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IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

SHILOH AUTOMOTIVE, INC.,	:	
	:	
Appellant/Cross-Appellee,	:	
	:	Case No. 06-1384
v.	:	
	:	Appeal from BTA
WILLIAM W. WILKINS, TAX	:	Case Nos. 2004-M-380; 2004-M-1283
COMMISSIONER OF OHIO,	:	
	:	
Appellee/Cross-Appellant.	:	<b>REPLY BRIEF OF APPELLEE/CROSS-</b>
	:	<b>APPELLANT</b>

**A. Introduction**

In our initial brief we responded to the appeal filed by Shiloh Automotive, Inc. (SAI) seeking a reduction in the assessed value of its machinery and equipment that had previously been owned by MTD Products, Inc. (MTD). In its appeal to this Court, SAI seeks to overturn the Commissioner's and BTA's rejection of SAI's valuation challenge. The Commissioner and the BTA rejected SAI's exclusive reliance on what SAI asserted was a previous "arm's-length" November 1, 1999 sale of those assets. We detailed why that sale did not support any reduction in the valuation of SAI's machinery and equipment as assessed by the Commissioner.

The November 1, 1999 sale was not an arm's-length sale on the open market. It was a closed, related-party sale between SAI's immediate parent corporation, Shiloh Industries, Inc., and Shiloh Industries, Inc.'s own parent corporation, MTD, of MTD's automotive division assets. This Court recently again reaffirmed that non-arm's-length sales are properly rejected as probative evidence of true value. *Strongsville Bd. of Edn. v. Cuyahoga Bd. of Rev.* (2007), 112 Ohio St.3d 319. In fact, the Court, in citing earlier precedent, emphasized that characterization of

a sale as “arm’s-length” may be defeated by the absence of any one of three separate criteria, as follows:

An arm's-length transaction possesses three primary characteristics. “[I]t is voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest.” *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio St.3d 23, 25, 546 N.E.2d 932. **The absence of even a single one of these factors is sufficient to demonstrate that a transaction was not conducted at arm's length.** See *Kroger Co. v. Hamilton Cty. Bd. of Revision* (1993), 67 Ohio St.3d 145, 147, 1993 Ohio 227, 616 N.E.2d 877 (finding lack of arm's-length transaction based on the absence of a sale on the open market). (Emphasis added.)

Applying *Strongsville* and a long-line of this Court’s previous decisions here, the related-party aspect of the November 1, 1999 sale means that the parties did not act “in their self-interest”; they acted in their collective, mutual interest arising from their inextricable, on-going ownership affiliation. Likewise, the closed transaction nature of the November 1, 1999 sale means that the sale did not “take place on the open market.”

As will be detailed below, the absence of an arm’s-length sale here is integral to the resolution of our cross-appeal, as well as to the appeal filed by SAI.

**B. The Commissioner filed his cross-appeal as a protective matter. Specifically, if the BTA’s directive to the Commissioner upon remand is given its plain meaning and effect, as we have urged in our cross-appeal, the BTA acted reasonably and lawfully in issuing that directive. However, to the extent that the BTA’s directive could be interpreted otherwise, so as to conflict with the meaning we have ascribed to it, we have filed this protective cross-appeal. An interpretation of the BTA’s directive in conflict with our amplification of that directive would constitute an unreasonable or unlawful BTA holding.**

Pursuant to our cross-appeal, we have asked the Court to adopt, in clear and explicit language, what we believe is the plain meaning and effect of the BTA’s directive to the Commissioner upon remand, but in greater detail than the BTA set forth in its Decision and Order. In other words, we ask the Court to rule on whether our amplification of the BTA’s

directive is reasonable and lawful. We do so because, to the extent that the BTA directive might be read otherwise, the BTA's directive would be unreasonable and unlawful.

Accordingly, we have filed our cross-appeal to protect against any such unreasonable and unlawful reading of the BTA's directive as could arise if, instead of filing this cross-appeal, the Commissioner upon remand simply applied his amplification of the BTA's directive. Specifically, SAI could then subsequently appeal our interpretation of the BTA's directive to the BTA, and the BTA could then potentially interpret its previous directive contrary to the Commissioner's amplification. Any appeal by the Commissioner to such interpretation by the BTA in conflict with our amplification would be limited in scope to determining the objective meaning of the BTA's directive – not to whether the directive was reasonable and lawful.

In response to our cross-appeal, SAI's reply/answer brief hardly discusses the matter at all (devoting less than one full page to it). SAI erroneously suggests that the BTA's directive upon remand is simply not properly reviewable by this Court, but then, nonetheless, urges its own interpretation of the BTA's directive (which greatly differs from the Commissioner's amplification of the BTA's directive). See SAI's reply/answer brief at 17-18. Thus, this Court's consideration of our cross-appeal is hardly "premature," as SAI would have it. *Id.* Rather, it will resolve a genuine issue for which SAI has taken a contrary position on the merits.

Moreover, the Commissioner has timely raised this issue by specifying this potential error in his cross-appeal to this Court. Thus, under R.C. 5717.04, the Court has been conferred with jurisdiction to determine whether the Commissioner's amplification of the BTA's directive upon remand, as set forth in our cross-appeal and briefing, is reasonable and lawful. We now proceed with a discussion of the merits of our amplification of the BTA directive upon remand.

**C. The Commissioner's amplification of the BTA's directive upon remand reasonably and lawfully gives full meaning and effect to the directive by rejecting the November 1, 1999 sale as probative evidence and instead utilizing MTD's arms-length purchase prices for the various machinery and equipment as incurred by MTD in the ordinary course of business over the years. In accordance with the BTA's directive, the Commissioner then will apply to those acquisition costs his prescribed rates of depreciation and obsolescence under his "true value computation" based upon the original acquisition years that such items of machinery and equipment were acquired by MTD.**

Under Proposition of Law No. V of our initial brief we have already outlined our amplification of the BTA's directive upon remand and the reasonable and lawful grounds for that amplification. Under our amplification of the BTA's directive, the Commissioner shall value the machinery and equipment previously owned by MTD using MTD's acquisition costs and applying the prescribed true value allowances for the property for SAI's industry. That is, for SAI's Schedule 2 "production machinery and equipment," the Commissioner shall apply Class Life V true value allowance percentages, and for SAI's Schedule 4 non-production machinery and equipment and furniture and fixtures the Commissioner shall apply Class Life III percentages. The applicable Class Lives to apply should not be in controversy as SAI itself, regarding its taxable personal property acquired after the November 1, 1999 sale, has self-reported using these same Class Lives. See its 2001 personal property tax return at pages 556-571 of the statutory transcript certified by the Commissioner to the BTA.

As noted, SAI's reply/answer brief does not contain any commentary on the reasonableness or lawfulness of the Commissioner's amplification of the BTA directive, other than a statement that SAI disagrees with it. Thus, we ask the Court to hold our amplification of the BTA directive to be reasonable and lawful, recognizing that SAI itself has opted not to directly address our analysis. The reasons we have advanced in support of our amplification of the BTA's directive

stand entirely unchallenged. We now proceed to discuss the interpretation of the BTA's directive upon remand as urged by SAI.

- D. SAI's interpretation of the BTA's directive to require the Commissioner to use a December 31, 1998 internal settlement memorandum to value the machinery and equipment upon remand conflicts with the BTA's holding that the November 1, 1999 sale was not an arm's-length sale, and thus that such sale should be rejected as probative evidence.**

**Moreover, a personal property taxpayer is not entitled to "memo treatment" absent consent of the Commissioner. By the memo's own terms, the Commissioner is justified in withholding consent under circumstances where he determines "newly established values" do not "represent true value in money" on account of a sales transaction not constituting an "arms length" sale.**

Central to interpreting the BTA's directive to the Commissioner upon remand is the BTA's rejection of the November 1, 1999 sale as constituting probative evidence of true value. The BTA reasonably and lawfully rejected SAI's claim that the sale was at arm's length. *BTA Decision and Order* at 14. Thus, the BTA's directive to the Commissioner upon remand clearly contemplates that the Commissioner not use SAI's allocation of the total November 1, 1999 sales price to the machinery and equipment. Rather, as the BTA's directive expressly provides: "We agree with the Commissioner that MTD's historical costs are a more probative basis for the value of the property," and to those historical acquisition costs, the Commissioner is to "properly apply the depreciation rates in accordance with MTD's acquisition history." *Decision and Order of the BTA* at 13.

The interpretation that SAI has given the BTA's directive, however, would not use MTD's historical acquisition costs and then apply the Commissioner's prescribed true value allowance percentages for depreciation and obsolescence. Thus, SAI's approach would be in direct violation of the BTA's express language.

Specifically, SAI urges that an Ohio Department of Taxation internal settlement memorandum dated December 31, 1998, captioned "Valuation of Tangible Personal Property Acquired in a Lump-Sum Acquisition of a Complete Business, Division or Entire Plant" (Ex. 5) be used. But that settlement memorandum requires that the starting point in determining true value be "newly-established values," typically as established from an arm's-length sale. In other words, this memo contemplates the use of a new lump-sum purchase price for the assets. Here, the BTA's directive upon remand orders that "MTD's acquisition costs" be used as the starting point in the valuations. Those acquisition costs are not "newly-established values."

Moreover, the treatment outlined in the memo applies only where the Commissioner has determined that the personal property values from a lump-sum acquisition reflect "true value in money." Namely, the memo provides that: "If the Tax Commissioner determines that as a result of the particular event, the 'book values' were not re-established at 'true value'; or the new values on the books are not representative of true value, other information will be used for determining true value." Ex. 5, page two.

Here, as determined by both the Commissioner and the BTA, the asset values that were assigned by SAI and Shiloh Industries, Inc. to MTD's automotive division assets following the November 1, 1999 sale did not reflect "true value." Thus, under the memo, use of such non-arm's-length sale figures is expressly foreclosed.

Finally, the memo by its terms is consensual in the sense that both the Tax Commissioner and the taxpayer must agree for the memo to apply, as follows: "[i]ts [the memo's] use is contingent upon mutual consent between the taxpayer and the Tax Commissioner, as evidenced by a written agreement." Ex. 5, page one. Such mutual consent is obviously not met here, as the

Commissioner has, throughout the course of the case, strongly rejected the use of the November 1, 1999 sale to value the machinery and equipment at issue.

At bottom, SAI's interpretation of the BTA directive relies upon the November 1, 1999 sale constituting an arm's length transaction. We review in the final sections of this brief key facts showing just why this is not so.

**E. As found by the Commissioner and BTA in their decisions below, immediately prior to the November 1, 1999 sale, MTD held a controlling 51% ownership interest in Shiloh Industries, Inc. SAI's recasting of its facts in its answer/reply brief filed with this Court contesting for the first time the 51%-ownership finding is jurisdictionally barred, violates the proper standards of judicial review, and is wholly contradicted in the evidentiary record.**

Remarkably, in its reply brief SAI chose for the first time to dispute the previous factual representations that SAI itself had made in its initial brief filed with this Court concerning MTD's ownership in Shiloh Industries, Inc. prior to the sale. In its initial brief, SAI had correctly characterized the ownership interest that MTD held in Shiloh Industries prior to the sale as constituting a "51% interest." See, for example, the chart on page 3 of its initial brief showing "**~51%**" interest held by MTD in Shiloh Industries "immediately prior to the sale."

In fact, SAI's first proposition of law in its initial merit brief expressly so characterizes MTD's pre-sale ownership interest in Shiloh Industries, Inc. as a "51% ownership interest." That first proposition of law provides as follows: "**MTD's 51% ownership interest in Shiloh** [Shiloh Industries, Inc.] did not preclude the parties from dealing at arm's length when negotiating the sale of MTD's Automotive Division to Shiloh (emphasis added)." SAI's initial merit brief at 20.

In its reply brief SAI now challenges its own previous characterization, which had accorded with the Commissioner's and BTA's own findings, without even acknowledging that it is doing so. Under the heading "Misstatement of Facts" of its reply brief, MTD newly asserts that, prior to the sale, MTD owned, directly or indirectly, only 42.8% of the stock of Shiloh

Industries. See SAI's reply/answer brief at 3-4. In other words, SAI now contests its own previous admission that MTD Products, Inc. held a 51% controlling interest in Shiloh Industries, Inc.; that such interest was a "majority interest"; and, thus, that MTD was the "parent" corporation of Shiloh Industries, Inc. Id.

Yet, both the Commissioner and the BTA expressly found that, prior to the sale, MTD owned or controlled a 51% interest in the shares of Shiloh Industries. In his final determination, the Commissioner found as follows: "MTD, prior to the acquisition, controlled 51% of the outstanding shares of the applicant \*\*\*." S. Supp.1. Similarly, the BTA found as follows: "MTD is the majority shareholder of Shiloh, owning or controlling 51 percent of the shares prior to the sale and 56 percent after." *BTA Decision and Order* at 10.

SAI's sudden reinvention of the facts should be jurisdictionally barred, given the omission of any challenge in SAI's notices of appeal to the BTA and this Court to the Commissioner's and BTA's contrary findings. In other words, in its notices of appeal, SAI failed to challenge such findings and therefore failed to confer jurisdiction upon the BTA and, subsequently upon this Court, to challenge them. In the words of the relevant appeal statutes, SAI failed to "specify error." R.C. 5717.02 (governing appeals to the BTA) and R.C. 5717.04 (governing appeals to this Court). For the Court's convenience we attach a true and accurate copy of SAI's notice of appeal to the BTA. Appx. 1-4.

This Court has consistently held that the specification requirements of R.C. 5717.02 and R.C. 5717.04 are mandatory, jurisdictional requirements which must be strictly complied with to invoke the jurisdiction of the BTA and the Court to consider an issue. *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579; *Lenart v. Lindley* (1980), 61 Ohio St.2d 110; *Manfredi Motor Transit Co. v. Limbach* (1988), 35 Ohio St.3d 73; *Dana Corp. v. Limbach* (1991), 60 Ohio St.3d

26; *Cleveland-Cliffs Iron Co. v. Limbach* (1991), 61 Ohio St.3d 349. In *Queen City Valves*, the Court pointed out that the language of the statute required that the BTA was “to be advised specifically of the various errors charged to the Tax Commissioner.” 161 Ohio St. at 583. After noting that the statute “requires in plain language that the errors complained of be specified[,]” the Court looked to the definition of the term “specify”:

The word, “specify,” according to Black’s Law Dictionary (4 Ed) means “to mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize; or to distinguish by words one thing from another.”

*Id.*

Measured against this standard, SAI’s notices of appeal to the BTA and to this Court cannot be viewed as having specified as an error the Tax Commissioner’s and BTA’s findings concerning the 51% ownership interest. In fact, SAI’s notices of appeal to the BTA and to this Court are silent as to the Commissioner’s and BTA’s 51%-interest findings.

In proceedings before the BTA and this Court, the taxpayer should not be able to “keep its powder dry” through the omission in its notices of appeal of any challenge to such a fundamental finding. Thus, SAI should be barred here from invoking this Court’s jurisdiction to consider a challenge to such finding now.

Moreover, even putting aside these jurisdictional bars, the applicable standards of judicial review should preclude any such recharacterization of the facts. Namely, the Commissioner’s findings 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 SAI’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.

At the BTA evidentiary hearing, SAI's own witnesses repeatedly testified that, prior to the November 1, 1999 sale, MTD owned or controlled more than a 50% interest in Shiloh Industries, Inc. See, e.g., the testimony of SAI's president, Theodore K. Zampetis, Supp. 102; the testimony of Ronald Houser, former executive vice president of MTD, Supp. 171 ("at that point in time [the sales date] MTD owned approximately 51% of Shiloh"); and the testimony of Albert Vondra, a PricewaterhouseCoopers' accountant, Supp. 262-262. Thus, the evidence adduced at the BTA fully supported the Commissioner's express findings concerning the ownership interest held by MTD in Shiloh Industries immediately prior to the sale: MTD, at that time, held a 51% ownership interest in Shiloh Industries, Inc.

In reviewing decisions of the BTA, this Court is limited to its statutorily delineated duties in R.C. 5717.04 of making a determination from the record whether the BTA's decision is "reasonable and lawful." *Citizens Financial Corp. v. Porterfield* (1971), 25 Ohio St.2d 53; *Buckeye Power v. Kosydar* (1973), 35 Ohio St. 2d 135; *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St. 2d 13; *Conalco v. Bd. of Revision* (1978), 54 Ohio St. 2d 330; *Alcoa v. Kosydar* (1978), 54 Ohio St.2d 477. *Episcopal Parish v. Kinney* (1979), 58 Ohio St. 2d 199, 201; *Operation Evangelize-Youth Mission, Inc. v. Kinney* (1982), 69 Ohio St.2d 346, 347. It is

not a trier of fact de novo. *Id.* Nor is it the function of this Court to substitute its judgment on factual issues for that of the BTA. *Id.*

As applied here, the BTA acted reasonably and lawfully in upholding the Commissioner's express finding. SAI failed to establish, as was its burden, that the Commissioner's finding of a 51% controlling interest held by MTD was "clearly unreasonable or unlawful." Rather, SAI's own witnesses testified to the very same effect.

To be sure, SAI's reply brief attempts to support its reinvention of the facts with a reference to the evidentiary record, but SAI's citation actually shows that its previous characterization of the facts (i.e., pursuant to its initial brief filed with this Court) is correct. Namely, in its reply brief, SAI cites to BTA Exhibit 1, Shiloh Industries, Inc.'s Proxy Statement, at pages 36 and 37, Supp. 352-353. Yet, the cited reference in the Proxy Statement should only further cement the conclusion that, prior to the sale, MTD owned over a 51%-controlling majority of the shares of Shiloh Industries, Inc. Namely, at page 36 of the Proxy Statement, under the Column "Amount and Percentage of Beneficial Ownership of Common Stock," MTD Products, Inc. is reported as owning "51.3%" of Shiloh Industries, Inc.'s common stock. Supp. 352. Then, on the next page of the Proxy Statement, Supp. 353, under enumerated note (5), MTD's 51.3% ownership of Shiloh Automotive's stock is expressly stated to have included 1,104,400 shares of Shiloh Common Stock held by the MTD Products Pension Pooled Fund and 1,000,000 shares of Shiloh Common Stock held by Summit Insurance Company of America, a wholly owned subsidiary of MTD \*\*\*."

In other words, the clear, unambiguous language of the Proxy Statement shows that MTD exercised sufficient control over the Shiloh Common Stock held by the pension fund, as well as the Shiloh Common Stock held by MTD's wholly-owned subsidiary Summit Insurance

Company of America, to be considered the “beneficial owner” of the shares held by those two entities, as well as of the shares that it held directly. Moreover, this characterization of “beneficial ownership” belies the bare, unsupported assertion in SAI’s reply/answer brief that the pension fund’s shares were controlled by an “independent trustee.” In fact, the evidentiary record does not disclose any information concerning the actual terms and conditions concerning the operation of the pension fund or the nature of the ownership interest that was held by MTD therein. Beneficial ownership is indicative of MTD’s effective control over the shares. SAI’s bare assertion to the contrary -- without any legal or evidentiary support -- should be rejected.

In sum, SAI was right in its initial brief in admitting that, prior to the sale of its automotive division assets to Shiloh Industries, Inc., MTD owned a majority (over-51%) interest in Shiloh Industries, Inc. In other words, SAI was correct in admitting that MTD was Shiloh Industries, Inc.’s parent corporation. This factual statement was a fair and accurate characterization of the evidentiary record. SAI’s belated attempt to rewrite and recharacterize its own Statement of Facts (and to contradict its own Proposition of Law No. 1) should be rejected. The very citations to the evidentiary record that it now relies upon to argue to the contrary hardly support its new, polar-opposite position.

Indeed, fundamentally altering its own proposition of law in its reply brief in itself is a suspect practice. The Court should decline to consider SAI’s new characterization of the facts when they conflict with SAI’s own proposition of law on the point. *Cleveland Mun. School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005), 107 Ohio St.3d 250, 255; and *Litton Sys., Inc. v. Tracy* (2000), 88 Ohio St.3d 568, 573 (holding that the failure of an appellant to present a proposition of law on a point properly constitutes a waiver of the issue). This is particularly so where, as here, the appellant provides no reasonable explanation for the recharacterization.

Finally, in any event, for all the reasons set forth in our initial brief, even if the ownership interest that MTD held in the pension fund shares of Shiloh Industries, Inc. common stock were somehow accepted to be less than a majority interest, MTD's argument should still fail miserably. Even if MTD did not hold a majority interest in the shares of Shiloh Industries, Inc., the November 1, 1999 sale would not thereby be magically transformed to an arm's-length transaction on the open market. Even under SAI's new characterization of MTD's ownership interest, MTD would, prior to the sale, still remain a "related party" holding a substantial and significant ownership interest in Shiloh Automotive, Inc. The sale would remain a closed, non-arm's length transaction.

**F. MTD's historical acquisition costs as reflected on MTD's personal property tax return Forms 937 for the tax year encompassing the November 1, 1999 sale are properly a part of the record before this Court. Any attempt by SAI to exclude such acquisition costs from the record in this case should be jurisdictionally barred because SAI did not challenge in its notice of appeal to this Court the BTA's directive to the Commissioner upon remand requiring the Commissioner to use such acquisition costs in determining the true value of SAI's machinery and equipment.**

In its reply/answer brief SAI claims that to the extent that the facts set forth in the Commissioner's initial merit brief relied upon the contents of the Forms 937 "True Value Computation" Forms attached as part of MTD's Ohio personal property tax return for the 2000 tax year, such facts should be disregarded. These Forms 937 were attached to the Appendix to our initial brief at pages 67-77.

As set forth in the "Certification" statement included with those Form 937s, see page 66 of the Appendix to our initial brief, the Forms 937 filed by MTD constituted evidence considered by John Nolfi, the Commissioner's Audit Manager (and now Administrator of the Personal Property Tax Division) in performing the audit at issue. Specifically:

The originals of the attached Documents [the Forms 937] were utilized by the undersigned [John Nolfi] in the Shiloh Automotive, Inc. audit referenced above, and were the source of the acquisition cost figures for MTD's production machinery and equipment cited in the undersigned's Statement of Facts & Conclusions, which was included in the Tax Commissioner's Statutory Transcript certified to the Board of Tax Appeals and has been included in the Second Supplement filed with the Ohio Supreme Court in the matter upon appeal.

A review of the "Statement of Facts & Conclusions" authored by then-Audit Manager Nolfi confirms that in issuing his audit report he did, in fact, utilize the historical acquisition costs reported by MTD on its Forms 937 attached as part of MTD's Ohio personal property tax return for the 2000 tax year. The Court is referred particularly to paragraph 21 of the Statement of Facts & Conclusions, wherein Mr. Nolfi noted that "the predecessor [MTD Products, Inc.] invested (@ cost) roughly \$30,673,001 in M& E [machinery and equipment during the four years before the acquisition." See S. Supp. 9, Statutory Transcript at 217.

The \$30,673,001 figure set forth by Mr. Nolfi in his Statement of Facts & Conclusions comes directly from the Forms 937. This is shown from a review of the Forms 937. One has only to add the amounts of acquisition costs shown in the "disposal" column of the Forms 937 for the "Class Life 5" production machinery and equipment located in the Cuyahoga County and Medina County taxing districts for the tax years 1996 through 1999. For the Medina County Schedule 2 property the amounts total to \$9,390,302, i.e., \$361,928 (1999 acquisitions) + \$3,141,525 (1998 acquisitions) + \$3,808,146 (1997 acquisitions) + \$2,078,703 (1996 acquisitions). See Appendix to the Commissioner's initial brief at 69. For the Cuyahoga County Schedule 2 property the amounts, total to \$21,282,699, i.e., \$10,803,690 (1999 acquisitions for "Cleveland") + \$4,615,498 (1998 acquisitions for "Cleveland") + \$3,937,992 (1997 acquisitions for "Cleveland") + \$1,816,631 (1996 acquisitions for "Cleveland") + \$39,600 (1998 acquisitions for "tool room") + \$69,288 (1996 acquisitions for "tool room"). See Appendix to the

Commissioner's initial brief at 67-68. When the Medina County total Schedule 2 property amount for the 1996-1999 taxable years of \$9,390,302 is added to the Cuyahoga County amount of \$21,282,699, the sum is precisely the \$30,673,001 figure set forth by Mr. Nolfi at ¶21 of his Statement of Facts & Conclusions. S. Supp.9.

A review of the BTA hearing transcript shows that SAI itself, as well as the Commissioner's auditing agent, relied upon MTD's historical acquisition costs. SAI did so for purposes of determining the allocation of the purchase price for the November 1, 1999 sale. Specifically, the amount of the purchase price (as calculated by SAI and Shiloh Industries, Inc.) to be assigned to the fixed assets was then further allocated based upon the net book values (their historical acquisition cost less book depreciation) of the various fixed assets as of the November 1, 1999 sales date. Supp. 234. The joint reliance by the parties on the historical acquisition cost figures paid by MTD to originally acquire these assets should, in itself, make these figures, as reflected on MTD's personal property tax returns, part of the evidentiary record. But there is an even more fundamental basis upon which these acquisition costs as reflected on the Forms 937 comprise part of the record.

The BTA's directive upon remand makes these acquisition costs part of the record. The BTA clearly contemplates that the Commissioner use MTD's original acquisition costs. See the *BTA's Decision and Order* at 13. MTD's personal property tax return for the 2000 tax year is precisely where these values would be reported. If SAI had a quarrel with the use of these historical cost figures, it was incumbent upon SAI to have specified as error the BTA's directive to the Commissioner requiring the Commissioner to use such figures. This SAI did not do. Thus, SAI should be jurisdictionally barred from seeking to exclude these acquisition costs from the record now.

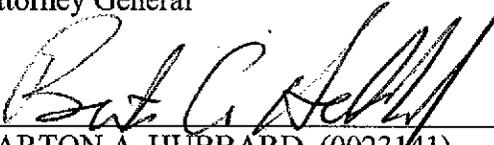
Finally, we note, in any event, that even without consideration of the Forms 937 attached to the Appendix to the Commissioner's initial brief, the evidentiary record, as set forth in the Commissioner's statutory transcript, is replete with acquisition cost information for the MTD automotive division machinery and equipment. Such evidence includes then-Audit Manager Nolfi's statements as to the \$30,673,001 of acquisition costs for production machinery and equipment paid by MTD in the immediately preceding four years prior to the sale relating to the assets at issue here. Similarly, the evidentiary record also includes that the "net book value" of the machinery and equipment transferred to SAI as a result of the sale was \$30,996,995. S. Supp. 25, see also the Commissioner's initial brief at 6-7. These net book values were determined by subtracting book depreciation from the original acquisition costs incurred by MTD to purchase the property. In its briefing, SAI simply ignores this evidence, as if it did not exist.

## CONCLUSION

For all these reasons, this Court should affirm the BTA's and Tax Commissioner's decisions rejecting the November 1, 1999 closed, related-party sale between MTD Products, Inc. and Shiloh Industries, Inc. as probative evidence. Furthermore, the Court should grant the relief we request in our cross-appeal and adopt the language that the Commissioner has proposed in his cross-appeal, or like language, amplifying the BTA's directive to the Commissioner upon remand.

Respectfully submitted,

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**STATE OF OHIO  
BOARD OF TAX APPEALS**

SHILOH AUTOMOTIVE, INC.,	)	
	)	
Appellant,	)	BTA Case _____
	)	
-vs-	)	Property Tax Controversy
	)	
WILLIAM W. WILKINS,	)	
TAX COMMISSIONER OF OHIO,	)	
	)	
Appellee.	)	
	)	
	)	

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**NOTICE OF APPEAL**

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Shiloh Automotive, Inc. ("Shiloh") hereby appeals to the Ohio Board of Tax Appeals the Tax Commissioner of Ohio's ("Commissioner") Final Determination with respect to the company's Ohio personal property tax liability for the 2001 tax year. A copy of the referenced Final Determination, which was issued on March 5, 2004, is appended to this Notice of Appeal.

Shiloh contends that the Commissioner, in his Final Determination, erred in the following respects

1. The Commissioner unreasonably and unlawfully concluded that Shiloh's purchase of the assets associated with the MTD Automotive Division of MTD Products, Inc. ("MTD") was not an arm's length transaction.

2. The Commissioner unreasonably and unlawfully concluded that Shiloh's purchase of the assets associated with the MTD Automotive Division of MTD was not an open market transaction between independent parties.
3. The Commissioner unreasonably and unlawfully concluded that Shiloh's purchase of the assets associated with the MTD Automotive Division of MTD was a bargain purchase.
4. The Commissioner unreasonably and unlawfully concluded that the amount paid MTD by Shiloh for the assets associated with the MTD Automotive Division, and recorded by Shiloh in its financial books and records as Shiloh's investment in such property, does not reflect the true value of such property as of the date of Shiloh's acquisition of such property.
5. The Commissioner unreasonably and unlawfully concluded that the portion of the amount paid MTD by Shiloh for the assets associated with the MTD Automotive Division that was allocated to personal property used in business in Ohio, and recorded by Shiloh in its financial books and records as Shiloh's investment in such property, does not reflect the true value of such property as of the date of Shiloh's acquisition of such property.
6. The Commissioner conclusion (a) that the amount paid MTD by Shiloh for the assets associated with the MTD Automotive Division and (b) that the portion of the amount paid MTD by Shiloh for the assets associated with the MTD Automotive Division that was allocated to personal property used in business in Ohio does not reflect the true value of such property as of the date of Shiloh's acquisition of such property is inconsistent with the treatment accorded other taxpayers in similar circumstances in violation of the equal protection and due process clauses of the 14<sup>th</sup> Amendment to the U.S Constitution and Article 1, Sec. 2 of the Ohio Constitution.
7. The Commissioner unreasonably and unlawfully concluded that the net book value of the assets associated with the MTD Automotive Division as recorded on the books of MTD as of April 30, 1999 reflects the true value of such property as of the date of Shiloh's acquisition of such property.

8. The Commissioner unreasonably and unlawfully deviated from the provisions of O.A.C. § 5703-3-10 and 11 in that he determined the true value (in Shiloh's hands) of the assets acquired by Shiloh from MTD by reference to the net book value of such assets as recorded on the books of MTD as of April 30, 1999 -- not by the application of the appropriate true value schedule to Shiloh's recorded acquisition cost of such property -- without any evidence that the net book value of the assets as recorded on the books of MTD as of April 30, 1999 accurately reflected the true value of such assets at such time or at any time thereafter.

9. The Commissioner unreasonably and unlawfully denied Shiloh the right to employ the alternate valuation method set forth in the December 31, 1998 Inter-Office Communication authored by the Administrator of the Personal Property Tax Division of the Ohio Department of Taxation captioned: Valuation of Tangible Personal Property Acquired in a Lump-Sum Acquisition of a Complete Business Division or Entire Plant.

Shiloh respectfully requests the Board of Tax Appeals to convene a hearing for the purpose of receiving evidence related to the issues raised above and, ultimately, to reverse the Final Determination issued by the Commissioner to Shiloh with respect to the 2001 tax year.

Respectfully submitted on behalf of Shiloh by:

  
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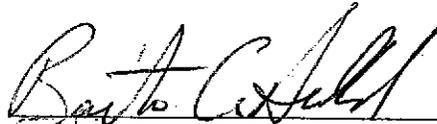
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the forgoing Notice of Appeal was sent by certified mail this 27th day of April, 2004 to William W. Wilkins, Tax Commissioner of Ohio, at his office located in the State Office Tower, 30 East Broad Street, Columbus, Ohio 43216.

  
\_\_\_\_\_  
Charles M. Steines

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the Reply Brief of Appellee/Cross-Appellant was sent by regular U.S. mail to Charles M. Steines, Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190, attorney for appellant/cross-appellant, on this 14 day of March, 2007.

  
BARTON A. HUBBARD  
Assistant Attorney General