

IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals

A. SHULMAN, INC.,

Appellee

v.

WILLIAM W. WILKINS, TAX
COMMISSIONER OF OHIO,

Appellant.

:
:
:
: Case No. 06-1944
:
: Appeal from BTA
: Case No. 2004-B-370
:
:
:

BRIEF OF APPELLANT

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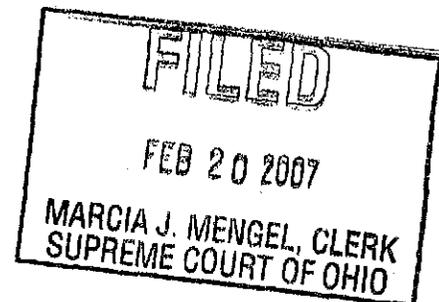


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LAW AND ARGUMENT

Proposition of Law No. 1:

An appellant to the BTA from a final determination of the Tax Commissioner has an affirmative evidentiary burden of demonstrating that the Tax Commissioner’s findings are clearly erroneous, both as to the manner and extent of any claimed errors in those findings

Moreover, when the issue presented entails a claim to property tax exemption the one seeking entitlement to the exemption bears the affirmative evidentiary burden of establishing, by clear and convincing evidence, entitlement to the exemption, as a matter of substantive proof, as to each requirement of the exemption.....18

Proposition of Law No 2:

Extruder screw and barrel assemblies, as integral components of extruder machines, move raw material plastic resin from the point that the resin is in solid, granular form, to the point where it is introduced into a die in a plasticized, low-viscosity, molten, semi-liquid form. Thus, as such, the assemblies constitute taxable material-handling equipment and do not qualify for personal property tax exemption as “dies” as defined in *Timken v. Lindley*, for their purpose and use is not to “impose their shape upon the product under production,” as required in order to qualify as “dies” under *Timken*20

Proposition of Law No 3:

“Jigs, dies, and patterns” are special purpose devices which “by their nature are capable of only special uses.” Thus, because extruder screw and barrel assemblies are integral components of extruder machines which are necessary to the basic operation of the extruders whenever they are in operation, for whatever specific products are being molded, such components necessarily fail to meet the qualifications for the jig and die exemption provided in R.C. 5701.03(A).

“[T]he limitation of special purpose implies that general purpose implements and devices are not exempt.” Because these integral components of the extruders are used for the most basic, general purposes, and are in active operation no matter the particular product being manufactured, they plainly fail to qualify for the exemption. *Colonial Foundry v. Peck* (1952), 158 Ohio St. 296, 299-300; *American Book Co. v. Porterfield* (1969), 18 Ohio St.2d 49,53; *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85, followed24

Proposition of Law No. 4:

For the same reasons that extruder screw and barrel assemblies fail to qualify for personal property tax exemption as “dies,” they likewise fail to qualify for the exemption as “jigs.”26

Proposition of Law No. 5:

A personal property taxpayer’s claim to property tax exemption for equipment, or components thereof, fails when the sole evidence presented by the claimant to meet its evidentiary burden of proof consists of estimates of the costs, instead of the actual costs, of the equipment for which the exemption is sought.

This is particular so where, as here the estimates:

- (a) are unauthenticated;
- (b) constitute hearsay, and hearsay within hearsay;
- (c) were not created or maintained by the claimant in the ordinary course of its business, but, instead, were obtained for purposes of litigation;
- (d) reflect widely-disparate cost amounts; and
- (e) are not sufficiently identified as pertaining to any specific items of assessed property27

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STATEMENT OF CASE AND FACTS

A. Introduction / Summary

As this Court has long and uniformly held, the exception from the definition of “personal property” presently codified in R.C. 5701.03 for “patterns, jigs, dies, and drawings,” but originally enacted in 1931, operates as an exemption from Ohio personal property taxation. Exemption claims are in derogation of the rights of all other taxpayers, necessarily shifting a higher burden on the non-exempt. Thus, personal property taxpayers bear the burden of establishing clear entitlement to exemption, both factually and legally.

In direct contravention of this Court’s established precedent, the BTA’s decision took a far different approach to the exemption claim advanced by the taxpayer. The BTA erred in two fundamental ways: (1) by broadening the exemption at issue beyond any recognition, and (2) failing to require the taxpayer claimant to meet its affirmative burden of proof of demonstrating the extent of the reductions in assessed value that would arise from that broad expansion of the exemption.

In holding that the Commissioner’s assessments must be reduced because the items for which the taxpayer sought exemption constituted “dies,” the BTA wildly departed from this Court’s established precedent defining that term. Suddenly, under the BTA’s ruling, general-purpose material-handling equipment used to convey raw materials to the dies (molds) would, for the first time in the long history of this exemption, escape personal property taxation. The BTA’s decision would unwarrantedly go where this Court, the General Assembly, and the Commissioner have never gone, and were never intended to go.

Moreover, general-purpose material-handling equipment constitutes a ubiquitous and substantial portion of our State's personal property tax revenue base. Thus, the expansion of the "jigs and dies" exemption reflected in the BTA's decision substantially threatens the revenues generated from the personal property tax, the vast majority of which funds our primary and secondary public schools.

This Court's decisional law and the Commissioner's administrative practices are aligned in defining "dies" as that term is used throughout the various manufacturing industries: as "special-purpose" devices that "through applied force, impose their shape upon the product under production." *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85, 87 (so defining the die function); *American Book Co. v. Porterfield* (1969), 18 Ohio St.2d 49, 52-54 (applying a like die definition, and expressly limiting the jigs and dies exemption to only "special-purpose" devices); *Colonial Foundry Co. v. Peck* (1952), 158 Ohio St. 296, 301 (enunciating and applying the "special-purpose devices" requirement to the "jigs and dies" definition).

Here, in the Commissioner's administrative proceedings, the taxpayer claimant sought exemption for various items that are not "special-purpose" devices and do not perform a die function. Namely, the items at issue are "extruder screws" and "extruder barrels" (extruder screw and barrel assemblies).

The extruder screw and barrel assemblies are integral parts of the claimant's extruder machines that are not product-specific. The assemblies move the taxpayer's raw material plastic resin from the point that the resin is in solid, granular form, to the point where it is introduced into the die in a plasticized, low-viscosity, molten, semi-liquid form. Thus, the screw and barrel assemblies do not qualify as "dies" under *Timken* for

they constitute items of material-handling equipment which convey raw material resin, rather than “impose their shape upon the product under production,” as required under *Timken*.

Ironically, while failing to apply, or even to acknowledge, the foregoing *Timken* definition of “die” in its decision, the BTA instead cited to this Court’s earlier personal property tax decision in *American Book Co.* for its authority, but that case actually strongly rejects the very expansion of the exemption that the BTA granted here. As its name describes, the personal property taxpayer in *American Book* was a printer, which successfully sought exemption for various printing plates used in its printing process. In so holding, however, the Court first reiterated the established principle that the “jigs, dies, and patterns” exemption encompasses “special use” devices only. Then, applying that standard, the Court recognized a limited exemption encompassing the printing plates. *American Book* at 52-53, quoting *Colonial Foundry* at 331. The Court held that the printing plates, which the Court noted had an average life of nine-months, constituted “special purpose” devices that “alone bear the specially formed design or pattern which is imparted to the paper in the process of printing.”

Revealingly, in *American Book*, none of the various cylinders, conveyor belts, and other material-handling equipment used by the printer to move the paper through the printing process likewise qualified for exemption. The printer did not even attempt to assert that such general-purpose, long-lived items that performed material-handling functions, rather than die functions, could even conceivably qualify for the exemption.

Applying the “special-purpose devices” requirement of *American Book* and *Colonial Foundry* here in itself should be dispositive, even putting aside that material-

handling is not a die function. As integral, general-use components of the claimant's extruder machines, the screw and barrel assemblies at issue are used in connection with a wide variety of dies in order to convey the claimant's raw material plastic resins to the dies. Unlike the dies themselves, the screw and barrel assemblies are not short-lived, product-specific devices, used in the taxpayer's business only for a particular product, and then, for the remainder of the time, placed in storage, possibly never to be used again. Rather, they are general-use components of the claimant's various extruder machines, used over and over again, which convey the raw material resins to the point where they are introduced into the dies.

For a wide variety of plastic products being produced on an extruder line, the same screw and barrel assemblies are used, no matter the claimant's changing of the dies. Rather, the screw and barrel assemblies are integral, necessary component parts of the extruders, with long useful lives, used in the manufacturing of a myriad of products over repeated product cycles. Thus, they are not "special-purpose" devices.

Because the BTA's decision did not expressly address the issue of whether the screw and barrel assemblies qualified for exemption as "jigs" the BTA has tacitly affirmed the Commissioner's determination that the items failed to qualify as such. We briefly note here, however, that the BTA acted reasonably and lawfully in tacitly rejecting such "jigs" claim for the same reasons that these items fail to qualify as "dies." First, just as "dies" must be "special purpose" devices, so, too, must "jigs." *Colonial Foundry, American Book*, supra. Thus, general use of these items on the claimant's extruder lines in connection with a wide variety of dies, of various shapes and sizes, in itself would preclude a "jigs" characterization.

Moreover, a “jig” must solely or primarily “perform a holding or positioning function during machining or processing operations.” *Timken*, at 87. As noted, the screw and barrel assemblies actively convey the raw material resin to the point where the screw and barrel assemblies then push the resin into the dies; they do not passively “hold or position the product during machining or processing.” Propulsion and transportation are hardly “holding” or “positioning” functions.

Finally, in any event, even if the extruder screws and barrel assemblies somehow were to qualify in whole or in part for the die exemption, the BTA’s decision on the issue should be reversed for a further independent reason: the BTA failed to apply the proper standard of judicial review. The BTA erred by failing to require the taxpayer claimant to meet its affirmative burden of demonstrating both the manner **and the extent** of the reductions in assessed value that would arise from that broad expansion of the exemption.

The claimant provided no competent or probative evidence of the costs it incurred for the extruder screw and barrel assemblies or components thereof, presenting two widely varying cost estimates obtained for purposes of litigation that were not authenticated or testified to, and which constituted multiple hearsay. Moreover, such approximations of value are not probative evidence to prove a deduction from taxable personal property. Actual costs are required, not estimates. *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506. Thus, even under the BTA’s broad expansion of the exemption, the BTA should have affirmed the Commissioner.

B. Procedural posture

Richard A. Levin, Tax Commissioner of Ohio, appeals as of right pursuant to R.C. 5717.04 from a decision and order of the BTA affirming in part and reversing in part the Commissioner's final determination. This is a personal property tax case for the 1999 through 2001 tax years. The BTA affirmed the Commissioner's final determination in large part; the Commissioner seeks this appeal on the sole issue upon which he was not affirmed. Namely, the BTA "reversed" the Commissioner as to the second specification of error in the taxpayer's, A. Schulman, Inc.'s (Schulman's), notice of appeal to the BTA, which provided, as follows:

2. The Tax Commissioner further erred in failing to find that certain items for tax years 1999, 2000, and 2001 described by Appellant as extruder screws, extruder barrels, discharge dies, pelletizers and gauges are properly classified as jigs and dies and pursuant to R.C. Sec. 5701.03 are excluded from the definition of personal property and are therefore not subject to Ohio personal property tax.

Specifically, the BTA held that: " *** the subject equipment meets the requirements and definition of a 'die' *** [t]herefore we agree with appellant's second specification of error and reverse the Tax Commissioner's final determination on the issue." *BTA Decision and Order* at 11. At first blush, the BTA's directive appears to possibly intend that the property the appellant characterized as "discharge dies," "pellitizers," and "gauges," as well as "extruder screws" and "extruder barrels," all qualify for exemption as "dies."

Yet, the evidentiary record is devoid of any testimony or description concerning any "discharge dies," any "pellitizers," or any "gauges." On this record, there is no way to ascertain what these items are, how they function, whether they qualify under the exemption, and, if so, the proper true value to exclude from the valuations. In fact, the

BTA's Decision and Order itself does not contain any reference to any such items -- other than in the BTA's recitation of the contents of specification of error number two of Schulman's notice of appeal. Rather, concerning the items for which Schulman sought exemption pursuant to specification of error two of its notice of appeal, the testimony quoted by the BTA in its decision and the BTA's other discussion of the "jigs and dies" exemption issue in its decision is limited to "extruder screws and barrels." See *BTA Decision and Order* at 8-11.

Thus, when the BTA's unreferenced use of the term "subject property" at page 11 of its Decision and Order is read in context, the BTA appears to have been referring only to the categories of "extruder screws" and "extruder barrels," as set forth in Schulman's notice of appeal to the BTA.

But even more fundamentally, "extruder screws" and "extruder barrels" are the only items upon which the BTA could have reasonably intended to encompass in the phrase "subject property" -- given the absence of any probative evidence, or even any description, concerning "pelletizers," "discharge dies" and "gauges" in the record, or in the BTA decision. The applicable standard of judicial review would bar any grant of exemption for any such items, for Schulman plainly failed to affirmatively establish entitlement to exemption for any such items.

Accordingly, just as the Introduction/Summary section above focused on the extruder screws and extruder barrels, i.e., the "screw and barrel assemblies," so, too, will the remainder of the brief in support of our appeal contesting the BTA's ruling on this issue. We now proceed with a discussion of a basic description of Schulman's manufacturing business.

C. Schulman's Ohio manufacturing business is the production of colored plastic pellets for resale as raw material resins.

As the BTA noted, "A. Schulman is an international supplier of plastic compounds and resins," and "has several manufacturing and technology centers in various locations in Ohio." *BTA Decision and Order* at 7.

More specifically, Schulman produces one end product, colored pellets, which are then used by its customers as raw material resins. See, e.g., *BTA Decision and Order* at 16, 19-22 and testimony adduced at the BTA evidentiary hearing quoted therein; the additional BTA testimony at Supp. 9-10 [BTA hearing transcript (TR.) at 33, 37]; and Schulman's annual Form 10-K for 2000, Note 12, "Segment Information" at Supp. 50 [Tax Commissioner's statutory transcript (ST.) at 106].

D. Schulman uses an extrusion process to produce its colored plastic pellets.

In order for Schulman to produce its colored pellets, the plastics giant itself purchases, as its own raw material, various plastic resins in solid, granular form. The purchased resins are then combined by Schulman with additives and pigments. Through the operation of Schulman's extruder machines, the resins are subjected to an extrusion process in which they are melted to a semi-liquid, molten form ("like taffy"). At that point, in taffy-consistency form, the resins are then introduced to a die (mold) after which they are cut and subjected to a cooling water bath. See the testimony of Schulman's witness Billy Ratliff at Supp. 5-6 (particularly, TR. 15-18), and Supp. 7-8 (particularly, TR.24-27).

E. The screw and barrel assemblies are material-handling components of the extruder machines which move the raw material plastic resin from the point that the resin is in solid, granular form to the point that it has been heated into a plasticized, low-viscosity, molten form, at which time the screw portion of the assembly then pushes the resin into the die.

In order to convey the raw material resins from the point that they are in solid, granular form to the point that they are in semi-liquid, low-viscosity, molten form, the resins are placed in the screw and barrel assembly -- component parts of the Schulman's extruders. Throughout the course of the conveyance of the raw material resins on a particular extruder line, the screw and barrel work together as an assembly in performing the material-handling function. The screw is located inside of the barrel, and the raw material is inserted into an opening at the beginning of the barrel.

The conveyance of the resin is accomplished through the rotations of the screw (much like the Play-Doh conveyance mechanism familiar to many parents and children, but more complex). The raw material resin is moved four to fifteen feet (depending on the length of the barrel) through the barrel, as the resin is being heated. Then, when sufficient resin has reached the end of the barrel, and thus has been heated to the proper temperature and consistency, the rotating screw pushes the resin into the die. See Mr. Ratliff's testimony at, e.g., Supp. 5 (TR. 16, 17), (explaining that the screw and barrel assembly "conveys" the resin); Supp. 7-8 (TR. 24-26) (describing the resin as "travel[ing]" through the barrel," and being "pushed" by the rotating screw into the die).

F. Unlike Schulman's dies, which impart their unique shapes onto the raw material resin in order to form unique, specific colorized pellet products, the extruder screw and barrel assembly components are integral, general-purpose components of the extruder machines, which may be repaired or retooled, but which are used to transport various raw material resins for introduction into a wide variety of dies of various shapes and sizes.

As Schulman itself characterized the items for which it has sought the "jigs and dies" exemption, these items constitute "components of plastic 'extruders.'" See, Schulman's tax representative's September 26, 2002 letter to the Commissioner's auditing division, Supp. 51-53 [ST. at 180-182]. See also, the "spare parts" price quote obtained by Schulman's tax representative from Battenfield of America and submitted to the Commissioner in the administrative proceedings below, which likewise characterizes the screw and barrel assemblies as component parts of Schulman's machines. Supp. 55 (ST. 342).

The characterization of the extruder screw and barrel assemblies as components of Schulman's extruder machines is in contradistinction to the characterization of the dies themselves – which are not component parts of the extruders, but, instead are product-specific devices separate and distinct from the extruders. Indeed, the non-product-specific, general-use character of the extruder screw and barrel assemblies was established by Mr. Ratliff's own testimony in cross-examination, as follows:

Q: Mr. Ratliff, you just stated that on one line you might be able to use different dies, to the extent that they would have a different size or number of holes on them?

A: Correct.

Q: And you would use those different dies with the same screw and barrel?

A: Yes.

Q: You wouldn't change anything with respect to the screw and barrel when you put a die with let's say 100 holes instead of 72 holes on it?

A: The screw and barrel would stay the same.

Supp. 9 (TR. 32).

To be sure, in order for Schulman to enjoy "continuing" use of the screw portions of its screw and barrel assemblies, the screws may undergo "retooling or reservicing," Supp. 9 (TR. 30). But any such modifications or repairs simply would be in the normal course of manufacturing operations, not product-specific to each of the particular products being manufactured. Also, Mr. Ratliff's testimony could not have more clearly displayed his own understanding that the "dies" are separate and distinct items from the screw and barrel assemblies of the extruder machines, for he repeatedly refers to the "dies" as such separate items. See, e.g., the testimony quoted immediately above, and the following testimony:

Q: And then, I take it, the screw turns and pushes it [the molten, raw material resin] through a die?

A: Yes, it [the screw] will turn and move it [the resin] forward to the face of the die, where it goes through the die.

Supp. 8 (TR.26).

Having described the characteristics of screw and barrel assemblies as general-purpose, material-handling components of the extruder machines, we now proceed, in the following sub-sections of the Statement of Case and Facts to discuss Schulman's failure to have adduced probative evidence establishing the extent of any error in the Commissioner's denial of Schulman's "jigs and dies" claim – even assuming that all or any portion of the screw and barrel assemblies would properly qualify for exemption.

G. At the BTA hearing, Schulman failed to present any proof at all concerning the actual costs, or even any estimates of the actual costs, of its extruder screws or extruder barrels, or any components thereof.

At the BTA evidentiary hearing, Schulman did not present any testimony or documentary evidence to show the actual costs of any of its “extruder screws” or “extruder barrels.” Instead, as detailed above, Schulman presented only a generalized description of the function of these components of its extruder machines. And, as noted under Section B above, as to the other categories of items for which it sought “jigs and dies” exemption as set forth in specification of error two of its notice of appeal, i.e., “discharge dies,” “pelletizers,” and “gauges,” Schulman likewise presented no such evidence (nor, as noted above, did Schulman’s BTA presentation even mention any such items).

In other words, Schulman made no attempt to connect its general BTA testimony concerning its screw and barrel assemblies with any quantification showing how the Commissioner’s denial of an exemption for such items (or components thereof) would warrant any reduction in the assessed valuations of Schulman’s taxable machinery and equipment.

For example, at the BTA hearing, Schulman did not present any invoices showing the actual purchase prices it paid for its extruder screws, extruder barrels, or any components thereof. Nor did Schulman present any other primary or secondary business records concerning the costs that it incurred to acquire these items. Nor, in the absence of such documentary proof of actual costs, did Schulman provide any estimates of any such costs. In fact, at the BTA hearing and in its post-hearing briefing, Schulman was

completely silent on the whole matter -- and understandably so, as this lack of evidentiary proof left Schulman with nothing positive to say.

H. Schulman's presentation upon audit and in the Commissioner's administrative proceedings below likewise failed to include any primary or secondary records, or any other probative or competent evidence, of the actual acquisition costs it incurred to purchase any extruder screw and barrel assemblies or any components thereof.

In failing to present any probative evidence at the BTA hearing concerning the acquisition costs for its extruder screws and extruder barrels, Schulman followed the same course that it had earlier done in the administrative proceedings before the Commissioner. The statutory transcript of evidence certified by the Commissioner to the BTA is devoid of any invoices or other ordinary-course-of-business, primary records of any of Schulman's purchases of extruder screws and barrels, or any components thereof. By providing invoices of its purchases of extruder screws and extruder barrels, Schulman could have established by probative evidence the actual costs it incurred for these items or components thereof.

Nor does the statutory transcript certified by the Commissioner contain any of Schulman's secondary records, which Schulman itself created or maintained in the ordinary course of business, evidencing the acquisition costs of the extruder screws and barrels, or components thereof. Schulman did not provide any such secondary records showing such costs on an item-by-item basis, such as fixed asset ledgers, or even on a more aggregate basis, such as balance sheets. In other words, just as it failed to provide the BTA with any such documentation at the BTA evidentiary hearing, Schulman likewise had earlier failed to provide the Commissioner with any such documentation upon audit and administrative review.

In fact, even the specialized Ohio personal property tax balance sheets prepared and submitted by Schulman for purposes of its compliance with Ohio tax law on the Commissioner's prescribed Forms 921 for the tax years at issue show only a de minimus amount of costs associated with the entire category of exempt "patterns, jigs, dies, and drawings." See, Line 14 of the Ohio Balance Sheets required to be attached to Schulman's Ohio personal property tax returns for the 1999, 2000 and 2001 tax years at issue, showing total cost amounts of only \$95,000 (1999 tax year); \$95,000 (2000 tax year) and \$110,000 (2001 tax year), for "patterns, jigs, dies, and drawings." Supp. 72-74 (ST. 669, 611, and 585).

I. At the Commissioner's level, Schulman's accounting firm tax representative submitted its own list of claimed-exempt items, together with claimed amounts of acquisition costs for those items. Schulman's representative failed to provide, or even to identify, any supporting documentation used to compile the list, other than two widely-varying, conflicting price quote estimates obtained by the tax representative for purposes of this litigation, rather than by Schulman in the ordinary course of business.

In the total absence of any ordinary-course-of-business records in the evidentiary record showing the actual costs of the screw and barrel assemblies (which, if properly authenticated, would have constituted probative and reliable evidence), any attempt by Schulman to establish or estimate these costs without such records would rest on the shakiest and most dubious of evidentiary and legal grounds. The only possible materials in the evidentiary record that could be advanced by Schulman for this purpose consist of litigation-created documents that were not introduced, testified to, or even mentioned, at the BTA hearing, but were earlier presented by Schulman's non-attorney tax representative in the administrative proceedings before the Commissioner.

Namely, Schulman's then-tax representative, PricewaterhouseCoopers, LLP (PWC), made up its own list of claimed exempt items, together with claimed acquisition costs, Supp. 56-71 (ST. 323-338, Appendix B to its January 23, 2002 letter to the Commissioner's personal property tax division.)¹ Additionally, PWC presented two price quotes which it had obtained from two different suppliers of extruder components. Supp. 54-55 (ST. 341-342).

PWC's claimed-exempt listings and the two PWC-obtained price quotes all suffer from multiple and substantial deficiencies.

First, the PWC listing of claimed-exempt items as "jigs or dies" was not accompanied by any of the source documentation that PWC may have used, or even with any identification of that source documentation. Nor did Schulman or PWC, at any subsequent time, ever provide or identify any such source documentation. So, on this evidentiary record, to evaluate the PWC listing we would necessarily engage in wholesale speculation as to what source documentation was used. And we would have no way of confirming whether PWC correctly reported the data taken from that source documentation, or whether that data was itself reliable and probative.

Moreover, in any event, the PWC listing of claimed-exempt "jigs or dies" contains only a few listings for "screws" or "barrels," and many of the items other than for "screws" or "barrels" for which exemption is claimed as "jigs or dies" include both a taxable amount and an exempt amount of the total acquisition cost stated for the item. No

¹The PWC listing of claimed exempt "jigs and dies" also includes a listing of items for which PWC claimed reductions in taxable value for other reasons such as constituting "pollution control" equipment, "rebuilt," "real property," "software," and "drawings." See the respective column headings running horizontally across each of the pages of the listing. None of those other categories of claimed tax reductions are at issue here.

explanation has ever been provided by Schulman or PWC as to PWC's determination of the taxable vs. exempt amount of the acquisition costs of a particular item. As to the "screws" and "barrels," for each of the items listed as such, PWC apparently determined the whole stated acquisition cost was exempt, but no evidence has been presented to establish the component costs of the specific property encompassed within any of PWC's "screws" and "barrels" listings.

The two PWC-obtained price quotes should be of no help to Schulman either for, not only do the price quotes fail to substantiate the acquisition costs for extruder "screws" or "barrels" reflected on PWC's undocumented listings, at Supp. 56-71 (ST. 323-338), they conflict with one another. In fact, the differences in the costs for the extruder barrels and extruder screws as between the two estimates are vast and unexplained. The first price quote, at Supp. 54 (ST. 341), provides a stated cost for "screws" of \$27,000, and for "barrels" of \$30,000, whereas the second price quote, at Supp. 55 (ST. 342) provides a stated cost for two separate "screw and barrel assemblies," one for only \$3,961.70, and the other for only \$4,971.70.

Making this vast difference in pricing even greater, the stated amounts in the second price quote are for the "screw and barrel assemblies" as "replacement parts," rather than as components of the "entire machine," thus reflecting an inflation of the price of these components as compared to the lower amounts that Schulman would pay if the components were to be purchased as part of a whole extruder machine. The author of the price quote, Ron Ricapito, states that: "I do not have any way to determine the value of these items as purchased with the entire machine. I can estimate, in my opinion, that the

pricing below (i.e., the \$3,961.70 and \$4,971.70 figures) would be approximately 25%-35% higher than that of the item included in the entire machine purchase.” Id.

Schulman has provided no testimony or other evidence to further explain these price quotes. Any information from them, therefore, must be gained from a review of their contents alone. But the price quotes simply are not tied at all to the amounts claimed as acquisition costs for “screws” and “barrels” in PWC’s exempt listings. Thus, it is an exercise in futility to compare these price quote amounts with PWC’s stated acquisition costs for the various “screws” and “barrels” set forth in its exempt listings. There is no correlation. As an example, at Supp. 59 (ST. 326), PWC lists as exempt a “Line 2 Buss Kneader Extruder Screw” as having an acquisition cost of \$68,468.82, all of which PWC claimed as exempt cost, whereas on the same page of the listings PWC lists as exempt “92MM Shafts (List as Screws)” as having an acquisition cost of \$18,000, all of which PWC claimed as exempt cost. Id.

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

LAW AND ARGUMENT

Proposition of Law No. 1:

An appellant to the BTA from a final determination of the Tax Commissioner has an affirmative evidentiary burden of demonstrating that the Tax Commissioner's findings are clearly erroneous, both as to the manner and extent of any claimed errors in those findings.

Moreover, when the issue presented entails a claim to property tax exemption the one seeking entitlement to the exemption bears the affirmative evidentiary burden of establishing, by clear and convincing evidence, entitlement to the exemption, as a matter of substantive proof, as to each requirement of the exemption.

The Commissioner issued his final determination concerning the true values of Schulman's taxable personal property for the 1999-2001 tax years. In so doing, the Commissioner made findings concerning the various claims asserted by Schulman pursuant to its applications for final assessment. Among other findings, the Commissioner denied Schulman's jigs and dies exemption claim as that claim related to Schulman's extruder screw and barrel assemblies. The Commissioner found that these integral components of Schulman's extruder machines did not, in whole or in part, primarily or solely perform jig or die functions as defined in *Timken v. Lindley* (1985), 17 Ohio St.3d 85, Supp. 39-40 (ST. 5-6).

The standard of judicial review required to be followed by the Board is well established. In considering Schulman's challenges to the Tax Commissioner's findings, the Board was required to apply the standard of judicial review enunciated by this Court. Namely, findings of the Tax Commissioner are presumptively valid and may not be disturbed by the Board absent a demonstration that the findings were clearly erroneous. *Nusseibeh v. Zaino* (2005), 98 Ohio St.3d 292, 2003-Ohio-855, ¶10; *Kern v. Tracy* (1995), 27 Ohio St.3d 24; *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121;

Hatchadorian v. Lindley (1983), 21 Ohio St.3d 66. Under that standard, it was Schulman's burden to present evidence sufficient to establish that the Tax Commissioner's findings were clearly erroneous. Absent such a showing, the Tax Commissioner's findings must be affirmed. *Id.*

As part of the evidentiary burden to show the Commissioner's findings are "clearly erroneous," it is an appellant taxpayer's burden to demonstrate clearly both the manner and the extent of the claimed error in those findings. *Federated Dept. Stores v. Lindley* (1983), 5 Ohio St.3d 213; *Hatchadorian v. Lindley*, supra; *Snider v. Limbach* (1989), 44 Ohio St.3d 200; *Holiday Inns, Inc. v. Limbach* (1990), 48 Ohio St.3d 34.

Moreover, as is true of all property tax exemption claims advanced by taxpayers, the "jigs and dies" tax exemption claim advanced by Schulman here requires that Schulman meet an independent evidentiary burden of showing by "**clear and convincing proof** *** [its] *** right thereto. *Youngstown Metropolitan Housing Auth. v. Evatt* (1944), 143 Ohio St. 268, 273. "In all doubtful cases exemption is denied (emphasis added)." *Id.* The Court articulated the rationale for this "clear and convincing proof" requirement as following from the principle that "all property shall bear its proportionate share of the cost and expense of government." *Id.* Indeed, as this Court has emphasized, "**exemption is in derogation of the rights of all other taxpayers** and necessarily shifts a higher burden upon the non-exempt (emphasis added)." *Parma Hts. v. Wilkins* (2005), 105 Ohio St.3d 463, 2005-Ohio-2818, ¶10, quoting with approval, *Joint Hospital Serv., Inc. v. Lindley* (1977), 52 Ohio St.2d 153, 155. Thus, exemption claims must be "strictly construed" against the claim of exemption. *Id.*, *quoting Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, ¶19.

Proposition of Law No. 2:

Extruder screw and barrel assemblies, as integral components of extruder machines, move raw material plastic resin from the point that the resin is in solid, granular form, to the point where it is introduced into a die in a plasticized, low-viscosity, molten, semi-liquid form. Thus, as such, the assemblies constitute taxable material-handling equipment and do not qualify for personal property tax exemption as “dies” as defined in *Timken v. Lindley*, for their purpose and use is not to “impose their shape upon the product under production,” as required in order to qualify as “dies” under *Timken*.

The Commissioner detailed his findings regarding the function of the extruder screw and barrel assemblies in his final determination. The testimony and other evidence adduced at the BTA hearing simply confirmed those findings. As found by the Commissioner, the extruder screw and barrel assemblies at issue are material-handling equipment whose sole purpose and use is to transport raw material plastic resin to the point that the resin is pushed by the extruder screw into the die. With full citations to the evidentiary record, we detail the purpose and use of the assemblies as material-handling equipment in Sections E and F of the Statement of Case and Facts, *supra*.

In so finding, the Commissioner reasonably and lawfully relied upon and applied the guidance of this Court’s most recent “jigs and dies” personal property tax exemption case. Namely, this Court requires that, to qualify for exemption as dies, the devices for which exemption is sought must “impose their shape upon the products under production.” *Timken*, 17 Ohio St.3d at 87. Moreover, in *Timken*, this Court also quoted with approval the more detailed definition of “dies” it had previously established in its immediately preceding personal property tax case, as follows:

[W]here a machine’s sole purpose and use is to imprint or impress specifically designed irregularities in the surface of one or more of its parts upon material placed in the machine, those parts which have such

specially designed surfaces are dies with the meaning of Section 5701.03, Revised Code.

Timken, 17 Ohio St.3d at 17, quoting *American Book Co. v. Porterfield* (1969), 18 Ohio St.2d 49, 53.

As applied here, *Timken* and *American Book* should be dispositive. Indeed, the instant case should present no serious objection to correcting the BTA's erroneous decision on the issue and upholding the Commissioner's finding that the extruder screw and barrel assemblies simply do not function as dies, and, therefore, do not qualify for exemption.

This is so because the screw and barrel assemblies do not "impose their shape on the product under production." Rather the assemblies convey raw material plastic resin as it is subjected to a heating process which transforms the resin from a solid, granular state to a molten, low-viscosity, "taffy"-like consistency, whereupon the extruder screw pushes the resin into the die. In other words, the instant case does not present the more difficult situation in which the purposes and uses of a device include both taxable, i.e., non-die, functions, as well as exempt "die" ones. The screw and barrel assemblies do not have any purpose or use as "dies."

Given the straight-forward nature of the applicable definitions of "dies," as expressly set forth in this Court's two immediately preceding personal property tax "dies" exemption cases to the present case, *Timken* and *American Book*, it is somewhat remarkable that the BTA went so far astray by holding that the extruder screw and barrel assemblies were "dies." Indeed, a careful reading of the BTA's decision shows that the BTA avoided applying, or even acknowledging, the foregoing Court-approved "dies" definitions in *Timken* and *American Book*. Moreover, the BTA's erroneous legal analysis

did not end there.

Perhaps even more remarkably, despite failing to acknowledge the *American Book* “dies” definition, the BTA actually purported to rely upon that case as authority -- and for less than supportable reasons. The BTA appears to have erroneously discerned from dicta in *American Book* an intent on the part of this Court in that case to broadly expand the definition of “die” far beyond the Court’s definition of “die” in that case. Yet, quite the contrary is true. The Court’s narrow application of the “dies” definition in *American Book* to include only one kind of device used in the taxpayer’s operations manifests quite the opposite intent, consistent with the “strict construction” of exemptions that this Court has always mandated.

In fact, *American Book Co.* strongly rejects the very expansion of the exemption that the BTA granted here. As its name describes, the personal property taxpayer in *American Book* was a printer, which successfully sought exemption for various printing plates used in its printing process. In so holding, however, the Court first reiterated the established principle that the “jigs, dies, and patterns” exemption encompasses “special use” devices only. Then, applying that standard, the Court recognized a limited exemption encompassing the printing plates. *American Book* at 52-53, quoting *Colonial Foundry* at 331. The Court held that the printing plates, which the Court noted had an average life of nine-months, constituted “special purpose” devices that “alone bear the specially formed design or pattern which is imparted to the paper in the process of printing.”

Revealingly, in *American Book*, none of the various cylinders, conveyor belts, and other material-handling equipment used by the printer to move the paper through the

printing process likewise qualified for exemption. The printer did not even attempt to assert that such general-purpose, long-lived items that performed material-handling functions, rather than die functions, could even conceivably qualify for the exemption.

Rather than look to the Court's definition of "dies" in *American Book*, and this Court's application of that definition in that case to exempt only the taxpayer printer's printing plates, the BTA quoted and misapplied dicta from the case. *BTA Decision and Order* at 14. Namely, in reciting the holdings of lower court decisions in two early cases, and in one of its own earlier decisions, *Colonial Foundry Co. v. Peck* (1952), 158 Ohio St. 296, the Court noted certain devices in those cases were held to constitute dies. *American Book* at 52. Unlike the screw and barrel assemblies at issue here, whose sole purpose and use is to convey raw materials, the purpose and use of the items exempted in these other decisions was in the "forming" of the product under production.

Nowhere in this dicta in *American Book* would it be appropriate to impute an intention by this Court to adopt a free-wheeling, broad expansion of the definition of die to encompass the material handling equipment at issue. In *Colonial Foundry*, the items consisted of short-lived, special-purpose "flasks, cast iron shapes, weights, and clamps ***." *American Book* at 52. Similarly, in the lower court decisions cited in *American Book*, the exempted items, only cursorily discussed by this Court, were apparently likewise used to "form" the taxpayer's product, and are described only as consisting of "certain rolls, guide shoes, piercing points, plugs and welding balls," and "glass molds." *Id.*

Finally, the BTA's reliance on this Court's sales and use tax decision in *General Motors Corp. v. Kosydar* (1974), 37 Ohio St.2d 138, defining "dies" likewise should be

unavailing to support the BTA here. *BTA Decision and Order* at 8. To be sure, in *Timken* this Court cited with approval to the *General Motors* decision, but the definition of the term “dies” in *General Motors* in no way contravenes the foregoing *Timken* and *American Book* definitions. Namely, in *General Motors*, the Court defined a die as “capable of forming or creating a part, either by pressure or molding techniques.” *Id.* Such definition accords with the *Timken* and *American Book* definitions limiting dies to those devices that impose their special design or shape on a product. Thus, just as *Timken* and *American Book* do not, *General Motors*, too, simply does not support the broad expansion of the dies exemption which would result from affirmance of the BTA’s decision here.

We now proceed with providing the Court with a mutually supportive, but wholly independent grounds for affirming the Commissioner’s findings that the screw and barrel assemblies did not qualify for the jigs and dies exemption. This basis, too, rests on the bedrock of this Court’s well-established personal property tax jurisprudence.

Proposition of Law No. 3:

“Jigs, dies, and patterns” are special purpose devices which “by their nature are capable of only special uses.” Thus, because extruder screw and barrel assemblies are integral components of extruder machines which are necessary to the basic operation of the extruders whenever they are in operation, for whatever specific products are being molded, such components necessarily fail to meet the qualifications for the jig and die exemption provided in R.C. 5701.03(A).

“[T]he limitation of special purpose implies that general purpose implements and devices are not exempt.” Because these integral components of the extruders are used for the most basic, general purposes, and are in active operation no matter the particular product being manufactured, they plainly fail to qualify for the exemption. *Colonial Foundry v. Peck* (1952), 158 Ohio St. 296, 299-300; *American Book Co. v. Porterfield* (1969), 18 Ohio St.2d 49,53; *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85, followed.

The long line of Ohio Supreme Court decisional law addressing the personal property tax exemption for “patterns, jigs, dies, or drawings,” now contained in R.C. 5701.03(A) and previously codified in Section 5325 of the General Code, has never departed from the basic dictates of the Court’s seminal decision in *Colonial Foundry v. Peck* (1952), *supra*. In that case, in following and applying the lessons of the “grandfather” of all decisions under this exemption, *Wheeling Steel Corp v. Evatt* (1944), 143 Ohio St. 71, 98, the Court enunciated the following most basic requirement for entitlement to pattern, jig, or die characterization for any kind of device:

“A fair construction of Section 5325 [General Code, now Section 5701.03, Revised Code] would limit the definition of ‘dies’ to only those **special types which by their nature are capable of only special uses** as distinguished from the molds with which the *Wheeling Steel* case, *supra*, was concerned.”

American Book Co. v. Porterfield (1969), 18 Ohio St.2d. 49, 53, quoting with approval, *Colonial Foundry v. Peck* (1952) at 301. (Emphasis and bracketed language added by the Court in *American Book*).

In turn, *American Book*, after quoting with approval the foregoing holding of *Colonial Foundry, supra*, amplified that holding as follows: “The limitation of special purpose implies that **general purpose implements and devices are not exempt** *** (emphasis added).” *Id.*

The “special-purpose” requirement of *Colonial Foundry* and *American Book* remains good law. Indeed, both of these cases are cited and quoted with approval in this Court’s most recent pronouncement on the patterns, jigs, and dies exemption in *Timken*, 17 Ohio St. 3d at 86-87. In expressly embracing these earlier decisions, therefore, the Court in *Timken* continues to recognize the special purpose requirement. A careful reading of *Timken* simply does not support erasure of this long-standing requirement.

The special purpose requirement reflects the plain meaning that the terms “jigs” and “dies” have always had in the various manufacturing industries. Moreover, the special-purpose requirement recognizes that, in most instances, special purpose items are short-lived and are relatively little used in comparison with general-purpose components such as the screw and barrel assemblies, which are used in the basic operations of the machinery no matter the specific product under production.

As applied here, the “special-purpose” requirement applicable to “jigs” and “dies” should be dispositive, even if the purpose and use of the screw and barrel assemblies as material-handling equipment were somehow to be disregarded. The screw and barrel assemblies are integral, general-use components of Schulman’s extruder machines. We detail the evidentiary record support, with full record citations in Section F of the Statement of Case and Facts, *supra*.

Proposition of Law No. 4:

For the same reasons that extruder screw and barrel assemblies fail to qualify for personal property tax exemption as “dies,” they likewise fail to qualify for the exemption as “jigs.”

The BTA acted reasonably and lawfully in tacitly rejecting Schulman’s “jigs” claim for the same reasons that these items fail to qualify as “dies.” First, just as “dies” must be “special purpose” devices, so, too, must “jigs.” *Colonial Foundry, American Book, supra*. Thus, general use of these items on Schulman’s extruder lines in connection with a wide variety of dies, of various shapes and sizes, in itself would preclude a “jigs” characterization.

Moreover, a “jig” must solely or primarily “perform a holding or positioning function during machining or processing operations.” *Timken*, at 87. As noted, the screw

and barrel assemblies actively convey the raw material resin to the point where the screw and barrel assemblies then push the resin into the dies; they do not passively “hold or position the product during machining or processing.” Propulsion and transportation are hardly “holding” or “positioning” functions.

Proposition of Law No. 5:

A personal property taxpayer’s claim to property tax exemption for equipment, or components thereof, fails when the sole evidence presented by the claimant to meet its evidentiary burden of proof consists of estimates of the costs, instead of the actual costs, of the equipment for which the exemption is sought.

This is particular so where, as here, the estimates:

- (a) are unauthenticated;**
- (b) constitute hearsay, and hearsay within hearsay;**
- (c) were not created or maintained by the claimant in the ordinary course of its business, but, instead, were obtained for purposes of litigation;**
- (d) reflect widely-disparate cost amounts; and**
- (e) are not sufficiently identified as pertaining to any specific items of assessed property.**

United Tel. Co. of Ohio v. Tracy (1999), 84 Ohio St.3d 506, 512; *Alcoa v. Kosydar* (1978), 54 Ohio St.2d 477, **followed**; see also, *Anheuser-Busch Companies, Inc. v. Zaino* (September 24, 2004), BTA Case No. 2003-K-699, unreported; *Alcoa, Inc. v. Zaino* (Oct. 22, 2004), BTA Case No. 1999-G-1401, unreported.

As detailed in Sections G, H, and I of the Statement of Case and Facts, *supra*, at the BTA, Schulman failed to meet its affirmative burden of demonstrating the reductions in the assessed valuations of its production machinery and equipment that would result if all or any portion of its extruder screw and barrel assemblies qualified for exemption. In other words, it failed to show both the manner and the extent of any claimed error in the

Commissioner's final determination denying the exemption claim. Schulman failed to adduce any probative or competent evidence in support of such showing.

Given these deficiencies, Schulman's exemption claims must fail, for want of probative evidence showing the extent of any error arising from the Commissioner's alleged failure to have exempted these items from personal property taxation. For decisional law authority, we rely upon this Court's own prior decisions in *United Telephone* and *Alcoa v. Kosydar*, *supra*².

Moreover, we also commend the Court to review the two above-cited BTA cases under this proposition of law, as they provide cogent, persuasive authority and analysis, directly applicable to the present case. See, particularly, *Alcoa v. Zaino*, at 30-32; and *Anheuser-Busch* at 10-15. Just as the personal property exemption claimants in those cases fell well short of meeting their evidentiary burden of proof of demonstrating the extent of any claimed error in the Commissioner's final determination denying the exemption claims asserted therein, so, too, has Schulman in this case. The BTA correctly determined in those cases that the Ohio Supreme Court's decision in *United Tel. Co. of Ohio*, *supra*, was directly on point, and, thus, constituted controlling precedent. So, likewise it is here.

Thus, even under the BTA's broad expansion of the exemption, the BTA should have affirmed the Commissioner.

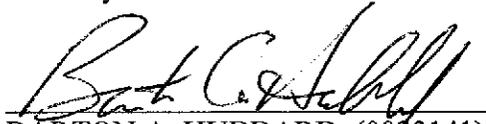
² This Court in *Alcoa* affirmed the BTA's rejection of a personal property taxpayer's appraisal on the basis that the appraiser **estimated** the installation costs for purposes of valuing the machinery and equipment at issue, rather than using the **actual** installation costs incurred by the taxpayer.

CONCLUSION

For all the foregoing reasons, to the extent that the BTA's decision "reverses" the Commissioner's final determination regarding Schulman's "jigs and dies" exemption claim, this Court should reverse the BTA and uphold the Commissioner's denial of the exemption.

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

Appeal From the Board of Tax Appeals

A. SHULMAN, INC.,

Appellant/Cross-Appellee,

v.

WILLIAM W. WILKINS, TAX
COMMISSIONER OF OHIO,

Appellee/Cross-Appellant.

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:
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: Case No. 06-1944
:
:
: Appeal from BTA Case
: No. 2004-B-370
:
:
:

NOTICE OF CROSS-APPEAL

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FILED
OCT 23 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

Appeal From the Board of Tax Appeals

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

NOTICE OF CROSS APPEAL

Appellant, William W. Wilkins, hereby gives notice of his appeal as of right to the Supreme Court of Ohio from the Decision and Order of the Ohio Board of Tax Appeals ("BTA") dated September 22, 2006, BTA Case No. 2004-B-370, entered on the journal of the proceedings on September 22, 2006. This appeal is filed in accordance with Section 5717.04, Ohio Revised Code, and Section 3(A)(1), S.Ct. Prac. R. II. A true copy of the Decision and Order of the BTA from which appeal is sought is attached hereto and incorporated herein by reference. This notice of appeal is being filed within thirty days of the entry of the attached BTA decision and order as required by statute and rule.

The appellant Tax Commissioner complains of the following errors in the Decision and Order of the BTA:

entitlement to the exemption from personal property taxation for “dies” as set forth in R.C. 5701.03.

- (2) The BTA erred, as a matter of fact and law, in determining that any of the assessed items characterized by the taxpayer in its notice of appeal to the BTA as “extruder screws, extruder barrels, pelletizers and gauges” qualified, in whole or in part, for exemption from *ad valorem* personal property taxation as “dies” within the meaning of R.C. 5701.03. Instead, the BTA should have determined that none of the assessed property claimed by the taxpayer to qualify as exempt dies qualified as such because the claimed-exempt items were general-use, non-special purpose, integral, permanent components of the taxpayer’s various assessed production machines, that did not, exclusively or primarily, “through applied force, impose their shape upon the item under production,” within the meaning of *Timken Co. v. Lindley* (1985), 17 Ohio St. 3d 85, 87; and *American Book Co. v. Porterfield* (1969), 18 Ohio St.2d 49.
- (3) The BTA erred, as a matter of fact and law, by failing to find that the taxpayer had not met its affirmative burden of establishing both the manner **and** the extent of any claimed error in the Commissioner’s final determination denying the taxpayer’s dies exemption claim with respect to any of the taxpayer’s various assessed taxable production machinery and equipment and components thereof.
- (4) Even assuming that any of the assessed personal property, or components thereof, constituted “dies” within the meaning of R.C. 5701.03, the BTA erred, as matter of fact and law, in failing to find that the taxpayer had not met its affirmative burden of establishing the true value of those items or components thereof properly characterized as “dies” regarding any of its assessed equipment or components thereof.

- (5) The BTA erred in remanding the case to the Commissioner for the Commissioner to determine the extent to which the true value of the taxpayer's assessed production machinery and equipment should be reduced by reason of the claimed dies exemption, where the taxpayer failed to adduce probative evidence concerning the actual costs or true values of any such claimed-exempt items or components thereof, or even to properly identify or document any such claimed-exempt items or components thereof. The BTA should have instead affirmed the Commissioner's determination of true value given the taxpayer's failure to meet its affirmative burden of proof to demonstrate the extent of the claimed error in the Commissioner's final determination, and the presumptive validity of the Tax Commissioner's findings denying the exemption.
- (6) The BTA erred, as a matter of fact and law, to the extent that the BTA implicitly relied upon, or would have the Commissioner upon remand rely upon, unauthenticated, conflicting, purported price quotes, obtained for litigation purposes only, as the sole documentary or testimonial evidence in support of the taxpayer's valuations of various components of various production machines. Such purported price quote **estimates** (pertaining to unidentified components of equipment of unidentified age, make, and production capacity) were neither competent, nor probative, nor reliable, nor relevant

evidence for purposes of determining the actual costs and true values of the various components of the taxpayer's various items of machinery and equipment (of various ages, makes, types, and production capacities) or components thereof claimed to be exempt as dies.

Respectfully submitted,

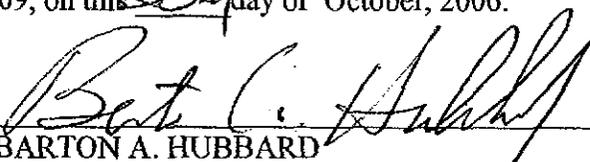
JIM PETRO (0022096)
Attorney General

A handwritten signature in cursive script, appearing to read "Bart C. Hubbard", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Notice of Cross- Appeal and the Case Information Statement were sent by certified U.S. mail to Leonard A. Carlson, 2700 East Main Street, Suite 111, Columbus, Ohio 43209, on this 23rd day of October, 2006.


BARTON A. HUBBARD

Assistant Attorney General

OHIO BOARD OF TAX APPEALS

A. Schulman, Inc.,)
)
Appellant,)
)
vs.)
)
William W. Wilkins,)
Tax Commissioner of Ohio,)
)
Appellee.)

CASE NO. 2004-B-370
(PERSONAL PROPERTY TAX)
DECISION AND ORDER

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Entered **SEP 22 2006**

Mr. Eberhart and Mr. Dunlap concur; Ms. Margulies recused.

On April 21, 2004, appellant, A. Schulman, Inc. ("A. Schulman"), filed the present appeal with this board seeking reversal of a final determination issued by the Tax Commissioner. Through his determination, the commissioner denied appellant's petition for reassessment in which appellant had challenged previously issued personal property tax assessments for tax years 1999, 2000 and 2001.

Appellant's notice of appeal states in pertinent part, as follows:

"1. The Tax Commissioner erred in failing to find that certain inventory of the Appellant held in a Foreign Trade Zone as of December 31, 1998 and January 1, 1999 was exempt from taxation for tax year 1999 pursuant to R.C. Sec. 5709.44.

"2. The Tax Commissioner further erred in failing to find that certain items for tax years 1999, 2000, and 2001 described by Appellant as extruder screws, extruder barrels, discharge dies, pelletizers and gauges are properly classified as jigs and dies and pursuant to R.C. Sec. 5701.03 are excluded from the definition of personal property and are therefore not subject to Ohio personal property tax.

"3. The Tax Commissioner further erred in failing to find that certain items for tax years 1999, 2000, and 2001 described by Appellant as drawings held for use and not for sale in the ordinary course of business and pursuant to R.C. Sec. 5701.03 are excluded from the definition of personal property and are therefore not subject to Ohio personal property tax.

"4. The Tax Commissioner further erred in failing to find that certain property against which Ohio personal property tax was levied for tax years 1999, 2000, and 2001 did not exist and therefore was not taxable property pursuant to R.C. Sec. 5709.01 and R.C. Sec. 5711.01, was not owned or controlled by Appellant and pursuant to R.C. Sec. 5711.03 did not have to be listed for taxation, and was not used in business by Appellant pursuant to R.C. Sec. 5701.08.

"5. The Tax Commissioner further erred in failing to find that the true value of certain property against which Ohio personal property tax was levied for tax year 1999 should have been greatly reduced given its in-utility and the fact that is (sic) was taken out of production and held for disposal only shortly after the Appellant's listing date which reflects a true value significantly lower than the true value found by the Tax Commissioner.

"6. The Tax Commissioner further erred in failing to find that certain property against which Ohio personal property

tax was levied for tax years 1999, 2000, and 2001 was computer application software which is intangible property rather than tangible personal property and therefore should not have been subject to tax.

"7. The Tax Commissioner further erred in failing to find that Appellant is engaged in manufacture of plastics and that its taxable tangible personal property used in the manufacture of plastics should have been classified as fall under prescribed Life Class IV for purposes of determining its true value for Ohio personal property tax purposes pursuant to R.C. Sec. 5711.18.

"8. The Tax Commissioner further erred in failing to find that with respect to Appellant's Akron manufacturing facility for tax years 1999, 2000, and 2001 there were special facts and circumstances which demonstrate that the normal prescribed '302' method of determining true value pursuant to R.C. Sec. 5711.18 was inappropriate and the true value as asserted by the Appellant should have been found to be the true value of such tangible personal property.

"9. The Tax Commissioner further erred in failing to find that certain property first included as taxable tangible personal property on the Appellant's Ohio personal property tax returns for 1999, 2000, and 2001 was real property under R.C. Sec. 5701.02 and not personal property described under R.C. Sec. 5701.03 and therefore should not have been subjected to tax and further that the Tax Commissioner erred in finding that certain property classified on the books and records of the Appellant as real property was personal property which was then erroneously added to the total assessment for personal property tax purposes."

Subsequently, specifications of error numbers 3, 4, 6 and 9 were dropped by appellant through its brief. Appellant also noted therein that specification of error enumerated as "5" should read tax year "2001" and not "1999."

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the Tax Commissioner, the record of the hearing before this board, and the briefs filed by the parties.¹

In reviewing appellant's appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66; *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is developed to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern, supra*; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan Aluminum Corp., supra*.

A. Schulman is an international supplier of plastic compounds and resins. Appellant's headquarters is located in Akron, Ohio and it has several manufacturing and technology centers in various locations in Ohio.

¹ On October 21, 2005, appellant moved to strike the Tax Commissioner's brief as it was filed well beyond the deadline and subsequent extensions. We overrule the motion.

The matter before us concerns personal property tax returns filed for tax years 1999, 2000 and 2001. A. Schulman's fiscal year ends on August 31. Appellant filed personal property tax returns for each of the aforesaid years and subsequently filed three applications for final assessment seeking a reduction and a refund of personal property taxes.

Appellant first argues that certain inventory held in a foreign trade zone as of December 31, 1998 and January 1, 1999 was exempt from taxation for tax year 1999 pursuant to R.C. 5709.44.

R.C. 5709.44 provides in pertinent part as follows:

“(A) As used in this section:

“(1) ‘Tangible personal property’ means the personal property of a merchant that is required to be returned on the average basis as provided in section 5711.15 of the Revised Code, and the average value of all articles purchased, received, or otherwise held by a manufacturer for the purpose of being used in manufacturing, combining, rectifying, or refining, and the average value of all articles that were at any time manufactured or changed in any way by the taxpayer, either by combining, rectifying, or refining, or adding thereto;

“(2) ‘Foreign trade zone’ means a general purpose foreign trade zone or a special purpose subzone for which, pursuant to the ‘Act of June 18, 1934,’ 48 Stat. 998, 19 U.S.C.A. 81a, as amended, a permit for foreign trade zone status was granted before January 1, 1992, including expansions of and additions to such a zone that are adjacent to the zone as it existed on January 1, 1992, but excluding special purpose subzones for which a permit is granted on or after such date.

“(B) Tangible personal property, including such property when used solely for display or demonstration purposes, shall be considered to be in the stream of foreign

commerce and shall be exempt from personal property taxation while held in a foreign trade zone.”

It appears that “[o]n or before December 16, 1998, the thirteen acres on which the Gilchrist Center² is located became part of the general purpose Foreign Trade Zone #181 that was created in 1991.” S.T. at 266.

A. Schulman contends that its inventory held in a foreign trade zone as of December 31, 1998 and January 1, 1999 was exempt from personal property taxation. We disagree.

R.C. 5711.03 provides as follows:

“Except as provided in sections 5711.01 to 5711.36 of the Revised Code, all taxable property shall be listed as to ownership or control, valuation, and taxing districts as of the beginning of the first day of January, annually, except that taxable personal property and credits used in business shall be listed as of the close of business of the last day of December, annually, and deposits not taxed at the source shall be listed as of the day fixed by the tax commissioner for the listing of deposits taxed at the source pursuant to Section 5725.05 of the Revised Code.”

However, R.C. 5711.101 provides:

“The tax commissioner may require that with every return listing personal property used in business or credits, the taxpayer shall file a financial statement or balance sheet of such business as of the close of business on the day next preceding the date of listing.

“A taxpayer who is required to file a financial statement or balance sheet of his business pursuant to this section *may be authorized or required by the commissioner to list his taxable property as of the close of business at the end of his fiscal year, instead of as of the day otherwise prescribed by section 5711.03 of the Revised Code.* The

² Subject property in question belonging to A. Schulman.

commissioner may adopt regulations to govern the use of the basis of listing authorized by this section, but a taxpayer who is authorized or permitted to list taxable property as of a day other than that prescribed by section 5711.03 of the Revised code, shall thereafter use the same basis unless the commissioner, for good cause shown, authorizes the substitution of another fiscal year, or, unless the commissioner requires or, upon application of the taxpayer, authorizes, the substitution of another listing date to insure that property subject to taxation under the provisions of section 5709.01 or 5709.02 of the Revised Code, and acquired by means of purchase, merger, or reorganization, involving an entire plant, a facility, or a division, shall not be excluded from taxation for a year or taxed more than once in a year. In the case of such acquisition the commissioner shall require or authorize a substitute listing date only for such acquired property and only for one year." (Emphasis added.)

Ohio Adm. Code 5703-3-04(B) provides as follows:

"Any taxpayer required to file an income tax return with the United States internal revenue service on a fiscal year basis shall employ the same fiscal year end for listing his personal property used in business. *For the purpose of listing such personal property, such fiscal year end shall be that for the fiscal year ending in the calendar year preceding the calendar year in which the property tax return is required to be filed.* If a taxpayer has not been engaged in business in Ohio for a full twelve months immediately preceding such fiscal year end, he shall list all taxable personal property as of the close of business on the last day of December." (Emphasis added.)

Such is the case before us today. The appellant's tax listing date of August 31, 1998 governs the taxability of the subject personal property. There is no evidence before us that the foreign trade zone was in effect on that date. Therefore, we deny appellant's first specification of error.

A. Schulman's second contention entails the taxability of personal property it claims is properly classified as jigs and dies and is excludable from taxation by reason of R.C. 5701.03.

Jigs and dies are exempt from taxation because they are excluded from the definition of "personal property" found in R.C. 5701.03:

"As used in Title LVII [57] of the Revised Code:

"(A) 'Personal property' includes every tangible thing that is the subject of ownership, whether animate or inanimate, including a business fixture, and that does not constitute real property as defined in section 5701.02 of the Revised Code. *** 'Personal property' does not include *** for purposes of any tax levied on personal property, patterns, jigs, dies, or drawings that are held for use and not for sale in the ordinary course of business, except to the extent that the value of the electricity, patterns, jigs, dies, or drawings is included in the valuation of inventory produced for sale."

In *Gen. Motors Corp. v. Kosydar* (1974), 37 Ohio St.2d 138, the court defined a die as "a piece of equipment or tooling that is capable of forming or creating a part, either by pressure or molding techniques." The court defined a jig as "a holding device that is used with a single part to further machine it, or with more than one part in order to position the parts for further operations." Later, in *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85, the court explained that it made little difference whether a jig held the machining tools or the item itself. Thus, the court agreed with the Board of Tax Appeal's definition of jigs as "devices which perform a holding and positioning function during machining or processing operation" on the grounds that it is the function of the device, rather than its form, that is paramount in determining whether

the item is exempt under R.C. 5701.03 as a jig, pattern, or die. Id. at 87 and at paragraph one of the syllabus.

A. Schulman's witness, Mr. Billy Ratliff, facility manager for appellant's plant, testified as to the subject equipment and the processes they are involved in as follows:

"Q. One of the things we need to pay particular attention to today in the extrusion process is the role played by screens, barrels, screws, water baths and cutters.

"Can you basically and briefly explain how the extrusion process works and the role that's played by barrels, screws, screens, water baths and cutters?

"A. Well, basically, the raw materials, which are the resins, additives, colors, are mixed together. There are several ways of that happening, but they're basically mixed together; they go into the barrel with the screw; they're heated up.

"As they pass through the barrel and screw they go to the die, which is at the end of the barrel and screw. They come through there, and there's knives at the end of it that cut it off, give it a water bath.

"Depending on the particular line they're being sprayed on, they could go right in underwater – they're cut off right at the end of the die and transferred to cartons or....

"Q. All right. Now, depending upon what kind of product it is that you're making, are there different barrels and screws that are used?

"A. Different sizes, yes. Different configuration.

"Q. Okay. Are they hooked to this end point line that you are talking about?

"A. Yes.

"Q. What does the barrel and the screw then do? How does it interact with the product?

"A. It turns the resins into a molten plastic and conveys them to the die in a uniform manner. To get them to go through the die in a uniform manner and consistent manner – See, we want a consistent pellet. We don't want different sizes. They need to be the same size, as specified by the customer.

"Q. So the barrel and screw act on the consistency form –

"A. Yes.

"Q. – of the product before it goes through and then gets cut off?

"A. Yes.

"Q. Does the barrel hold molten plastic?

"A. Yes. The barrel and the screw will work together. The screw has to be the same size as the barrel. Basically, in order for the – to convey the material to the die it has to be completely filled till it is consistent all the way around, whether it's a round die or a rectangular-type die.

"It has to go through each and every section of that die evenly and consistently. If not, you will not get a consistent pellet that comes out the other end, where it cuts it off.

"Q. So is it kind of like an extension of that die?

"A. They're all, basically, one piece. I mean, it's different pieces in the one – one will not work without the other."
H.R. at 15-18.

In *American Book Co. v. Porterfield* (1969), 18 Ohio St.2d 49, 52, the court recounts some of the history of the subject exclusion. Therein, the court stated, with regard to certain glass molds, as follows:

“This exclusion was enacted in 1931 (114 Ohio Laws 714, 716) and research discloses several important tax determinations thereunder. In the earliest reported case requiring its interpretation, the Court of Appeals held that tire molds used in the rubber industry were in fact *dies* or *patterns* within the meaning of the statutory exclusion. *Mong v. B. F. Goodrich Co.* (1935), 19 Ohio Law Abs. 198. In *National Tube Co. v. Tax Commission* (1937), 26 Ohio Law Abs. 523, affirmed, 25 Ohio Law Abs. 619, 31 N.E.2d 486, certain ‘rolls, guide shoes, piercing points, plugs and welding balls,’ as these items were known to the steel industry, used in forming steel products, were excluded from taxation under the statute as *dies*. Glass molds, used in the production of pressed and blown glassware with figures or designs on the exterior were held by the Board of Tax Appeals to be *dies* for tax purposes in *Cambridge Glass Co. v. Evatt* (1940), 19 Ohio Ops. 162.

“In *Colonial Foundry Co. v. Peck* (1952), 158 Ohio St. 296, 109 N.E.2d 11, this court held various flasks, cast iron shapes, weights and clamps, used in the manufacture of iron and alloy castings of special and varying designs, exempt from taxation as *dies*.” (Emphasis added.)

Such is the case before us today. Mr. Ratliff’s testimony reveals that the subject equipment meets the requirements and definition of a “die” as described above and in the aforementioned *Gen. Motors* case. Therefore, we agree with appellant’s second specification of error and reverse the Tax Commissioner’s final determination on this issue.

Appellant's third specification of error³ is that the true value of certain personal property should have been reduced for tax year 1999, 2000 and 2001 because of special circumstances.

Appellant states that it closed its manufacturing facility in Akron, Ohio in December of 2000 and that by February of 2001 all the manufacturing machinery and equipment was removed and scrapped by A. Schulman. At this board's evidentiary hearing, appellant presented the testimony of Mr. Curt Suppes, the corporate tax manager, and submitted a summary document prepared by its outside accountants to support its contentions of a lower proposed true valuation for the subject personal property. Ex. I. The closing of the facility and the scrapping of the aforestated machinery and equipment, appellant argues, clearly denotes an unusual and special circumstance which supports a deviation from the standard 302 personal property tax valuation.

R.C. 5709.01 provides that all personal property located and used in business in this state is subject to taxation. R.C. 5701.08 defines "used in business" and "business" as follows:

"As used in Title LVII [57] of the Revised Code:

"(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise. Machinery and equipment classifiable upon

³ Enumerated in appellant's notice of appeal as "5" and "8."

completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be 'used' by the owner of such plant or other facility within the meaning of 'used in business' until such machinery and equipment is installed and in operation or capable of operation in the business for which acquired."

The starting point for determining the value of tangible personal property is R.C. 5711.18, which states in pertinent part as follows:

"In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money."

In accordance with this statute, the Tax Commissioner promulgated the 302 computation directive which establishes the method of depreciation to be employed on all equipment used in business as well as the percentage of depreciation to be applied against specific types of equipment. The valuation of personal property used in business as derived by the method set forth by the commissioner applies to every taxpayer and to all applicable equipment so as to achieve uniformity of valuation in this state. The prescribed annual depreciation rates to be used in lieu of book depreciation are prima facie correct. *Monsanto Co. v. Lindley* (1978) 56 Ohio St.2d 59.

The goal sought by utilization of the 302 computation directive is to estimate as closely as possible the true market value of the plant equipment involved. Accordingly, the depreciation rates set forth by the directive will be adjusted in unusual and special circumstances, and will not be rigidly applied to create an

unreasonable or unjust result. *Alcoa v. Kosydar* (1978), 54 Ohio St.2d 477; *PPG Industries v. Kosydar* (1981), 65 Ohio St.2d 80; *Towmotor Corp. v. Lindley* (1981), 66 Ohio St.2d 53.

In *PPG Industries*, supra, the Supreme Court held that to establish the right to deviate from the prescribed rate of depreciation, the burden is on the taxpayer to demonstrate by competent evidence of probative value that the 302 computation produces a result which does not reflect the true value of its personal property. See, also, *Gahanna Heights, Inc. v. Porterfield* (1968), 15 Ohio St.2d 189, at 190; and *Commonwealth Plan, Inc. v. Kosydar* (1976), 47 Ohio St.2d 39, at 41.

Giving full attention and consideration to the totality of evidence presented herein, the Board of Tax Appeals concludes that the appellant has not demonstrated by competent evidence of probative value that the property at the subject facility should have a lower personal property valuation, nor that the 302 computation results in an excess value for the subject property.

Initially, the board points out that the Tax Commissioner's 302 computation is founded on industry-wide experience. Appellant has not shown that its equipment is put to an extraordinary use or is operated in an extraordinary environment. A. Schulman's first witness, Mr. William Ratliff, the facility manager of the Akron plant, only testified as to the process and did not discuss equipment life. Appellant's second witness, Mr. Suppes, was a corporate tax manager and was not qualified as an expert in valuing the subject property. The fact that the appellant had overcapacity at the time in question and high labor costs, as Mr. Suppes testified, does

not automatically result in obsolescence of, or a lower valuation for, the property in question. A plant closing based on these details alone would not prove special or unusual circumstances to justify such a change of value. See, also, *The BOC Group, Inc., fka Airco, Inc. v. Limbach* (June 30, 1989), BTA No. 1985-G-679, unreported.

We have no probative evidence before us which would show that the closed plant was incapable of operation. The claim that it was not economically feasible to operate the plant does not render the equipment and machinery useless nor does it enlighten us adequately as to the true condition of the property.

We find little value to Ex. I as it is merely a summary document of calculations based in part on the arguments above.

The appellant has failed to present any probative evidence of the value of the equipment in the closed plant and has therefore failed to meet its burden of proof to show that the Tax Commissioner was in error. Therefore, we deny this specification of error.

Appellant's final specification of error is that the subject personal property used in the manufacture of plastics should have been classified as Class Life IV for true value purposes.⁴

Appellant originally filed its personal property tax returns for the subject years in question utilizing Class Life V. A. Schulman contends that Class Life IV, which allows for a quicker depreciation schedule, is the appropriate classification and directs this board to its annual report (Form 10K) filed with the U.S. Securities and

⁴ Enumerated "7" in appellant's notice of appeal.

Exchange Commission for the year 2000 in support. The description therein reads as follows:

“The Company combines basic resins purchased from plastic resin producers and, through mixing and extrusion processes introduces additives that provide color, stabilizers, flame retardants or other enhancements that may be required by a customer. These compounds are formulated in the Company’s laboratories and are manufactured in the Company’s fourteen plastics compounding plants in North America, Europe and Asia. Customers for the Company’s plastic compounds include manufacturers, custom molders and extruders of a wide variety of plastic products and parts. The Company generally produces compounds on the basis of customer commitments. ***”

The 302 computation method provides a uniform method of valuing property by classifying similar types of property by business activity/industry. In some cases, however, property can be classified in two different categories, depending upon the use of the items.

In an attempt to assist taxpayers with classification of personal property, the Tax Commissioner publishes a pamphlet entitled “True Value of Tangible Personal Property – Composite Annual Allowance Procedure published in Accordance with Ohio Administrative Code 5703-3-11.” That pamphlet, which is published yearly, reflects accepted composite group-life classes for personal property tax purposes.

Monsanto Co., supra. Therein, it is stated regarding “composite class life”:

“The composite class life used for valuing the personal property of a business is determined on a prima facie basis by the business activity.

“The list of business activities in previous editions of this publication was based on the Standard Industrial Code

(SIC) Manual published by the United States Office of Budget and Management (USOBM). As a guide to finding the business activity, the first two (2) of the four (4) digits for each classification was listed. In 1997, USOBM introduced the North American Industry Classification System (NAICS). The new classification system uses six (6) digits. The current edition of True Value of Tangible Personal Property lists general business activities and shows the first three (3) digits of the NAICS classification number. A table which displays SIC numbers and the corresponding NAICS numbers is on the inside front cover of this publication.”

Class Life IV, under which appellant seeks to classify the subject property, includes the following description under the aforementioned NAICS guidelines:

“326 Plastics and Rubber Products Manufacturing

“Industries in the Plastics and Rubber Products Manufacturing subsector make goods by processing plastics materials and raw rubber. The core technology employed by establishments in this subsector is that of plastics or rubber product production. Plastics and rubber are combined in the same subsector because plastics are increasingly being used as a substitute for rubber; however the subsector is generally restricted to the production of products made of just one material, either solely plastics or rubber.

“Many manufacturing activities use plastics or rubber, for example the manufacture of footwear, or furniture. Typically, the production process of these products involves more than one material. In these cases, technologies that allow disparate materials to be formed and combined are of central importance in describing the manufacturing activity. In NAICS, such activities (the footwear and furniture manufacturing) are not classified in the Plastics and Rubber Products Manufacturing subsector because the core technologies for these activities are diverse and involve multiple materials.

“3261 Plastics Product Manufacturing

“This industry group comprises establishments primarily engaged in processing new or spent (i.e., recycled) plastics resins into intermediate or final products, using such processes as compression molding; extrusion molding; injection molding; blow molding; and casting. Within most of these industries, the production process is such that a wide variety of products can be made.”

The Tax Commissioner contends that the subject property more appropriately is classified as Class Life V and points to the corresponding NAICS sections which read as follows:

“325211 Plastics Material and Resin Manufacturing

“This U.S. industry comprises establishments primarily engaged in (1) manufacturing resins, plastics materials, and nonvulcanizable thermoplastic elastomers and mixing and blending resins on a custom basis and/or (2) manufacturing noncustomized synthetic resins.

“***

“325991 Custom Compounding of Purchased Resins

“This industry comprises establishments primarily engaged in (1) custom mixing and blending plastics resins made elsewhere or (2) reformulating plastics resins from recycled plastics products.”

We agree with the commissioner. Mr. Ratliff testified regarding appellant’s products as follows:

“Q. You had been asked to identify two exhibits, Exhibit A and Exhibit B. I believed you indicated that Exhibit A was a resin that was one of the raw materials used to produce Schulman’s product?”

“A. Correct.

"Q. What is Exhibit A? What kind of material is that?

"A. Exactly what kind of material it is, I don't know. It's a resin. We have different kinds of resins. It could be propylene; it could polyethylene. Based on -- the hardest -- I would say it's probably propylene.

"Q. And then Exhibit B, is that the actual product that results from the use of Exhibit A in conjunction with other materials?

"A. Correct.

"Q. What other -- with respect to Exhibit B, what materials or compounds other than what is contained in Exhibit A would go into the product?

"A. Well, depending on the physical properties required, the different types of additives, colors, fillers, stabilizers....

"Q. Now, is the product that results that's at least contained in Exhibit B, is that a resin product itself?

"A. I'm not sure.

"Q. What would you call that specific product? Does it have a specific --

"A. It would have a specific name, yes. For instance, I'm not sure exactly which one this is, but PP1329-2173. The -1329 part would represent the physical properties, and then the -2173 would represent the color. The second number would be the color of it.

"Q. Would one of the products that would be manufactured by H&O be a polyvinylchloride-type product?

"A. Yes.

"Q. Is that a fairly common product they make?

"A. It used to be years ago. I don't think -- We produced very little of it in the last several years. In '83, when we

modernized Lines 1 and 2, PPC was our biggest product. We ran that from Line 2, I mean, 24/7.

“Q. Would the more modern products be modern versions of polyvinylchloride-type products?”

“A. Not really.

“Q. Well, I guess what I’m saying is what you make is a product that’s a combination of various raw material, resins and other chemical compounds?”

“A. Yes.

“Q. And that results in various compounds that have color concentrates that are then sent to your customers that they use as a raw material?”

“A. Yes.

“Q. Would most of the products, the compounds that you manufacture for your customers, be custom manufactured for a particular customer?”

“A. Yes.

“Q. They want a particular type of resins with a particular color and certain other additives?”

“A. Yes, sir. Basically, what they want is certain physical properties for – and a specific color, which we would match it to their specifications and physical properties and the coloring.

“Q. Would most of the products produced by A. Schulman resemble what we see in Exhibit B?”

“A. Yes.

“Q. Same basic size, maybe different colors, additives, properties?”

“A. You may have pretty much the same size, you may have different shapes, depending on the type of die that it

goes through. Some of it will be a square cut, which is something that may come out of the die and go through the water bath and it's cut in what's called dicer, which dices it.

"Q. If you know, would your customers normally take that product and in using it first would they melt it into a –

"A. Yes.

"Q. – or later mold it into a product or –

"A. They would – they'd have to do it at the time they melt it.

"Q. They would melt it?

"A. Yes, and mold it into another item.

"Q. What type of specification do they ask for for a particular product?

"A. It all depends on the customer. They ask for strength, weathering. One of our largest customers was the automotive industry. They ran very strict specifications for weathering, strength, durability." H.R. at 19-23.

This description of appellant's products appears to squarely fit within the definition of a Class Life V property.

However, A. Schulman contends that it is engaged "in processing *** plastic resins into *intermediate**** products," fulfilling the requirement of NAICS 3261, and thus, qualifying for either classification. Indeed, Mr. Ratliff testified under redirect examination as follows in this regard:

"Q. Mr. Ratliff, the product that you make, that you sell to other people, is that then used by them to turn into another product?

"A. Yes.

"Q. Okay. Could you classify, or do you know if you could classify what's in Exhibit A as a basic resin?

"A. Yes, it is a basic resin.

"Q. Is what you have in Exhibit B a basic resin?

"A. No, it's not.

"Q. What kind of resin might it be?

"A. It's a custom-compounded resin.

"Q. Okay. Would that be *intermediate*, then, to making something else?

"A. Yes.

"Q. All right. So your finished product is someone else's raw product?

"A. Correct." H.R. at 29, 30. (Emphasis added.)

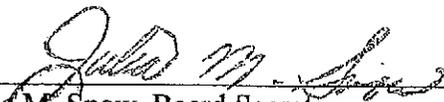
Despite this assertion that A. Schulman produces an intermediate product, the evidence indicates otherwise. There is no heel or sole being produced for later assembly into the final product of some footwear or any other production which might fit this classification. The evidence indicates only that A. Schulman is primarily engaged in Class Life V activities. This conclusion is further supported by the commissioner's aforementioned "True Value of Tangible Personal Property" guide which describes Class Life IV rubber and plastic products as follows:

"Manufacturing products from natural, synthetic or reclaimed rubber such as tires, tubes, footwear, heels and soles, mechanical rubber goods, flooring and rubber sundries; recapping, retreading and rebuilding tires; manufacturing finished plastics products and molding of primary plastics for the trade." Id. at 5.

Given the evidence herein before us regarding appellant's products, we cannot conclude that A. Schulman has met its burden of proof. Accordingly, we reject appellant's final specification of error.

Based upon the foregoing, appellant's second specification of error is well taken. Appellant's other specifications of error are overruled. It is the order of this board that the final determination of the Tax Commissioner must be, and hereby is, affirmed in part and reversed in part, consistent with this decision.

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


Julia M. Snow, Board Secretary

1 of 1 DOCUMENT

Anheuser-Busch Companies, Inc., Appellant, vs. Thomas M. Zaino, Tax Commissioner of Ohio, Appellee.

CASE NO. 2003-K-699 (PERSONAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

2004 Ohio Tax LEXIS 1483

September 28, 2004; September 24, 2004, Entered

[*1]

APPEARANCES:

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For the Appellee -- Jim Petro, Attorney General of Ohio, Richard C. Farrin, Assistant Attorney General, State Office Tower -- 16th Floor, 30 East Broad Street, Columbus, Ohio 43215

OPINION:

DECISION AND ORDER

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

On June 6, 2003, appellant, Anheuser-Busch Companies, Inc., filed the present appeal with this board seeking reversal of a final determination issued by the Tax Commissioner. Through his determination, the commissioner denied appellant's petition for reassessment in which appellant had challenged previously issued personal property tax assessments for tax years 1995 and 1996.

This matter is now considered upon appellant's notice of appeal, the statutory transcript ("ST.") certified by the Tax Commissioner, the evidence presented at a hearing convened before this board and the post-hearing briefs of counsel. At this board's hearing, appellant presented the testimony of two witnesses: Thomas C. Ford, its senior engineering manager, and Carl Blough, its [*2] manager of fixed assets and property taxes.

Following the filing of appellant's inter-county personal property tax returns for tax years 1995 and 1996, the Tax Commissioner issued amended preliminary assessment certificates which resulted in an increase in the valuation of appellant's taxable Schedule 2 property located in Franklin County, Ohio. n1 Appellant then filed with the Tax Commissioner a petition for reassessment n2 in which it asserted that costs attributable to engineering drawings had been improperly included within the valuation of its Schedule 2 machinery and equipment.

n1 The notices issued to appellant did not include the addition of any costs attributable to engineering drawings now at issue in this appeal. Rather, appellant raised for the first time in its petition for reassessment its claim that costs it initially reported in its personal property tax returns for engineering drawings be removed.

n2 As noted by the Tax Commissioner in his final determination, although appellant initially challenged several aspects of the preliminary assessments, it later withdrew such claims and instead elected to restrict its argument to the one pursued through the present appeal:

"The petitioner contends that the assessments include the cost of exempt pollution control equipment; the improper reclassification of land and building improvements as personal property; an improper increase in the true value of Schedule 2 machinery and equipment to account for mov-

ing and relocation costs; and the cost of exempt engineering drawings. However, prior to hearing, the petitioner indicated that the only issue it wished to pursue was the issue of exempt drawings. Therefore, the only issue for consideration is whether the petitioner's machinery and equipment costs contain costs that should be removed as exempt drawings. Although the petitioner raised the issue of exempt drawings in its petitioner for reassessment, it was not an issue on audit and is being considered here for the first time." S.T. at 1.

[*3]

During the period in question, appellant undertook four separate construction projects at its Columbus, Ohio brewery whereby it either built new or expanded upon existing manufacturing operations. These projects were identified as follows: (1) Project 598-O'Douls Expansion; (2) Project 6506-Chip Upgrade; (3) Project 6241-Process Piping for Ice Beer and (4) Project 418/410-Aseptic Filling for Bud Dry. n3

n3 Appellant's witness briefly described the nature of these projects: Project 598-O'Douls Expansion: "Anheuser-Busch was -- was wanting to increase the capacity of its O'Douls production [a non-alcoholic beer], so they put forth a capital production for the Columbus brewery to increase that capacity." H.R. at 18-19. Project 6506-Chip Upgrade: "We wanted to modify our -- our process and we added some -- some chip separators to take yeast out of the -- out of the chips." H.R. at 31. "We at the time were trying to get -- to figure out a way to remove the yeast from our chips, you know, the beechwood chips that we put in Budweiser. And so we put in chip separators kind of like a centrifuge and they would centrifuge the chips and the yeast would come off and then we could reuse the chips easier and dispose of the yeast." H.R. at 126. Project 6241-Process Piping for Ice Beer -- "Ice beer is another product that we wanted to make it -- at Columbus. And these would -- this was a modification to the process systems to make ice beer." H.R. at 36. Project 418/410-Aseptic Filling for Bud Dry: "We wanted to make an aseptic product sort of like a draft beer in a bottle; so we had to modify a substantial amount of the plant to allow that to occur." H.R. at 39.

[*4]

In order to complete these projects, appellant engaged two outside engineering firms, i.e., MK Ferguson Corporation and Holloman and Associates. As part of their efforts, these firms either newly created or modified a number of engineering drawings, many of which appellant maintains in the ordinary course of its business. However, neither of these firms, on any invoices which could be located by appellant, separately stated the specific costs attributable to the creation of engineering drawings. Instead, invoices simply made reference to "engineering services." In the absence of specifically invoiced costs for engineering drawings, yet in an effort to demonstrate that such costs had been improperly included as taxable personal property, appellant provided an estimate of drawings costs to the commissioner predicated upon an internal analysis performed by its employee, Thomas Ford.

In his final determination, the Tax Commissioner rejected appellant's claims and affirmed the assessments as issued. In reaching this conclusion, the commissioner found that the methodology employed by appellant in calculating the costs of engineering drawings could neither be verified nor audited, and therefore [*5] could not be relied upon as a basis for the claimed reduction:

"In the instant case, the petitioner has provided no detailed project review that would allow verification of the accuracy of its estimates. Furthermore, drawings costs and the results of the estimates were not subject to Department or objective external review. Without detailed and verifiable information, no modifications can be made to these assessments." S.T. at 3.

From the preceding determination, appellant appealed to this board, specifying the following as error:

"The Final Determination erroneously allowed the 1995 and 1996 tax assessments to stand as issued, even though such assessments improperly included the cost of engineering drawings in the valuation of Appellant's Schedule 2 taxable property; drawings are excluded from the definition of personal property under R.C. 5701.03(A)."

Appellant asserts that costs attributable to engineering drawings were improperly included within the 1995 and 1996 personal property tax assessments issued by the commissioner. See fn. 1, supra. Although R.C. 5709.01 subjects to

personal property tax all personalty located and used in business in this state, engineering [*6] drawings are expressly excluded from this definition by virtue of R.C. 5701.03(A): " Personal property' does not include * * * drawings that are held for use and not for sale in the ordinary course of business * * *."

It is uncontroverted that engineering drawings were created for purposes of completing the projects undertaken by appellant. However, as previously indicated, the costs specifically attributable to these drawings were not delineated on invoices appellant received from its outside engineering firms. In the absence of such information, n4 appellant's senior engineering manager developed a methodology, substantially similar for three of the four projects, i.e., Projects 598, 6506 and 6241, by which he estimated the costs attributable to engineering drawings.

n4 Thomas Ford testified that he had been employed as an engineer with appellant for thirty years, the last fifteen of which have been as a senior manager of engineering services. In his current position, Ford not only manages an internal group of professionals who create drawings, but he also generally oversees those engineering projects which are outsourced to private engineering firms.

For these three projects, [*7] Ford indicated that his efforts began with a review of the master drawing lists retained by appellant which identified the drawings used in each project. He then reviewed the drawings themselves, not only to ensure all drawings were accounted for on the master lists, but to also ascertain whether the drawings were newly created or modified versions of pre-existing drawings. n5

n5 In order to ascertain whether drawings were modified or newly created for a particular project, Ford reviewed the drawings themselves and the corresponding revision numbers reflected thereon. Using what he considered to be a "conservative approach," Ford categorized drawings which had undergone three or fewer revisions as new drawings, while those with four or more revisions were treated as modified drawings. As indicated above, under Ford's approach, "modified" drawings took less time to create and were therefore less costly.

Ford categorized the projects' drawings into one of six "disciplines," i.e., process, mechanical, structural, piping, electrical, or instrumentation. Based upon his personal experience in dealing with design and engineering drawings, he attributed an average number of hours to [*8] the creation of both new and modified drawings for each discipline. n6 Ford next estimated the hourly costs attributable to the creation of engineering drawings by first noting that appellant currently pays its outside engineering firm, MK Ferguson, \$ 90 per hour for engineering work. Relying upon his personal experience, he determined that the average market rate for engineering services had increased at approximately three percent annually since the time the projects had been undertaken. Using this percentage, he concluded that average market engineering rates for 1993 and 1992 would have been \$ 67 and \$ 65 per hour, respectively. However, in calculating costs, Ford elected to use \$ 60 per hour in order to ensure his estimate would again be conservative.

n6 Ford stated that the use of an "average" number of hours would again result in a conservative estimate, suggesting that more complicated drawings would take significantly longer to prepare than simpler ones. To illustrate his conclusions, in order to develop modified drawings, Ford indicated an average of 40 hours would be required for process and mechanical drawings, 30 hours for structural and piping, 10 hours for electrical and 1 hour for instrumentation drawings. In order to create new drawings for each of the preceding categories, Ford estimated the following average number of hours for each discipline: process and mechanical -- 120 hours; structural and piping -- 100 hours; electrical -- 40 hours; and instrumentation -- 4 hours.

[*9]

Ford then multiplied the various disciplines of engineering drawings by the average number of hours he considered attributable to their creation. These figures were then multiplied by the average hourly costs he attributed to the years in which they would have been created, resulting in the following total engineering drawings costs: Project 598 -- \$ 917,940; Project 6506 -- \$ 239,520; and Project 6241 -- \$ 85,680. Ford testified, that, based upon his experience, engineering drawings costs typically accounted for between eight and twelve percent of total project costs. However, when he compared his estimated costs to each of the total project costs, Ford found the amounts he attributed to engineering drawings to have been extremely conservative, i.e., Project 598 -- 5.8%, Project 6506 -- 3.9%, and Project 6241 -- 3.5%.

With respect to Project 418/410, Ford indicated he was required to develop a different approach for estimating drawings costs. He explained that this project actually involved multi-plant construction undertaken at several of appellant's brewery locations, including the one located in Columbus, Ohio. He testified that, like the other three projects, invoices detailing [*10] costs for engineering drawings were lacking. However, unlike the other three projects, appel-

lant did not have a master drawings list or even the actual drawings used in the project because it had been abandoned several years earlier.

Therefore, Ford first reviewed appellant's business records and determined the total costs for the multi-site project to be \$ 40 million. Of that amount, approximately \$ 17 million of total project costs, or 43%, was allocated to work performed at the Columbus brewery. Similarly, Ford's review of available records indicated that of the total capital costs for the project, 43% was again attributable to the Columbus brewery, i.e., approximately \$ 12.3 million of \$ 28.5 million. From a review of appellant's records, he determined that approximately \$ 3.9 million had been paid in total engineering fees to MK Ferguson for the entire project. n7 Using the above-referenced 43% as his benchmark, Ford applied that percentage to the MK Ferguson costs and concluded that \$ 1,687,480 of the Columbus brewery project costs were actually attributable to engineering drawings.

n7 In arriving at the above-referenced engineering costs, i.e., \$ 3,910,375, Ford relied upon appellant's disbursements rather than the actual invoices themselves since he was able to locate only a portion of the invoices related to the project, totaling only \$ 1,108,129.

[*11]

Appellant next called as a witness Carl Blough, who testified that he prepares and files appellant's property tax returns and that engineering drawings costs for all four projects would have been included as part of appellant's taxable property reported for the years in question. Blough explained that as costs for a project are incurred, they are recorded in appellant's "construction-in-progress" ("CIP") system. n8 As a project nears completion, appellant's engineering department informs the property accounting group, and when assets are actually placed in service they are cleared from the CIP system and transferred to a fixed assets general ledger system. When assets are placed in service, all soft costs, such as design and engineering drawings costs, which cannot be specifically identified with a particular asset, are "spread," or allocated, among hard assets ultimately reported by appellant on its returns. Since no specific breakout existed for engineering drawings costs, such costs would have been allocated among the hard assets placed in service as part of the construction projects.

n8 The record erroneously referred to this as "construction and progress system." H.R. 145.

[*12]

In order to derive the total taxable values claimed to have been erroneously reported on appellant's 1995 and 1996 personal property tax returns, Blough identified total project costs, including real estate and machinery and equipment. He then determined the percentage of such costs attributable solely to machinery and equipment, i.e., Project 598 -- 82.87%, Project 6506 -- 95%, Project 6241 -- 89.3%, and Project 418/410 -- 90.36%. Applying these percentages to Ford's analyses for the four projects,

he calculated engineering drawings costs attributable to machinery and equipment, i.e., Project 598 -- \$ 760,709, Project 6506 -- \$ 227,546, Project 6241 -- \$ 76,514, and Project 418/410 -- \$ 1,524,756. These costs were then depreciated by 81.8% for tax year 1996 and 88.1% for tax year 1995 in order to identify the claimed true value of engineering drawings. Multiplying these figures by the statutory assessment rate of 25%, Blough concluded that for each project the following taxable values would have been reported: Project 598 -- tax year 1996-\$ 155,565 and tax year 1995\$167,546, Project 6506 -- tax year 1996-\$ 53,644; Project 6241 -- tax year 1996-\$ 16,852 and tax year 1995\$18,038; and [*13] Project 418/410 -- tax year 1996\$4288,179 and tax year 1995\$311,813. Ultimately, the total taxable values attributable to engineering drawings for all four projects claimed to have been erroneously reported on appellant's returns was \$ 514,240 for tax year 1996 and \$ 497,397 for tax year 1995.

In considering an appeal from a final determination of the Tax Commissioner, we acknowledge the presumption that the Tax Commissioner's findings are valid. In *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, the Supreme Court held:

"Absent a demonstration that the commissioner's findings are clearly unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for the BTA to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect. * * *" *Id.* at 124. (Citation omitted.)

A taxpayer challenging a finding of the commissioner must therefore rebut the preceding presumption and establish a clear right to the relief requested. *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138; [*14] *Ohio Fast Freight, Inc. v. Porterfield* (1968), 29 Ohio St.2d 69. Accordingly, on appeal, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

The issue in this appeal is not whether during the course of its construction projects appellant may have incurred costs attributable to the creation of engineering drawings to which personal property tax is inapplicable. Instead, the critical issue is whether appellant has met its burden of demonstrating, by sufficient competent, probative and reliable evidence the costs attributable to such drawings and the extent to which such costs were included as personal property for which tax was indeed paid. For the reasons which follow, we conclude that appellant has fallen far short of its burden in this appeal.

In reaching this conclusion, we find the Supreme Court's reasoning in *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506, to be dispositive regarding the sufficiency of appellant's evidence. In *United* [*15] *Tel. Co.*, the taxpayer, a provider of local and toll access telephone service, deducted from its personal property tax returns the value it attributed to property claimed not to be used in business. n9 However, because United Telephone had failed to retain accurate records specifically delineating the amount of such property for the years in question, it extrapolated data from a random sampling of information available to it for subsequent years. n10 Although United Telephone had information from which it could have ascertained the specific status of its property at particular time periods, it argued that the sheer volume of materials and the man hours required for such an undertaking rendered the exercise cost prohibitive. n11

n9 On its personal property tax returns for tax years 1987 through 1989, United Telephone had deducted the value of cable claimed not to be used in its business. This cable consisted of both "dead pairs," i.e., excess cable that, while operable, was not yet connected, and "bad pairs," i.e., cable that was damaged and could no longer be used.

n10 To illustrate, since its computerized grid maps for 1995 reflected the amount of dead pairs then in its system, United Telephone randomly selected such maps and worked backwards, using work orders which detailed system modifications, to reconstruct the grid maps as they presumably would have existed for each of the tax years in question. From these randomly selected grid maps, the taxpayer extrapolated the total amount of dead pairs on each of the tax listing dates. In an effort to support its estimate, the taxpayer presented the testimony of a professor of statistics who confirmed the utility and statistical reliability of the approach employed and who calculated the amount of system-wide dead pairs for the periods in question. With regard to the amount of bad pairs in its system, again while actual data was available, appellant's tax manager relied upon internally created reports and the statistical analysis performed for dead pairs in order to estimate bad pairs.

[*16]

n11 In *United Tel. Co.*, the court commented as follows:

"In utility cases, the dollar amounts are usually large and, therefore, small changes in the numbers used to calculate the taxes may mean large changes in the dollars paid by the utility and received by the taxing authorities. For instance, in this case a one-percent change in the amount of dead and bad pairs may equate to a change of over two and one-half million dollars in the value of United Telephone's cable account. The goal in tax valuation cases is to achieve as much accuracy as possible. The burden of proving the amount of the dead and bad pairs and their value was imposed upon United Telephone." *Id.* at 511.

Although the instant appeal involves a challenge by a general business taxpayer, the amount at stake is not insignificant and presumably the preceding rationale would apply with equal force regardless of the nature of the taxpayer's business.

While this board accepted as reliable the methodology employed by United Telephone in estimating the amount of its property, the Supreme Court held otherwise, stating in part:

"The commissioner next turns to United Telephone's [*17] attempts to prove the amount and value of its dead and bad pairs. The commissioner argues that the statistical estimates used by United Telephone were not probative and that the BTA should not have used them to determine the amount and value of its dead and bad pairs. We agree.

"We are aware of the magnitude of the number of grid maps maintained by United Telephone and the magnitude of the effort required to accurately reconstruct all the grid maps. However, United Telephone assumed this burden when it appealed the commissioner's order. *Hatchadorian [v. Lindley (1986), 21 Ohio St. 3d 66]*, paragraph one of the syllabus. The type of evidence that is acceptable to determine accurately the amount and value of dead and bad pairs cannot be varied from case to case depending upon the number of the documents involved. Statistical estimates determined from random samples cannot be used to meet the burden of proving the amount of dead and bad pairs when there are documents available from which an accurate count of the number of dead and bad pairs can be obtained." *Id.* at 511-512.

Appellant attempts to distinguish its own facts from those in *United Tel. Co.* [*18] by pointing out that, unlike United Telephone, there exists no actual data detailing engineering drawings costs. Thus, appellant suggests that the court's holding is restricted to only those situations in which a taxpayer favors estimates over actual and available information. We disagree. The decision in *United Tel. Co.* reaffirms the well-established proposition that a taxpayer has the burden of proving its allegations with reliable evidence and that statistical estimates, developed through a myriad of subjective determinations, fail to satisfy such a burden. See, also, *R.K.E. Trucking, Inc. v. Tracy* (May 24, 2002), BTA No. 1998-S-1316, unreported, affirmed sub nom., *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149.

Initially we note, as did the Tax Commissioner in his final determination, that the essential elements of appellant's cost estimates remain unverifiable and could easily vary by discipline, complexity, individual involved, etc. Exemplifying the subjective nature of appellant's analysis, Ford elected to treat drawings as new or modified based solely on the revision number set forth on the master drawings lists. n12 [*19] Although appellant repeatedly characterizes Ford's analysis as an overly conservative approach, a taxpayer's burden on appeal is to provide neither a conservative nor liberal estimation, but rather it is required to produce reliable, verifiable information which permits an accurate and consistent accounting.

n12 Ford also admitted that the only manner by which he could actually tell whether a drawing was new or modified would be to look at each and every drawing in sequence, which he did not do.

Ford admitted he was not familiar with the specific engineering work performed in any of the projects. Thus, he relied solely upon his general experience when he made sweeping assumptions regarding the average number of hours and hourly costs required to produce the various types of drawings. Regardless of the complexity of an individual drawing, the nature of the changes which may have been required or the level of engineering firm employee who may have been involved in its creation, Ford attributed a single creation period to each drawing within a particular category despite, for example, his admission that a modified drawing may take anywhere from 1 to 80 hours to create. While Ford [*20] indicated his figures were premised upon an "historical average," no documentation was offered to support such representations. Likewise, projected hourly costs were nothing more than averages, not based upon actual data, but instead premised upon Ford's general experience. The annual depreciation figure of 3% applied to current costs and trended back to the period in issue was based simply upon Ford's "educated guess" as to increasing engineering costs over the past decade. S.T. at 127.

With respect to Project 418/410, Ford's analysis is even more speculative. Appellant had neither the master drawing list or any of the drawings used in the project. Thus, Ford's drawings costs estimates were derived from nothing more than application of the ratio of total project capital costs to costs attributed to the Columbus brewery. While Ford may have summarily accepted that such a direct correlation exists, this board cannot.

Appellant attempts to draw comparisons between the evidence it presented and that offered by the taxpayers, and accepted by this board, in *National Distillers & Chemical Corp. v. Limbach* (Mar. 5, 1993), BTA No. 1990-X-552, unreported, affirmed (1994), 71 Ohio St.3d 214, [*21] and *Duquesne Light Co. v. Tracy* (Nov. 6, 1998), BTA Nos. 1995-K-40, et seq., unreported. However, neither of these cases persuades us that appellant has met its burden of proof in the instant appeal.

It is not insignificant that each of the cases relied upon by appellant was decided prior to the Supreme Court's pronouncement in *United Tel Co.* In fact, in this board's decision in *United Tel Co., National Distillers* was cited as favorable authority for our acceptance of the sampling technique employed by United Telephone, a proposition subsequently rejected by the court. n13 With respect to *Duquesne Light Co.*, as recognized by the parties, the decision itself has no precedential value as it was vacated and ultimately remanded to the Tax Commissioner following appeals to the Supreme Court. See *Duquesne Light Co. v. Tracy* (2000), 88 Ohio St.3d 1459; *Duquesne Light Co. v. Tracy* (June 2, 2000), BTA Nos. 1995-K-40, et seq., unreported (order certifying matter to the commissioner for further proceedings). Nevertheless, appellant insists that the rationale set forth within the board's decision warrants favorable consideration of its evidence [*22] in this appeal. However, had *United Tel Co.* been released prior to this board's decision in *Duquesne Light Co.*, it likely would have had some impact upon our consideration of the taxpayer's evidence in that case. As previously noted, the court in *United Tel Co.* placed considerable emphasis upon the evidentiary burden imposed upon taxpayers to demonstrate the actual amount and value of property claimed to be exempt or deductible, indicating that broad-based application of estimates and sampling techniques necessarily ignores the fact that different items have different costs. n14 Such is the fallacy in appellant's presentation and argument in this case.

n13 In our decision in *United Tel. Co. of Ohio v. Tracy* (Nov. 14, 1997), BTA Nos. 1991-Z-197, et seq., unreported, we stated:

"We find the manner in which appellant calculated the costs attributable to its dead and bad cable to be a reasonable means by which to estimate its value for the years in question. The application, on a pro rata basis, of the percentage of appellant's dead and bad cable to its total cable costs is little different than the situation in which we accepted a taxpayer's claim that seventy-eight percent of the costs charged by outside plant engineers was attributable to engineering drawings. See *National Distillers & Chemical Corp. v. Limbach* (Mar. 5, 1993), B.T.A. No. 90-X-552, unreported, affirmed (1994), 71 Ohio St.3d 214. See, also, *Monsanto Co. v. Limbach* (Feb. 4, 1988), B.T.A. No. 85-F-151, unreported (finding that taxpayer had established by probative evidence the costs attributable to its scale drawings as being a percentage of the total value attributable to its machinery). As appellant has provided this Board with evidence which we consider reliable and probative as to the value of its taxable property, we accept such values for purposes of determining the amount appropriately deducted." Id. at 44-45.

[*23]

n14 Even if we were persuaded that the rationale expressed by this board in *Duquesne Light Co.* had continued efficacy, the extent and quality of the evidence presented in that case and this one differs significantly.

Accordingly, we find the evidence upon which appellant relies to support its claimed engineering drawing costs to be significantly deficient, rendering it unreliable. Based upon the foregoing, appellant's specification of error is not well taken and is overruled. It is therefore the order of this board that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

BOARD OF TAX APPEALS

RESULT OF VOTE YES NO

DATE

Ms. Jackson

[ILLEGIBLE WORD]

Ms. Margulies

[ILLEGIBLE WORD]

Mr. Eberhart

[ILLEGIBLE WORD]

6 of 6 DOCUMENTS

Alcoa Inc., Appellant, vs. Thomas M. Zaino, Tax Commissioner of Ohio, Appellee.

CASE NO. 1999-G-1401 (PERSONAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

2004 Ohio Tax LEXIS 1672

October 25, 2004; October 22, 2004, Entered

[*1]

APPEARANCES:

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For the Appellee -- Jim Petro, Attorney General of Ohio, James C. Sauer, Assistant Attorney General, State Office Tower, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215

OPINION:

DECISION AND ORDER

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

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant from final assessment certificates of valuation issued by the Tax Commissioner. The assessment certificates are dated August 6, 1999, and relate to applications for final assessment of appellant's personal property for tax years 1994, 1995, 1996, and 1997.

The appellant's notice of appeal states in pertinent part, as follows:

"1. Appellant, Alcoa Inc. (formerly Aluminum Company of America and Subsidiaries), appeals from a Final Assessment Certificate [sic] of Valuation by the Tax Commissioner of the State of Ohio Department of Taxation, concerning Appellant's Application for Final Assessment of its 1994, 1995, 1996 and originally filed 1997 Inter-County return of Taxable Business [*2] Property.

* * *

"2. Appellant operates a forged products manufacturing facility in Cleveland, Cuyahoga County, Ohio (the Cleveland Works'). Within the Cleveland Works, Appellant operates two separate production lines, known as the A-Plant and the H-Plant. Production at the A and H Plants is supported by other departments within the Cleveland works [sic], including a die shop and boiler and compressor facilities (collectively the A Plant, the H Plant and the supporting departments will be referred to as the A and H Plants'). The A and H Plants were originally constructed during World War II for the production of military aircraft parts. Following World War II, these production lines continued to be used for the production of military aircraft parts.

"3. * * *

Abnormal Functional and Economic Obsolescence

"4. Due to a number of factors, including the end of the Cold War and a reduction in the amount of defense spending by the United States government, there has been a decline in the demand for the type of military aircraft components historically produced at the A and H Plants. As a result, Appellant has been forced to find alternative uses for the A and H Plants, [*3] including the production of commercial aircraft parts. These facts have lead to substantial abnormal economic and functional obsolescence relative to the subject equipment.

"5. The appellant reported the taxable value of the business personal property related to the A and H Plants on the originally filed 1994, 1995, and 1996 Inter-County Returns of Taxable business property. For this purpose, Appellant used the 302 Computation' authorized by Ohio Rules 5703-3-10, 11. For the 1997 Return, Appellant adjusted the reported taxable value of the business personal property related to the A and H Plants to reflect this economic and functional obsolescence.

"6. In its Application for Final Assessment of the 1994, 1995, 1996, and its originally filed 1997 Inter-County Return of Taxable Business Property, Appellant supported that the true value of the business personal property used in the A and H Plants had been substantially diminished by abnormal economic and functional obsolescence. In support of this position, Appellant presented a detailed analysis of the utilization rates of the machinery and equipment at the A and H Plants based on actual production records. Appellant also provided [*4] an analysis of the substantial decline in revenue by the A and H Plants that resulted from the decline in military production and the switch to commercial production. Appellant also presented a study entitled Aluminum Company of America Cleveland, Ohio Works Obsolescence Analysis.'

"7. Tangible personal property must be returned, for purposes of the personal property tax, at its true value in money. The true value of depreciable tangible personal property used in business is its depreciated book value, unless the depreciated book value is greater or less than the true value of such property. Ohio Rule 5703-3-10. It is well established that economic and functional obsolescence arising from changed business conditions is an essential factor in the determination of the value of property for tax purposes. *Standard Oil Co. v. Glander*, 155 Ohio State 61, 98 N.E.2d 8 (1951); *B.F. Keith Columbus Co. v. Board of Revision of Franklin County*, 148 Ohio St. 253, 74 N.E.2d 359 (1947).

"8. As a result of abnormal functional and economic obsolescence, use of the 302 Computation substantially overstates [*5] the true value of the business personal property used at the A and H Plants. The evidence presented by Appellant established the true value of the business personal property used at the A and H Plants.

"9. The functional and economic obsolescence of the A and H Plants gives rise to special and unusual circumstances under which the Tax Commissioner's use of the 302 Computation is unlawful. *See, Townmotor [sic] Corp. v. Lindley* [(1981)], 66 Ohio State 2d 53, 419 N.E.2d 1086.

"10. The Tax Commissioner's use of the 302 Computation with respect to the business personal property used at the A and H Plants gives rise to an unjust and unreasonable result and is therefore unlawful. *See, Townmotor [sic] Corp. v. Lindley* [(1981)] 66 Ohio State 2d 53, 419 N.E.2d 1086.

"11. The Tax Commissioner erroneously determined the true value of the property identified in Appellant's Application for Final Assessment without taking into account the abnormal economic and functional obsolescence of the A and H Plants.

"12. The Tax Commissioner erroneously determined that Appellant had not provided sufficient [*6] evidence to substantiate Appellant's computation of the true value of the business personal property used at the A and H Plants.

"13. The Tax Commissioner erroneously determined that Appellant was seeking a reduction in the true value of the personal property at the A and H plants based on a theory of idle capacity.'

Exclusion for Patterns, Jigs and Dies

"14. In its Application for Final Assessment of the 1994, 1995, 1996 and its originally filed 1997 Inter-County Return of Taxable Business Property, Appellant supported that certain business personal property used at the Cleveland Works * * * qualified as exempt patterns, jigs and dies.

"15. Patterns, jigs and dies that are held for use and not for sale in the ordinary course of business are excluded from the definition of personal property' for purposes of the property tax. Ohio Rev. Code § 5701.03

"16. The Commissioner erroneously determined that the property identified in Appellant's Application for Final Assessment did not meet the definition of patterns, jigs and dies.

"17. The Commissioner erroneously determined that Appellant had not presented sufficient probative evidence to support its claim with respect [*7] to the value of the exempt patterns, jigs and dies inherent in the machinery and equipment in question.

Exclusion for Rebuilt Assets

"18. The Commissioner erroneously determined that Appellant had not presented substantiation to support its claim with respect to the value of rebuilt machinery and equipment in question.

"19. Engineering and operations employees have identified and summarized certain assets as rebuilt assets in which an original asset has been rebuilt or refurbished to a point at which the original components that compromised [sic] that asset are no longer in existence.

Spare Parts

"20. The Commissioner erroneously assessed tax on spare parts separately in Schedule 2 at 100% of book cost for each year in question.

"21. The appellant believes the value derived using the prescribed true value computation to be proper relative to the spare parts at issue. n1

Request for Relief

"22. Appellant requests that the Board of Tax Appeals reverse, vacate, and set aside the Final Assessment Certificate of valuation of the Tax Commissioner dated August 6, 1999 for tax years 1994, 1995, 1996 and 1997, and grant such other and further relief [*8] as Appellant may be entitled to receive under law, including Appellant's refund claims as requested with respect to the Applications for Final Assessment filed for the 1994, 1995, and 1996 tax reports as well as the personal property tax liability as determined by the 1997 tax report as originally filed."

n1 At the hearing before this board the issue of spare parts was not mentioned. Further, appellant's brief does not address this issue. Therefore, we find that appellant has abandoned this issue and it will not be discussed further herein.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the Tax Commissioner, the record of the hearing before this board, and the briefs filed by counsel. n2

n2 During the course of the hearing in this matter, counsel, the parties, and the presiding attorney examiner toured the Cleveland Works.

In reviewing appellant's appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a

finding [*9] of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66; *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is developed to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern, supra*; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan Aluminum Corp., supra*.

Appellant Alcoa, Inc. ("Alcoa") is an integrated processor and manufacturer of aluminum and aluminum products. It operates numerous [*10] facilities in approximately 42 states and several foreign countries. The appellant also produces titanium and steel products. The instant appeal involves the plant located in Cleveland, Ohio also known as the "Cleveland Works."

Cleveland Works produces aluminum forgings in two primary divisions: A plant and H plant. A plant produces large aerospace forgings; H plant produces small aerospace forgings as well as truck wheels and auto wheels. Exhibit 1 is a layout of the entire facility. In addition to the two primary plants, it shows the wheel line area, central services, and a new auto facility known as X plant and Y plant. (X and Y plants were not in existence during the tax years in issue.)

Cleveland Works originally started in 1917 as an aluminum casting company. Small castings were used to make plates and dishes. Then in 1925, the first forging press, a small hammer press, was installed. Ten years later, the first mechanical press was installed. And in 1941, a 3,000-ton hydraulic press was installed. H.R. I at 18. n3 The hydraulic press produced small parts for planes and pieces for mortar shells or bombs for World War II. H.R. I at 20. At the end of World War II, pursuant to the [*11] War Reparations Act, a 15,000-ton press was disassembled in Germany and shipped to the United States. The press was installed in H plant. The government owned the press and Cleveland Works operated the press. At the same time, the Department of Defense commissioned a study that led to the installation and commissioning of a 35,000-ton press and a 50,000-ton press in 1954. The presses were located in A plant. The government owned the presses until 1982, when Alcoa purchased the assets of A plant. H.R. I at 23. Cleveland Works ceased making castings for customers around 1989. H.R. II at 126.

n3 The hearing in this matter took place over nine days. Each volume of the hearing record is numbered separately. References to the hearing record will be by Roman numeral following the abbreviation "H.R."

The relevant issues for this board's determination are as follows: (1) the application of the "302 Computation" directive in valuing the appellant's personal property; (2) removal of a portion of the original cost of certain assets due to replacement; and (3) deletion of the value of portions of machines the appellant claims are jigs. H.R. I at 5-7. Alcoa presented the testimony of several [*12] witnesses in support of its contentions.

Witnesses from the corporation included Michael A. Peters, Sales and Marketing Manager; Ronald Fryberger, Design Supervisor; Deborah Ann Dillinger, Manager of Property Taxes; Sandra Will, Accounting Manager at Cleveland Works; Stephan Nemeth, Maintenance Manager for Aerospace and Industrial Products; and Daniel J. Dattilio, Staff Mechanical Engineer. Additionally, the appellant presented the expert testimony of Nancy Smith, a business valuation analyst; Albert A. Vondra, a partner with Price Waterhouse Coopers LLP; and Victor Neil Thompson, an expert in machinery and equipment appraisal.

Cleveland Works has two primary businesses: the aerospace business and the wheel business. The aerospace business is located in A Plant and part of B Plant. Alcoa is only challenging the value of the personal property associated with the aerospace division.

I

USE OF 302 TRUE VALUE COMPUTATION

Alcoa claims that the values calculated for its personal property at Cleveland Works utilizing the commissioner's 302 true value computation were excessive. Alcoa argues that the 302 computation must be adjusted because unusual or special circumstances existed, [*13] and that rigid application of the 302 directive created an unjust or unreasonable result.

As we initially consider this issue, we note that every taxpayer engaged in business in Ohio must annually file a personal property tax return with the county auditor of each county in which property used in the taxpayer's business is

located. R.C. 5711.02. On that return, the taxpayer must list "all his taxable property * * * as to value, ownership and taxing districts as of the tax lien date he engages in business." R.C. 5711.03. R.C. 5711.18 describes the manner in which taxable property is to be listed, providing in pertinent part that:

"In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such book value is greater or less than the then true value of such property in money. Claim for any deduction from * * * depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return * * *."

Recognizing that it would be impractical to personally value all personal [*14] property in Ohio, the Tax Commissioner developed a formula, referred to as the "302 computation," in order to determine the true value of such property. *W.L. Harper v. Peck (1954), 161 Ohio St. 300; Snider v. Limbach (1989), 44 Ohio St.3d 200.*

Ohio Adm. Code 5703-3-10 speaks directly to the valuation of personal property for tax purposes and provides in part that:

"(A) Tangible personal property used in business in this state must be returned, for purposes of the personal property tax, at its true value in money. The true value of depreciable tangible personal property is its book cost less book depreciation, unless the tax commissioner finds that the depreciated book value is greater or less than the true value of such property.

"(B) Application of the composite annual allowance procedure provided for in rule 5703-3-11 of the Administrative Code shall determine the prima facie true value of depreciable tangible personal property used in business. The prima facie valuations can be rebutted by probative evidence of higher or lower valuation.

" * * *

"(3) If a taxpayer believes that the composite annual allowance [*15] procedure as determined by the commissioner does not accurately reflect the true value in money of the taxpayer's depreciable tangible personal property on hand, the taxpayer may establish more accurate annual allowances by probative evidence.

"(a) Such evidence must show that the published composite annual allowance procedures are inappropriate because they cause an unjust or unreasonable result, or must be modified because of special or unusual circumstances.

"(b) Such evidence may include, but is not limited to, an aging of disposals study and any other studies, data, or documentation the taxpayer wishes to submit for consideration by the commissioner.

"(c) Such evidence must cover a sufficient number of years to demonstrate a pattern in the history of the useful life of the subject property."

The "composite annual allowance" or "302 computation" is more fully discussed in Ohio Adm. Code 5703-3-11, which provides in part:

"(A) To assist taxpayers in returning the true value of depreciable tangible personal property used in business in this state as required by Chapter 5711 of the Revised Code and rule 5703-3-10 of the Administrative Code, and to assist in the efficient [*16] administration of the personal property tax, the tax commissioner shall determine a composite annual allowance procedure for use in computing the true value of such property. The application of the composite annual allowance procedure to the original cost of tangible personal property may be referred to as the true value computation' or the 302 computation.'

"(B) The valuation determined by the true value computation shall be the prima facie true value in money of the taxable tangible personal property.

"(C) The composite annual allowance procedure shall take into consideration the type of business conducted, the types and classes of property, the useful life of the property in such classes, physical deterioration, functional and economic obsolescence, repair and maintenance practices, salvage value of property assigned to such classes, and any other factors that the commissioner considers proper in determining the true value of depreciable tangible personal property used in business in this state."

The Supreme Court has repeatedly accepted the 302 computation as an appropriate method to value personal property. As the court held in *PPG Industries v. Kosydar* (1981), 65 Ohio St.2d 80, 83, [*17] "this directive has been approved by this court as a practical, reasonable and lawful method and device to achieve uniform valuation of plant equipment in Ohio by prescribing annual depreciation rates in lieu of book depreciation for Ohio personal property tax purposes. *Wheeling Steel Corp. v. Evatt* [(1944), 143 Ohio St. 71] * * *; *W.L. Harper Co. v. Peck* (1954), 161 Ohio St. 300." While application of the 302 computation results in a prima facie true value figure, the value reflected through its use is not absolute. A taxpayer who objects to the use of the 302 computation can demonstrate, through competent and probative evidence, that a different result is warranted. *PPG Industries, supra*; *Gahanna Heights, Inc. v. Porterfield* (1968), 15 Ohio St.2d 189.

In *Towmotor Corp. v. Lindley* (1981), 66 Ohio St.2d 53, the court set forth a two-part test to be applied by this board when considering a taxpayer's claim that the 302 computation does not reflect the true value of the personal property:

"First, the board must [*18] determine if there exists special and unusual circumstances which require that the 302 Computation' not be used. If the board determines that such circumstances do exist, the 302 Computation' is inappropriate. If such circumstances do not exist the board must, second, determine if the rigid application of the 302 Computation' directive creates an unjust or unreasonable result in that case. If so, the directive is inappropriate. * * * "

Based upon the foregoing, Alcoa's ultimate burden in this case, i.e., proving that its property is overvalued when reported in accordance with the commissioner's classification directives, may be met by any of three accepted methods. Alcoa may prove that special or unusual circumstances exist, or that the use of the 302 computation produces an unjust or unreasonable result, or Alcoa may offer direct evidence of the personalty's true value. *RPS, Inc. (fka Roadway Package System, Inc.) v. Tracy* (Oct. 30, 1998), BTA No. 1996-M-1209, unreported; *Keystone Powdered Metal Company v. Zaino* (Mar. 22, 2002), BTA No. 2000-A-749, unreported. We will now proceed to consider Alcoa's evidence.

II

SPECIAL OR UNUSUAL CIRCUMSTANCES/UNJUST OR UNREASONABLE [*19] RESULT BASED ON RIGID APPLICATION OF THE "302 COMPUTATION"

Alcoa is not claiming excessive physical depreciation or shortened lives for its machinery and equipment. Alcoa claims that due to a decline in demand and increased competition in forgings for military and commercial aircraft along with changes in technology, the usage of the aerospace machinery and equipment in A and H Plants has decreased dramatically. In the early 1980s, Cleveland Works was very busy making forgings for military and commercial aircraft. Cleveland Works also made forgings for other military machines. At the time, the United States was the primary source for military aircraft in the world. The United States Department of Defense ("DOD") purchased approximately 700 aircraft per year, including the F-14 built by Grumman, the F-15 and F-18 built by McDonnell-Douglas, and the C-5 and C-130 large transports built by Lockheed. During the tax period in issue, Cleveland Works' main competitor in supplying forged parts was Wyman Gordon, located in Massachusetts.

In the late 1980s and early 1990s, world changes and changes in technology had a drastic effect on the number of military forgings produced by Cleveland [*20] Works. In the early 1980s, the Department of Defense's procurement of airplanes was almost 700 planes per year. That figure dropped to 70 airplanes by the late 1990s. H.R. I at 68-90. While defense expenditures were plummeting, the commercial sector was also hit hard, which impacted the entire business cycle. In 1987, 70% of the aerospace industry was represented by expenditures from the Department of Defense. By 1989, that number dropped to 50%. And by 1999, the figure dropped to 28%. H.R. V at 45.

Just as the demand for forgings for military business declined, Cleveland Works' production of forgings for commercial aircraft dropped. This was due to several factors. In the early 1980s, Boeing and McDonnell Douglas were the major airplane manufacturers in the United States. Lockheed built commercial aircraft, but to a lesser extent. There were also second-tier manufacturers of airplanes such as North American, Rockwell, Grumman Aerospace, and Northrop. Although Alcoa and Wyman-Gordon had been producing the large forgings for these planes until the early 1980s, other forging companies, which added large presses or converted their presses to commercial use, entered the market.

Another [*21] event in the early 1980s changed the aerospace industry. The commercial airlines were deregulated, and due to competition, cost became a greater factor. The cost controls and annual price reductions borne by the airplane manufacturers were passed on to their suppliers such as Alcoa. Also, mergers among the manufacturers provided more purchasing power and leverage for demanding lower prices from the suppliers.

Competition from foreign airplane manufacturers was another factor. In the early 1990s, Airbus entered the market. Airbus is a marketing consortium comprised of four European aircraft builders. Airbus received governmental subsidies; therefore, cost was not a major factor. Furthermore, foreign purchasers of the airplanes wanted the components to be built by their own countries. As a result of all these factors, Airbus replaced Boeing as the largest aircraft builder in the world and overseas companies were making the forgings that were formerly produced in the United States.

Changes in technology also had an impact on appellant's aerospace manufacturing. Castings and "hog-outs" (extensive metal removal with a milling machine), which had been abandoned because they were either [*22] too heavy or lacked structural integrity, were improved, making them a viable alternative to the larger forgings. Consequently, older planes which specified forgings and utilized appellant's parts were replaced by newer planes using more castings and hog-outs.

Based upon the foregoing, we must first determine whether Alcoa has met its burden of proving that special or unusual circumstances existed which would warrant deviation from the 302 computation. This board has previously found special or unusual circumstances to exist when business equipment was subjected to conditions which were abnormal for the industry and which caused the equipment to age more rapidly than like equipment. See, e.g., *Sun Chemical Corp. v. Limbach* (Apr. 21, 1989), BTA Nos. 1986-A-157, et seq., unreported, (finding special or unusual circumstances where taxpayer's equipment was subjected to salt and caustic soda, large quantities of steam, corrosive chemicals, and a full-time operating schedule, and taxpayer presented testimony distinguishing its use of the equipment from other chemical plants in Ohio) and *Defiance Precision Products, Inc. v. Tracy* (Apr. 3, 1998), BTA No. 1995-T-564, unreported, (finding [*23] special or unusual circumstances where taxpayer operated equipment at twice the normal speed for three, eight-hour shifts per day, up to six or seven days per week, and taxpayer presented testimony that this usage differs from that normally found in the industry). This board has also found special or unusual circumstances to exist when business equipment was subjected to conditions not planned for when the equipment was originally purchased. In *Dayton Walther Corp. v. Limbach* (Aug. 24, 1990), BTA No. 1988-J-190, unreported, foundry equipment was run 24 hours per day, six or seven days per week. Additionally, the equipment was subjected to corrosive wet sand, extreme weight of products, excessive vibration, high operating speeds, and extreme heat. Maintenance expenditures ran between 18 and 45 per cent of the equipment's original cost. In *The Babcock and Wilcox Co. v. Kosydar* (Nov. 20, 1974), BTA No. B-318, unreported, the equipment was operated around the clock to produce nuclear hardware. Similarly, equipment was used either in a manner not intended by its original purchase or under conditions not intended by its original purchase or under conditions not intended by the original [*24] specifications in *Philips Electronics North American Corp. v. Tracy* (June 28, 1996), BTA No. 1993-K-825, unreported; *Phoenix Dye Works v. Porterfield* (Feb. 16, 1968), BTA No. 65747, unreported; *Spang & Co. v. Porterfield* (July 9, 1970), BTA Nos. 74978 and 74979, unreported.

Alcoa is claiming a decrease in value due to factors other than physical depreciation. Alcoa has presented testimony that a number of factors, including increased competition, a decrease in demand, and changes in technology, had a profound effect on the aerospace operations and profitability at Cleveland Works during the years in issue. Other companies in the forging business such as Wyman Gordon and Hexcel Corporation had negative earnings between 1993 and 1996. Alcoa also had a decline in production. H.R. VI at 41-42. The utilization at A and H plants was far below their capacity. H.R. VI at 47.

As the previously referenced cases hold, a decrease in production and a drop in revenue, in and of themselves, do not establish that special or unusual circumstances exist. Rather, as set forth above, Alcoa must prove that the special or unusual circumstances surrounding the use of its equipment are not experienced [*25] generally throughout the industry or that its equipment was subjected to conditions not planned for when the equipment was originally purchased. Al-

coa has not presented sufficient evidence to establish that the experience of Alcoa at Cleveland Works, in its forgings for the aerospace business, was special or unusual when compared to the rest of the industry. Indeed, the appellant acknowledges that other large forgers experienced the same decline and left the aerospace industry. Therefore, we find that appellant has failed to demonstrate that special or unusual circumstances existed with respect to the machinery and equipment used in aerospace production at Cleveland Works during the tax years at issue.

With regard to the second criterion, and in support of its position that application of the 302 computation created an unjust or unreasonable result, Alcoa presented the testimony and appraisal reports of Nancy C. Smith, Victor Neil Thompson, and Albert A. Vondra. As always, as we review said evidence, we are mindful of the fact that this board is vested with wide discretion in determining the weight to be given to the evidence before it. *Cardinal Fed. S & L Assn. v. Cuyahoga Cty. Bd. of Revision (1975)*, 44 Ohio St. 2d 13, [*26], at paragraph two of the syllabus.

Initially, we note that the Tax Commissioner objects to separately valuing the equipment used in appellant's aerospace operations. The commissioner argues that "although aerospace operations may be identified as a separate cost center for accumulating certain costs, it does not constitute a separate business unit. Cost center' and business unit' are not synonymous terms." The commissioner goes on to state that "it is hypocritical for Alcoa to argue that weakness in the market for its aerospace (sic) required a reduction in the value of forging equipment used for those products, without recognizing that the same rationale would support an increase in the valuation of the forging equipment it uses in the production of wheels." Appellee's Brief, p. 11.

We are not persuaded by the commissioner's contention that the personal property devoted to the aerospace industry is incapable of being separated from the rest of the forging equipment for valuation purposes. We agree with appellant that there may be circumstances which render one or more pieces of equipment within a single facility not capable of valuation by the 302 computation method. The aforementioned [*27] changes in the aerospace industry support appellant's contention that the rigid application of the 302 computation to that equipment would create an unjust or unreasonable result. Nevertheless, contending that the 302 computation should not be used is not sufficient to overcome the presumption that the Tax Commissioner's valuation is correct. Alcoa still has the burden of introducing evidence of probative value of the personal property's true value in money. *Alcoa v. Kosydar (1978)*, 54 Ohio St.2d 477.

The appraisal report prepared by Valuation Research Corporation Exhibit 45, which consists of five volumes, was testified to by Nancy C. Smith, a business valuation analyst and appraiser with the ASA designation, and Victor Neil Thompson, senior vice-president of Valuation Research Corporation, whose responsibilities include valuation of machinery and equipment and special projects. n4 The three traditional approaches to value were considered: the market approach, the cost approach, and the income approach. The appraisal also includes a valuation of the business enterprise.

n4 We note that Mr. Thompson testified regarding the valuation of machinery and equipment in *Sun Chemical Corp.*, supra, wherein we deviated from the 302 computation.

[*28]

The business enterprise value is equal to the net working capital (current assets less current liabilities) plus fixed assets value plus intangible assets value. Pages 29 through 39 of the appraisal set forth a thorough and detailed analysis of the valuation of the business enterprise. The valuation includes a balance sheet analysis, growth and profitability analysis, calculated rates of return, and the valuation of future free cash flow. Utilizing the above analysis, the business enterprise values for A and H Plants were as follows:

December 31, 1993	\$ 47,300,000
December 31, 1994	\$ 44,500,000
December 31, 1995	\$ 47,500,000
December 31, 1996	\$ 50,300,000

These figures include assets such as land and buildings, machinery and equipment, people and goodwill, and other intangible assets.

The valuation of the machinery and equipment begins on page 41 of the appraisal. Both an income and a cost approach were utilized. The market approach was considered but no information was found with respect to the value of the subject equipment in the used market. n5

n5 The parties disagree as to whether the acquisition of Wyman-Gordon Company by Precision Castparts Corp. should have been utilized in a market approach. This will be discussed more fully later in this decision.

[*29]

The income approach includes an economic obsolescence penalty. Normal economic obsolescence which includes economic conditions in most businesses was exceeded by appellant's aerospace business due to the change in the industry which has previously been set forth in detail. This abnormal economic obsolescence affected the values of all the assets. The method of applying abnormal economic obsolescence and the resulting effect for the tax years in issue appear on pages 42 and 43 of the appraisal report. n6 The summary of economic obsolescence for December 31, 1993 through December 31, 1996 appears as follows:

Alcoa, Inc. -- A & H Plants
Summary of Economic Obsolescence 12-31-1993 to 1996
(In Thousands of Dollars)

	As of December 31, 1996			
	1996	1995	1994	1993
Concluded Business Enterprise Value	\$ 50,000	\$ 47,500	\$ 44,500	\$ 47,300
Tangible Assets:				
Current Assets: *				
A/R Customers	\$ 18,477	\$ 20,330	\$ 20,330	\$ 20,330
Inventory	45,529	44,846	43,098	43,098
Total Current Assets	\$ 64,006	\$ 65,176	\$ 63,428	\$ 63,428
Current Liabilities: *				
Accounts Payable	\$ 11,562	\$ 10,436	\$ 13,810	\$ 13,810
Net Working Capital	\$ 52,444	\$ 54,740	\$ 49,618	\$ 49,618
Real Property **	6,200	6,200	6,200	6,200
Personal Property ***	45,298	49,639	52,393	59,467
Total Tangible Assets	\$ 103,942	\$ 110,579	\$ 108,211	\$ 115,285
Intangibles	0	0	0	0
Total Tangible and Intangible Assets	\$ 103,942	\$ 110,579	\$ 108,211	\$ 115,285
Economic Obsolescence	\$ 53,624	\$ 63,079	\$ 63,711	\$ 67,985

* Alcoa Business Unit Financial Data

** Ohio (sic) Board of Review (sic) (BOR) Agreed to True Value

*** VRC's CRNLD based on VRC's Indexes and Depreciation Tables.

Also see separate volumes with asset detail for each year.

[*30]

n6 Page 43 in the original appraisal was corrected by page 43A which contained the more complete financial documents.

The cost approach begins on page 44 of the appraisal report using the cost of reproduction new less physical depreciation. Abnormal economic and functional obsolescence were also considered. To calculate the physical depreciation, the Marshall & Swift physical depreciation schedule was utilized. This was followed by a recapitulation report for each tax year. Abnormal economic obsolescence was determined by using the following formula: business enterprise value minus nonallocables divided by inventory plus property. The results appear on pages 64 through 67 of the appraisal report. n7 When functional obsolescence was considered, it was determined not to be abnormal due to the nature of forging technology.

n7 These pages in the original were corrected by pages 64A through 67A.

Therefore, the appraisal report concluded that significant abnormal economic obsolescence affected the value of the personal property at issue. The final conclusion of the value of the assets was as follows: n8

Ohio Audit Year	True Value
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Ohio Audit Year	True Value
December 31, 1993	\$ 20,049,000
December 31, 1994	\$ 17,437,000
December 31, 1995	\$ 16,500,000
December 31, 1996	\$ 18,545,000

[*31]

n8 The figures stated are reflected on corrected page 70A of the appraisal.

The Tax Commissioner contends that the appraisal report is flawed and does not accurately reflect the true value of the equipment and machinery utilized in aerospace production in A Plant and a portion of H Plant. We find nothing in the commissioner's contentions which would cause us to find the opinion of value to be unreliable. The origin of the source materials was adequately identified, as was the appraisers' familiarity with Alcoa's aerospace operations. We find the expertise of the appraisers coupled with the analysis contained in the appraisal report to be reliable and to provide competent, probative evidence of the true value of appellant's machinery and equipment utilized in its aerospace operations. In so finding, again we recognize that this board is vested with wide discretion when weighing the evidence. *Cardinal Fed. S. & L. Assn., supra.*

The appellant also presented the report and testimony of Albert A. Vondra, CPA and partner with Pricewaterhouse Coopers LLP. The report is an analysis to consider the application of generally accepted accounting principles [*32] to the aerospace machinery and equipment of A and H Plants for the years ending December 31, 1993 through December 31, 1996. More specifically, the report addresses whether an impairment loss is required to be recognized under Statement of Accounting Standards No. 121, "Accounting for the Impairment of Long-Lived Assets and for Long-Lived Assets to be Disposed Of (SFAS 121). Impairment is defined in SFAS 121 as the inability to fully recover the carrying amount of an asset. Page 5 of the report addresses the application of SFAS 121 to the machinery and equipment. Indicators of impairment (changes in the aerospace industry) were analyzed. The analysis determined that the undiscounted cash flows expected to be generated from aerospace machinery in A and H Plants exceed the carrying value of the assets. Thus, under the provisions of SFAS 121, an impairment loss is not applicable and has no bearing on the appraisal value contained in exhibit 45.

Finally, as previously noted in footnote 5, the parties disagreed as to whether the acquisition of the Wyman-Gordon Company by Precision Castparts Corp. was a valid market transaction which appellant's appraisers should have utilized in a market [*33] value approach. Mr. Thompson testified that he did not consider one sale a "market." Further, appellee's exhibit E, which is an internet printout reflecting Precision Castparts Corp.'s SEC form 10-Q for the quarter ending December 26, 1999, which was offered into evidence at the hearing, received an objection to admission. We reserved ruling on the admissibility and requested the parties to brief the issue. Appellee's brief did not address the specific issue of admissibility when discussing the transaction. The appellant's reply brief contends that exhibit E was neither identified nor authenticated as required by the Ohio Rules of Evidence. We agree with appellant's statement that no certification was appended to the exhibit nor was a witness present to testify that exhibit E was a true copy of the original or that it was ever filed with the Securities and Exchange Commission. Therefore, it is the ruling of this board that appellee's exhibit E is not admitted into evidence in this matter. See *Wyandot Ltd. Inc. v. Franklin Cty. Bd. of Revision* (Feb. 4, 2000), BTA No. 1999-K-531, unreported.

In conclusion, we find the value of the assets as previously stated on page 70A of exhibit [*34] 45 accurately reflects the value of appellant's machinery and equipment in A and H Plants related to the aerospace industry.

III

JIGS n9

n9 Counsel for the Boards of Education of Cuyahoga Heights, Euclid, Mentor, Parma, and Solon School Districts filed an amici curiae brief in support of the Tax Commissioner regarding the sole issue of jigs.

The appellant contends that certain portions of its machines constitute "jigs" and are therefore exempt from taxation under R.C. 5701.03, which provides in part as follows:

"As used in Title LVII [57] of the Revised Code:

"(A) Personal property' includes every tangible thing that is the subject of ownership, whether animate or inanimate, including a business fixture, and that does not constitute real property as defined in section 5701.02 of the Revised Code. Personal Property' also includes every share, portion, right, or interest, either legal or equitable, * * *. *Personal Property' does not include money as defined in section 5701.04 of the Revised Code, motor vehicles registered by the owner thereof, or for purposes of any tax levied on personal property, patterns, jigs, dies, or drawings that are held for use [*35] and not for sale in the ordinary course of business except to the extent that the value of the patterns, jigs, dies, or drawings is included in the valuation of inventory produced for sale.*" (Emphasis added.)

In *Gen. Motors Corp. v. Kosydar (1974)*, 37 Ohio St.2d 138, 139, the court stated that a jig "is a holding device that is used with a single part to further machine it, or with more than one part in order to position the parts for further operations such as welding, bolting or assembling." Later, the Supreme Court of Ohio in *Timken Company v. Lindley (1985)*, 17 Ohio St.3d 85, upheld this board's definition of a jig as follows:

"The board adopted an expanded approach to the definition of a jig.' The Board defined jigs' in this manner: *jigs are devices which perform a holding and positioning function during machining or processing operations.*' The fact that those items exempted as jigs' by the board hold machining tools or the product as it is tested, rather than the part as it is machined or ground does not automatically eliminate those items from the R.C. 5701.03 exemption. Case law stresses that [*36] the function of a holding device is paramount in determining its character rather than a vintage dictionary definition. *General Motors, supra*. We agree that the definition applied by the board is within the contemplation of R.C. 5701.03." (Emphasis added.)

The personal property at issue consists of portions of hydraulic and mechanical presses, steam hammers, and vertical turning machines or lathes. Appellant presented the testimony of two employees, Daniel J. Dattilio, staff mechanical engineer, and Stephan Nemeth, mechanical engineer and maintenance manager for aerospace and industrial products. The components and function of the presses, hammers, and vertical turning lathes were testified to at length on direct and cross-examination.

A typical hydraulic press applies hydraulic force to a moving crosshead. The moving crosshead is used to raise and lower the upper die. Beneath the crosshead is a bolster plate, the die holder. A hard plate, which has a series of slots and clamps, is attached to the die holder. The upper die is attached to the hard plate. The entire crosshead assembly is accurately aligned and mechanically held together. There is a [*37] similar arrangement at the bottom of the press. There is a moving table that is clamped and held into position under the press. The floor level is only part of the moving table; the majority of it sits below floor level and houses the lower die and corresponding components. H.R. III at 138-149.

The mechanical presses have an electric motor which drives a whole series of belts. The belts drive a shaft which runs to the other side of the press. The driving gear drives a flywheel which is a heavy weight which is moved by the motor. The flywheel is constantly rotating its energy to the crankshafts. The shafts translate their motion through a connecting rod. The connecting rod is attached to the slide, which has jibs that guide it downward in the frame of the press. Attached to the slide or the ram is the die holder, a plate, and then the upper die. The lower die is secured to the lower die holder. The mechanical presses always sit down in the foundation. Larger presses go down into the ground, whereas smaller presses sit on the floor and can be moved around. The components are clamped and keyed much like the hydraulic presses. H.R. III at 167-176.

The vertical turning lathe is a machine [*38] that has a chuck, or table, that rotates on a vertical axis, and it holds a part in position and alignment and clamps it in place. It has stationary tools on both horizontal and vertical planes that hold the metal cutting tools which operate the machine. The tools are activated at a controlled speed for machining the part or product. The machine contains a sliding crosshead that houses the tool in the cutting position. The crosshead has a ram which actually does the feed cutting. It is engaged with a screw, and the control feed moves vertically, cutting or displacing metal. H.R. IV at 10-11, 16-17.

The steam hammer contains a cylinder that is powered by steam. It houses a ram that weighs about the capacity of the machine. The cylinder is supported by two side frames and sits on an anvil. H.R. IV at 49. The top die is connected

to the ram, which forms the product, and the bottom die is connected to the sowblock, both of which are keyed, and the sowblock is keyed to the anvil. The lower die cannot be attached to the anvil because the lower die takes all the impact and is replaced from time to time. The alignment of the dies is important to avoid making a bad product. H.R. IV at 54-62. [*39]

The appellant has claimed that certain parts of each press, hammer, and vertical turning lathe ("VTL") are jigs and therefore, exempt from taxation. Joseph Catey, assistant administrator of the property division of the Ohio Department of Taxation, testified that after the *Timken* case, the department acknowledged the fact that inherent in some machines are components which function as jigs. Utilizing the definition that a jig is a device that performs a holding or positioning function during machining or processing operations, Mr. Catey opined that certain parts of the hydraulic and mechanical presses, the steam hammers, and the VTLs are indeed jigs.

Specifically, as to the hydraulic presses, the appellant claims that the moving table, the lower hard plate with clamps, and the bolster which is attached to the moving table are jigs for the lower die. The upper hardplate, bolster, moving crosshead and ram constitute the jigs for the upper die. Mr. Catey testified that it would be the department's position that the hardplates and keys that hold the dies to the hardplates are jigs. The other components either deliver or absorb the energy necessary to shape the product. As to the mechanical [*40] presses, the appellant claims that the wedge, adjustment mechanism, lower and upper die holders, and the ram assembly qualify as jigs. Mr. Catey testified that only the upper and lower die holders would qualify as jigs. The function of the ram is to deliver the energy necessary to manufacture the product.

Regarding the steam hammers, the appellant claims that the ram (hammer), sowblock, and anvil qualify as jigs. Mr. Catey regarded the ram as a jig because the die is attached to the ram. He considered the sowblock to be a jig using the same reasoning. The anvil would not qualify because its function is to absorb great amounts of energy when the ram falls.

Lastly, the appellant claims that the jigs associated with the VTLs are the table/chuck, including the jaws, the crosshead or rail, the tool holders that are mounted on the crosshead and rail, the vertical tool holder, and the horizontal tool slides. Mr. Catey testified that the part of the machine labeled tool holder would qualify as a jig. The vertical and horizontal tool slides would not be jigs without knowing exactly what the tool is. However, he stated that the table/chuck, jaws and pie-shaped sections depicted in exhibit 37 [*41] would qualify as jigs.

Giving consideration to all the testimony, exhibits, and arguments set forth in the respective briefs regarding what portion of the personal property qualifies as jigs, we find that the components identified by Mr. Catey were correctly identified as jigs. Those components performed a holding and positioning function during machining or processing operations. We agree with appellee's contentions that *Timken* stressed function over form. Although the appellant's witnesses made it quite clear that perfect alignment and stability are necessary for its forging process and that the items it claims are jigs contribute in some manner to that alignment and stability, the primary function of the items is not to hold or position during machining or processing. We acknowledge that the components we determined are jigs are also attached to other components of the machinery, but the mere attachment does not define the function of the component. Not every component that contributes in some remote way to alignment or stability qualifies as a jig. All the components interact to achieve the desired product. It is the precise function of the component which determines its qualification [*42] as a jig.

Although this board has made a determination that certain components of the machinery and equipment qualify as jigs, the appellant still has the burden of proving the value of the jigs. Appellant's witnesses, Mr. Dattilio and Mr. Nemeth, expressed opinions of value of the jigs based on their extensive experience regarding the machines and the utilization of price quotes from suppliers. The record reflects that the witnesses solicited price quotes and estimates from Siempelkamp Pressen Systeme, Erie Press Systems, and Giddings and Lewis Machine Tools. Appellant contends that the opinions of Messrs. Dattilio and Nemeth provide competent, probative evidence of the value of the portions of the machines that are jigs. Counsel for the Tax Commissioner and counsel for the boards of education in his amici curiae brief both argue that the price breakdowns are only estimates; they are not even estimates of the costs of the equipment in issue, but are estimates for similar machines.

Counsel for the appellant cites *Natl. Distillers & Chem. Corp. v. Limbach* (1994), 71 Ohio St.3d 214, in support of his position that estimates and percentages constitute competent, [*43] probative evidence. In *Natl. Distillers*, the director of engineering who had supervised several expansion projects, and managed and reviewed the work of outside engineers, testified to a percentage he believed constituted the cost charged by outside engineers for actual engineer drawings. This board accepted the engineer's estimate as competent, probative evidence of the cost of the drawings. We

find appellant's reliance on *Natl. Distillers* is misplaced. Although the engineer testified that his number was just his "best estimate," his estimate was based on actual costs that were charged by the outside engineers. In the instant matter, the appellant's witnesses based their percentages of cost on quotes pertaining to similar machinery. We acknowledge that Messrs. Dattilio and Nemeth are engineers with many years of experience in the installation, repair and maintenance of the presses, steam hammers, and VTLs in issue. We also acknowledge that the two engineers are familiar with the vendors from which they received the quotes, and that said vendors had supplied some of the machinery at Cleveland Works. However, the quotes are not for the specific machines owned by the appellant. [*44] Appellant has admitted that the quotes are for similar machines. Further, as noted by counsel for the Tax Commissioner, the persons supplying the quotes and estimates for the various parts of the machinery did not appear and testify before this board regarding the method used to determine the percentages and costs, or their qualifications to do so.

Counsel for the Tax Commissioner and counsel for the boards of education cite *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506 and *Defiance Precision Products*, supra. In *United Tel. Co. of Ohio*, the court found that statistical estimates from random samples of grid maps and work orders could not be used to meet the burden of proving the amount of dead and bad pairs when the appellant chose not to reconstruct all of the grid maps and work orders. The present case is analogous. Alcoa chose to submit quotes and estimates based on similar equipment instead of the cost of the actual machinery at Cleveland Works.

In *Defiance*, price quotations were obtained from a dealer for equipment. Defiance claimed that a portion of each quotation represented hard tooling. Defiance arrived at a percentage [*45] of the equipment that represented hard tooling. This information was used to prepare an estimate of its book costs of machinery and equipment that could be attributed to hard tooling. This board found that the evidence was not competent or probative of the value of the hard tooling. We are aware that in the present case Alcoa presented the testimony of engineer's familiar with the equipment; however, that fact does not elevate the estimates and quotes to the level of competent or probative evidence of the costs attributed to the jigs.

Consequently, we find that the appellant has failed to provide competent, probative evidence of the amount and value of the components it claims are jigs. The appellant has failed to rebut the presumption that the findings of the Tax Commissioner are valid. *Hatchadorian*, supra. Therefore, we find that the Tax Commissioner's final order as it relates to the jigs must be, and hereby is, affirmed.

IV

MACHINERY REBUILT/REMOVAL OF ORIGINAL COST

The final specification of error involves machines that the appellant claims were either rebuilt or had parts replaced. Appellant claims that a portion of the original cost should [*46] be removed when the additional costs are capitalized. Deborah Ann Dillinger, manager of property taxes for Alcoa, is responsible for preparing and filing the personal property tax returns for Alcoa. Ms. Dillinger testified regarding the original costs and the costs of the rebuilds or replacements for the four assets in issue. (See exhibits 18, 19, 20, and 21.) Exhibit 22 is a rebuild cost adjustment summary for the four assets. Ms. Dillinger reviewed the property records for the assets and determined that replacements were made and additional costs were capitalized without removing any of the original costs. Using the Marshall Valuation Service, the appellant calculated the portion of the original cost that had been replaced by the rebuilds that should be removed from the original cost of the asset.

Mr. Catey testified that the Department of Taxation also utilizes the Marshall Valuation Service to remove original costs from an asset that has undergone a rebuild by deflating the cost of the rebuild back to the original year of acquisition and removing it from the original asset. Mr. Catey stated that there is not much difference between the methodology used by Ms. Dillinger and the [*47] methodology used by the department.

Counsel for the Tax Commissioner argues in his brief that the methodology used by Ms. Dillinger produces an estimate which may not be reliable. In light of Mr. Catey's testimony that the department uses basically the same methodology for the same purposes, we find appellee's argument to be without merit. Since the Tax Commissioner has not produced any evidence that the records utilized by Ms. Dillinger were incomplete or inaccurate, we find that the appellant has proved its right to the relief requested as shown on appellant's exhibit 22.

V

In conclusion, giving consideration to the record in this matter, the statutes and case law, it is the decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner is affirmed in part and reversed in part in conformity with this decision and order.

BOARD OF TAX APPEALS

RESULT OF VOTE	YES	NO	DATE
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Ms. Jackson			[ILLEGIBLE WORD]
Ms. Margulies			[ILLEGIBLE WORD]
Mr. Eberhart			[ILLEGIBLE WORD]

§ 5717.04. Appeal from decision of board of tax appeals to supreme court; parties who may appeal; certification

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of budget and management, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be certified, or by any other person to whom the board certified the decision appealed from, as authorized by *section 5717.03 of the Revised Code*.

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

In all such appeals the tax commissioner or all persons to whom the decision of the board appealed from is required by such section to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

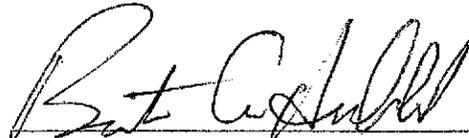
Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

HISTORY:

GC § 5611-2; 107 v 550; 116 v 104(123), § 2; 118 v 344(355); 119 v 34(49); Bureau of Code Revision, 10-1-53; 125 v 250 (Eff 10-2-53); 135 v S 174 (Eff 12-4-73); 137 v H 634 (Eff 8-15-77); 140 v H 260 (Eff 9-27-83); 142 v H 231. Eff 10-5-87.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant 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 & Pease, LLP, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216-1008, attorneys for appellee, on this 20th day of February, 2007.



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