MTD Products Pension Pooled Fund (“Pension Fund”) owned 1,104,000 of those shares. (Supp. 352 and 353; Exhibit 1, pg. 36 and 37). Voting rights relating to those 1,104,000 shares reside with the Pension Fund’s independent trustee, the Northern Trust Company, which acts in a fiduciary

¹ As an aside, even if the \$72 million amount was accurate, all it would indicate is that over decades, MTV spent that amount on property acquisitions. It indicates nothing at all about the current value of such property.

capacity on behalf of the Pension Fund's beneficiaries – current and future retirees.

Accordingly, only 5,603,735 (42.8%) of the issued and outstanding shares of Shiloh were owned or controlled, directly or indirectly, by MTD and its shareholders on July 17, 1999. Moreover, immediately after Shiloh Automotives' purchase of the Automotive Division, only 7,032,306 (48.5%) of the issued and outstanding shares of Shiloh were owned or controlled, directly or indirectly, by MTD and its shareholders. In neither set of circumstances does MTD constitute Shiloh Automotives' "ultimate parent corporation".

- At page 13 of the Commissioner's Brief, the Commissioner first states that "MTD expected that its automotive division assets would be significantly enhanced in value by reason of their [transfer to Shiloh Automotive]." This statement warps the testimony of Mr. Houser, formerly the Executive Vice President and Chief Financial Officer of MTD, who appeared before the Board and presented the case for combination with Shiloh from MTD's perspective. Mr. Houser testified that, based on the factors referenced in Exhibit 14 at pages 47-52, MTD concluded that no other entity would be as interested in acquiring the Automotive Division, or willing to pay more for the Division, than Shiloh. (Supp. 31-35, 49-50, 105, 148-149, 151-157, 168). No one testified (or suggested in any way) that a purchase by Shiloh would enhance the value of the Division.

- At page 14 of the Commissioner's Brief, the Commissioner first states that the price paid for the Automotive Division was "estimated". To the contrary, pursuant to § 2.2 of the Asset Purchase Agreement (Supp. 360; Exhibit 1, pg. A-3), the purchase price negotiated for MTD's Automotive Division had, initially, 3 components:

- (1) \$20 million in cash, plus

- (2) a number of shares of Shiloh common stock that, pursuant to a formula, turned out to be 1,428,571 shares -- determined by dividing 20,000,000 by the greater of (a) \$14 or (b) the average closing price of the shares, and

(3) the assumption of certain liabilities. (Supp. 75-76).

Pursuant to § 2.3 of the Asset Purchase Agreement, the purchase price could be adjusted downward if closing net working capital as of the closing date, determined by reference to an audit done 90 days after the closing, was less than initial net working capital. (Supp. 76, 78, 360, 403; Exhibit 1, pg. A-3, Exhibit 4).²

Pursuant to § 2.8 of the Asset Purchase Agreement, depending on Shiloh Automotives' earnings before interest, income tax, depreciation, and amortization expense over the 12 month period from November 1, 1999 through October 31, 2000, the purchase price could be increased by as much as \$28 million or decreased by as much as \$15 million. (Supp. 78-79, 361, 403; Exhibit 1, pg. A-5, Exhibit 4).

Pursuant to § 4.4 of the Asset Purchase Agreement, in certain circumstances the purchase price could be decreased because of customer price concessions -- §4.4(b), or excess capital expenditures -- §4.4(d). (Supp. 79-82, 370, 403; Exhibit 1, pg. A-24, Exhibit 4)

The purchase price for the Automotive Division, as finally determined under the Asset Purchase Agreement, was \$49,483,786. More to the point, this amount, calculated to the dollar, was not the product of, nor did it involve, any estimates.

- At page 14 of the Commissioner's Brief, the Commissioner first states that "current assets *** were valued [by Shiloh] at their stated book values on MTD's books." That simply isn't the case. As explained in the Statement of Facts to the Brief of Appellant at pages 16 and 17, Shiloh Automotive followed the mandate of APB 16 to the letter when determining the value to be allocated to each category of current assets.

² Exhibit 4 is a spreadsheet that sets forth the amount and allocation of the purchase price paid for the assets of MTD's Automotive Division. It is based on the permanent books and records of Shiloh Automotive. (Supp. 76, 209).

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

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

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

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

ARGUMENT

Proposition of Law 1

MTD's sale of its Automotive Division to Shiloh Automotive was an arm's length transaction.

This case involves three basic issues:

1. Was the sale of MTD's Automotive Division to Shiloh Automotive an arm's length transaction?
2. Does APB 16 apply for purposes of allocating the purchase price among the acquired assets?
3. Did Shiloh Automotive properly apply APB 16?

Was the Transaction an Arm's Length Sale

The parties are in agreement that if the transaction in which Shiloh Automotive acquired the assets of MTD's Automotive Division constitutes an arm's length sale, the amount paid for such assets is the best evidence of value. Indeed, as recently explained by the Court in Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision, 108 Ohio St.3d 310, 2006-Ohio-1059: "[W]hen *** property has been the subject of a recent arm's-length sale between a willing seller and a willing buyer, the sale price of the property shall be the true value for taxation purposes."

Commissioner's Initial Argument

When this case was presented to the Board, the Commissioner's argument was that in order to be arm's length for Ohio tax purposes, a sale must be an "open market" transaction – (i.e., marketed to the general public). In his Final Determination, the Commissioner cites The Grabler Mfg. Co. v. Kosydar (1975), 43 Ohio St.2d 75, the syllabus of which reads:

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

Fourteen years later, the Court, in *Walters v. Knox Cty. Bd. of Revision*, (1989), 47 Ohio

St.3d 23, wrote:

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

Justice Douglas, in a concurring opinion, wrote:

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

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

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

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

Board's Decision Establishes a Rule of Law

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

Five persons related to MTD sit on Shiloh's nine-person board of directors. We acknowledge that the directors related to MTD did not participate in Shiloh's decision to purchase the MTD Automotive Division. However, the record does not contain the same evidence with respect to MTD's decision to sell. In fact, because of the close relationship to Shiloh, MTD's board of directors was aware of Shiloh's long-range plans, was able to have informal discussions with the corporation even before the formal proposal was completed, and was able to tailor its proposal to attract Shiloh's interest. Because of this symbiotic relationship between the purchaser and the seller, the board must agree with the Tax Commissioner that the sale itself does not meet the definition of a qualifying sale for valuation purposes. (Emphasis added) (Appendix page 14).

In effect, the Board established a rule of law that precludes "related" companies from qualifying their transactions as arm's length unless the actions of each company are limited to those authorized by their disinterested directors. Absent that, a related party sale will not be considered transacted at arm's length as a matter of law, no matter how fair and reasonable the negotiations may have been.

The Commissioner Current Argument

The Commissioner takes the Board's rule one step farther. He cites and relies on Columbus Bd. of Educ. v. Franklin County Bd. of Revision, (Jan. 18, 1990), Franklin App. No. 89AP-448, unreported, for the proposition that an arm's length sale requires a transaction

conducted between unrelated parties. The Court of Appeals opinion does not, however, support this proposition. As the Court of Appeals wrote:

While the absence of these factors [i.e., a public listing of the property offered for sale and a transaction between unrelated parties] may not preclude there being an arm's length transaction, their absence supports the board's finding. (Appendix to Brief of Appellee/Cross Appellant at page 6).

Thus, on the facts presented in *Columbus Bd. of Educ. v. Franklin County Bd. of Revision*, which involved a sale of property by the general partner of a partnership to the partnership, the Court of Appeals simply held that there was sufficient evidence in the record to affirm the Board's determination that an arm's length sale had not taken place.

Shiloh Automotives' Response

This Court has never adopted as part of the definition of an arm's length sale a requirement that the parties be unrelated – only that they act in their own self-interest. *Walters v. Knox Cty. Bd. of Revision*, 47 Ohio St.3d at 25. That being the case, it is reasonable for the Board to evaluate the facts presented in a given case for the purpose of determining whether the parties acted in their respective self-interest. It is unreasonable to base that determination exclusively on the identity of the parties' representatives. By doing so in this case the Board established a rule of law that says only certain people (i.e., the disinterested directors of a company) are legally qualified to negotiate an arm's length sale on behalf of their company. That this rule of law is unreasonable is borne out by the facts of this case.

As more fully developed in the Brief of Appellant, it defies logic to suggest that only MTD's disinterested directors (i.e., those with no direct or indirect ownership interest in Shiloh, of which there were none) would have acted in a manner that is consistent with the best interests of MTD and its shareholders. Indeed, when the pivotal issue is: "Did MTD sell its Automotive

Division for less than fair market value?”, it is more likely that the company’s interested directors would protect the company’s interests more assiduously than its disinterested directors.³ As explained in the Brief of Appellant, if MTD had sold its Automotive Division for less than fair market value, every dollar of discount would have resulted in a permanent shift of value from MTD to Shiloh’s other shareholders. That being the case, it is unreasonable to assume that MTD’s directors would act contrary to their financial interest by granting such a discount.

Commissioner’s Speculation – Priming the Pump

Unwilling to concede the obvious and undaunted by the absence of any supporting evidence, the Commissioner suggests at page 13 of his Brief that MTD consciously and deliberately decided to discount the price of its Automotive Division -- permanently transferring to Shiloh’s other shareholders approximately \$12 million in the process -- with the expectation that the Automotive Division would thrive in the hands of Shiloh Automotive and generate more than enough profit in the future to recoup for MTD the \$12 million it had given away, and then some. This notion is, charitably speaking, far-fetched.

Prudent businessmen (even dumb ones) don’t give away massive sums of money to total strangers as an incidental cost of “priming the pump”. Especially when, as in this case, the Automotive Division had a history of losses dating back at least to the fiscal year beginning November 1, 1997. Unfortunately, but not surprisingly, that trend continued after the sale of the Automotive Division.⁴

³ It has been conceded from the outset that Shiloh acted in its best interests when negotiating the acquisition of MTD’s Automotive Division.

⁴ The record reflects Shiloh Industries’ losses through October 2003. Since it acquired the Automotive Division Shiloh Automotive has lost over \$60 million and deteriorated to the point that more than 75% of its workforce has been laid-off. The entire Parma facility (by far, the larger of the two acquired from MTD) is being shut down.

The foregoing facts make it plain that, rather than discounting the price for the Automotive Division, MTD correctly recognized in the Spring of 1999 that the Division was worth no more than the \$49,483,786 Shiloh Automotive agreed to pay for it. It is noteworthy that that amount is very close to the amount MTD anticipated that it could hope to receive for the Division in late 1997 and early 1998 – months before it approached Shiloh about a possible acquisition. (Supp. 142-143).

Corroboration that MTD Negotiated at Arm's Length

In the Brief of Appellant, the long history of negotiations leading up to Shiloh Automotives' purchase of the Automotive Division is set forth. The Commissioner dismisses this history as probative evidence of an arm's length transaction for one over-riding reason – he doesn't like the result. The Commissioner is fixated on the fact that, prior to November 1, 1999, the net book value of the assets that make up the Automotive Division, as recorded on MTD's books, was higher than the amount paid for the assets by Shiloh Automotive. For this reason, the Commissioner concluded "the applicant's [i.e., Shiloh Automotives'] reported book cost did not reflect true value". (Supp. 482; St.380 2). The Commissioner left no room for the possibility (indeed, the not uncommon occurrence) that the assets had declined in value at a much greater pace than the rate of depreciation allowed for financial reporting purposes.

More to the point, dissatisfaction with the result of the negotiations is not evidence that the negotiations were not conducted at arm's length. Moreover, and as noted below, the Commissioner is the only person who thinks the price paid by Shiloh for the assets of the Automotive Division was less than the fair market value of the assets on the date of sale.

Purchase Price Approved by Unrelated Parties

Not only is the seriousness with which the parties approached and conducted their negotiations evidenced by the fact that it took more than 6 months to reach an agreement, the purchase price negotiated by the parties was blessed by Baird, an independent investment banking firm, which issued its opinion that the amount paid by Shiloh for the assets of MTD's Automotive Division was fair.

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

Finally, Albert Vondra, a partner with PricewaterhouseCoopers, testified that PricewaterhouseCoopers would not have certified the company's financial statements issued after the acquisition of MTD's Automotive Division if the price paid for the Automotive Division was not considered the fair market value of such assets. (Supp. 253).

Auditors' Acknowledgement

Given the corroborating evidence set forth above, it is not surprising that even the Commissioner's audit agents conceded in writing that the sale of MTD's Automotive Division to Shiloh was negotiated at arm's length. The Audit Manager wrote:

The consensus of the agent and audit manager is that this was an 'arm's-length' transaction for financial statement purposes. (Supp. 82, 494; St.380 305).

Given this concession, and the facts presented by Shiloh Automotive that detail the long negotiations that eventually led to the sale in question, the Court is respectfully requested to rule that:

The Board unreasonably and unlawfully held, based solely on the identity of the individuals representing the parties and without regard to the conduct of such individuals, that MTD's sale of its Automotive Division to Shiloh Automotive can not be considered an arm's length transaction;

The evidence in the record of this case establishes that each of the parties to the sale in question acted in their own self interest;

The evidence in the record establishes that each of the parties to the sale in question negotiated at arm's length and that the purchase price paid for the assets of MTD's Automotive Division reflects the fair market value of such assets on the date of sale.

Proposition of Law 2

APB 16 applies to the sale of MTD's Automotive Division to Shiloh Automotive for purposes of allocating the purchase price among the acquired assets.

Without benefit of any supporting testimony, expert or otherwise, the Commissioner argues that APB 16 does not apply to Shiloh Automotives' purchase of the assets of MTD's Automotive Division. In the process, he rejects as incorrect the testimony of Albert Vondra, a partner with PricewaterhouseCoopers who was recognized as an expert with regard to APB 16. Mr. Vondra unequivocally testified that APB 16 does apply to Shiloh Automotives' purchase.

The lynchpin of the Commissioner's argument is that paragraph 5 of APB 16 excludes from the definition of "business combination" (to which APB 16 applies):

[A] transfer of net assets *** between companies under common control (control is defined in paragraph 2 of ARB No. 51), such as between a parent corporation and its subsidiary ***.

The Commissioner also refers to Accounting Research Bulletin No. 51, as amended in paragraph 13 of Statement of Financial Accounting Standards No. 94, effective October, 1987.

Paragraph 13 provides:

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 rule. ***.

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.

Relying on the foregoing provisions, the Commissioner argues that on the date MTD sold the assets of its Automotive Division to Shiloh, “MTD was the parent and Shiloh Automotive was a more-than-50%-controlled subsidiary” and, therefore, the two companies must be considered under common control – making APB 16 inapplicable to the sale. As noted on pages 3 and 4 of this brief, however, MTD controlled only 42.8% of the issued and outstanding shares of Shiloh on November 19, 1999. Accordingly, MTD was not Shiloh’s parent corporation at that time. Nor did MTD possess voting control over Shiloh at that time. For this reason, as Mr. Vondra testified during the Board’s hearing, APB 16 applies.

Proposition of Law 3

Shiloh Industries properly applied APB 16 for purposes of allocating the purchase price paid for MTD’s Automotive Division.

The Commissioner has argued that the amount paid by Shiloh Industries for the assets of MTD's Automotive Division, if fair in the aggregate, was not properly apportioned among such assets. This argument was not addressed by the Board. Nevertheless, a few comments in response to the Commissioner are in order at this point.

As noted in the Statement of Facts to the Brief of Appellant at pages 16 and 17 and pages 5 and 6 of this brief, Shiloh Automotive followed the mandate of APB 16 to the letter when determining the value to be allocated to each category of current assets. As required by APB 16, whatever portion of the purchase price was left over after the appropriate amounts were allocated to the current assets was to be apportioned among non-current assets – i.e., land, buildings, and machinery used in business. The residual purchase price was supposed to be apportioned based on the relative values of the non-current assets, which ordinarily are determined from an appraisal of the real property and the current replacement cost of the machinery. In this case, because the residual purchase price was relatively small, it made little sense to appraise the current assets. Instead, the apportionment was based on relative net book values of the non-current assets, resulting in all but \$32,613 of the residual purchase price being attributed to tangible personal property used in business. Accordingly, at most Shiloh Automotive may have understated the November 19, 1999 value of its machinery and equipment by \$32,613 – and then only if no value is attributed to real property.

Stephen Graham, Shiloh's Chief Financial Officer, and Albert Vondra both testified that Shiloh Automotives' apportionment methodology was consistent with APB 16. Moreover, Mr. Vondra, who was recognized as an expert with regard to the interpretation and application of APB 16, further testified that PricewaterhouseCoopers would not have rendered an opinion that the financial books and records of Shiloh for the years ending October 31, 2000, 2001 and 2002, was consistent with APB 16 and generally accepted accounting principles had the firm not believed that to be the case.

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

Proposition of Law 4

It is premature for the Commissioner to request the Court to interpret the Board's directive that this matter "be remanded to the Tax Commissioner so that he may properly apply depreciation rates in accordance with MTD's acquisition history."

In its final determination, the Board agreed with Shiloh Automotive that the true value of the assets of MTD's Automotive Division that were acquired by Shiloh Automotive on November 1, 1999 should be determined in future years using a true value schedule that takes into account the fact that the property is used. The Board remanded the matter to the Commissioner to do so.

Shiloh Automotive had argued to the Board that the appropriate true value schedule to employ is that which is determined by reference to Exhibit 5, a December 31, 1998 Departmental IOC from Robert Dudgeon to Personal Property Tax Division Tax Agents Re: Valuation of Assets Acquired in Lump Sum Purchase. That being the case, Shiloh believes it is reasonable to conclude that the Board intended the Commissioner to implement the IOC.

For his part, the Commissioner argues that he should be permitted to disregard the IOC and simply apply the standard true value schedule based on the year the property was purchased by MTD. The Commissioner has asked that the Court to interpret the Board's final determination accordingly.

Whichever interpretation ultimately prevails, Shiloh submits that it is for the Board to interpret its own ruling in the first instance. Certainly the Commissioner can interpret the Board's final determination as he sees fit. If that interpretation is considered incorrect by Shiloh Automotive, an appeal may be perfected. At that time, the Board will side with one party or the other. Until then there simply is no legal issue for the Court to address or resolve.

CONCLUSION

For all of the reasons set forth in the Brief of Appellant and this Third Merit Brief of Appellant/Cross Appellee, the Court is urged to find that: Shiloh Automotives' November 1, 1999 purchase of the assets of MTD's Automotive Division was an arm's length transaction; that the November 1, 1999 true value of the assets of MTD's Automotive Division was appropriately determined by reference to the amount paid by Shiloh Automotive for such assets; that the amount paid for the assets of MTD's Automotive Division was properly allocated by Shiloh Automotive among such assets under APB 16; and, should the Court address the issue, the appropriate true value schedule to employ when determining the true value of such assets is that which is determined by reference to Exhibit 5.

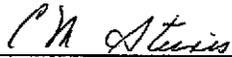
Respectfully submitted



Charles M. Steines
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Third Merit Brief of Appellant/Cross Appellee was served on Barton Hubbard, Assistant Attorney General, 30 East Broad Street, Columbus, Ohio 43215, counsel for the Tax Commissioner, this 16th day of February, 2007.



Charles M. Steines