

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
ARGUMENT	2

Proposition of Law No. 1:

A statute defining the subjects of taxation, such as R.C. 5701.03(A), is not an exemption statute. Any ambiguities must be construed in favor of the taxpayer. *Goodrich v. Peck* (1954), 161 Ohio St. 202, followed. 3

Proposition of Law No. 2:

Patterns, jigs and dies held for use and not for sale in the ordinary course of business are not subject to personal property tax. R.C. 5701.03(A). The terms “patterns,” “jigs” and “dies” must be construed broadly and given flexible definitions to account for the diversity in manufacturing processes and continuing advancements in technology. Furthermore, the function of a particular device, rather than its form, is paramount in determining whether the device qualifies as a “pattern,” “jig” or “die.” *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85, followed. 3

Proposition of Law No. 3:

Whether items claimed to be exempt as patterns, jigs or dies comport with the flexible definitions required by this Court is a factual question to be determined by the Board of Tax Appeals. This Court may not substitute its judgment for that of the Board on such factual issues. *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85, and *Libby-Owens-Ford Co. v. Collins* (1977), 50 Ohio St.2d 9, followed. 7

Proposition of Law No. 4:

The Board’s jurisdiction is limited to those issues addressed by the tax commissioner in his final determination and specified as error by the appellant in its notice of appeal to the Board. *DeWeese v. Zaino*, 100 Ohio St.3d 324, 2003-Ohio-6502, followed. 11

CONCLUSION..... 14

APPENDIX.....Appx. Page

STATUTES

R.C. 5701.03(A)..... 1

R.C. 5709.01(B)(1) 2

R.C. 5711.01(A)..... 4

R.C. 5711.24 7

R.C. 5717.03(G)..... 9

UNREPORTED DECISIONS

TAMCO Distributors Co. v. Zaino, Ohio BTA Case No. 99-V-461
(Nov. 2, 2001)..... 10

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Alcoa, Inc. v. Zaino</i> , Ohio BTA Case No. 1999-G-1401 (Oct. 22, 2004)	13
<i>Aluminum Co. of America v. Kosydar</i> (1978), 54 Ohio St.2d 477	12
<i>American Book Co. v. Porterfield</i> (1969), 18 Ohio St.2d 49	4-6, 10
<i>Am. Natl. Can Co. v. Tracy</i> (1995), 72 Ohio St.3d 150	8
<i>Anheuser-Busch Companies, Inc. v. Zaino</i> , Ohio BTA Case No. 2003-K-699 (Sept. 24, 2004)	13
<i>Cambridge Glass Co. v. Evatt</i> (1940), 11 Ohio Supp. 125, 19 Ohio Ops. 162	4
<i>Colonial Foundry Co. v. Peck</i> (1952), 158 Ohio St. 296	4-6, 10
<i>Columbus City School Dist. Bd. of Edn. v. Zaino</i> (2001), 90 Ohio St.3d 496	7
<i>DeWeese v. Zaino</i> , 100 Ohio St.3d 324, 2003-Ohio-6502	11
<i>Gahanna-Jefferson Local School Dist Bd. of Edn. v. Zaino</i> (2001), 93 Ohio St.3d 231	7
<i>General Motors Corp. v. Kosydar</i> (1974), 37 Ohio St.2d 138	6
<i>Goodrich v. Peck</i> (1954), 161 Ohio St. 202	3
<i>Libby-Owens-Ford Co. v. Collins</i> (1977), 50 Ohio St.2d 9	7-9
<i>Mong v. B.F. Goodrich Co.</i> (1935), 19 Ohio Law Abs. 198	4
<i>National Tube Co. of New Jersey v. Tax Commission</i> (1937), 5 Ohio Supp. 62, 26 Ohio Law Abs. 523, <i>affirmed</i> , 25 Ohio Law Abs. 619	4
<i>TAMCO Distributors Co. v. Zaino</i> , Ohio BTA Case No. 99-V-461 (Nov. 2, 2001)	3
<i>Timken Co. v. Lindley</i> (1985), 17 Ohio St.3d 85	3-10
<i>United Tel. Co. of Ohio v. Tracy</i> (1999), 84 Ohio St.3d 506	12

Wheeling Steel Corp. v. Evatt (1944), 143 Ohio St. 71 5, 10

STATUTES

R.C. 5701.03(A).....3-4, 11-12

R.C. 5709.01(B)(1) 13

R.C. 5711.01(A)..... 13

R.C. 5711.24 13

R.C. 5717.03(G)..... 12

STATEMENT OF FACTS

The taxpayer utilizes a plastic extrusion molding process to manufacture custom-compounded resins for sale to its customers. The equipment at issue in this case is used by the taxpayer in this extrusion process. A brief summary of the process demonstrates how the equipment is used.

First, the taxpayer mixes natural resin pellets with selected additives, fillers, stabilizers and colors that are necessary to produce the particular product sought by a given customer. The particular mixture is dictated by the customer's needs. The mixture is then loaded into one end of an enclosed extruder screw and barrel assembly (the "Assembly" or "Assemblies"). The Assemblies are enclosed and completely self-contained. Once an Assembly is completely filled, the materials are heated to form a taffy-like substance. The screw, which is the same size as the barrel, then turns in the barrel to create pressure on the molten plastic from all directions, thereby forcing the heated materials out the face of the Assembly on the other end of the barrel through various round, rectangular or hexagonal openings. As the material is forced through these openings, it is immediately cooled and cut to the precise dimensions required by the customer. The taxpayer operates multiple lines in its manufacturing facility in the foregoing manner.

Much has been said by the tax commissioner in an attempt to describe the Assemblies as materials handling equipment. As the evidence demonstrates, however, the Assemblies are not utilized to move the product through the various stages of the manufacturing process like a conveyor belt. Rather, as the Board determined, the Assemblies work as self-contained and integrated units to create applied pressure or force

on the product under manufacture so that a particularly molded plastic pellet is produced pursuant to the customer's desired specifications. The Assemblies perform this function *after* the materials have been mixed and conveyed to the point of production. To say, as the tax commissioner does, that the Assemblies "convey" the resin says too much. More accurately, the screw and barrel operate to apply pressure and thereby force the resin out the face of the Assembly in a uniform and consistent manner. (Appellant's Appx. 15-16, 22; Supp. 5-9, 43, 49.)

ARGUMENT

This case essentially comes down to a single question: What is the function of the Assemblies? The tax commissioner advances the position that the Assemblies function as materials handling devices. The taxpayer argues that the Assemblies function directly, through applied pressure, to shape and mold molten plastic into its final manufactured form.

After reviewing the evidence and testimony presented at hearing, the Board of Tax Appeals agreed with the taxpayer and determined that the function of the Assemblies is consistent with the requirements and definitions of a die. In any event, the functionality of the Assemblies is purely a question of fact, the determination of which is not to be disturbed by this Court on appeal so long as the Board's decision is reasonable based on a review of the record.

Proposition of Law No. 1:

A statute defining the subjects of taxation, such as R.C. 5701.03(A), is not an exemption statute. Any ambiguities must be construed in favor of the taxpayer. *Goodrich v. Peck* (1954), 161 Ohio St. 202, followed.

Contrary to the tax commissioner's analysis in his first proposition of law, the taxpayer is not advancing any "tax exemption claims" in the present case. In this regard, R.C. 5701.03(A) does not exempt any property from taxation. Rather, it defines the term "personal property" and excludes "patterns, jigs and dies" from that definition. Ohio law draws a distinction between that which defines the subjects of taxation in the first instance, and that which separately exempts something from the defined scope. *See, e.g., Goodrich v. Peck* (1954), 161 Ohio St. 202; *TAMCO Distributors Co. v. Zaino*, Ohio BTA Case No. 99-V-461 (Nov. 2, 2001). Because all of the cases cited by the tax commissioner on page 19 of his brief deal with exemption claims and exemption statutes, they are not applicable to the present appeal. Furthermore, as a statute defining the scope of personal property that is subject to tax, any ambiguities in R.C. 5701.03(A) must be resolved in favor of the taxpayer. *Id.*

Proposition of Law No. 2:

Patterns, jigs and dies held for use and not for sale in the ordinary course of business are not subject to personal property tax. R.C. 5701.03(A). The terms "patterns," "jigs" and "dies" must be construed broadly and given flexible definitions to account for the diversity in manufacturing processes and continuing advancements in technology. Furthermore, the function of a particular device, rather than its form, is paramount in determining whether the device qualifies as a "pattern," "jig" or "die." *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85, followed.

For personal property tax purposes, the term "personal property" does not include "patterns, jigs or dies" that are held for use and not for sale in the ordinary course

of business. R.C. 5701.03(A).¹ The Revised Code does not provide any definitions for these terms. Furthermore, as this Court has noted, it is “difficult to understand how an all comprehensive definition can possibly be stated.” *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85, 86, quoting *Colonial Foundry Co. v. Peck* (1952), 158 Ohio St. 296, 300. Over the years, however, the Board and the courts have provided certain guidelines through case law decisions:

For example, in *American Book Co. v. Porterfield* (1969), 18 Ohio St.2d 49, this Court held that printing plates used to print books by letterpress and offset processes were “dies” within the meaning of R.C. 5701.03. In support of its decision, the Court reviewed a series of earlier cases noting the hallmark of a die as an item, or series of items working together, that use applied pressure or force to form or shape a product with the precision that a customer demands. See *Mong v. B.F. Goodrich Co.* (1935), 19 Ohio Law Abs. 198 (tire molds used in the rubber industry are dies or patterns); *National Tube Co. of New Jersey v. Tax Commission* (1937), 5 Ohio Supp. 62, 26 Ohio Law Abs. 523, *affirmed*, 25 Ohio Law Abs. 619 (rolls, guide shoes, piercing points, plugs and welding balls collectively used to form steel products are dies); *Cambridge Glass Co. v. Evatt* (1940), 11 Ohio Supp. 125, 19 Ohio Ops. 162 (glass molds used in the production of pressed and blown glassware are dies); *Colonial Foundry Co. v. Peck* (1952), 158 Ohio St. 296 (flasks, cast iron shapes, weights and clamps used in making iron and alloy castings are dies). The Court then contrasted the items at issue in these cases with the

¹ There is nothing in the record to suggest, nor has the tax commissioner ever suggested, that the Assemblies are held by the taxpayer for sale in the ordinary course of its business or that they are otherwise included in the valuation of inventory produced for sale. See R.C. 5701.03(A).

ingot molds at issue in *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71, which were held *not* to constitute dies because these open-ended molds were merely used for temporarily holding molten steel for further processing rather than exerting force to create a particular form or shape.

On two separate occasions, this Court has quoted with approval from the Board's decision in the *Colonial Foundry* case as a means for demonstrating some of the pertinent distinctions involved in cases addressing dies. The portion quoted in the Court's *Colonial Foundry* decision (and also quoted, in part, in the Court's *American Book* decision) is set forth as follows:

In discussing the *Wheeling Steel* case, *supra*, the Board of Tax Appeals made the following observations:

* * * Such molds bear little resemblance to a molder's flasks which are used once and perhaps never again, while ingot molds are used over and over again, simply to give convenient shape, weight and size to semiprocessed raw material which will again be heated and rolled or drawn to a desired gage, form or shape. Ingot molds are nothing more than receptacles to hold molten steel or pig iron to an average weight, size and shape for convenience in further processing. *[In contrast,] Appellant's molds produce a finished product ready for use in conformity to its customers' order and specifications. The word 'dies' contemplates that such an instrument, tool or contrivance, or any application of several implements used to exert force from within or without, will form and shape a finished or semifinished product with the precision and nicety that the consumer demands.* Ingot molds only partially resist the force of molten metal. It is really only confined on the bottom and sides. The pressure and force expended is exerted upwards and is not confined, but simply seek its level as does any liquid poured into a container.

'It must be conceded that sand alone could not confine heavy red hot molten iron within a sand cavity; and that the rigid flask and the other items are indispensable if it is to be confined within space in the mold and the casting produced

in the shape and form desired. *It must be apparent that all of these questioned items play their part in maintenance of the cavity within the mold which imparts form to the product and resists the force applied from within the molten metal.* What boots it whether the force applied to make an article true to form be centripetal or centrifugal? In the making of seamless tubing, force is applied from both within and without. Plastic and viscous materials can only be formed into desired shapes by being confined from without unless it be in the case of some rubber goods like ballons, which are produced by dipping form in latex. The Legislature made no distinction. We can perceive none. After examining numerous present day mechanical authorities on 'dies,' it becomes more and more difficult to understand how an all comprehensive definition can possibly be stated.

** * * To hold that which forms and shapes the product of an industry by the application of force, no matter from what source exerted, to be a die, is but just and fair. All are thereby treated alike and none are favored. * * **

Colonial Foundry, supra, 158 Ohio St. at 299-300 (emphasis added). See also *American Book, supra*, 18 Ohio St.2d at 52. Through this passage, we see the distinction between that which applies force on the product from all directions in order to shape or mold a finished product and that which merely holds the in-process product for further processing. We also see a recognition that the functionality of a die may require the simultaneous application of several implements, working together, to produce the desired shape.

In *General 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." *General Motors, supra* at 139. Then, most recently, in *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85, the Court rejected the narrow, dictionary definitions of patterns, jigs and dies advanced by the tax commissioner, and held that more flexible definitions, with emphasis on function and use

rather than physical form, must be applied. In this regard, the *Timken* Court cited with approval the definitions utilized by the Board of Tax Appeals in that case, including a definition for dies as “devices which, through applied force, impose their shape upon the object under production.” The Court stressed that the flexible definitions utilized by the Board were better suited to account for technological developments and advancements over time with respect to the state of various manufacturing processes.

In the present case, the Board’s determination that the Assemblies perform the functionality of a die is consistent with all of the foregoing decisions and guidelines. In this regard, each component of the Assembly is simultaneously exerting force and pressure on the product from all directions to produce a specifically molded shape and size desired by the customer. The tax commissioner’s sole focus on the openings at the face of the Assembly is a focus on physical form and ignores the common functionality that the barrel, screw and assembly face are collectively and simultaneously performing. These components all act together and at the same time to create the force that is applied against the molten plastic to produce the desired shape.

Proposition of Law No. 3:

Whether items claimed to be patterns, jigs or dies comport with the flexible definitions required by this Court is a factual question to be determined by the Board of Tax Appeals. This Court may not substitute its judgment for that of the Board on such factual issues. *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85, and *Libby-Owens-Ford Co. v. Collins* (1977), 50 Ohio St.2d 9, followed.

In reviewing a decision of the BTA, the Court determines whether it is “reasonable and lawful.” *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 498. The Court “will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion.” *Gahanna-Jefferson Local School Dist Bd. of Edn. v.*

Zaino (2001), 93 Ohio St.3d 231, 232. However, “[t]he BTA is responsible for determining factual issues and, if the record contains reliable and probative support for these BTA determinations,” the Court will affirm them. *Am. Natl. Can Co. v. Tracy* (1995), 72 Ohio St.3d 150, 152.

The determination of whether an item qualifies as a pattern, jig or die is inherently a factual determination based on the evidence presented as to the function of a particular device. The Board of Tax Appeals, as the trier of fact and receiver of evidence, is uniquely positioned to evaluate the evidence and to determine these factual questions. For this reason, the Court may not substitute its judgment for that of the Board on these precise factual questions. Rather, the Court’s role is limited to a determination as to whether the Board’s decision is reasonable and lawful. If the record contains reliable and probative support for the Board’s determination, the Court must affirm it.

In its two most recent decisions involving patterns, jigs and dies, this Court has deferred to the Board’s factual determinations on these matters. In *Libby-Owens-Ford Co. v. Collins* (1977), 50 Ohio St.2d 9, in a very short opinion, the Court upheld the Board’s determination as follows:

Appellant contends that the tin and the assistor rolls are not personal property subject to taxation because of the exclusion from the definition of personal property of ‘dies’ in R.C. 5701.03.

The decision of the Board of Tax Appeals that the items in question are not ‘dies’ is a factual determination.

This court’s review of the board’s decision is limited to questions of law and ‘(i)t is not the function of the court to substitute its judgment for that of the Board of Tax Appeals on factual issues, but only to determine from the record whether the decision rendered by the board is unreasonable or unlawful.’ *Buckeye Power v. Kosydar* (1973), 35 Ohio

St.2d 137, 298 N.E.2d 610, approving and following Citizens Financial Corp. v. Porterfield (1971), 25 Ohio St.2d 53, 266 N.E.2d 828; R.C. 5717.04. Stated differently, '(i)t is the function of this court on appeal pursuant to Section 5611-2, General Code (analogous to R.C. 5717.04), to determine * * * whether the correct principles of law were applied in a reasonable manner.' Midwest Haulers v. Glander (1948), 150 Ohio St. 402, 407, 83 N.E.2d 53, 56.

The Board of Tax Appeals made a factual determination and applied to it the correct principles of law. Its decision is, therefore, reasonable and lawful and is affirmed.

Libby-Owens-Ford, supra at 10. Similarly, in *Timken Co., supra*, the Court deferred to the Board:

Whether those items claimed exempt by appellee comport with this definition [of a pattern] is a factual question. This court may not substitute its judgment for that of the Board of Tax Appeals on factual issues. *Libby-Owens-Ford, supra*, 50 Ohio St.2d at 10, 361 N.E.2d 456. The function of this court is instead limited to a determination as to whether the board's decision is unlawful or unreasonable. R.C. 5717.04. We find that the substantial evidence presented by appellee supports the board's decision to exempt these items as patterns.

* * * * *

As with those items considered "patterns," whether a particular device falls within the above definition of a "jig" is a factual determination to be made by the board. *Libby-Owens-Ford, supra*. An examination of the record reveals substantial evidence to support the board's decision to allow the exemption.

* * * * *

There is evidence to support the board's finding that the items exempted here comport with the foregoing definitions [of a die]. *Libby-Owens-Ford, supra*. Appellant has failed to present any evidence to refute appellee's position with respect to the function of these particular devices.

Timken, *supra* at 86-88. See also *Colonial Foundry*, *supra* (affirming the Board's determination with respect to the treatment of molds as dies); *Wheeling Steel*, *supra* (same). In contrast, on only one occasion has the Court reversed the Board's determination on a pattern, jig or die issue. See *American Book*, *supra* (reversing the Board's determination with respect to the treatment of printing plates as dies). In that case, however, the Court did not dispute the Board's factual determination as to the functionality of the printing plates. Rather, it disagreed with the Board's legal determination as to whether the agreed functionality was of a type that was consistent with the treatment of a printing plate as a die under the existing case law.

There is nothing in the present appeal to suggest that the Board applied an incorrect legal standard. The issues were fully briefed by the parties and the Board's decision cites and discusses many of the leading cases in this area. Furthermore, the record demonstrates that sufficient factual evidence as to the nature and function of the Assemblies was presented to the Board. Most notably, the testimony and evidence presented demonstrated a basis for the Board to conclude that the components of the Assemblies, working together as a single integrated unit, performed the required functionality of a die in forming and creating the taxpayer's plastics products through applied pressure and molding techniques. Portions of the record in this regard were expressly cited by the Board in its decision. See Appellant's Appx. at 15-16 (quoting testimony from the taxpayer's employee noting the manner in which the components at issue work together as a unit to force the molten plastic into a molded shape for sale to customers). Under these circumstances, there is no basis in law or in fact for this Court to determine that its review of the facts and evidence set forth in a cold record would be

superior to the firsthand review provided by the Board. Accordingly, a substitution of this Court's judgment for that of the Board's would serve no purpose in advancing the interests of justice.

Proposition of Law No. 4:

The Board's jurisdiction is limited to those issues addressed by the tax commissioner in his final determination and specified as error by the appellant in its notice of appeal to the Board. *DeWeese v. Zaino*, 100 Ohio St.3d 324, 2003-Ohio-6502, followed.

In his final proposition of law, the tax commissioner takes issue with a purported failure of the taxpayer to sufficiently quantify the costs of the Assemblies before the Board. That issue, however, was not before the Board. In this regard, the only issue decided by the tax commissioner in his final determination with respect to the Assemblies – and thus the only issue over which the Board had jurisdiction on appeal – was the question of whether the Assemblies were excepted from the definition of “personal property” as patterns, jig or dies. See *DeWeese v. Zaino*, 100 Ohio St.3d 324, 2003-Ohio-6502, ¶ 21 (“... the only issues that can be appealed to the BTA from a final determination by the Tax Commissioner are those that were considered by him, as set forth in his final determination.”). Having determined the Assemblies were not excepted as such, the issue of cost quantification became moot and the tax commissioner made no determination on that issue. (Supp. 39-40.) Likewise, the taxpayer's notice of appeal to the Board was limited to the issue of whether the Assemblies were “personal property” within the meaning of R.C. 5701.03(A). (Appellant's Appx. 8.) Thus, the only question over which the Board had jurisdiction was the question of whether the Assemblies were “personal property” within the meaning of R.C. 5701.03(A). *Id.* It is that precise

question, which both the tax commissioner and the Board addressed, that is now before this Court.

By reversing the tax commissioner's final determination with respect to the Assemblies, the Board effectively remanded the case back to the tax commissioner to make a determination that simply was not required in light of his initial ruling (*i.e.*, a valuation and removal of the Assemblies from the taxpayer's "personal property"). See R.C. 5717.03(G) ("If the Board finds that issues not raised on the appeal are important to a determination of a controversy, the board may remand the cause for an administrative determination and the issuance of a new tax assessment, valuation, determination, finding, computation, or order ..."). Because the tax commissioner had not previously made such a determination, there was no basis for the Board to evaluate his actions in this regard. Even the tax commissioner, in his notice of appeal filed with this Court, acknowledges as much. See Appellant's Appx. at 4 ("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 ...").

Finally, the decisions of this Court relied upon by the tax commissioner do not involve the fundamental issue of determining "personal property" under R.C. 5701.03(A). Rather, they involve the valuation of equipment that was admittedly "personal property" in the first instance, but for which the taxpayer sought a deduction to account for inoperability or obsolescence. See *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506 (valuation of the taxpayer's telecommunications cables); *Aluminum Co. of America v. Kosydar* (1978), 54 Ohio St.2d 477 (valuation of the taxpayer's

manufacturing machinery and equipment in light of claimed obsolescence).² In that instance, the valuation of the equipment at issue is directly related to the tax commissioner's duty to value and assess all "taxable property," which by definition is limited to "personal property" that is located and used in business in this state. See R.C. 5709.01(B)(1); 5711.01(A); and 5711.24. Even personal property that is not currently used in business may become taxable property at a later date once it is placed in service. Thus, the valuation of such property is directly related to the tax commissioner's duty. In contrast, with respect to items that are not "personal property" in the first instance (and thus will never be taxable property), there is no duty or need for valuation. Rather, the tax commissioner's duty is to value taxable property, which may be addressed on remand once a determination as to the appropriate scope of the tax base (*i.e.*, "personal property") is determined by the Board, and ultimately this Court.

² The tax commissioner also cites two BTA decisions that do involve exclusions from the definition of "personal property," but in both of those cases the issue of quantification was squarely addressed and determined by the tax commissioner in his final determination, such that the BTA had jurisdiction over the issue on appeal. In fact, quantification was the sole or primary issue in these cases since the tax commissioner had conceded, in whole or in part, that the exclusions were applicable with respect to the items at issue. See *Alcoa, Inc. v. Zaino*, Ohio BTA Case No. 1999-G-1401 (Oct. 22, 2004) (addressing the exclusion for jigs); *Anheuser-Busch Companies, Inc. v. Zaino*, Ohio BTA Case No. 2003-K-699 (Sept. 24, 2004) (addressing the exclusion for drawings). These cases were never considered on the merits by this Court.

CONCLUSION

The decision of the Board of Tax Appeals with respect to the Assemblies is both reasonable and lawful, and it must be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Czerwonka', written over a horizontal line.

Kevin M. Czerwonka
COUNSEL FOR APPELLEE,
A. SCHULMAN, INC.

IN THE SUPREME COURT OF OHIO

A. Schulman, Inc.,	:	
	:	
Appellee,	:	Case No. 06-1944
	:	
v.	:	
	:	
William W. Wilkins,	:	On Appeal from the
Tax Commissioner of Ohio,	:	Ohio Board of Tax Appeals
	:	
Appellant.	:	
	:	

APPENDIX TO MERIT BRIEF OF APPELLEE A. SCHULMAN, INC.

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5701.03 Personal property and business fixture defined.

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, in and to every ship, vessel, or boat, used or designed to be used in business either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere. "Personal property" does not include money as defined in section 5701.04 of the Revised Code, motor vehicles registered by the owner thereof, electricity, or, 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.

(B) "Business fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. "Business fixture" includes, but is not limited to, machinery, equipment, signs, storage bins and tanks, whether above or below ground, and broadcasting, transportation, transmission, and distribution systems, whether above or below ground. "Business fixture" also means those portions of buildings, structures, and improvements that are specially designed, constructed, and used for the business conducted in the building, structure, or improvement, including, but not limited to, foundations and supports for machinery and equipment. "Business fixture" does not include fixtures that are common to buildings, including, but not limited to, heating, ventilation, and air conditioning systems primarily used to control the environment for people or animals, tanks, towers, and lines for potable water or water for fire control, electrical and communication lines, and other fixtures that primarily benefit the realty and not the business conducted by the occupant on the premises.

Effective Date: 10-05-1999

5709.01 Taxable property entered on general tax list and duplicate.

(A) All real property in this state is subject to taxation, except only such as is expressly exempted therefrom.

(B) Except as provided by division (C) of this section or otherwise expressly exempted from taxation:

(1) All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture are subject to taxation, regardless of the residence of the owners thereof.

(2) All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21 of the Revised Code, are subject to taxation.

(C) The following property of the kinds mentioned in division (B) of this section shall be exempt from taxation:

(1) Unmanufactured tobacco to the extent of the value, or amounts, of any unpaid nonrecourse loans thereon granted by the United States government or any agency thereof.

(2) Spirituous liquor, as defined in division (B)(5) of section 4301.01 of the Revised Code, that is stored in warehouses in this state pursuant to an agreement with the division of liquor control.

(3) Except as otherwise provided in section 5711.27 of the Revised Code, all other such property if the aggregate taxable value thereof required to be listed by the taxpayer under Chapter 5711. of the Revised Code does not exceed ten thousand dollars.

(a) If the taxable value of such property exceeds ten thousand dollars only such property having an aggregate taxable value of ten thousand dollars shall be exempt.

(b) If such property is located in more than one taxing district as defined in section 5711.01 of the Revised Code, the exemption of ten thousand dollars shall be applied as follows:

(i) The taxable value of such property in the district having the greatest amount of such value shall be reduced until the exemption has been fully utilized or the value has been reduced to zero, whichever occurs first;

(ii) If the exemption has not been fully utilized under division (C)(3)(b)(i) of this section, the value in the district having the second greatest value shall be reduced until the exemption has been fully utilized or the value has been reduced to zero, whichever occurs first;

(iii) If the exemption has not been fully utilized under division (C)(3)(b)(ii) of this section, further reductions shall be made, in repeated steps which include property in districts having declining values, until the exemption has been fully utilized.

(D) All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

Effective Date: 07-01-1997

5711.01 Listing personal property definitions.

As used in this chapter:

(A) "Taxable property" includes all the kinds of property mentioned in division (B) of section 5709.01 and section 5709.02 of the Revised Code, and also the amount or value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding the date of listing, and of all other taxable property converted into deposits after the date as of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent the taxpayer may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from the taxpayer's credits. "Taxable property" does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26 of the Revised Code, surrender values under policies of insurance, or any tangible personal property acquired from a public utility or interexchange telecommunications company as defined in section 5727.01 of the Revised Code and leased back to the public utility or interexchange telecommunications company pursuant to a sale and leaseback transaction as defined in division (I) of section 5727.01 of the Revised Code. For tax year 2007 and thereafter, "taxable property" of a telephone, telegraph, or interexchange telecommunications company, as defined in section 5727.01 of the Revised Code, includes property subject to such a sale and leaseback transaction.

For tax year 2007 and thereafter, taxable property leased to a telephone, telegraph, or interexchange telecommunications company, as defined in section 5727.01 of the Revised Code, shall be listed and assessed by the owner of the property at the percentage of true value in money required under division (H) of section 5711.22 of the Revised Code.

(B) "Taxpayer" means any owner of taxable property, including property exempt under division (C) of section 5709.01 of the Revised Code, and includes every person residing in, or incorporated or organized by or under the laws of this state, or doing business in this state, or owning or having a beneficial interest in taxable personal property in this state and every fiduciary required by sections 5711.01 to 5711.36 of the Revised Code, to make a return for or on behalf of another. For tax year 2007 and thereafter, "taxpayer" includes telephone companies, telegraph companies, and interexchange telecommunications company as defined in section 5727.01 of the Revised Code. The tax commissioner may by rule define and designate the taxpayer, as to any taxable property which would not otherwise be required by this section to be returned; and any such rule shall be considered supplementary to the enumeration of kinds of taxpayers following:

(1) Individuals of full age and sound mind residing in this state;

(2) Partnerships, corporations, associations, and joint-stock companies, under whatever laws organized or existing, doing business or having taxable property in this state; and corporations incorporated by or organized under the laws of this state, wherever their actual business is conducted;

(3) Fiduciaries appointed by any court in this state or having title, possession, or custody of taxable personal property in this state or engaged in business in this state;

(4) Unincorporated mutual funds.

Taxpayer excludes all individuals, partnerships, corporations, associations, and joint-stock companies, their executors, administrators, and receivers who are defined in Title LVII of the Revised Code as financial institutions, dealers in intangibles, domestic insurance companies, or public utilities, except to the extent they may be required by sections 5711.01 to 5711.36 of the Revised Code, to make returns as fiduciaries, or by section 5725.26 of the Revised Code, to make returns of property leased, or held for the purpose of leasing, to others if the owner or lessor of the property acquired it for the sole purpose of leasing it to others or to the extent that property is taxable under section 5725.25 of the Revised Code.

(C) "Return" means the taxpayer's annual report of taxable property.

(D) "List" means the designation, in a return, of the description of taxable property, the valuation or amount thereof, the name of the owner, and the taxing district where assessable.

(E) "Taxing district" means, in the case of property assessable on the classified tax list and duplicate, a municipal corporation or the territory in a county outside the limits of all municipal corporations therein; in the case of property assessable on the general tax list and duplicate, a municipal corporation or township, or part thereof, in which the aggregate rate of taxation is uniform.

(F) "Assessor" includes the tax commissioner and the county auditor as deputy of the commissioner.

(G) "Fiduciary" includes executors, administrators, parents, guardians, receivers, assignees, official custodians, factors, bailees, lessees, agents, attorneys, and employees, but does not include trustees unless the sense so requires.

(H) "General tax list and duplicate" means the books or records containing the assessments of property subject to local tax levies.

(I) "Classified tax list and duplicate" means the books or records containing the assessments of property not subject to local tax levies.

(J) "Investment company" means any corporation, the shares of which are regularly offered for sale to the public, engaged solely in the business of investing and reinvesting funds in real property or investments, or holding or selling real property or investments for the purpose of realizing income or profit which is distributed to its shareholders. Investment company does not include any dealer in intangibles, as defined in section 5725.01 of the Revised Code.

(K) "Unincorporated mutual fund" means any partnership, each partner of which is a corporation, engaged solely in the business of investing and reinvesting funds in investments, or holding or selling investments for the purpose of realizing income or profit which is distributed to its partners and which is subject to Chapter 1707. of the Revised Code. An unincorporated mutual fund does not include any dealer in intangibles as defined in section 5725.01 of the Revised Code.

Effective Date: 12-22-1992; 06-30-2005; 03-30-2006

5711.24 Power of tax commissioner to assess taxable property – assessment certificate.

The tax commissioner shall assess all taxable property, except property listed in returns which the county auditor is required to assess as his deputy, and shall list and assess all such property which is not returned for taxation, and for that purpose shall have and exercise all powers vested in him by law for the purpose of administering any law which he is required to administer. The action of the assessor in assessing taxable property under sections 5711.01 to 5711.36, inclusive, of the Revised Code, shall be taken as to taxable property required to be listed in a return, whether listed or not, and whether such return has been made or not. Such action shall be evidenced by a preliminary or final assessment certificate in such form as the commissioner prescribes, and when issued by the commissioner it shall be under his official seal. The filing of a return with the county auditor pursuant to sections 5711.01 to 5711.36, inclusive, of the Revised Code, shall be deemed to be the preliminary assessment of the taxable property contained therein when entered on the proper duplicate by the county auditor. Each such certificate shall show in what taxing district in the county such property is assessable, as provided in sections 5711.01 to 5711.36, inclusive, of the Revised Code. Neither such certificate issued by the commissioner nor his action with respect thereto shall be required to be entered on the record of the proceedings of the commissioner, nor shall either be open to public inspection.

Effective Date: 08-18-1955

5717.03 Decision of board of tax appeals - certification - effect.

(A) A decision of the board of tax appeals on an appeal filed with it pursuant to section 5717.01, 5717.011, or 5717.02 of the Revised Code shall be entered of record on the journal together with the date when the order is filed with the secretary for journalization.

(B) In case of an appeal from a decision of a county board of revision, the board of tax appeals shall determine the taxable value of the property whose valuation or assessment by the county board of revision is complained of, or in the event the complaint and appeal is against a discriminatory valuation, shall determine a valuation which shall correct such discrimination, and shall determine the liability of the property for taxation, if that question is in issue, and the board of tax appeals's decision and the date when it was filed with the secretary for journalization shall be certified by the board by certified mail to all persons who were parties to the appeal before the board, to the person in whose name the property is listed, or sought to be listed, if such person is not a party to the appeal, to the county auditor of the county in which the property involved in the appeal is located, and to the tax commissioner.

In correcting a discriminatory valuation, the board of tax appeals shall increase or decrease the value of the property whose valuation or assessment by the county board of revision is complained of by a per cent or amount which will cause such property to be listed and valued for taxation by an equal and uniform rule.

(C) In the case of an appeal from a review, redetermination, or correction of a tax assessment, valuation, determination, finding, computation, or order of the tax commissioner, the order of the board of tax appeals and the date of the entry thereof upon its journal shall be certified by the board by certified mail to all persons who were parties to the appeal before the board, the person in whose name the property is listed or sought to be listed, if the decision determines the valuation or liability of property for taxation and if such person is not a party to the appeal, the taxpayer or other person to whom notice of the tax assessment, valuation, determination, finding, computation, or order, or correction or redetermination thereof, by the tax commissioner was by law required to be given, the director of budget and management, if the revenues affected by such decision would accrue primarily to the state treasury, and the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue.

(D) In the case of an appeal from a municipal board of appeal created under section 718.11 of the Revised Code, the order of the board of tax appeals and the date of the entry thereof upon the board's journal shall be certified by the board by certified mail to all persons who were parties to the appeal before the board.

(E) In the case of all other appeals or applications filed with and determined by the board the order was filed by the secretary for journalization shall be certified by the board by certified mail to the person who is a party to such appeal or application, to such persons as the law requires, and to such other persons as the board deems proper.

(F) The orders of the board may affirm, reverse, vacate, modify, or remand the tax assessments, valuations, determinations, findings, computations, or orders complained of in the appeals determined by the board, and the board's decision shall become final and conclusive for the current year unless reversed, vacated, or modified as provided in section 5717.04 of the Revised Code. When an order of the board becomes final the tax commissioner and all officers to whom such decision has been certified shall make the changes in their tax lists or other records which the decision requires.

(G) If the board finds that issues not raised on the appeal are important to a determination of a controversy, the board may remand the cause for an administrative determination and the issuance of a new tax assessment, valuation, determination, finding, computation, or order, unless the parties stipulate to the determination of such other issues without remand. An order remanding the cause is a final order. If the order relates to any issue other than a municipal income tax matter appealed under sections 718.11 and 5717.011 of the Revised Code, the order may be appealed to the court of appeals in Franklin county. If the order relates to a municipal income tax matter appealed under sections 718.11 and 5717.011 of the Revised Code, the order may be appealed to the court of appeals for the county in which the municipal corporation in which the dispute arose is primarily situated.

Effective Date: 09-26-2003

Board of Tax Appeals

State of Ohio

TAMCO DISTRIBUTORS COMPANY, APPELLANT

v.

THOMAS M. ZAINO, TAX COMMISSIONER OF OHIO, APPELLEE

Case No. 99-V-461

November 2, 2001

(Personal Property Tax)

DECISION AND ORDER

APPEARANCES:

For the Appellant

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

This cause and matter comes to be considered by the board of tax appeals upon a notice of appeal filed on April 12, 1999. Appellant TAMCO Distributors Company (hereinafter "Tamco") appeals a final determination of the tax commissioner denying its petition for reassessment. The underlying assessment relates to Tamco's claim for reductions in the value of merchandise "not used in business" pursuant to R.C. 5701.08(B) and Ohio Adm. Code 5703-3-21 for tax years 1994 and 1995.

The matter is considered by the board of tax appeals upon the notice of appeal, the statutory transcript ("S.T."), and the testimony and other evidence adduced at the hearing ("H.R."). The parties have also provided written legal arguments.

The record establishes that before the tax period in question, Tamco was a wholly-owned subsidiary of Giant Eagle, a retailer with several locations. Tamco operated warehouses from which it distributed merchandise to the Giant Eagle Stores. Beginning in the 1980s, Tamco provided merchandise to other retailers, including Phar-Mor Inc., a national chain of discount drug stores. (H.R.16-17)

In 1989, Phar-Mor acquired a one-half interest in Tamco from Giant Eagle. In March 1992, Phar-Mor acquired complete ownership of Tamco from Giant Eagle. (H.R. 17) In August 1992, it was discovered that certain Phar-Mor senior executives had engaged in fraudulent reporting of the company's financial position as well as embezzlement of assets. (H.R. 15, Exhibit C) In the same month, Phar-Mor and its fifteen wholly-owned subsidiaries (including Tamco) filed for protection under Chapter 11 of the United States Bankruptcy Code. (H.R. 15, Exhibit C) Management of Phar-Mor then developed internal controls to protect against fraudulent overrides in the future. In September 1995, Phar-Mor and its fifteen subsidiaries emerged from bankruptcy. (H.R. 15,19,104)

During the period at issue in this appeal, tax years 1994 and 1995, Tamco was a wholly-owned subsidiawarehousing operations in Ohio, one in Austintown and another in Youngstown. (S.T. 1, H.R. 22-23) These warehouses were used to supply out-of-state Phar-Mor retail outlets with merchandise. [FN1] (H.R. 24, S.T. 356)

The uncontroverted evidence demonstrated Phar-Mor's method of conducting its business. Merchandise stored in Tamco's warehouses was ordered by Phar-Mor employees and payment was processed [FN2] after delivery to the warehouses. (H.R. 26-40, Exhibits 1, 2, 3) Tamco's inventory costs were credited by intercompany transfers by Phar-Mor after the merchandise was ultimately delivered to the various out-of-state Phar-Mor stores. (H.R. 41) Phar-Mor's corporate offices maintained a centralized bookkeeping system which followed the distribution of Tamco's merchandise to the various retail stores as well as crediting and debiting payment for the shipments. (H.R. 41, 121, Exhibits 5, 6, S.T. 9)

The tax commissioner's final determination acknowledges that Tamco's shipments to Phar-Mor retail stores meet the requirements of Ohio Adm. Code 5703-3-21(A), (B), and (C). However, the tax commissioner rejected Tamco's contention that the shipments qualified under Ohio Adm. Code 5703-3-21(D), reasoning that Phar-Mor retail stores are a separate corporate entity and that they are "customers" as defined in Ohio Adm. Code 5703-3-21(E). The commissioner concluded that:

" * * * [D]uring the years at issue, the applicant held its inventory for sale to its customers, retail stores, which were subsidiaries of Phar-Mor, Inc. The customers ordered merchandise from the applicant when needed. The applicant fulfilled the orders and created accounts receivable on its books to reflect the transfers. The inventory therefore does not qualify as 'not used in business in this state' under R.C. 5701.08(B)(1)(a) but does qualify for the reduced listing percentage of 20% for the tax year 1995, as originally returned." (See final determination, S.T.3)

Tamco raises the following issues in its notice of appeal:

"4. The Tax Commissioner erroneously determined that the personal property identified in Appellant's Applications for Final Assessment was not property 'not used in business in the state' under Ohio Revised Code § 5701.08(B)(1)(a) and Administrative Rule 5703-3-21.

"5. The Tax Commissioner erroneously determined that the personal property identified in Appellant's Application[s] for Final Assessment was not property held to be shipped to the taxpayer or persons other than customers at locations outside this state for use, processing or sale.

"6. The Tax Commissioner erroneously determined that the shipments from the distribution center to the retail stores were not shipments to the taxpayer.

"7. The Tax Commissioner erroneously determined that the retail stores owned by Phar-Mor, Inc. and its wholly owned subsidiaries were customers of the TAMCO (a wholly owned subsidiary of Phar-Mor, Inc.) distribution center, and that the retail stores owned by Phar-Mor, Inc. and its wholly owned subsidiaries were not persons other than customers.

"8. The Tax Commissioner's determinations referenced in paragraphs 4 through 7 of this Notice are inconsistent with the established practice and precedents of the Ohio Department of Taxation. *NLO, Inc. v. Limbach*, 66 Ohio St.3d 389, 613 N.E.2d 193 (1993)."

Initially, we note that the findings of the tax commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is incumbent upon a taxpayer challenging a finding of the tax commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *National Tube v. Glander* (1952), 157 Ohio St. 407. The taxpayer is assigned the burden of showing in what manner and to what extent the tax commissioner's determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213. It is with these authorities in mind that we turn to the merits of the instant appeal.

The description of personal property used in business subject to listing and assessment is central to this appeal. R.C. 5701.08(B) provides in pertinent part:

"Merchandise or agricultural products shipped from outside this state and held in this state in a warehouse or a place of storage without further manufacturing or processing and for storage only and for shipment outside this state are not used in business in this state. Such property qualifies for

this exception if division (B)(1) or (2) of this section applies:

"(1) During any period that a person owns such property in this state:

"(a) The property is to be shipped from a warehouse or place of storage in this state to the owner of the property or persons other than customers at locations outside this state for use, processing, or sale; ***"

Ohio Adm. Code 5703-3-21 provides, in pertinent part:

"Personal property belonging to either a resident or nonresident of this state, and held for storage only as provided in division (B) of section 5701.08 of the Revised Code, will not be considered as being used in business' in this state, within the meaning of said phrase as defined in section 5701.08 of the Revised Code only if all of the following conditions exist:

"(A) The property involved is either 'agricultural products' or 'merchandise.' 'Merchandise' includes all items of property in saleable form.

"(B) The property involved is shipped into Ohio from points outside this state.

"(C) The property involved is held in Ohio in a 'warehouse or place of storage.'

"(D) The property involved, while in storage in Ohio, is held for 'storage only' and for 'shipment outside of this State.'

"Property will be considered as being so held if:

"(1) It is to be shipped, without processing, to the taxpayer or persons other than 'customers' at locations outside this state for use, processing, or sale, or,

"(2) It is located in public or private warehousing facilities which are not subject to the control of or under the supervision of the taxpayer or manned by its employees from which it is to be shipped to persons outside the state of Ohio, or, ***"

"(E) 'Customers' as used herein includes all persons with whom a taxpayer normally and usually deals with as a matter of established business practice or policy. The term, however, does not include consignees or bailees."

We conclude that R.C. 5701.08 does not represent an "exception" to property from taxation; rather, it defines the scope of the personal property tax, and describes specific property which is not "used in business" in R.C. 5709.01(B)(1) and is not subject to taxation. See, *Goodrich v. Peck* (1954), 161 O.S. 202, 209, construing former G.C. 5325-1. In this instance then, any ambiguity must be resolved in favor of the taxpayer.

Tamco argues that the evidence demonstrates that Phar-Mor and its wholly-owned subsidiaries (including Tamco) operated as a single entity during the period of the assessment. Further, Tamco was operated as a "cost center" with no view to gain a profit or to provide income. [FN3] The evidence demonstrates that from the time of Phar-Mor's purchase of Giant Eagle's remaining portion of Tamco in 1992, Tamco was also moving towards merger with Phar-Mor, which actually occurred in 1995 after the bankruptcy proceedings. (H.R. 19, 104)

It is apparent to us that the issue presented in this case is novel, particularly given the period in question which finds Tamco in transition between separate corporate subsidiaries and intra-company divisions. The evidence clearly demonstrates, however, that during the tax years in question, Tamco's operation resembled that of a division of Phar-Mor, rather than a separate corporation. (S.T. 355) Tamco's merchandise buyers became Phar-Mor employees. (H.R. 24) Phar-Mor's accounting and inventory systems managed the merchandise as well as the fiscal controls. (H.R. 26-41, Exhibits 5, 6)

It is not in dispute that Tamco was a separate corporate entity, and the Supreme Court has generally recognized that: "Parent and subsidiary corporations are distinct legal entities." *White Motor Corp. v. Kosydar* (1977), 50 Ohio St.2d 290,296. See, also, *Hoover Universal Inc. v. Limbach* (1991), 61 Ohio St.3d 563. For legitimate business reasons, however, Phar-Mor chose to operate what was essentially a chain of retail pharmacies utilizing corporate subsidiaries domiciled in the various states in which it did business. The uncontroverted evidence is that Tamco was a part of this corporate structure performing the purchasing, storage and distribution service on behalf of the overall business entity. Even as separate subsidiary corporations, we conclude from the evidence that the retail pharmacies serviced by Tamco were other than customers as that term is understood. Phar-Mor's decision to treat Tamco as a "cost center" without any gain or profit is consistent with Phar-Mor's out-of-state retail stores being "persons other than customers" as described in Ohio Adm. Code 5703-3-21(D)(1) and R.C. 5701.08(B)(1)(a).

We distinguish our decision in *Cotter & Company v. Tracy* (Mar. 13, 1998), B.T.A. No. 96-A-291, unreported, where Cotter made the argument that the lack of profit in operating a merchandise warehousing facility for cooperative members meant that the members were not "customers" as described in R.C. 5701.08(B) and Ohio Adm. Code 5703-3-21(D)(1). The board held that Cotter's argument, that it operated on a break-even basis which was synonymous with a lack of gain or profit, was without merit. The evidence demonstrated that Cotter realized a gain which was subsequently redistributed to its members/stockholders in the form of a dividend, and therefore it was engaged in business with its members. In comparing the facts before us in the instant appeal, Phar-Mor's use of its corporate subsidiaries for the purchase, warehousing and distribution to

its retail pharmacy is unrelated to the operations of a cooperative such as Cotter. [FN4]

Although not discussed in the tax commissioner's final determination, Appellee argues that Tamco's 1992 and 1993 federal income tax returns, both filed under the name of "Phar-Mor Inc. & Subsidiaries" demonstrate gross profits and capitalized costs, and hence, support the tax commissioner's position that Phar-Mor is a "customer" of Tamco under R.C. 5701.08. The evidence before us demonstrates that Phar-Mor's decision to operate Tamco as a cost center for Phar-Mor's retail stores was made in September of 1992. (H.R. p.22) Further, Tamco acknowledges that during this transition, Tamco continued to supply inventory to other entities at a profit. Although not speaking to the federal income tax returns, Phar-Mor's Managing Director of Financial Reporting and General Accounting, William Adams, testified that Tamco's books and ledgers reflected a mark-up on inventory before the September 1992 change in accounting procedures. (H.R. p. 102) Moreover, Mr. Adams explained that Tamco's relationship with Giant Eagle ended during the same period of time, which necessitated Tamco selling the remaining inventory to other distributors at a profit. (H.R. p. 102-103) We fail to see that the gross profits reported on the federal returns are necessarily a result of Tamco's dealings with Phar-Mor, given Mr. Adam's testimony.

Appellee also argues that Tamco, Phar-Mor, and the remainder of Phar-Mor's subsidiaries were debtors-in-possession in what had been an implied consolidated bankruptcy during the tax period in question. Appellee suggests to the board that there is no conclusive proof that the bankruptcy petitions were actually consolidated and describes, at length, the procedure for consolidating cases before the bankruptcy court. Appellee then surmises that, assuming the bankruptcy estates were not consolidated given the absence of proof before the board, Phar-Mor and Tamco could not possibly transfer merchandise between the separate bankruptcy estates without consideration. Since the transfers were not gifts, Appellee argues that they were necessarily purchases. We are unwilling to arrive at such conclusion that there was not consideration between Phar-Mor and Tamco based upon this syllogism.

Both of appellee's arguments concerning the gross profits reported on Phar-Mor's federal income tax returns and the bankruptcy status of Phar-Mor and its subsidiary entities are not supported by sufficient substantive and probative evidence to overcome the preponderance of evidence in favor of Tamco.

For the foregoing reasons Tamco's specifications of error nos. 4, 5, and 7 are found to be meritorious and sustained. Accordingly, it is the decision and order of the board of tax appeals that the final determination of the tax commissioner must be, and hereby is, reversed.

FN1. Approximately 1% of Tamco's inventory was shipped to Giant Eagle and/or other purchasers. (S.T. 7, 53)

FN2. The record is clear that, by intercompany transfers, Phar-Mor would advance funds to Tamco's account to cover payments made by Tamco. (H.R. 129- 130, 79-84, Exhibit

14) During the period in question, Phar-Mor paid for the merchandise, (H.R. 26) and Tamco carried the inventory and liability on its books. (H.R. 40) Tamco's profit and loss statement (Exhibit 24, p.1, H.R. 103) for 1994 depicts a "cost of sales" figure of \$636,240,124, a number substantially similar to Tamco's year-end "sales" figure.

FN3. At hearing, Mr. William Adams, Managing Director of Financial Reporting and General Accounting for Phar-Mor, described the "average weighted cost" method of determining what amount Phar-Mor retail stores credited Tamco in the intercompany account. Mr. Adams gave the following example: If 10 items were stored at the cost of \$1 each, and 10 more items received at \$2 each, the average weighted cost would be \$1.50 per item. (H.R. 46-47) Further, Mr. Adams described Phar-Mor's intent to treat Tamco as a "cost center" during the period in question. (H.R. 21)

FN4. Appellee argues that Tamco generated a profit in the form of cost savings to its parent, Phar-Mor. There was no evidence to suggest that Phar-Mor enjoyed any appreciable saving of expenses by directing its warehousing operations through its subsidiary, Tamco. Clearly, Phar-Mor's large-volume purchases, which necessitate large-volume warehousing, account for the profitability of Phar-Mor's "deep-discount concept." Whether the warehouse is operated under the name of "Phar-Mor" or its wholly owned subsidiary, we fail to see how any cost savings through large-scale warehousing is a direct result of Tamco's separate corporate existence.

CERTIFICATE OF SERVICE

I certify that a true and complete copy of the foregoing Merit Brief of Appellee, A. Schulman, Inc., was sent by regular mail to counsel of record for the Appellant, Barton A. Hubbard, Assistant Attorney General, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215, on this 11th day of April, 2007.



Kevin M. Czerwonka