

IN THE SUPREME COURT OF OHIO

CARROLL E. NEWMAN,
Adams County Auditor,

Appellant,

v.

WILLIAM W. WILKINS,
TAX COMMISSIONER OF OHIO,

Appellant.

Case No. 07-1054

On Appeal From The Ohio
Board Of Tax Appeals
Nos. 2002-P-170, 171, 172

APPELLANT ADAMS COUNTY AUDITOR'S MEMORANDUM IN
OPPOSITION TO APPELLEE UTILITIES' MOTION TO DISMISS CLAIMS
OF ERROR TWO, THREE, FOUR AND FIVE

DAVID C. DIMUZIO (0034428)
David C. DiMuzio, Inc.
1900 Kroger Building
1014 Vine Street
Cincinnati, Ohio 45202
Telephone: (513) 621-2888
Facsimile: (513) 345-4449

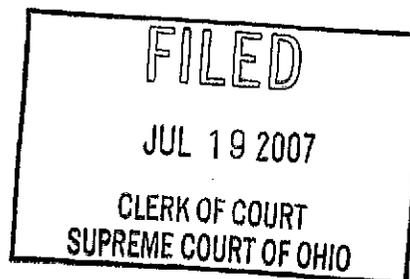
ATTORNEY FOR APPELLANT
ADAMS COUNTY AUDITOR

MARC DANN
Attorney General of Ohio
JANYCE C. KATZ (0042425)
Assistant Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-5967
Facsimile: (614) 466-8226

ATTORNEYS FOR APPELLEE
OHIO TAX COMMISSIONER

ANTHONY L. EHLER (0039304)
Vorys, Sater, Seymour & Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216
Telephone: (614) 464-8282
Facsimile: (614) 719-4702

ATTORNEY FOR APPELLEE
ELECTRIC COMPANIES
CINCINNATI GAS &
ELECTRIC COMPANY
THE DAYTON POWER &
LIGHT COMPANY; AND
COLUMBUS SOUTHERN
POWER COMPANY



MEMORANDUM IN OPPOSITION

The errors listed by Appellant are sufficiently specific, and the cases cited by Appellee in its Motion do not relate to the types of errors in this Appeal. Errors number 2, 3 and 4 are specific and relate to legal deficiencies in the BTA's decision. The legal tests and definitions referred to in the errors can be found in the following Supreme Court decisions: Satullo v. Wilkens (2006), 111 Ohio St.3d 399, 2006 Ohio 5856; Timken v. Lindley (1980), 64 Ohio St.2d 224; Key Services Corp. v. Zaino (2003), 95 Ohio St.3d 11, 202-Ohio-1488.

Any attempt by Appellees to characterize these legal errors as mere requests to reweigh the evidence is incorrect on its face.

Appellee Utilities' Motion To Dismiss incorrectly applies the holding of Castle Aviation, Inc. v. Wilkens (2006), 109 Ohio St. 3d 290, 2006-Ohio-2420. That decision referred to the failure of a taxpayer to specify an error in its statutory appeal under §5717.02 from the Tax Commissioner to the BTA. It had nothing to do with how an aggrieved party from an erroneous decision of the BTA specifies its errors to the Ohio Supreme Court. As long as the aggrieved party properly specified the Tax Commissioner's errors in its appeal to the BTA, the jurisdictional requirements of §5717.02 are met.

In an appeal to the Ohio Supreme Court from the BTA, the operative statute is §5717.04, which requires that "A Notice of Appeal shall set forth the decisions of the board appealed from and the errors therein complained of." (Italics added). Clearly, the Appellant's Notice of Appeal met those requirements. (The Court in Castle Aviation noted that the reason for specificity in appeals to the BTA is that the state needs to be able to gather evidence and testimony to provide at the evidentiary trial for constitutional challenges. See page 426 of the Court's opinion). None of Appellant's claimed errors to this Court involve constitutional challenges.

Appellant's reliance on the following cases was also misplaced:

- 1) Queen City Valves, Inc. v. Peck (1954), 161 Ohio St. 579, 120, N.E.2d 310. That case involved defects in the appeal notice from the Tax Commissioner to the BTA. It also involved very general errors, unlike Appellant's Notice of Appeal, which refer to legal deficiencies in the BTA's decision (failure to meet recognized Supreme Court rulings such as the need to meet each and every requirement of an exemption statute, failure to apply a strict scrutiny test, and failure to properly apply definitions of statutory language.) These are legal failures and do not merely ask the Supreme Court to look at the same evidence already reviewed by the BTA. It asks the court to overturn legal mistakes made by the BTA.
- 2) Deerhake v. Limbach (1998), 47 Ohio St.3d 44, 546 N.E.2d 1327. This case again involved the use of general language such as "against the manifest weight of the evidence and contrary to law". Appellant's Notice of Appeal in the present case specifically alleges legal errors made by the BTA. These errors are clearly set forth in recognized Supreme Court cases such as Satullo v. Wilkens (2006), 111 Ohio St.3d 399, 2006 Ohio 5856 [applies strict scrutiny test and requirement that the exemption request is affirmatively met by the taxpayer]; see also Timken v. Lindley (1980), 64 Ohio St.2d 224. [applies strict scrutiny test and applies proper definitions for application of exemption requests in industrial applications.]. Nothing in Appellant's Notice of Appeal asks the court to merely reweigh evidence.
- 3) Cousino Const. Co. v. Wilkens (2006), 108 Ohio St.3d 90, 2006-Ohio 162. This again involved a defect in a taxpayer's notice filed with the BTA, not the Supreme

Court. The taxpayer failed to specify the particular exemption it was seeking. In our case, Appellant was not seeking any exemption, and therefore did not need to specify one. Appellant was objecting to an exemption already applied for by the utilities, and it was clear which exemption was being challenged. There is no requirement in any statute that all of the arguments and evidence relating to each challenge be set forth in detail in each error complained of.

- 4) Satullo v. Wilkens (2006), 111 Ohio St.3d 399, 2006 Ohio 5856. This case actually supports Appellant's appeal. It expressly states the rule that taxpayers have an affirmative burden to establish their right to tax exemption, and that tax exemption requests will be "strictly construed".

With regard to Error number 4, Appellees argue that waste heat was not a matter brought before the BTA. In fact, large parts of the BTA hearing were dedicated to discussion of the waste heat issue. Waste heat is a specific requirement for exemption under ORC §5709.46; that statute was specifically discussed in the appeal to the BTA. Errors number 2 and number 8 in the appeal to the BTA also relate to the waste heat issue. The engineer admitted in his testimony that he did not analyze any of the specific requirements of the exemption statute other than mathematical calculations of thermal savings. Error number 2 to the BTA relates directly to the proper definition of waste heat.

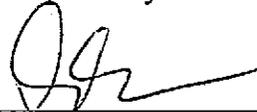
Finally, Appellees object to Error number 5 to this Court, claiming that no such error was specified by the county in its notice of appeal to the BTA. Error number 5 is appropriate, since it relates to an error made by the BTA, not the Tax Commissioner. The facts necessary to raise Error number 5 were not even in the record until the BTA evidentiary hearing took place. (See pages 4, 35, and 41 of Tax Commissioner's Brief filed November 1, 2004.) In other words, key

information was missing from the exemption application filed by the taxpayers. It was only after the BTA appeal took place that the true facts about the replacement nature of the equipment became clear. Obviously, the taxpayer should not benefit from its own failure to provide information.

Conclusion

The errors specified to this Court are specific and relate to the legal errors made by the BTA. The Motion shall be overruled.

Respectfully submitted,



David C. DiMuzio (0034428)
David C. DiMuzio, Inc.
1900 Kroger Building
1014 Vine Street
Cincinnati, Ohio 45202
(513) 621-2888 telephone
(513) 345-4449 facsimile

ATTORNEY FOR APPELLANT
ADAMS COUNTY AUDITOR

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Memorandum In Opposition To Motion To Dismiss Claims, has been sent by ordinary U.S. mail on this 18th day of July, 2007 upon the following counsel of record:

Anthony L. Ehler
Vorys, Sater, Seymour & Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216

Janyce C. Katz
Assistant Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3428



David C. DiMuzio