IN THE SUPREME COURT OF OHIO

UBS Financial Services, Inc. f/k/a Paine Webber, Inc. Appellant, v. Thomas M. Zaino, [Richard A. Levin] Tax Commissioner of Ohio, Appellee.	: : : : : : : : : : : : :	Supreme Court Case No. 07-1129 Appeal from the Ohio Board of Tax Appeals BTA Case No. 2003-T-1139

NOTICE OF APPEAL

Marc Dann
Attorney General of Ohio
Barton A. Hubbard
30 East Broad Street
Columbus, Ohio 43215
(614) 466-4320

Attorneys for Appellee,
Tax Commissioner of Ohio

Thomas J. Kenny
(Counsel of Record)
Varnum, Riddering, Schmidt & Howlett, L.L.P.
39500 High Pointe Blvd.
Suite 350
Novi, MI 48375
(248) 567-7400
tjkenny@varnumlaw.com

Edward J. Bernert (0025808)
Baker & Hostetler LLP
65 East State Street
Suite 2100
Columbus, OH 43215
(614) 228-1541
ebernert@bakerlaw.com

Attorneys for Appellant,
UBS Financial Services, Inc

FILED
JUN 22 2007
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

UBS Financial Services, Inc. f/k/a Paine Webber, Inc. Appellant, v. Thomas M. Zaino, [Richard A. Levin] Tax Commissioner of Ohio, Appellee.	: : : : : : : : : : : : :	Supreme Court Case No. Appeal from the Ohio Board of Tax Appeals BTA Case No. 2003-T-1139

NOTICE OF APPEAL

UBS Financial Services, Inc. f/k/a Paine Webber, Inc. ("Appellant"), hereby gives notice of its appeal to the Supreme Court of Ohio from a Decision and Order of the Board of Tax Appeals ("BTA") journalized in Case No. 2003-T-1139 on May 25, 2007, a true copy of which is attached hereto and incorporated herein by reference as Exhibit A. This appeal is filed as a matter of right pursuant to Revised Code ("R.C.") 5717.04.

Appellant complains of the following errors in the BTA's Decision and Order:

Apportionment Formula

1. The BTA erred in overstating the Ohio portion of Appellant's Dealer in Intangibles tax base.

2. The BTA erred in failing to apply former R.C. 5725.14 as drafted and in failing to apportion the tax base based, in part, on the proportion of (one percent of) other gross receipts assignable to Ohio compared with other gross receipts assigned everywhere.

3. The BTA erred in substituting other standards, such as "revenues", "profits" and "net trading profits" for the then statutory standard of "receipts" ("gross receipts") in former R.C. 5725.14.

4. The BTA erred by failing to apply former R.C. 5725.14 as written.

5. The BTA erred in failing to resolve any ambiguity found to exist in former R.C. 5725.14 in favor of the taxpayer.

6. The BTA erred in relying upon aids in construction of a statute not sanctioned by R.C. Chapter 1, including but not limited to, accounting testimony not relevant or germane to construction of the apportionment provisions of R.C. 5725.14.

7. The BTA erred in accepting a statement in the Tax Commissioner's instructions and an internal policy of the Tax Commissioner as to the meaning of "gross receipts" when such internal policy applied a rule of general application but was not promulgated in accordance with the statutory provisions for administrative rules.

Calculation of Net Worth

8. The BTA erred in overstating the net worth of Appellant by improperly adding thereto the costs of certain real property leasehold improvements that were not owned by Appellant.

Jurisdictional Issue

9. The BTA erred in finding that it lacked jurisdiction to consider the proper apportionment of Appellant's tax base.

10. The BTA erred in concluding that Appellant did not properly raise the issue of the application of the "other gross receipts" issue in proceedings before the Tax Commissioner or that the Tax Commissioner lacked the authority to correct that error.

11. The BTA erred in failing to recognize that unlike other taxes, such as the Ohio franchise tax, the Dealer in Intangibles Tax is not self assessed by the taxpayer but is assessed by the Tax Commissioner in the first instance, *see* R.C. 5725.15, and thus on a petition for reassessment, the Tax Commissioner may correct his original assessment as well as the deficiency assessment.

12. The BTA erred in using the absence of a claim for deduction from book value, which has no bearing on an apportionment issue or the issue of whether the leasehold improvements should be added to net worth, neither of which issue implicates valuation or the book values of Appellant.

13. The BTA erred in requiring the filing of an "application for refund" to pursue additional issues when no such provision is required by the Ohio Revised Code.

14. The BTA erred in requiring the filing of an amended return, requesting a certificate of abatement, or any other action to pursue additional issues, when no such requirements are set forth in the Ohio Revised Code.

15. The BTA erred in finding that Appellant failed to take an action to preserve the issue of proper apportionment when the BTA can cite no statutory requirement that Appellant failed to meet.

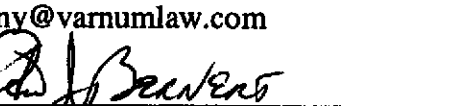
16. In the alternative, the BTA erred in failing to determine that even if the refund could not be honored, the protest of the misapplication of former R.C. 5725.14 by failing to apply the gross receipts standard in any case would remain a defense against the increase in tax resulting from the deficiency assessment.

Claim for Relief

17. Wherefore, the order of the BTA is unreasonable and unlawful in these respects and should be reversed. Appellant requests such other relief as properly may be accorded by law.

Respectfully submitted,

Thomas J. Kenny
(Counsel of Record)
Varnum, Riddering, Schmidt & Howlett, L.L.P.
39500 High Point Blvd., Suite 350
Novi, MI 48375
(248) 567-7400
tjkenny@varnumlaw.com



Edward J. Bernert (0025808)
Baker & Hostetler, LLP
65 E. State St., Suite 2100
Columbus, Ohio 43215
(614) 228-1541
ebernert@bakerlaw.com

Attorneys for Appellant,
UBS Financial Services, Inc.

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

UBS Financial Services, Inc. f/k/a Paine Webber, Inc. Appellant, v. Thomas M. Zaino, [Richard A. Levin] Tax Commissioner of Ohio, Appellee.	: : : : : : : : : : : : :	Ohio Board of Tax Appeals BTA Case No. 2003-T-1139

PRAECIPE

TO THE OHIO BOARD OF TAX APPEALS

Demand is hereby made that the Ohio Board of Tax Appeals ("Board") prepare, transmit and file with the Supreme Court of Ohio a certified transcript of the records and proceedings of the Board pertaining to its Order in the above-styled manner, including in said certified transcript, the Board's Order, the original papers in the case or a transcript thereof, all evidence with originals or copies of all exhibits as adduced in said proceeding considered by the Board in making its Order.

Thomas J. Kenny
(Counsel of Record)
Varnum, Riddering, Schmidt & Howlett, L.L.P.
39500 High Point Blvd., Suite 350
Novi, MI 48375
(248) 567-7400
tjkenny@varnumlaw.com

Edward J. Bernert (0025808)
Baker & Hostetler, LLP
65 E. State St., Suite 2100
Columbus, Ohio 43215
(614) 228-1541
ebernert@bakerlaw.com

Attorneys for Appellant,
UBS Financial Services, Inc.

ACKNOWLEDGEMENT OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing Notice of Appeal and Praecipe was delivered to the Board of Tax Appeals, 30 East Broad Street, 24th Floor, Columbus, Ohio 43215, by hand-delivery on this ___ day of June, 2007.

OHIO BOARD OF TAX APPEALS

By: _____

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal and Praecipe were served this 22nd day of June, 2007 by hand-delivery upon the Ohio Board of Tax Appeals, 30 East Broad Street, 24th Floor, Columbus, Ohio 43215, and by certified mail upon Richard A. Levin, Tax Commissioner of Ohio, 30 East Broad Street, 22nd Floor, Columbus, Ohio 43215, and Barton A. Hubbard, Assistant Attorney General, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215.

Edward J. Bernert

101760686

OHIO BOARD OF TAX APPEALS

UBS Financial Services, Inc., f/k/a/ PaineWebber, Inc.,	)	CASE NO. 2003-T-1139
	)	
Appellant,	)	(DEALER IN INTANGIBLES TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
Thomas M. Zaino, Tax Commissioner of Ohio,	)	
	)	
Appellees.	)	

APPEARANCES:

For the Appellant - Varnum, Riddering, Schmidt & Howlett, L.L.P.
Thomas J. Kenney
39500 High Pointe Blvd.
Suite 150
Novi, MI 48375

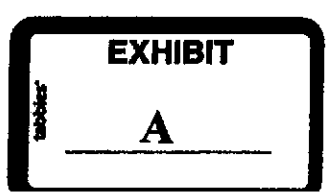
Siegel, Siegel, Johnson & Jennings Co., L.P.A.
Nicholas M.J. Ray
3001 Bethel Road
Suite 208
Columbus, Ohio 43220

For the Appellee - Marc Dann
Attorney General of Ohio
Barton A. Hubbard
Assistant Attorney General
Taxation Section
State Office Tower, 16th Floor
30 East Broad Street
Columbus, Ohio 43215-3248

Entered May 25, 2007

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

UBS Financial Services, Inc., appeals from a final determination of the Tax Commissioner, in which the commissioner affirmed three dealer in intangibles tax ("DIT") assessments issued for tax years 1999, 2000, and 2001. UBS claims that the



commissioner erred by a) not allowing a deduction for "landlord contributions" when computing taxable value and b) failing to include in the DIT's receipts factor all receipts from the sale of UBS' securities inventory, including the original cost of the securities to UBS. For the following reasons, we affirm the commissioner's determination in its entirety.

UBS is a Delaware corporation that is engaged in brokering various investment and capital products to its clients. It has its principal place of business located in New Jersey. In addition, UBS operates a "branch office" system throughout the United States, including Ohio. H.R., Vol. I, at 53. The branch offices service what UBS refers to as its "individual clients group." Through its branch offices, UBS provides its individual clients with equity stocks, securities, commodities, insurance, trusts, wrap products,[1] mutual funds, other securities and related products and services. H.R., Vol. I, at 48 and 53. UBS' "institutional clients" purchase similar products and services primarily through UBS' New Jersey office. H.R., Vol. I, at 53. For its services, UBS charges or earns commissions, management fees, interest income, and gains on inventory sales. H.R., Vol. I, at 78.

In 2001, the Department of Taxation conducted an audit on UBS' 1999-2001 DIT returns. As a result of the audit, the department disallowed certain landlord contributions in determining the value of UBS' leasehold improvements and increased the numerator of the gross receipts factor. UBS was assessed an additional tax of

[1] Wrap products are those in which a client invests with a money manager who charges the client an annual fee based upon a percentage of the assets, rather than on each transaction conducted throughout the year. H.R., Vol. I, at 55.

$195,287.68 for tax year 1999, $228,437.04 for tax year 2000 and $360,357.52 for tax year 2001. See S.T., Vol. II, at 517, 539, and 526.

UBS subsequently filed a petition for reassessment, challenging the deficiency assessments. In addition to challenging the assessments, UBS claimed in its petition that it had incorrectly reported "gross receipts" for the apportionment calculation during each of the assessed years. UBS claimed that it had erroneously included one percent of its net trading profits from inventory sales in both the numerator and denominator, rather than one percent of all of its gross receipts from the inventory sales. UBS claimed that a recalculation of the factor would result in a refund for each of the assessed years. UBS has not filed any amended DIT returns or filed an application for refund.[2]

Upon review of the petition for reassessment, the commissioner affirmed the three assessments in their entirety and further declined to make UBS' requested changes to the apportionment factor. UBS, on appeal, concedes the increases made to the numerator of the receipts factor, but argues that the commissioner erred in not permitting the landlord contributions and in not recalculating the factor using gross receipts from inventory sales.

We begin our review by observing that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a

[2] The record indicates that UBS did request the auditing agent to issue a refund based upon UBS' suggested changes to the apportionment factor. The agent, however, relied upon UBS' returns, as filed, in recommending the assessments. The assessments did not alter the apportionment factor, as reported by UBS.

determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

UBS is a "dealer in intangibles," as that term is defined in R.C. 5725.01(B).[3] Pursuant to R.C. 5725.13, the property of a dealer in intangibles must be listed and assessed at its fair value and is to be taxed in the manner prescribed in R.C. 5725.01 to 5725.26, inclusive.[4] Under R.C. 5725.14, a dealer is required to file an annual return with the Tax Commissioner that shows, in detail, the dealer's resources and liabilities. If the dealer maintains separate business offices, whether within Ohio only or within and without the state, the report must also show the gross receipts from business done at each office during the year ending on the thirty-first day of the preceding December.

---

[3] R.C. 5725.01(B), as enacted during the assessment period, provided: "'Dealer in intangibles' includes every person who keeps an office or other place of business in this state and engages at such office or other place in a business that consists primarily of *** buying or selling bonds, stocks, or other investment securities, whether on the person's own account with a view to profit, or as agent or broker for others, with a view to profit or personal earnings."

[4] The DIT is a tax "distinguished from a franchise tax or other form of excise tax." *Bond & Mortgage Investment Co. v. Evatt* (Oct. 28, 1943), BTA No. 8061, unreported. The tax is not one on the entity as a corporation and a dealer in intangibles. Id. at 609; *Household Finance Corp. v. Porterfield* (1970), 24 Ohio St.2d 39. A dealer in intangibles does not pay Ohio franchise tax. R.C. 5733.09(A). The DIT "is imposed upon the dealer's capital *** to the extent that the capital is employed in Ohio." *Household Finance*, supra, at 43.

Upon receipt of the return, "the commissioner is to ascertain and assess all the shares of such dealers in intangibles, the capital stock of which is divided into shares, representing capital employed in this state, and the value of the property representing the capital, not divided into shares, employed in this state by such dealer in intangibles, according to the aggregate fair value of the capital, surplus, and undivided profits as shown in such report, including in the case of an unincorporated dealer, the value of property converted into nontaxable bonds or securities within the preceding year, without deduction for indebtedness created in the purchase of such nontaxable bonds or securities." R.C. 5725.15.

R.C. 5725.15 further provides that, where the dealer has separate offices within and without Ohio, the amount of capital employed in Ohio shall bear the same ratio to the entire capital of the corporation, wherever employed, as the "gross receipts" of the Ohio offices bear to the entire gross receipts of the dealer, wherever arising. During the assessment years, R.C. 5725.14 defined "gross receipts," for the purpose of allocation in the case of a dealer principally engaged in the business of selling or buying stocks, bonds, and other similar securities, as "the aggregate amount of all commissions charged plus one percent of the aggregate amount of all other receipts."[5]

UBS' primary specification of error relates to the proper interpretation of the phrase "aggregate amount of all other receipts" for purposes of defining "gross

[5] Beginning with the 2003 tax year, R.C. 5725.14 now provides, at R.C. 5725.14(3)(b), that "gross receipts" means, "In the case of a dealer in intangibles principally engaged in the business of selling or buying stocks, bonds, or other similar securities either on the dealer's own account or as agent for another, the aggregate amount of all commissions charged." See Am.Sub.H.B. No. 405, effective March 14, 2002, 149 Ohio Laws, Part IV, at 6624.

receipts" under former R.C. 5725.14. Nevertheless, before we can proceed to consider the merits of UBS' contentions, we must address a jurisdictional issue raised by the commissioner. The commissioner maintains that UBS can seek a review of only the increased liability imposed pursuant to the audit of UBS' returns. The commissioner argues that UBS is precluded from seeking, through its petition for reassessment, a refund on amounts UBS originally paid as a result of the information UBS voluntarily reported on its DIT returns. According to the commissioner, UBS must seek a refund on any alleged overpayments through an application for refund.

In reviewing the commissioner's contention, we note that, in its 1999-2001 DIT returns, UBS voluntarily reported its receipts using its "net trading profits" from inventory sales in the numerator and denominator of the apportionment formula, as specified by the commissioner's instructions on the returns, and voluntarily returned and paid the tax based upon its reporting. UBS did not contest the accuracy of the returns at the time they were filed, nor did UBS make any claim for any deduction from book value at the time of making its returns, as specifically required by R.C. 5725.15.[6] During the department's audit, UBS stated that it had erred in calculating the apportionment factor and claimed that it should have based its receipts on "cash received," rather than on the "net trading profits." The agent disagreed and finished the audit using the information reported by UBS in each of its returns. Although UBS informally advanced the issue during the department's audit, UBS neither filed amended returns nor submitted an application for refund.

[6] R.C. 5725.15 provides: "Claim for any deduction from book value of capital, surplus, and undivided profits must be made in writing by the dealer in intangibles at the time of making his return."

R.C. 5725.15 provides, "Whenever the commissioner assesses the fair value of the capital, surplus, and undivided profits of a dealer in intangibles at an amount *in excess of the book value thereof as shown by its report*, or disallows any claim for deduction from book value of such capital, surplus, and undivided profits, he shall give notice and proceed as provided in section 5711.31 of the Revised Code." (Emphasis added.) R.C. 5711.31 specifies both the manner in which the commissioner must give notice of the assessment and the requirements for the filing of a petition for reassessment. Under R.C. 5711.31, the commissioner, upon review of the petition for reassessment, "may make such correction *to the assessment*, as he finds proper." (Emphasis added.)

The commissioner relies upon *Wright Aeronautical Corp. v. Glander* (1949), 151 Ohio St. 29, to support his claim that we lack subject-matter jurisdiction over UBS' specification of error. We find *Wright* to be instructive, in that the court considered a situation where a taxpayer had voluntarily made a tax return and had paid the tax thereon without making any protest that the return was inaccurate, or without filing at the time the return was filed a written claim for a deduction in book value. Nevertheless, the utility of *Wright* is limited because the taxpayer raised its claim of error for the first time before this board, rather than in the proceedings before the commissioner.

We do find *Internatl. Business Machines Corp. v. Zaino* (2002), 94 Ohio St.3d 152, however, to be supportive of the commissioner's position. In *IBM*, the court considered a situation in which a taxpayer sought a refund of an overpayment of

franchise tax through a petition for reassessment rather than through an application for refund. The commissioner had issued a deficiency assessment against the taxpayer. The taxpayer filed a petition for reassessment, seeking a review of the assessment. In addition, the taxpayer argued that changes should be made in the reporting of certain deferred tax asset accounts. The taxpayer argued that, if the entire debit balance was included in its net worth calculation, not only would its franchise tax liability be reduced to zero, but also it would be entitled to a refund. Upon review, the commissioner cancelled the assessment but did not grant the additional refund requested by IBM. The commissioner maintained that, in the absence of a refund application, his authority was limited to the amount of the deficiency assessment.

Upon appeal, the court agreed. In reviewing the assessment statute for franchise tax, the court stated, "There is no language in R.C. 5733.11 that grants the commissioner authority to refund any amount greater than that paid toward the deficiency assessment with the petition for reassessment. Therefore, when the commissioner has made an assessment under R.C. 5733.11, the amount that may be contested and refunded under that statute is limited to the amount paid on the deficiency assessment. No refund of the money paid with the filing of the franchise tax returns is available under R.C. 5733.11" *IBM*, supra, at 154-155.

We find the circumstances before us to be similar. R.C. 5711.31 limits the commissioner's authority to making "such correction *to the assessment*, as he finds proper." (Emphasis added.) Hence, as his authority is limited to the assessment itself, the commissioner is limited to the amount either paid or due on the deficiency

assessment.[7] The commissioner could not go beyond the assessment to consider any other claim for refund not made at the time of filing or not made pursuant to an application for refund. *IBM*, supra. See, also, *Wright*, supra, at paragraph one of the syllabus.

We stress that this is not to say that UBS did not have an avenue to seek a refund of money paid with the filing of its DIT returns. UBS could have filed amended returns and then challenged any refusal by the commissioner to value UBS' property according to the amendments. *Lincoln Elec. Co. v. Limbach* (1993), 66 Ohio St.3d 176. Alternatively, UBS could have filed an application for refund under R.C. 5703.05(B), with any certificate of abatement issued on an overpayment being tendered as provided by R.C. 5725.16. See *IBM*, supra, at 155. Cf. *Lancaster Colony Corp. v. Lindley* (1980), 61 Ohio St.3d 268. UBS has filed neither an amended return for each of the years at issue nor an application for refund. As such, UBS has failed to comply with a specific requirement necessary for our review. *IBM*, supra, at 156.

Although we find jurisdiction wanting in this instance, if we had considered the contested issue, we would have found that the record before us supports the Tax Commissioner's interpretation of R.C. 5725.14. As previously stated, the issue raised by UBS concerns the proper interpretation of the phrase "aggregate amount of all other receipts" for purposes of defining "gross receipts" under former R.C. 5725.14. UBS maintains that the phrase "all other receipts" should include not only the gains and losses from the sale of securities on its own account (as opposed to

[7] UBS had paid the assessment prior to the commissioner's issuance of his final determination. See R.C. 5725.22.

acting as an agent for its customers), but should also include the broker's cost of purchasing the securities. The commissioner counters that "receipts" means the aggregate gains or losses from the sale of securities. Although perhaps an over-simplification, the issue may be hypothetically illustrated by looking at a broker's purchase of stock for $10.00 per share. The broker then sells the stock at a price of $15.00 per share. Under UBS' theory, the "receipts" generated by the sale are $15.00 per share, i.e., the cash received. According to the commissioner, the "receipts" are $5.00 per share, i.e., the broker's gain.

For each of the tax years in question, UBS filed its DIT return (Tax Form 980) pursuant to the commissioner's instructions, which specified that income was to be used when calculating "receipts." This calculation was made in Exhibit C to the return. The instructions for Exhibit C provided:

> "In the case of a dealer engaged primarily in the business of dealing in securities as principal, broker, or both, gross receipts shall consist of the aggregate amount of commissions charged for business done at each office, plus 1% of the aggregate amount of all other receipts from business done at each office.
>
> "Exhibit 'C' is used by brokers who have offices both in Ohio and out. To calculate the Ohio percentage of business for brokers, 100% of commissions charged plus 1% of all other income earned in Ohio, divided by 100% of commissions charged elsewhere plus 1% of all other income everywhere. Line 3, Exhibit A, is then multiplied by the percentage obtained from this calculation." Appellees Ex. F, at page 2 of Form 980-A.

While UBS acknowledges that it filed according to the instructions, it argues that the return is in error and that it should have reported using cash received rather than income. In support, UBS relies upon decisions from other jurisdictions and

the testimony of both Thomas Stampfli, who was UBS' Chief Financial Officer, Eastern Division, during the assessment period, and Louis DeVico, who is UBS' Manager of State and Local Taxes.

We find the cases relied upon by UBS to be unpersuasive. They concern other taxes, and one of the cited cases involves the definition of "total sales," which was defined as "gross receipts." As to the testimony, we do find the witnesses to be credible; however, the testimony, while knowledgeable, goes little beyond personal theory. Given the self-interested nature of the testimony, we do not find it sufficient to overcome the burden in favor of the commissioner. In this regard, we remind the parties that we will determine the weight and credibility to be accorded the testimony and other evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

In addition, the commissioner presented the testimony of Dr. Ray Stephens, a former Senior Academic Fellow of the Office of Chief Accountant, Securities and Exchange Commission, and currently the director of the School of Accountancy at Ohio University. Dr. Stephens testified as to the accounting principles that apply to brokers like UBS. Dr. Stephens testified that "receipts" would be defined as "revenue received in cash." H.R., Vol II, at 141. According to Dr. Stephens, the term "revenue" may have several meanings, depending upon the industry and the type of transaction. H.R., Vol. II, at 142 and 148. Dr. Stephens testified that accounting practice defines "revenue" for purposes of the sale of securities in the brokerage

industry as "the amount of gain or loss from the principal transactions." H.R., Vol. II, at 174. See, also, H.R., Vol. II, at 143.

We agree with the commissioner that the term "receipts," as used in R.C. 5725.14, contemplates factors intrinsic to both the DIT, a tax unique to Ohio, and the sale of securities in the brokerage industry. We find Dr. Stephens' testimony to be credible and probative of the issue. We therefore accept the commissioner's interpretation that, under R.C. 5725.14, "receipts" means the amount of gain or loss on the relevant transactions.

This definition also comports with the commissioner's historical application of R.C. 5725.14 when calculating the gross factor for use in R.C. 5725.15. A review of DIT returns from several years, see Appellee's Exs. B-J, along with the testimony of Michael Sachs, a former employee of the Department of Taxation who supervised the DIT audits, establishes that the commissioner has for several decades interpreted the term "receipts" to mean the gain or losses on the transactions. "Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Weiss v. Pub. Util. Comm.* (2000), 90 Ohio St.3d 15, at 17-18, citing *Collinsworth v. W. Elec. Co.* (1992), 63 Ohio St.3d 268, at 272. See, also, *State ex rel. Clark v. Great Lakes Contr. Co.*, 99 Ohio St.3d 320, 2003-Ohio-3802, at ¶ 10 ("It is a fundamental tenet of administrative law that an agency's interpretation of a statute that it has the duty to enforce will not be overturned unless the interpretation is unreasonable."); *In re Estate of Packard* (1963), 174 Ohio St. 349,

at 356 (holding that "*** long standing administration practices are not only persuasive, but should not be set aside unless judicial construction makes it imperative to do so."). There is nothing unreasonable in the commissioner's interpretation of R.C. 5725.14.

In its final specification of error, UBS asserts that the commissioner erred in adding the landlord contributions portion of its leasehold improvements in UBS' net worth. At the time it enters into a lease, UBS makes substantial renovations to the office. Improvements include new wiring to support UBS' computer system. H.R., Vol. I, at 238. In such situations, UBS will enter into an arrangement in which the landlord agrees to pay for a portion of the improvements. For purposes of the DIT, UBS reported the cost of the improvements, less the amount of funds it received from the landlord. H.R., Vol. I, at 238. The commissioner counters that the total cost of the improvements should be included because the improvements themselves exist regardless of who pays for them. See S.T., Vol. I, at 1.[8]

Upon review, we agree with the commissioner. The improvements are part of UBS' net worth, regardless of whether UBS received a discount in its lease as part of making the necessary improvements to its offices. Moreover, it is clear that UBS treated the landlord contributions as an asset in its financial statements. See S.T. at 126, 184, 185. In addition, UBS provided only general testimony as to the type of

[8] The commissioner also argues that there is no jurisdiction to consider UBS' specification because UBS failed to make a written claim for a deduction in book value at the time it filed each return. In support, the commissioner relies on *Willys-Overland Motors, Inc. v. Evatt* (1943), 141 Ohio St.402. However, the instant matter differs factually. The court specified in *Willys-Overland* that the commissioner was without jurisdiction to consider a request for a deduction from book value where the request was not made in writing at the time of filing *and* where the commissioner failed to assess any item in excess of the value reported. Id. at paragraph four of the syllabus. Here, the commissioner did assess UBS for property that the commissioner believed was omitted.

improvements involved. We reiterate that UBS has the burden of coming forward with probative evidence to support its claims. *Alcan*, supra. In considering the evidence before us, we are unable to conclude that UBS has met its burden of proving, with competent and probative evidence, that the commissioner's inclusion of the landlord contributions was in error.

In conclusion, we find that we are without jurisdiction to consider UBS' contention that the broker's cost of purchasing securities should be included in its "receipts" under R.C. 5725.14. We further find that UBS has failed to prove, by competent and probative evidence, that the commissioner's inclusion of landlord contributions is in error. Finally, upon review of the record before us, we conclude that the commissioner's final determination is supported by a preponderance of the evidence and is in accordance with law. Accordingly, we affirm the Tax Commissioner's final determination.

ohiosearchkeybta