

IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

CARROLL E. NEWMAN,
Adams County Auditor,

Appellant,

v.

WILLIAM W. WILKINS,
TAX COMMISSIONER OF OHIO,

Appellant,

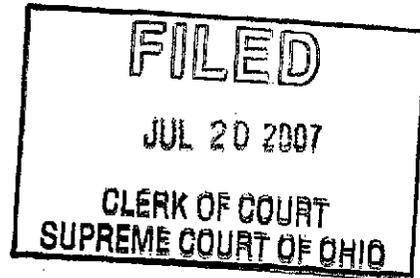
v.

ELECTRIC COMPANIES CINCINNATI GAS
& ELECTRIC COMPANY; THE DAYTON
POWER & LIGHT COMPANY; AND
COLUMBUS SOUTHERN POWER
COMPANY,

Appellee.

Case No.07-1054

Appeal from BTA Case
Nos. 2002-P-170, 171, 172



MEMORANDUM AGAINST MOTION TO DISMISS

ANTHONY L. EHLER (0039304)
JEFFREY ALLEN MILLER (0072702)
Vorys, Sater, Seymour & Pease LLP'
52 East Gay Street
P. O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614)464-8282
Facsimile: (614) 719-4702

ATTORNEYS FOR APPELLEES

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

MARC DANN (0039425)
Attorney General of Ohio
JANYCE C. KATZ (0042425)
Assistant Attorney General
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-5967
Facsimile: (614) 466-8226

ATTORNEYS FOR APPELLANT

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

ATTORNEY FOR APPELLANT

**Memorandum Contra to Motion to Dismiss
Appellant/Appellee Tax Commissioner's Notice of Appeal**

Introduction

The Motion to Dismiss the Tax Commissioner's Notice of Appeal to this Court filed by Dayton Power & Light Company, Cincinnati Gas & Electric Company and the Columbus & Southern Ohio Electric Company ("Appellee Electric Companies") comprises numerous misstatements of law applied to numerous misstatements of fact, all in an effort to avoid the review by this Court of an erroneous decision of the Board of Tax Appeals ("BTA"). The Tax Commissioner, as a party to the BTA appeal, has both statutory authority under R.C. 5717.04 and standing to appeal the Board's decision to this Court. Thus, Appellees' contention that the Tax Commissioner's notice of appeal should be dismissed for lack of subject matter jurisdiction or statutory standing is devoid of merit.

The case before this Court arose when the Tax Commissioner incorrectly granted¹ three exemptions based on a mistake of fact. The Tax Commissioner certified as exempt "thermal efficiency improvement facilities" under R.C. 5709.46 certain equipment of the J. M. Stuart Electric Generating Station ("Stuart"), owned by Appellee Electric Companies. During the lengthy BTA hearing held over a number of days spanning a period of more than one year, the Tax Commissioner decided that he had been presented with erroneous information that caused him to err in granting the exemption. Thus, he conceded that the exemption was erroneously granted and urged the Board to so rule.

¹ The specific statutes under which the Tax Commissioner granted exemption were repealed in 2003 and reenacted as part of R.C. 5709.20 through 5709.27. Am.Sub. H.B. 95, eff. June 26, 2003 Former R.C. 5709.45 through 5709.52 formed the basis of the exemption granted and will be so referenced.

³ Evolving out of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), 467 U.S. 837, 842-43, a court is to address two questions "whether Congress has directly spoken to the precise question at issue" and if not "whether the agency responsible for filling a gap in the statute has rendered an interpretation that is "based on a permissible construction of the statute." *SKF USA Inc. v. United States* (D.C. Cir. 2001) 254 F.3d 1022, 1027. Vacatur of a factually erroneous position is available to a court. For example, in *Price v. U.S.* (2003), 537 U.S. 1152, the U.S. Supreme Court remanded a case for further consideration in light of another case "and the Solicitor General's acknowledgement that the Court of Appeals 'erred in concluding that the petitioner's drug possession offense qualified as a predicate felony.'"

Appellees filed a motion to strike the Tax Commissioner's post hearing brief filed with the BTA, which motion was denied by the Board. Appellees' motion to dismiss filed with this Court is nothing more than a rehashing of the same arguments that the BTA readily, and rightly, rejected.

Appellee Electric Companies' also argue that they have been denied due process by virtue of the change in the Tax Commissioner's position. This outcry about lack of due process has no merit. Due process requires notice and a meaningful opportunity to be heard. *State v. Hayden*, 96 Ohio St.3d 211, 773 N.E.2d 502, 2002 Ohio 4169, at P6.

Appellee Electric Companies had notice that the issue regarding the mistake of fact relating to the completion date of Stuart was at issue in the case. The auditor's notice of appeal clearly alerted Appellee Electric Companies to that error. This error is supported by the evidence regarding the items of equipment that were merely replacement parts for older equipment. Moreover, the Tax Commissioner's cross-examination of Appellees' witnesses focused on this issue. Appellees certainly had a meaningful opportunity to be heard, in that the hearing spanned several days over a period of more than a year. Thus, all due process requirements were met in the proceedings below.

It is also significant that, under R.C. 5715.271, an applicant for exemption bears the burden of proving the property worthy of exemption. Appellee Electric Companies' own witness indicated that these were replacement parts and that the replacement parts added no additional efficiency to the plant. .

As is more fully explained below, this Court should deny Appellees' Motion to Dismiss.

Procedural and Factual Background

Appellees filed applications with the Tax Commissioner claiming that certain equipment located at Stuart was exempt as thermal efficiency improvement facilities, as defined in R.C. 5709.45. As part of the process of exemption mandated by statute, an engineer at the Department of Development examined the application and prepared a report finding that the equipment was thermal efficiency equipment, and stating that the thermal efficiency improvement facilities at Stuart were completed on December 31, 1996. The Interim Director of the Department of Development signed off on the report and the Tax Commissioner issued his certification based upon that report. The result was that close to forty percent of the equipment Stuart uses to produce electricity was exempted under R.C. 5709.50 from real, personal property, franchise, sales and use taxes.

Carroll E. Newman, Adams County Auditor (“auditor”) properly appealed to the BTA from the three decisions of the Tax Commissioner on this matter. The auditor’s appeals specified numerous errors with respect to the Tax Commissioner’s granting of the exemptions. In error number four, the auditor pointed out the Tax Commissioner’s error of exempting parts and equipment from a plant, the completion of which predated the effective date of R.C. 5709.46.

The BTA hearing in this matter was conducted over several days within two time periods separated by more than a year. The hearing initially convened on February 18, 2003, and continued through February 22, 2003. The hearing reconvened on May 11, 2004, and continued for seven additional days, concluding on June 1, 2004. At the de novo hearing, when presented with evidence confirming information that had been obtained during discover, the Tax Commissioner decided that he had wrongly granted the exemption for the subject property of Appellee Electric Companies. The Tax Commissioner altered his position and conceded his error as he is obligated to do when he determines that his decision was incorrect. The Tax Commissioner through his conduct at the hearing, his questioning of witnesses, and in his post-

hearing brief publicly conceded his error. For reasons of judicial efficiency, the Tax Commissioner did not seek a remand of the three cases.

The BTA consolidated the three cases into one case, and then wrongly affirmed the mistakenly-issued final determination granting the exemption. The Tax Commissioner, as a party to the BTA hearing, properly filed an appeal to this Court under R.C. 5717.04. The following memorandum details why this Court has subject matter jurisdiction over the appeal and why dismissal is unwarranted

Argument

- A. The Tax Commissioner has a duty to change his position in a de novo hearing before the BTA if facts discovered during the course of the hearing before the Board so warrant. The Tax Commissioner, a party to the case, may express that opinion in the presentation of his case before the Board and in his appeal from the Board's decision to this Court.**
- 1. The Tax Commissioner is a party to a hearing before the Board of Tax Appeals.**

Appellees' motion attempts to foreclose the Tax Commissioner from presenting his argument to this Court that the Appellees are not entitled to the exemption at issue, first by arguing that the Tax Commissioner was not a party to the BTA proceedings and thus, has no statutory right to appeal the decision of the BTA. This argument ignores the plain language of both R.C. 5717.02 and R.C. 5717.04, and the case law of this Court.

That the Tax Commissioner is a party before the BTA under R.C. 5717.02 was recognized by this Court in *Pennsylvania Rd Co. v. Porterfield* (1970), 22 Ohio St.2d 94, 98. Appellees argue that the Tax Commissioner is required to be not only a party to a BTA hearing but also an aggrieved party. The Tax Commissioner is clearly a party under R.C. 5717.02. That a statute gives select parties the right to appeal a decision of the Tax Commissioner to the BTA does not exclude the Tax Commissioner as a party. Appellee Electric Companies are attempting to confuse this Court by arguing that the Tax Commissioner appealed against himself and as he is not an aggrieved party, he has no right to appeal. The reality is that the auditor properly appealed to the BTA and the Tax Commissioner was a proper party to the hearing.

That the Tax Commissioner is a party before the BTA under R.C. 5717.02 was recognized by this Court in *Pennsylvania Rd Co. v. Porterfield* (1970), 22 Ohio St.2d 94, 98. As a party to an appeal at the BTA, the Tax Commissioner, certainly has the right, and, in fact the duty, to change his position on appeal if facts presented at a de novo hearing convince him that his original position was erroneous or illegal.

2. The hearing before the Board is a de novo hearing and, as a party at a de novo hearing, the Tax Commissioner has an obligation to alter his position if facts indicate that position was incorrect.

a. The hearing before the BTA is a de novo proceeding.

Appeals to the Board are de novo proceedings in which parties may submit additional evidence. R.C. 5717.02. *Pennsylvania Rd. Co. v. Porterfield* (1971), 25 Ohio St.2d 223; *Clark v. Glander* (1949), 151 Ohio St. 229. The Ohio Revised Code contemplates that there will be “full administrative appeals from the orders of the Tax Commissioner, in which the parties are entitled to produce evidence in addition to that considered by the Tax Commissioner, and the Board of Tax Appeals is authorized to exercise investigational powers to ascertain further facts.” *Bloch v. Glander* (1949), 151 Ohio St. 381, 385-386.

The Board of Tax Appeals is to enquire into all relevant evidence. *Key Services v. Zaino* (2002), 95 Ohio St.3d 11. It would render meaningless the statutory duty of the Board to investigate if the Board were to limit its investigatory power. *Pennsylvania Rd. Co. v. Porterfield*, 25 Ohio St.2d at 226.

The Supreme Court in *Key Services v. Zaino*, 95 Ohio St.3d at 13, has ruled that “that there is no statutory limit on what the commissioner may contest,” as opposed to an appellant, who is limited to what is raised in the notice of appeal. The BTA found this rational compelling, using it as a basis for denying Appellee Electric Companies’ motion to strike the Tax Commissioner’s brief to the BTA. (Decision and order at).

In this case, when evidence produced in discovery and at the BTA hearing indicated the Tax Commissioner had not narrowly constructed an exemption, the Tax Commissioner altered

his position to comply with his obligation to make certain no property is improperly or illegally exempted. This is so because a tax exemption is in derogation of the rights of all taxpayers and necessarily shifts a heavier tax burden upon the nonexempt. *Joint Hospital Services v. Lindley* (1977), 52 Ohio St.2d 153.

The Board of Tax Appeals, pursuant to R.C. 5717.03, issues orders which “may affirm, reverse, vacate, modify, or remand the tax assessments, valuations, determinations, findings, computations, or orders complained of.” The Board may, under R.C. 5717.03, remand to the Department of Taxation, “[i]f the board finds that issues not raised on the appeal are important to a determination of a controversy” or, if the parties so stipulate, determine “such other issues without remand.” Appellee Electric Company incorrectly implies in its motion to dismiss that R.C. 5717.03 would not be operative because the Tax Commissioner, a party to a BTA hearing, altered his position during the hearing when facts presented as evidence indicate he was wrong. The BTA, like the Tax Commissioner, has an obligation to protect the tax-paying public from exemptions that are illegally or incorrectly granted. *Zindorf v. Otterbein Press* (1941), 138 Ohio St. 287, 290.

b. The obligation of an agency like the Department of Taxation to concede error when a case is on appeal has been recognized in the federal courts.

Appellee Electric Companies argue that an agency, as a party to an appeal involving a de novo hearing, may not concede an error in its own determination or finding when new facts presented at that hearing indicate the incorrectness of its original opinion. On the federal level, the *Chevron* doctrine³ requires the courts to respect agency interpretation of ambiguous statutory language and will generally allow an agency an opportunity to change interpretations while on appeal. *SKF USA Inc. v. United States* (D.C. Cir. 2001) 254 F.3d 1022, 1027-1028⁴. Usually, if the agency changes its position or believes its original decision is incorrect, the decision is to be

⁴ In *Ethyl Corp. v. Browner* (D.C. Cir. 1993) 989 F.2d 522, 524, the Court noted that it frequently grants motions to remand to allow an agency to consider new evidence and make a new decision.

remanded back to the agency for further action if it is defending itself on grounds not previously articulated by the agency. *Id.*

When a federal agency finds it erred, it may ask for a remand, but the court has the discretion to either remand or to keep the case. *Id.* at 1029-1030. This is because there are instances where the outcome is so clear that a remand is not necessary. For example, when the United States Solicitor General conceded before the Supreme Court that mail fraud convictions were invalid, the Court vacated the judgment of the United States Court of Appeals for the Ninth Circuit affirming the mail fraud convictions. *Mariscal v. United States* (1981), 449 U.S. 405. To do otherwise would be to waste judicial and financial resources. In Ohio, *Chevron U.S.A.* is usually cited when a court stresses that there is a duty to respect the legitimate policy choices made by the agency entrusted to make such a decision. See, e.g., *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad* (2001), 92 Ohio St.3d 282, 287-288.

But, R.C. 5717.03 allows for similar treatment of cases when the Tax Commissioner finds compelling evidence that warrants a change in his position. The auditor's notice of appeal to the BTA clearly encompassed the error of incorrectly issuing a certificate exempting replacement parts to a facility finished and operational before 1974. Therefore, there were no issues outside the notice of appeal. Appellee Electric Companies' argument that R.C. 5717.03 was not applicable is, therefore, wrong.

Due to considerations of judicial economy, the Tax Commissioner did not move for remand in this case although a remand would have been permissible. In its Decision and Order, the BTA agreed with the Tax Commissioner. Basing its decision on the wording in *Key Services, Corp. v. Zaino* (2002), 95 Ohio St.3d 11, the BTA stated that "the Tax Commissioner must be permitted to review the evidence presented and argue for the position he believes the facts warrant." The BTA then discussed the issues raised by the Tax Commissioner.

The auditor moved two times for a remand. In both instances, the BTA denied the motion.

c. **When the Tax Commissioner finds compelling evidence which warrants a change in his position, he has changed his position.**

Appellee Electric Companies argue that the Tax Commissioner is limited on appeal to defending his Final Determination. However, a decision to support the Appellee Electric Companies' position would be harmful to taxpayers appealing to decisions to the BTA as well as the general tax-paying public. Plus, it would go against common practice of the Tax Commissioner at the BTA, a practice that has not been contested prior to this case.

The number of cases before this Board where the Tax Commissioner has been an appellee and has conceded at least one issue in favor of the appellant is high. See, e.g., *Bleile Supply Co. v. Tracy* (August 9, 2002), B.T.A. Case No. 97-P-1696 (transactions involving Grayland Farms, Garner Farms and David Hester conceded in Tax Commissioner's brief, page 5); *Dean Supply Co. v. Tracy* (March 10, 2000), B.T.A. Case No. 96-P-206 (can opener, knives and rub bronze, conceded in Tax Commissioner's brief, page 24); *Metropolitan Environmental, Inc. v. Tracy* (March 5, 1999), B.T.A. 97-K-1693 (Counsel for Tax Commissioner conceded at the hearing that a transaction taxed should be removed from the assessment); *Timken Co. v. Lindley* (March 7, 1985), B.T.A. Case No. 82-D-404 (Some pollution control items conceded in Tax Commissioner's brief, pages 20-21). Appellee Electric Companies' position would compel the Tax Commissioner to litigate issues he would otherwise concede, resulting in a waste of resources, time and lack of judicial efficiency, impacting the appellant, the tax commissioner and the BTA.

Tax Commissioner can alter his position against an appellant as well as concede an issue in the applicant's favor. Thus, there have been other cases in which the Tax Commissioner, after hearing the facts at the Board, added to an assessment or opposed an exemption already issued. For example, in *Nestle v. Porterfield* (1971), 28 Ohio St.2d 190, 191-192, "the Tax Commissioner conceded" before the Board of Tax Appeals that additional assessments were

erroneous and urged the adoption of another assessment. This Court affirmed the Board's finding as to these figures. *Id* at 194-195.

In *Columbus Board of Education v. Limbach* (June 26, 1992), B.T.A. Case No. 86-H-566, the Tax Commissioner, who had originally granted an exemption to American Chemical Society for six parcels of land, took the position in the proceeding before the Board of Tax Appeals that the exemption should be denied. Evidence brought to the Board indicated that the American Chemical Society made significant money from its supposedly charitable work. The evidence presented at the hearing before the Board convinced the Tax Commissioner that the American Chemical Society did not fit the definition of a charitable organization. The Tax Commissioner changed his position during the Board's proceedings, and argued against the granting of the exemption. In that matter, the Board agreed with the changed position of the Tax Commissioner and reversed his final determination. *Id*, at 1

Although Appellees argue to the contrary, the BTA has never demanded a formal pre hearing notice when the Tax Commissioner concedes an issue. *Id*, *Columbus Bd. of Education v. Limbach*. And this Court has concurred. *Nestle Co. v. Porterfield, supra*, at 193.

Because the Tax Commissioner was waiting for the evidence produced at the hearing to confirm that the parts were merely replacement parts for a pre existing system, the Tax Commissioner filed no notice of his changed position at the BTA. The hearing was extended over several years, with the first part in 2003 and the second part in 2004. Since the evidence produced at the hearing confirmed what the earlier discovery indicated, the Tax Commissioner wrote his brief pointing out that the requirements of the certification had not been met.

Appellee Electric Companies were permitted to write an additional brief to argue against the issues raised about the replacement parts in a facility that was constructed prior to the passage of the statute. Appellee Electric Companies also filed a motion to strike the Tax Commissioner's brief. Their arguments in their brief were similar to the arguments in their motion to dismiss the notice of appeal. The BTA, as noted earlier, denied the motion to strike.

The BTA recognized the Tax Commissioner's right and obligation to modify his opinion at a de novo hearing. Basing its decision on the wording in *Key Services, Corp. v. Zaino* (2002), 95 Ohio St.3d 11, the BTA stated that "the Tax Commissioner must be permitted to review the evidence presented and argue for the position he believes the facts warrant." The Tax Commissioner appealed from the decision to this Court because the BTA had failed to protect the interests of the tax-paying public when it allowed an exemption the Tax Commissioner had conceded was wrongly issued. See, e.g., *Zindorf v. Otterbein Press*, 138 Ohio St. at 290.

d. The cases cited by Appellee Electric Companies are not on point with the situation in this case where the Tax Commissioner, a party to a de novo hearing, altered his position at the hearing when presented with facts that he was wrong.

The cases cited by Appellee Electric Companies break into several categories. There are those cases that state that a final order cannot be changed after it is appealed. They are not applicable to this case. The final order was not changed. Here, the Tax Commissioner altered his position at a de novo hearing when confronted with facts that he was wrong.

Then, Appellee cites cases that indicate the Tax Commissioner does not have the statutory authority to appeal. Again, the Tax Commissioner did not appeal to the BTA, the auditor did. Until the auditor's discovery process at the BTA started, the Tax Commissioner thought he had exempted thermal efficiency facilities constructed after the statute exempting them was passed and finished in December of 1996. There would have been no reason for the Tax Commissioner to appeal to the BTA from the information he had when he issued the certificates exempting Stuart's equipment. Therefore, the cases Appellee Electric Companies cite along with its argument that the Tax Commissioner cannot appeal from his own determinations have no relevance to the issues before the Court.

Appellee Electric Companies continue along the same path, citing cases that say the BTA cannot decide an issue if it wasn't raised as error. Again, the Tax Commissioner did not appeal to the BTA. The auditor did. These cases are not applicable to a party to a de novo hearing who changes his position when confronted with evidence that he was wrong.

Finally, Appellee Electric Companies, claiming his due process rights were violated, cites cases in an attempt to prove that they never had any knowledge that the equipment of Stuart might be considered “replacement parts” or predating the statute. In particular, Appellee Electric Companies cites paragraph 45 from *Plain Dealer Publishing Co. v. Floyd*, 111 Ohio St.3d 56, 2006-Ohio-4437 to bolster their erroneous claim that they were not apprised of the legal issues until after the completion of discovery and hearing.

Yet, this claim, that they were not apprised of the legal issues until the end of the hearing was also bogus and therefore the cases are not applicable. First, the auditor’s notice of appeal to the BTA indicated as an error the fact that the Tax Commissioner had granted an exemption to a “facility” that was finished and operational before 1974 and equipment that did not increase thermal efficiency – something that clearly contradicted the requirements of R.C. 5709.46. The auditor’s notice of appeal also covered the possibility that the parts in question were merely replacement parts. Then, Appellee Electric Companies always bore the burden of proof under R.C. 5715.0271. Appellee Electric Companies had the opportunity to prove that the parts qualified for the exemption at the BTA hearing, a fair trial in a fair tribunal – the basic requirement of procedural due process. *In re Oliver* (1947), 333 U.S. 257. Appellee Electric Companies had time to meet their burden of proof during week of full-day hearings starting on February 18, 2003. Then, starting on May 11, 2004 and running through June 1, 2004, there were seven more hearings. On the first day of the first hearing, the auditor opened with a statement indicating “some of the equipment that is the subject of this hearing, in fact, is replacement equipment.” (Appx.) Clearly, that statement alone put Appellee Electric Companies on notice that they would have to prove the equipment parts were not replacement parts for a plant that predated the statute. The basic requirements of due process were met.

Besides *Floyd*, the cases Appellee Electric Company cited to prove lack of due process relate back to the two themes. The Tax Commissioner, as a party to a de novo hearing, has no right to change his position if facts prove him wrong. More obscure is Appellee Electric

Companies' argument that the Tax Commissioner must defend an erroneously issued exemption and has the burden of proving an applicant does not deserve an exemption.

As this Court recognized in *Key Services*, it is important that the Tax Commissioner be able to change his position at a hearing at the BTA. 2002-Ohio-1488 at ¶ 7. "There is no statutory procedure for the Tax Commissioner to file any answer or cross appeal to the taxpayer's notice of appeal. Likewise, there is no statutory limit to what the Tax Commissioner may contest. The only statutory constraints are imposed upon the appellant's appeal to the BTA." *Id.* The BTA understood the importance of this doctrine when it cited *Key Services* and then decided (erroneously) the issues raised by the Tax Commissioner. It allows the Tax Commissioner to inform the BTA. It permits the Tax Commissioner to reduce assessments and, on occasion, increase them when facts so indicate. Finally, it helps the BTA fulfill its obligation to deny exemptions that are illegally or incorrectly granted. *Zindorf v. Otterbein Press*, 138 Ohio St. at 290.

B. The Tax Commissioner had an obligation, in fact a duty, to alter his position at a de novo hearing about a certification exempting replacement parts at Stuart. The obligation is especially strong when the Tax Commissioner has erred by exempting property that does not qualify for an exemption. In this case, R.C. 5709.46 specifically excludes facilities constructed prior to the effective date of the statute from the "thermal efficiency improvement facility" exemption. The information provided to the Tax Commissioner prior to the BTA hearing indicated Stuart had thermal heat efficiency facilities that were completed on December 31, 1996. Facts produced during discovery and at the hearing indicated he had erred when issuing a determination. That the Tax Commissioner had changed position was evident from his questions to witnesses as well as the evidence he entered into the record. Appellee Electric Companies always retained the burden of proving the parts qualified for an exemption and therefore, that the Tax Commissioner reversed position in a hearing should have been no surprise.

a. When an applicant seeks an exemption from taxation, the grantor of the exemption is obligated to construe each exemption strictly, leaving the burden of proof as it should be, upon the applicant for the exemption.

Based upon the requirement that under R.C. 5709.01 all property is to be taxed unless expressly exempted, the Tax Commissioner interprets each exemption strictly, leaving the burden of proof as it should be, upon the applicant for the exemption. *American Society for Metals v. Limbach* (1991), 59 Ohio St.3d 38. In fact, the applicant for an exemption always has

the burden of proof, even when the applicant is the appellee in a hearing before the BTA or before this Court. R.C. 5715.271.

The Tax Commissioner is aware of the obligation to narrowly construe exemption statutes. This obligation is based upon not only the need to protect the revenue source from illegal or incorrect exemptions but, even more important, the need to protect the tax-paying public from paying more to cover property that should not be exempt. As this Court pointed out, in *Joint Hospital Services v. Lindley* (1977), 52 Ohio St.2d 153:

Exemptions are recognized only upon the showing that which is claimed to be exempt falls clearly within the express meaning of the statute granting the exemption. The General Assembly encourages certain activities through the grant of tax-exempt status, but tax exemption is in derogation of the rights of all taxpayers and necessarily shifts a heavier tax burden upon the nonexempt.

Id. at 154-155.

In *Timken Co. v. Lindley* (1980), 64 Ohio St.2d 224, and in *Sun Oil Co. v. Lindley* (1978), 56 Ohio St.2d 313, this Court pointed out that the pollution control statutes, like the exemption statutes, had to be strictly construed, and the taxpayer had the burden of establishing that it met each and every requirement of the exempting statute, before the exemption from taxation is given. This is to protect the other taxpayers who will pick up the burden shed by the entity granted an exemption and add it to their own burden of taxation. See, e.g., *Ohio Children's Soc'y v. Porterfield* (1971), 26 Ohio St.2d 30, 33.

This case involves an exemption under former R.C. 5709.46. As such, the exemption should be strictly construed with Appellee Electric Companies retaining the burden of proving that their property qualifies under the statute. R.C. 5715.271. By citing *Satullo v. Wilkens*, 111 Ohio St.3d 399, 2006-Ohio-5856 at § 27, Appellee Electric Companies emphasized that point.

However, throughout their motion to dismiss, Appellee Electric Companies have ignored the basic principles of tax exemption law. They have sought to ignore R.C. 5715.021 and to shift the burden of proof from themselves elsewhere, something that contradicts the rule that

exemptions should be strictly construed and the applicant has the burden of proving that the property qualifies under a particular statute for an exemption.

b. Former R.C. 5709.46 offered an exemption for “thermal efficiency improvement facilities” as defined in former R.C. 5709.45 if such facilities were completed after the effective date of the statute. Information from an engineer at the Department of Development indicated that Stuart was completed in the 1990’s. Facts presented at the BTA hearing indicated Stuart was, in reality, completed prior to 1974. The Tax Commissioner changed his position during the hearing before the BTA based upon these facts entered into evidence.

The statute under which Appellee Electric Companies applied for the exemption, former R.C. 5709.46, exempted from sales or use tax and from real and personal property tax and from franchise tax that equipment qualified as a “thermal efficiency improvement facility” under the definition in former R.C. 5709.45. The exemption was only for “such thermal efficiency improvement facility used exclusively for thermal efficiency improvement as certified.” R.C. 5709.46; R.C. 5709.50. A thermal efficiency improvement certificate is available for property or equipment “designed, constructed, or installed in a commercial building or site or in an industrial plant or site for the primary purpose of thermal efficiency improvement. R.C. 5709.45(D), R.C. 5709.46. “Thermal efficiency improvement” was defined in R.C. 5709.45 (C) as “the recovery and use of waste heat or waste steam produced incidental to electric power generation, industrial process heat generation, lighting, refrigeration, or space heating.”

There was a caveat. In addition to the facility having been designed primarily for thermal efficiency improvement as defined by R.C. 5709.45 (C), the application for such a certificate was not to relate “**to facilities upon which construction was completed on or before December 31, 1974.**” R.C. 5709.46. (emphasis added).

Former Ohio Adm. R. 5703-1-09 (L), in effect at the time Appellee Electric Companies filed their applications, defined “the completion date” as “that date upon which construction of the facility terminated resulting in the facility either being placed in operation or capable of being placed in operation.” The rule emphasizes that “[n]o certification may be obtained in

those instances where the completion date of the facility occurred on or prior to December 31, 1974.”

Appellee Electric Companies applied for a thermal efficiency improvement certificate for forty percent of the equipment designed to allow an existing supercritical boiler like Stuart to generate electricity. In the narrative submitted with the application for certification, Appellee Electric Companies wrote that the four operating units of the system began commercial operation between 1970 and 1974.

The statutorily mandated process of granting an exemption under former R.C. 5709.46 for property used as a thermal efficiency improvement facility included an evaluation by an engineer from the Department of Development. The report of the engineer would then be signed by the Director of the Department of Development. This essential component of the process was to give the Tax Commissioner an expert evaluation of the function and use of property alleged to be a thermal efficiency improvement facility.

However, the engineer reviewing the application of Appellee Electric Companies recommended exemption, based upon his finding that the alleged thermal efficiency improvement facilities at Stuart were completed on December 31 1996. The Interim Director of Development wrote the Tax Commissioner that he adopted the recommendation as his opinion. Based upon the recommendation of the engineer and the opinion of the Interim Director of Development, the Department of Taxation issued three certificates to Appellee Electric Companies for what it thought was a thermal efficiency improvement facility, the construction of which started in 1970 and ended in 1996.

c. The auditor properly appealed the Tax Commissioner’s certification of Stuart’s replacement parts to the Board of Tax Appeals. The notice of appeal the auditor filed was broad, covering the error of exempting replacement parts for a plant built and completed prior to the passage of the statute authorizing the exemption, the former R.C. 5709.46.

Carroll E. Newman, Adams County Auditor properly appealed to the BTA from a decision of the Tax Commissioner. The decision consisted of the Tax Commissioner certifying as a thermal heat improvement facility under R.C. 5709.46 some replacement parts necessary to

keep in operation the J. M. Stuart Electric Generating Station (“Stuart”), a thermal electric generating station designed, constructed and completed before 1974.

The auditor broadly wrote the notice of appeal to the BTA from the decision of the Tax Commissioner. The auditor’s fourth assignment of error was that the issued certificate “refers to machinery, equipment and property that were completed prior to December 31, 1974, and therefore not eligible under RC 5709.46.” The auditor also accused the Tax Commissioner of failing to strictly apply exemption law. In addition, the auditor argued that “[t]he findings of the engineers used by the Tax Commissioner were in error.” To say that the notice of appeal did not cover as error the Tax Commissioner’s certification of replacement parts for a facility constructed and operational prior to the effective date of R.C. 5709.46 would be hypertechnical. In *Buckeye Internatl., Inc. v. Limbach* (1992), 64 Ohio St.3d 264, 267-268, this Court concluded that Buckeye had raised an alternate argument, “In resolving questions regarding the effectiveness of a notice of appeal, we are not disposed to deny review by a hypertechnical reading of the notice.”

The auditor appealed from a decision of the Tax Commissioner to the BTA. Thus, there was subject matter jurisdiction for the BTA to hear the case.

However, as the Tax Commissioner discovered once the auditor appealed the case to the BTA and discovery started, the Tax Commissioner’s certificate exempted something else. It exempted replacement parts used to keep operating at its designed level a supercritical boiler designed and constructed in the 1960’s and early 1970’s. This certificate, in effect granted an exemption from personal, real, sales and taxation to approximately forty percent of Stuart’s on-going electrical energy producing property. All of the parts exempted had been replaced after Stuart’s construction was completed and none the parts exempted, according to testimony and evidence, increased any thermal efficiency in the plant.

Appellee Electric Companies incorrectly argue that the Tax Commissioner should have followed the procedure outlined in R.C. 5709.47 for modifying or revoking a certificate when a

certificate has been obtained by fraud or misrepresentation. However, for purposes of judicial efficiency, the Tax Commissioner did not urge remand to follow the procedure outlined in R.C. 5709.47. To remand would mean to replicate the information already produced and to have wasted time and resources.

d. Appellee Electric Companies had notice from the auditor's notice of appeal and later, through testimony of witnesses both in deposition and at hearing that a critical issue in the case would be whether the facility pre dated the exemption statute and whether the parts in question were merely replacement parts.

From the day the auditor filed his notice of appeal, Appellee Electric Companies had notice. As mentioned earlier, the auditor's notice of appeal was broad, clearly encompassing replacement parts for a facility constructed and operational by 1974. The auditor, in his opening remarks, pointed out that "some of the equipment that is the subject of this hearing, in fact, is replacement equipment." The auditor then introduced two witnesses, the deposition of whom the auditor entered into the record. Michael Harrell stated in deposition that he was not aware of any new capacity that had been added to the plant since it opened in 1970. (Harrell Deposition at 12, 54, 58-9 or Vol 1 S.T. 86-102). Abdur Rahim, in his deposition, indicated that he thought the parts in question were new, with the plant being finished in 1996. (Rahim Deposition at 89). He believed that construction on the facility began in 1970 and was completed in at some time in the 1990's. (Rahim Deposition at 89). Replacement parts, he said at his deposition, were to be handled differently from new ones; "In other words, you don't get credit for replacing." (Rahim Deposition at 50).

Appellee's own witness was asked about the parts in question and confirmed that the parts in question had just replaced other parts that had worn out but had not increased the plant's efficiency. Tom Coleman testified that the design of the boilers created an efficiency at about 89 as measured on the heat balance when the plant was new and generally speaking, with replacement of parts, Stuart's efficiency has remained the same throughout the lifetime of the plant. (Vol. IV Tr. 54-56).

The auditor's witness, George Sansoucy, testified on May 12, 2004 that the facility was completed in 1974, not in 1996. (Appx). He also stated that there were no new designs or new additions to the plant and all the equipment listed for purposes of the exemption certificate were replacement parts.

Thus, throughout the very extensive hearing for this case, Appellee Electric Companies had notice that replacement parts to a facility not qualified to be exempt under R.C. 5709.46 because of the date of its completion. Further, the Tax Commissioner had an obligation and a duty to change positions once the facts indicated the true nature of the parts for which he had issued certification.

4. The Tax Commissioner is a party and therefore has a right to appeal under R.C. 5717.04.

The wording of R.C. 5717.04 clearly permits the Tax Commissioner, a party at the BTA hearing, to appeal to this Court. The Tax Commissioner has appealed to this Court previously when convinced that the decision of the BTA was erroneous and unlawful.

Under the theory advanced by Appellee Electric Companies, the Tax Commissioner lacks subject matter jurisdiction to appeal to this Court as the Tax Commissioner is forbidden to concede issues either in favor or against other parties in cases before the BTA. Further, the Tax Commissioner would be forbidden to advise this Court or to have advised the BTA previously about its opinion on the replacement parts at Stuart because the Tax Commissioner could not deviate from his final determination or finding. Appellee Electric Companies has confused the changing of a position when the Tax Commissioner is a party in a de novo proceeding before the Board with a change in a final determination or a withdrawal of a certificate after an appeal has been made. The latter is governed by R.C. 5703.05(H), the former is not. The case law cited by Appellee Electric Companies reflects this confusion.

The auditor properly appealed to the BTA under R.C. 5717.02. The BTA's hearing was de novo and the Tax Commissioner was a party to the hearing. The Tax Commissioner properly

altered position due to the facts presented. Under R.C. 5717.03, the BTA has the power to “affirm, reverse, vacate, modify or remand the tax assessments, valuations, determination, findings, computations or orders complained of in the appeals determined by the board.” Therefore, the BTA followed procedure as set forth in the statute. The Tax Commissioner properly filed the notice of appeal. As there was subject matter jurisdiction and as all procedure was properly filed, Appellee Electric Companies’ motion to dismiss should be overruled.

Clearly, under R.C. 5709.46, the Tax Commissioner should not have granted an exemption to a facility constructed and completed prior to the passage of the statute. However, given incorrect information, the Tax Commissioner did not realize until he heard evidence presented at the BTA hearing that he had just shifted a heavier burden on the nonexempt – in this instance, the county and the school board and the people of Adams County, all of whom would have to pay extra tax to cover the cost of the exemption given to Stuart’s replacement parts. The Tax Commissioner is obligated to protect the tax payer as well as the tax revenue stream. *Joint Hospital Services v. Lindley*, 52 Ohio St.2d at 153. Presented with evidence that Stuart’s replacement parts should not have been certified under R.C. 5709.46, the Tax Commissioner modified his position at the BTA. The Tax Commissioner did not vacate or amend his final determination while the appeal was pending before the Board. The Tax Commissioner simply took a position as a party in an appeal at a de novo hearing before the Board.

Further, the BTA also has an obligation to deny exemptions that are illegally or incorrectly granted. *Zindorf v. Otterbein Press*, 138 Ohio St. at 290. As the BTA affirmed a decision the Tax Commissioner had conceded as erroneous, and as both the Tax Commissioner and BTA were obligated to strictly construe exemption statutes, the Tax Commissioner, a party to the BTA hearing, appealed from the decision to this Court.

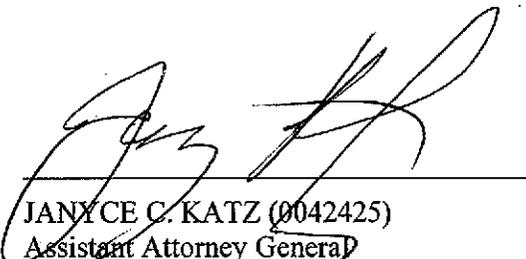
Further, the BTA also has an obligation to deny exemptions that are illegally or incorrectly granted. *Zindorf v. Otterbein Press*, 138 Ohio St. at 290. As the BTA affirmed a decision the Tax Commissioner had conceded as erroneous, and as both the Tax Commissioner and BTA were obligated to strictly construe exemption statutes, the Tax Commissioner, a party to the BTA hearing, appealed from the decision to this Court.

Conclusion

For all the above reasons, there was subject matter jurisdiction at the hearing before the BTA. Further, the appeal to this Court was proper under R.C. 5717.04. For that reason, Appellee Electric Companies' motion to dismiss the Tax Commissioner's notice of appeal should be denied.

Respectfully submitted,

MARC DANN
Attorney General of Ohio



JANICE C. KATZ (0042425)
Assistant Attorney General
30 E. Broad St.—25th Floor
Columbus, OH 43215-3428
Telephone: (614) 466-5967
Fax: (614) 466-8226

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Memorandum Contra Motion to Dismiss was sent by regular U.S. mail to David C. DiMuzio, 1900 Kroger Building, 1014 Vine Street, Cincinnati, Ohio 45202, attorney for Appellant Carroll Newman and to Anthony L. Ehler and Jeffrey Allen Miller, Vorys, Sater, Seymour & Pease LLP, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216-1008, attorneys for Appellee Utilities, on this 20th day of July, 2007.



JANYCE C. KATZ
Assistant Attorney General