

IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals

A. SHULMAN, INC.,

Appellee

v.

WILLIAM W. WILKINS, TAX  
COMMISSIONER OF OHIO,

Appellant.

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: Case No. 06-1944  
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: Appeal from BTA  
: Case No. 2004-B-370  
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REPLY BRIEF OF APPELLANT

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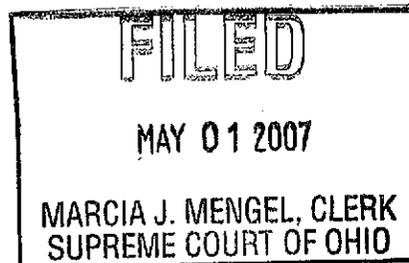
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## **REPLY BRIEF**

### **A. Introduction**

In this brief, we respond to Schulman's answer brief, which itself contains numerous mischaracterizations and omissions of the applicable law and facts. Schulman's brief even contests what should be the most uncontroversial and unassailable of the Commissioner's statements of the law in this case: that the exception from the definition of "personal property" for "patterns, jigs, dies, or drawings" set forth in R.C. 5701.03 is an exemption provision that must be strictly construed against the claim of exemption.

As we emphasized in our initial brief, an exemption claimant must establish by clear and convincing evidence entitlement to exemption, and the claimant's right to exemption must be clearly expressed by the General Assembly.

Instead, Schulman has asserted the mirror opposite position. Under Schulman's novel conception, the General Assembly's enactment of the exception in R.C. 5701.03 for "patterns, jigs, dies, or drawings" would require a strict construction against the Commissioner. Ignoring this Court's controlling precedent, as well as the plain meaning of R.C. 5701.03 upon which these decisions are based, Schulman claims that the "patterns, jigs, dies or drawings" language of the statute constitutes a tax-imposition statute, so that a broad interpretation of "jigs" and "dies" would be legislatively mandated. Schulman Br. 3.

Having begun its analysis with this overarching error, Schulman's brief then proceeds to advance a myriad of other equally untenable positions. We discuss these errors and show them for what they are in the sections that follow.

**B. The provision excluding “patterns, jigs, dies, or drawings” from the definition of “personal property,” and hence from personal property tax, is an exemption claim, which must be strictly construed against the claim of exemption.**

In regard to R.C. 5701.03(A)’s language regarding “patterns, jigs, dies, or drawings \*\*\*” this Court has long and repeatedly held such language to be an exemption from the annual *ad valorem* personal property tax. *Natl. Distillers & Chem. Corp. v. Limbach* (1994), 71 Ohio St.3d 214, 217 (“R.C. 5701.03 exempts drawings from the personal property tax.”); *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85, 86 (“whether those items claimed exempt [as patterns, jigs, or dies] by appellee [taxpayer] comport with this definition is a factual question”); *American Book Co. v. Porterfield* (1969), 18 Ohio St.2d 49, paragraph two of the syllabus (“[p]rinting plates \*\*\* are excluded from the definition of taxable personal property by Section 5701.03, Revised Code, and are exempted from taxation thereby”), citing with approval, *Colonial Foundry Co. v. Peck* (1952), 158 Ohio St. 296, 298 (“the question \*\*\* is whether the flasks \*\*\* are exempt from taxation by reason of being ‘dies’”). (Emphasis added.)

The conclusion that the provision at issue here provides an exemption from taxation is confirmed when one examines the actual statutory language involved. For at least the last 150 years, the general definition of “personal property” for purposes of Ohio taxation has been generally defined “to include every tangible thing that is subject to ownership \*\*\* [other than money and real property].” See, *Swann’s Revised Statutes, Taxation*, Chapter 113 (1854).

The first amendment to that definition pertinent here occurred in 1931, as follows: “The term ‘personal property’ as so used, includes \*\*\* every tangible thing being the subject of ownership, whether animate or inanimate, other than *patterns, jigs, dies, drawings*, money and motor vehicles registered by the owner thereof, and not forming part of a parcel of real property,

as hereinbefore defined;\*\*\*.” (Italicized language added per amendment.) 114 Ohio Laws 714, 716 (Am. S. B. 323 of the 89<sup>th</sup> Gen. Assembly, eff. July 6, 1931); Gen. Code Section 5325.

The next pertinent amendment to the definition of “personal property” occurred in 1955, as follows:

“personal property” includes every tangible thing which is the subject of ownership, whether animate or inanimate, other than patterns, jigs, dies, or drawings, *which are held for use and not for sale in the ordinary course of business*, money, and motor vehicles registered by the owner thereof, and not forming part of a parcel of real property \*\*\*. *The exclusion of patterns, jigs, dies, and drawings from the definition of “personal property” by this section shall not be deemed an exclusion of the value of same when such value may enter into the valuation of inventory produced for sale.* [Italicized language added per amendment.]

126 Ohio Laws 59 (Sub. S.B. of the 101<sup>st</sup> Gen. Assembly, eff. Oct. 4, 1955); R.C. 5701.03.

Finally, R.C. 5701.03 was amended to its current language in 1992 to specifically define “business fixtures” and to provide for the inclusion of such “business fixtures” as personal property, resulting in the creation of paragraphs (A) and (B). Paragraph (A) was enacted to provide, in pertinent part, as follows:

(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. \*\*\* “Personal property” does not include money as defined in section 5701.04 of the Revised Code, motor vehicles registered by the owner thereof, or, for purposes of any tax levied on personal property, patterns, jigs, dies or drawings that are held for use and not for sale in the ordinary course of business, except to the extent that the value of the patterns, jigs, dies, or drawings is included in the valuation of inventory produced for sale.

144 Ohio Laws, Part One, 1528, 1529 (Sub. S. B. 272 of the 119<sup>th</sup> Gen. Assembly, eff. July 20, 1992).

Thus, the Court’s decision in *Colonial Foundry* (holding that the exception from the definition of “personal property” for “dies” was an exemption provision), applied the version of the statute as amended in 1931. That is, in *Colonial Foundry* this Court had before it a statute

which provided that “personal property includes every tangible thing being the subject of ownership \*\*\* **other than** patterns, jigs, dies, drawings, money, and motor vehicles registered by the owner thereof \*\*\*.” (Emphasis added).

In all of the Court’s subsequent above-referenced cases involving personal property tax assessments levied against items asserted to be patterns, jigs, dies, or drawings, the statutory language before the Court for review was per the General Assembly’s amendment in 1955. That is, in addition to the language of the 1931 amendment, the General Assembly added language expressly referring to the language of the 1931 amendment as providing for “**an exclusion \*\*\*** from the definition of personal property.” (Emphasis added.) Under that statute, as well as the statute as amended in 1931, the Court has uniformly characterized the “patterns, jigs, dies, and drawings” language as an exemption.

Under the 1992 amendments to the definition of “personal property,” the nature of the “patterns, jigs, dies, or drawings” language as constituting an exemption has been retained. As quoted above, R.C. 5701.03 as amended in 1992 provides that “personal property” generally includes “every tangible thing that is the subject of ownership \*\*\* including business fixtures \*\*\*.” The amended statute then goes on to provide in a following sentence that “personal property does not include money as defined in section 5701.04, motor vehicles registered by the owner thereof, or, for purposes of any tax levied on personal property, patterns, jigs, dies, or drawings \*\*\*.” Under this Court’s established precedent, the latter sentence of the amended statute, when read in conjunction with the former sentence of the statute, is an exemption provision. *In re Estate of White* (1986), 25 Ohio St.3d 355, 357-358; *In re Estate of Roberts* (2002), 94 Ohio St.3d 311, 314-315.

The structure of R.C. 5701.03 (A) as enacted pursuant to the 1992 amendment of R.C. 5701.03 parallels the structure of R.C. 5731.12 (A) of the estate tax law at issue in *White*. R.C. 5731.12 (A) provided as follows:

The value of the gross estate **shall include the value of all property** to the extent of the amount receivable by the decedent's estate as insurance under policies on the life of the decedent. The value of the gross estate **shall not include** any amount receivable as insurance under policies on the life of the decedent by beneficiaries other than the decedent's estate, whether paid directly to such beneficiaries or to a testamentary or inter vivos trust for their benefit. (Emphasis added.)

In *White*, the estate had argued that R.C. 5731.12 was a taxing statute that must be strictly construed against the state, whereas the Commissioner countered that the second sentence of R.C. 5731.12 (A) was an exclusion from taxation that must be strictly construed against the taxpayer with any doubt as to its meaning resolved in favor of taxation. The Court agreed with the Commissioner, as follows:

We find the commissioner's characterization of the second sentence of R.C. 5731.12 (A) to be persuasive. Although the first sentence of R.C. 5731.12 (A) is a taxing provision that requires the **inclusion** of any "amount receivable by the decedent's estate as insurance under policies on the life of the decedent," the second sentence of division (A) **excludes** from taxation any "amount receivable as insurance \*\*\* by beneficiaries other than the decedent's estate." The second sentence of division (A) therefore must be strictly construed. (Emphasis in original, underlining added.)

*White*, 25 Ohio St.3d at 357.

Applying to the present case the same reasoning and analysis as in *White*, the first sentence of R.C. 5701.03 (A) requires the inclusion of "every tangible thing that is the subject of ownership \*\*\* including business fixtures \*\*\*," but the third sentence of division (A) excludes from taxation "money as defined in section 5701.04, motor vehicles registered to the owner thereof, \*\*\* patterns, jigs, dies, or drawings \*\*\*." As an exemption provision, the third sentence must be strictly construed against the claim of exemption.

This Court's recent decision in *Roberts* addressed a similarly structured statute to that at issue in *White* (and in the present case), citing with approval to *White. Roberts* (2002), 94 Ohio St.3d at 315. Per Justice Cook, the Court undertook a cogent examination of the statute therein at issue, R.C. 5731.09 (A), very similar to that undertaken in *White* in determining that the provision at issue provided for a tax exemption. Additionally, the Court reaffirmed the strict construction principles applicable to such exemption provisions, citing and quoting with approval to several of its previous decisions. *Id.* at 314.

Just recently, this Court once again recognized and applied the "strict construction" standard to apply to property tax exemption claims, citing to one of the oldest of its tax decisions: "Laws that exempt property from taxation must receive a strict construction because such laws are in derogation of equal rights." *First Baptist Church of Milford, Inc. v. Wilkins* (2006), 110 Ohio St.3d 496, at ¶10, quoting *Cincinnati College v. State* (1850), 19 Ohio 110, 115.

In sum, Schulman's answer brief completely misses the mark when it argues that the exception from the definition of personal property for "patterns, jigs, dies, or drawings" should be broadly interpreted in favor of Schulman's claim. Quite the opposite is true: as an exemption in derogation of the rights of all other taxpayers, that phrase must be narrowly construed, and any reduction in value sought by the taxpayer-claimant thereunder must be established by "clear and convincing evidence."

But this is not the only fundamental error in Schulman's brief. In both its factual and legal analysis, the plastics giant commits other basic errors. We discuss Schulman's brief's mischaracterization of the function of the screw and barrel assemblies in the following section.

**C. The function of the screw and barrel assemblies is as a feeder of raw material plastic resins, conveying the raw material plastic resins to the point where they are introduced into the dies. Neither by applying force or in any other way, do the screw and barrel assemblies “impose their shape upon the product,” as would be required for the assemblies to constitute “dies” as defined by this Court in *Timken v. Lindley* (1985), 17 Ohio St.3d 85, 87.**

The BTA’s findings establish that the screw and barrel components of Schulman’s extruder machine do not qualify as exempt “dies.” Despite these findings, however, the BTA concluded that these components of the extruder machines qualified for the “dies” exemption. If the BTA had applied the correct principles of law to those findings, the BTA would have affirmed the Commissioner’s denial of the exemption.

The BTA’s findings consisted exclusively of quoting from the testimony of Schulman’s witness, Billy Ratliff (see the *BTA’s Decision and Order* at 9-10). Specifically, after quoting excerpts from his testimony, the BTA then adopted Mr. Ratliff’s BTA testimony as the BTA’s findings as follows: “Mr. Ratliff’s testimony reveals that the subject equipment meets the requirements and definition of a ‘die’ as described above \*\*\*.” *BTA Decision and Order* at 11. Other than adopt Mr. Ratliff’s testimony, the BTA made no factual findings in connection with its conclusion that the assemblies qualified for the “dies” exemption.

Yet, as we detailed in our initial brief and further elaborate upon below, Mr. Ratliff’s testimony establishes that the assemblies function as raw material handling equipment. Through the rotation of the screw located within the barrel, the screw and barrel assemblies move the raw material plastic resins over the length of the barrels, which vary from four feet to fifteen feet in length. TR. 16-17, 24-26, Supp. 5, 7-8. In other words, the screw and barrel assemblies transport the raw material resins over a considerable distance, as the resins are being heated from solid granular form to a semi-molten, taffy-like consistency.

The very excerpts from Mr. Ratliff's testimony quoted by the BTA in its decision include one of several statements by him that the assemblies "convey" or "move" the raw material resins through the barrel. In that excerpted testimony, Mr. Ratliff explained that the screw and barrel "convey the [raw] material [plastic resin] to the die (emphasis added)," and that, in order to do so, the screw (located inside the barrel) must be the same size as the barrel. *Decision and Order of the BTA* at 10, quoting Mr. Ratliff's testimony at TR. 17, Supp. 5. Likewise, just a few pages of testimony later, Mr. Ratliff again states that the turning of the screws "move" the raw material plastic resin forward through the barrels, and then "push it through those [the die] holes." TR. 26, Supp. 8. Additionally, Mr. Ratliff described the resins as "traveling through" the barrel, TR. 24, Supp. 7.

So, it is baffling, to say the least, when Schulman asserts that "to say, as the Commissioner does, that the Assemblies 'convey' the resins says too much." Schulman's Br. 2. If the resin is not "conveyed" from the point of its introduction into the barrel to the point (four to fifteen feet later) that it is then pushed by the screw into the die holes, is Schulman suggesting that the resin arrives at the die through some sort of mental telepathy or other magic? Mr. Ratliff's testimony unambiguously and unequivocally establishes that the assemblies do precisely what we say they do: they convey the raw material resin through the barrel and, when sufficient resin has aggregated at the end of the barrel, the screw then pushes that resin through the die holes.

Notably, Schulman's Statement of Facts does not attempt to claim that the screw and barrel assemblies impose their shape on the product -- nor would the record support such a characterization. Instead, Schulman asserts only that "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.” (Emphasis added.) Schulman’s Br. 2. But, this statement is simply not correct either.

As Mr. Ratliff testified, the screw pushes the raw material resin through holes in the “face of the **die**” – not, as Schulman erroneously asserts, “out of the face of the **Assembly**.” See TR. 26, lines 17-19, Supp. 8: “It [the screw] will turn and move it [the resin] forward to the **face of the die**, where it goes through the die.” (Emphasis added.) In Mr. Ratliff’s own words, the screw “pushes” the raw material resin through the die holes. *Id.*, lines 20-25. By referring to the “face” of the assembly, rather than to the “face” of the die, Schulman confuses the assemblies with the dies. Schulman’s confusion is not reflected in the BTA testimony.

Mr. Ratliff’s testimony makes no mention of the “face” of the screw and barrel assembly, and for good reason – there is no “face” to the screw and barrel assemblies. The screw obviously does not have a “face.” And, if by the “face of the Assembly,” Schulman is simply referring to the opening in the end of the barrel, then it should say so. Perhaps the word “mouth” could be used for that opening, but using the word “face” in that context simply does not make any sense.

Because neither the screws nor the barrels can be said to “impose their shape on the product under production,” they do not perform a die function as defined by this Court in *Timken* and, thus, fail to qualify for the dies exemption. *Timken*, 17 Ohio St.3d at 87. The dies impose their unique shapes on the particular products under production; the screw and barrel assemblies merely transport the raw material resin to the point that the resin is fed into the dies.

Given the total absence of any “die” function performed by either the screw or barrel component of the screw and barrel assemblies, let alone a “primary” one<sup>1</sup>, the assemblies plainly

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<sup>1</sup> Consistent with the “strict construction” required to be given to tax exemptions, in order for the screws or barrels to qualify for exemption as dies, Schulman would be required to show that the “primary” or exclusive use of these integral components of Schulman’s extruder machines is to perform a die function. See, e.g., *Parisi Transp. Co. v. Wilkins* (2004), 102 Ohio St. 3d 278, ¶22

fail to qualify for exemption under *Timken*. But this is not the only reason that the assemblies do not qualify as “dies.” As we detail in the following section, the screws and barrels are “general purpose” devices, and, as such, under a long and uniform line of this Court’s jigs-and-dies-exemption cases, the screw and barrel assemblies fail to qualify as “dies” for that reason as well.

**D. The instant case presents a far easier one for upholding the Commissioner’s denial of the die exemption than was presented to this Court in its seminal decision in *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 268, in which the Court upheld the Commissioner’s denial of a die exemption claim regarding ingot molds. The teachings of *Wheeling Steel* and its progeny, limiting the definition of jigs and dies to “special purpose” devices only, have been uniformly followed in all of this Court’s subsequent exemption cases. Indeed, the policy reasons animating the General Assembly’s enactment of the exemption strongly militate toward limiting the exemption only to “special purpose devices,” as this Court has required but which the BTA failed to do below.**

In Section F of the Statement of Facts in our initial brief, T.C. Br. 10-11, and under Proposition of Law No. 3 of our initial brief, Id. 24-27, we set forth the facts and law applicable to the “special purpose” requirement that must be met in order for a device to qualify for the die exemption. We detailed that the screw and barrel assemblies at issue are “general purpose,” long-lived, permanent, integral parts of Schulman’s extruder machines that regularly perform their transportation functions no matter the raw material resin being transported and no matter the particular plastic product under production.

Likewise, we cited, quoted, and applied this Court’s long and uniform line of decisions holding that only “special purpose devices” may qualify under the exemption for “patterns, jigs or dies.” Our case law analysis included discussion of this Court’s decisions in *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71, 98, *Colonial Foundry v. Peck* (1952), 158 Ohio St. 296,

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(holding that, as applied to the “motor vehicle” exception to the definition of “personal property” likewise set forth in R.C. 5701.03(A), “[t]he primary and principal use of the equipment in question is determinative of the exception,” citing *Manfredi Motor Transit Co. v. Limbach* (1988), 35 Ohio St.3d 73, 75.)

299-300; *American Book Co. v. Porterfield* (1969), 18 Ohio St.2d 49,53; *Timken Co. v. Lindley* (1985), 17 Ohio St.3d 85.

We emphasized that the short-lived, product-specific nature of those items qualifying as exempt “dies” under this Court’s jurisprudence provides the legislative policy rationale for the exemption. Namely, these characteristics of dies tend to sharply limit their utility and value, in contrast to the far more stable, long-lived utility and value of “general purpose” items such as the screw and barrel components of Schulman’s extruder machines. T.C. Br. 26.

We further note here a related policy consideration animating the General Assembly’s limiting of the exemption to “special purpose” items only. By limiting the exemption to “special purpose devices” only, the General Assembly has targeted the very property most related to product innovation. Such grant of exemption encourages product innovation to a far greater extent than had the General Assembly granted exemption for long-lived, general purpose machinery and equipment and components thereof, such as the screw and barrel assemblies at issue.

Indeed, had the General Assembly intended the “patterns, jigs, and dies” exemption to encompass “general purpose” machinery and equipment and components which are in some way “related to” the shaping or forming of a product, the General Assembly would have enacted a far more expedient, efficient and direct way to accomplish that end. Namely, it would have lowered the statutory assessment rate, or listing percentage,” applied to the “true value” of taxable machinery and equipment presently set forth in R.C. 5711.22. This is so because virtually all machinery and equipment, in a general sense, is “related” to the shaping or forming of a product under production. So, taking Schulman’s (and the BTA’s) position to its logical conclusion, virtually all production machinery and equipment would qualify for the exemption.

As we additionally emphasized in our initial brief, but which Schulman likewise has ignored entirely in its answer brief, in *American Book*, supra, the only items qualifying for exemption as jigs or dies were the printer's printing plates. No other items of equipment or components thereof qualified for exemption. None of the cylinders or other equipment used to move the raw material paper as it was being conveyed through the printing process qualified. Rather, only the printing plates qualified for the dies exemption, for only the printing plates imposed their special shape on the product under production.

In response to Section F of our Statement of Facts and Proposition of Law No. 3 of our initial brief, Schulman's answer brief followed the dictum that "if you can't say something positive, say nothing at all." Schulman's Statement of Facts and the remainder of its brief do not contest the general purpose nature of the screw and barrel assemblies. Likewise, just as the BTA in its decision below failed to recognize, let alone apply, the "special purpose device" requirement, so, too, Schulman's brief failed to do so.

Yet, in one way Schulman's brief does tangentially address the "special purpose device" requirement. Its brief includes, as part of an extensive quote from this Court's *Colonial Foundry* decision, a portion of the Court's commentary and analysis of the "grandfather" of all of the Ohio Supreme Court cases concerning the dies exemption, *Wheeling Steel*, supra. Schulman's Br. 4-6. In *Wheeling Steel*, as Schulman concedes, the Court held that the ingot molds did not qualify for exemption. Schulman's Br. 5. We now proceed with applying the principles of law arising from *Wheeling Steel* to the present facts.

The *Wheeling Steel* Court was confronted with a far more difficult case for holding that the ingot molds at issue there did not qualify for the dies exemption than this Court is presented with for likewise holding that the assemblies at issue fail to qualify for the exemption. The facts

concerning the ingot molds presented a more favorable case for granting the exemption for two fundamental reasons. First, unlike the screw and barrel assemblies at issue here, the ingot molds in *Wheeling Steel* actually did “impart their shape” upon the product under production. Thus, the screw and barrel assemblies are further removed from an actual die function than were the ingot molds at issue in *Wheeling Steel*.

Second, the lack of precision of the screw and barrel assemblies in performing their transportation functions is far more apparent than was the lack of precision of the ingot molds in shaping the product in *Wheeling Steel*. In contrast with the ingot molds, which were of unique and varying shapes depending upon the dimensions of the ingot desired, the same extruder machines, with the same screws and barrel assembly components, are used over and over again by Schulman no matter the particular product being produced. Moving the raw materials four to fifteen feet through the barrels does not demand the kind of precision that is necessary to render the assemblies “special purpose” devices. Otherwise, virtually all equipment would be “special purpose” devices.

In *Wheeling Steel*, the Court reasoned that because the open-ended ingot molds at issue “only partially resist the force of molten metal” they did not qualify as “dies.” Here, the screw and barrel assemblies do not resist the raw material resins at all – they do the antithesis of “restraining” the resins. The screw and barrel assembly components of the extruder machines transport the resin to the end of the barrel and then the screw pushes the semi-molten resin into the die holes.

To summarize this section, as material-handling equipment which transports the raw material resins to the dies, the screw and barrel assemblies at issue not only fail to perform any “dies” function, they likewise are general purpose equipment rather than “special purpose

devices.” Thus for these two independent, but mutually supportive reasons, the screws and barrels do not qualify for exemption as “dies.” Accordingly, as we discuss in further detail in the next section, under application of this Court’s principles of law to the BTA’s findings (i.e., Mr. Ratliff’s testimony), the BTA’s decision should be reversed.

**E. At issue in this case is not the BTA’s factual findings concerning the basic facts – but rather the ultimate fact inferred from those underlying facts, i.e., a conclusion derived from given basic facts. “The reasonableness of such an inference is a question appropriate for judicial determination. ‘What the evidence tends to prove is a question of law; and when all the facts are admitted which the evidence tends to prove, the effect of such facts raises a question of law only.’”** *Moore Personnel Services, Inc. v. Zaino* (2003), 98 Ohio St.3d 337, ¶7, quoting *Ace Steel Baling Inc. v. Porterfield* (1969), 19 Ohio St.2d 137, 142, quoting *Turner v. Turner* (1867), 17 Ohio St. 449, 452.

**Moreover, where an application of the correct principles of law to the BTA’s findings shows that the BTA’s holding is unreasonable or unlawful, the Court properly reverses that holding.** *Libby-Owens-Ford Co. v. Collins* (1977), 50 Ohio St.2d 9, 10. **Indeed, where as here, the findings of the BTA not only do not support, but contradict its conclusion, the conclusion must fall and the findings must prevail.** *SFZ Transp., Inc. v. Limbach* (1993), 66 Ohio St.3d 602, 604-605, citing *Hocking Valley Ry. Co. v. Pub. Util. Comm.* (1919), 100 Ohio St. 321, 325, **followed.**

The BTA’s findings regarding the screw and barrel assemblies consist of Mr. Ratliff’s testimony at the BTA evidentiary hearing. See, Section C of this brief, supra, The BTA’s cursory factual and legal analysis consisted of extensively quoting Mr. Ratliff’s testimony, then quoting excerpts from this Court’s decisions, and then adopting Mr. Ratliff’s testimony as the BTA’s own findings.

As detailed in Sections C and D, we embrace Mr. Ratliff’s testimony as it concerns the basic, pertinent facts of this case. Indeed, concerning the functions and nature of the assemblies - - which both the Commissioner and Schulman agree constitute the pertinent inquiry -- we have

quoted and relied upon that very testimony. It is Schulman who has attempted to mischaracterize and avoid that testimony.

Schulman's brief has failed to identify even one line of Mr. Ratliff's testimony concerning the function and nature of the screw and barrel assemblies that the Commissioner has disputed. This case does not present a question of weighing conflicting evidence or evaluating the credibility of witness testimony. Rather, it entails a situation in which the findings of the BTA not only do not support, but contradict its conclusion that the screw and barrel assemblies constitute exempt "dies."

In such circumstances as these, the Court's determination is one of law only. *Moore Personnel Services, Inc.*; *Ace Steel Baling*, supra; *D&A Rofael Enter. v. Tracy* (1999), 85 Ohio St. 3d 118, 121; *SFZ Transp., Inc. v. Limbach*, supra.

Particularly instructive, under the present circumstances is this Court's discussion in *SFZ*, quoting and discussing the Court's established precedent as follows:

**"In this appeal, the findings of the agency not only do not support, but contradict its conclusion. In such case, the latter must fall and the findings must prevail. \* \* \***" (Citations omitted.)

A review as to the reasonableness and lawfulness of the agency decision necessarily includes an examination of the record "to examine the evidence and determine as to the ultimate facts established by it, and whether such ultimate facts furnished sufficient legal predicate upon which to base the order complained of." *Hocking Valley Ry. Co. v. Pub. Util. Comm.* (1919), 100 Ohio St. 321, 325, 126 N.E. 397, 398. "The fact that a question of law involves a consideration of the facts or the evidence, does not turn it into a question of fact or raise a factual issue; **nor does that consideration involve the court in weighing the evidence or passing upon its credibility.**" *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 58 O.O.2d 424, 280 N.E.2d 896, paragraph two of the syllabus.

*SFZ*, supra at 204. (Emphasis added.)

Moreover, the Court should reject any suggestion in Schulman's brief that this Court's decision in *Libby-Owens-Ford*, supra, somehow bars this Court from making its own judicial determination concerning the BTA's conclusion that the screw and barrel assemblies qualify for exemption. In the present case, unlike in *Libby-Owens-Ford*, supra, the BTA has not applied the correct legal principles to the basic facts of the matter. See *Libby-Owens-Ford*, 50 Ohio St.2d at 10 (holding that "[t]he Board of Tax Appeals made a factual determination and applied it to the **correct** principles of law.") (Emphasis added.)

In fact, as we have noted in this reply brief and in our initial merit brief, the BTA failed to set forth the definition of "die" set forth in *Timken* upon which we correctly rely, and altogether ignored the "special purpose device" requirement that this Court has long and uniformly held must be met in order for an item of equipment or component thereof to qualify for the exemption. Had the BTA actually applied Mr. Ratliff's testimony to the correct legal principles, the BTA would have affirmed the Commissioner's denial of the exemption claim. Indeed, as we have detailed above, Mr. Ratliff's testimony not only fails to support the BTA's holding, it contradicts it. Accordingly, the Court should reverse that unreasonable and unlawful conclusion, thereby upholding the Commissioner's denial of the exemption claim.

**F. In challenging the Commissioner's denial of the exemption claim at the BTA, Schulman had the affirmative burden of establishing both the manner and the extent of the Commissioner's alleged error in failing to grant the exemption. Schulman had the burden of showing that the Commissioner's assessment of true value was factually, as well as legally, incorrect. *Nat'l City Bank v. Wilkins* (2006), 111 Ohio St.3d 485, ¶13; *Stds. Testing Laboratories, Inc. v. Zaino* (2004), 100 Ohio St.3d 240, ¶30; *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28, 30-31; *Inland Refuse Transfer Co. v. Limbach* (1990), 53 Ohio St.3d 10, 12; *Holiday Inns, Inc. v. Limbach* (1990), 48 Ohio St.3d 34, 37; *Snider v. Limbach* (1989), 44 Ohio St.3d 200; *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 124; *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, 69.**

In the present case, Schulman failed to present any probative evidence establishing the amount of the reduction in true value, if any, that would properly result from exempting any of its screw and barrel assemblies from personal property taxation. Nor even did Schulman present any probative evidence identifying the items of its assessed, taxable property that would qualify for exemption as screws or barrels.

We detailed Schulman's failure to present such evidence in our initial brief in Sections G-K of the Statement of Facts, T.C. Br. 12-17, and under Proposition of Law No. V, T.C. Br. at 27-29. Schulman's answer brief did not contest any of our factual statements or analysis concerning its failure to present such evidence. Instead, Schulman submits that it was not required to present such evidence to the BTA, and that, upon remand to the Commissioner, it may present such evidence to prove its entitlement to a reduction in the Commissioner's assessed valuations. Schulman's Br. 11-14.

This Court has long and uniformly required those challenging the Tax Commissioner's administrative determinations to demonstrate to the BTA both the manner and the extent of the claimed errors in the Commissioner's determinations. At the BTA, the Commissioner's determinations of true value must be shown to be factually, as well as legally, incorrect. For this

latter established principle, see, particularly, *Hatchadorian* and *Snider*. In *Hatchadorian*, this Court reversed the BTA's decision ordering the Commissioner, upon remand, to use a more reasonable method of valuation. The Court reversed the BTA because no evidence was offered by the appellant at the BTA to establish a more accurate value or to show the extent of the claimed error in the Commissioner's determination of value. See also, *Snider*, 44 Ohio St.3d at 201. More recently, the Court has likewise applied these same principles in reversing the BTA.

As this Court held in *Inland Refuse*, 53 Ohio St.3d at 12:

As the Commissioner argues, Inland had the burden to show the manner and extent of her [the Commissioner's] error. *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, 42 O.O. 2d 365, 235 N.E. 2d 511, and *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St. 3d 213, 215, 5 OBR 455, 457, 450 N.E. 2d 687, 688. Thus, Inland should have established before the BTA what items were used directly in rendering the public utility service; consequently, the BTA erred when it remanded the case to the commissioner for this determination. (Bracketed language added.)

Similarly, as this Court held in *CNG Dev.*:

[The BTA] reversed the commissioner's order as to all transactions that required delivery or performance in a county other than that in which the vendor's place of business was located. Nevertheless, the BTA failed to identify these transactions and where they occurred, apparently requiring the commissioner to determine this on remand. \*\*\*

This evidence [presented by the taxpayer at the BTA] falls short of proving the extent of the claimed error, and the BTA should have affirmed the commissioner's order. (Citation omitted, bracketed language added.)

63 Ohio St.3d at 30-31. See, also, *Holiday Inns*, 48 Ohio St.3d at 37; *Alcan Aluminum*, 42 Ohio St.3d at 124.

Finally, we note that, by brief at 11-14, Schulman asserts that in its notice of appeal to the BTA it did not raise any issue concerning the extent of the reduction in true value which would arise from granting exemption for its screw and barrel assemblies. On this asserted basis Schulman argues that such issue was not properly before the BTA for resolution. Such argument,

in addition to violating the established principles we set forth under this caption, runs headlong against this Court's recent holding in *Key Serv. Corp. v. Zaino*, (2002), 95 Ohio St.3d 11, 16 (“[T]here is no statutory limitation on what the commissioner may contest. The only statutory constrains are imposed upon the appellant’s appeal to the BTA.”)

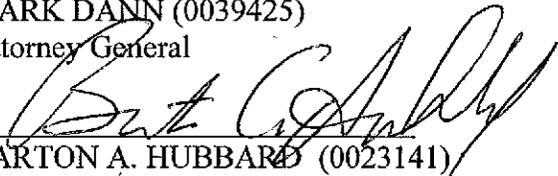
Thus, even if screw and barrel assemblies were to properly qualify as exempt “dies,” the BTA acted unreasonably and unlawfully in failing to uphold the Commissioner’s denial of the exemption claim. This is so because of Schulman’s failure to meet its affirmative burden of proof of showing the extent, if any, to which the Commissioner’s determination of true value was factually incorrect.

### CONCLUSION

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

Respectfully submitted,

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### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply Brief of Appellant was sent by regular U.S. mail to Leonard A. Carlson, 2700 East Main Street, Suite 111, Columbus, Ohio 43209, and Raymond D. Anderson and Kevin M. Czerwonka, Vorys, Sater, Seymour & Pease, LLP, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216-1008, attorneys for appellee, on this 15<sup>th</sup> day of May, 2007.

  
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