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IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals,

HEALTHSOUTH CORPORATION
Appellee,

v.

WILLIAM W. WILKINS [RICHARD A.
LEVIN], TAX COMMISSIONER OF OHIO,

Appellant.

07-2281

Case No. _____

Appeal from BTA Case
No. 2005-A-1386

NOTICE OF APPEAL

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Appeal from the Ohio Board of Tax Appeals,

HEALTHSOUTH CORPORATION :
Appellee, :
v. : Case No. _____
WILLIAM W. WILKINS [RICHARD A. : Appeal from BTA Case
LEVIN], TAX COMMISSIONER OF OHIO, : No. 2005-A-1386
Appellant. :

NOTICE OF APPEAL

Richard A. Levin, Tax Commissioner of Ohio, successor to William W. Wilkins, hereby gives notice of his appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio from a decision and order of the Ohio Board of Tax Appeals (“BTA”), journalized on November 9, 2007, in Case No. 2005-A-1386 before the BTA. A true copy of the decision and order of the BTA being appealed from is attached hereto and incorporated herein by reference.

The errors in the decision and order of the BTA of which the Tax Commissioner (“Commissioner”) complains are as follows:

1. The BTA erred, as a matter of fact and law, in ordering the Commissioner to reduce the assessed valuations of the taxable personal property of HealthSouth Corporation (“HealthSouth”) for the 2002 tax year below the valuations that had been assessed by the Commissioner under his acquisition-cost-less-prescribed-allowances-for-depreciation method for determining “true value.”
2. The BTA erred, as a matter of fact and law, in granting, in whole or in part, HealthSouth’s request for refund of personal property taxes regarding the true values

of personal property listed for taxation by HealthSouth on its 2002 tax year Ohio personal property tax return and assessed by the Commissioner against HealthSouth for that tax year.

3. The BTA erred, as a matter of fact and law, in determining that HealthSouth had met its affirmative burden of demonstrating both the manner and the extent of any error in the Commissioner's determination of the taxable true value of HealthSouth's personal property for the 2002 tax year.
4. The BTA erred, as a matter of fact and law, in determining that HealthSouth had established by probative, competent evidence the extent, if any, to which for Ohio personal property taxation for the 2002 tax year HealthSouth had listed "phantom" or "fictitious" assets or "phantom" or "fictitious" asset values that never existed or existed in acquisition amounts less than the actual amounts HealthSouth incurred for acquiring or producing its Ohio-located taxable assets.
5. The BTA erred, as a matter of fact and law, in admitting into evidence multiple-level hearsay witness testimony and in solely relying, as the basis for the BTA's granting of HealthSouth's refund claim, upon that incompetent, non-probative witness testimony and unauthenticated, multiple-level hearsay summary documentation that had been presented and rejected as such by the Commissioner.
6. The BTA erred, as a matter of fact and law, by failing: (1) to have required HealthSouth to have admitted into evidence, as necessary foundation documentation, the underlying documentation supporting the unauthenticated, multiple-level hearsay summaries relied upon by the BTA to reduce the Tax Commissioner's determination of true value and grant HealthSouth's refund claim, and (2) to have required

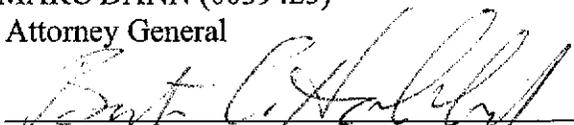
HealthSouth to have presented the accounting books and records and journal entries reflecting any corrections to HealthSouth's alleged fraudulent over-reporting of its Ohio-located taxable personal property.

7. Even had HealthSouth established by probative, competent evidence the manner and extent to which any of the assessed true value of HealthSouth's taxable personal property included "phantom" assets or "phantom" asset values, the BTA erred, as a matter of fact and law, in failing to hold that HealthSouth is properly barred or estopped from obtaining a reduction in taxable value of personal property and a refund of personal property taxes for the 2002 tax year.

HealthSouth is properly barred from such relief because any such over-reporting by HealthSouth of assets or asset values on its Ohio personal property tax return constituted an intentional, fraudulent misrepresentation under penalty of perjury that was relied upon by the Commissioner, the Ohio school districts and other recipients of the tax revenues to their detriment. HealthSouth perpetrated any such fraudulent misrepresentations in order to hide its intentional and fraudulent financial statements filed with the Securities and Exchange Commission in order to perpetrate a fraud on its stockholders, the general public, and all other users of its financial statements.

Respectfully submitted,

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In The Supreme Court of Ohio
Case Information Statement

Case Name: <u>HealthSouth Corporation v Wilkins</u>	Case No.: _____
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I. Has this case previously been decided or remanded by this Court? Yes No
If so, please provide the Case Name: _____
Case No.: _____
Any Citation: _____

II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes No
If so, please provide the Case Name and Citation: _____
Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court? Yes No
If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows:
U.S. Constitution: Article _____, Section _____ **Ohio Revised Code:** R.C. Chapter 5711
Ohio Constitution: Article _____, Section _____ **Court Rule:** _____
United States Code: Title _____, Section _____ **Ohio Admin. Code:** O.A.C. _____

III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g., jury instructions, UM/UIM, search and seizure, etc.):

- 1) personal property taxation
- 2) fraud/estoppel
- 3) refund claims

IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes No
If so, please identify the Case Name: _____
Case No.: _____
Court where Currently Pending: _____
Issue: _____

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Name Atty.Reg. # Telephone # Fax #

Address _____
30 East Broad Street, 25th Floor
Address _____ Signature of appellant or counsel
Columbus OH 43215-3428 Counsel for: Tax Commissioner
City State Zip Code

certificates, issued under date of July 22, 2005, relate to an application for final assessment, i.e., request for refund, filed by appellant for the 2002 personal property tax year.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the Tax Commissioner, the record of the hearing before this board, and the brief filed by counsel to the appellant.

In reviewing appellant's appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66; *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is developed before this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern, supra*; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan, supra*.

As we consider this case, we note that every taxpayer engaged in business in Ohio must annually file a personal property tax return with the county

auditor of each county in which property used in the taxpayer's business is located.

R.C. 5711.02. On that return, the taxpayer must list "all his taxable property *** as to value, ownership and taxing districts as of the tax lien date he engages in business."

R.C. 5711.03. In this instance, appellant has filed an inter-county return. R.C. 5711.13.

Initially, we note appellant's contentions, as set forth in the notice of appeal, as follows:

"2. Appellant requests that the decision be reversed because the Tax Commissioner erred in the following respects:

"A. The Tax Commissioner erred in upholding a tax assessment against property which did not exist on the tax lien date. Such property which was initially reported was the result of accounting irregularities at the Appellant which resulted in the listing of fictitious assets on the originally filed return. Taxpayers has [sic] timely requested a refund of tax paid on these fictitious assets and such refund should be granted.

"B. The Tax Commissioner also erred by denying Appellant the right to due process of law and equal protection under the Fifth and Fourteenth Amendments of the Constitution of the United States of America, and Article I, Section 2 of the Ohio Constitution, and denying Appellant the right to due course of law under Article I, §16 of the Constitution of the State of Ohio, including but not limited to the improper disqualification of the property, if the Tax Commissioner believes that it did exist, from its proper classification as not used in business."

More specifically, attached to its request for final assessment for tax year 2002, appellant HealthSouth Corporation provided the following information regarding its claim:

"In March 2003, HealthSouth became aware of accounting irregularities. Part of the accounting irregularities, consisted of overstating property, plant and equipment by listing fictitious assets on depreciation schedules using the asset description "AP SUMMARY". These assets do not exist. As a result of this, HealthSouth has been reporting, has been assessed and has paid personal property taxes on these erroneous assets. Consequently, these erroneous assets have been included in the taxing jurisdictions certified tax roll in error." S.T. at 73.

The basis of the tax department's denial of HealthSouth's refund request was set forth in a letter from the Ohio Department of Taxation regarding the final audit results and indicated that:

"You requested final assessment of the 2002 return on the basis that the assets have been over reported [sic] on the 2002 return. The asset listing you submitted in regards [sic] to this request show [sic] acquisition cost amounts compared to the AP summary amounts for various items of property in the State of Ohio. Under section 5711.18 of the Ohio Revised Code and Section 5703-3-10[c] of the Ohio Administrative rules, probative evidence is needed to establish true value of tangible personal property. In the request letter of March 11, 2005, the auditor requested journal entries to establish probative evidence the items being requested to be removed from the 2002 return have in fact been written off the books as well. As this information was not provided, there is a sufficient lack of evidence to establish these items have fully been removed from the assets as required by GAAP." S.T. at 37.

It is appellant's contention that specific line items designated on its 2002 personal property tax return as "AP SUMMARY" were erroneously included as tangible personal property, when, in fact, the items did not exist. H.R. at 7. This overstatement of assets was uncovered when HealthSouth "hired PricewaterhouseCoopers' forensic auditors to come in and start reviewing *** returns

and identifying all the irregularities and fixed asset – fictitious fixed assets, and just completely restate *** financial statements.” H.R. at 32-33. In addition, “a bag and tag inventory” count for virtually all of HealthSouth’s facilities was used to assist in completing a restatement of HealthSouth’s assets for purposes of filing restated and/or original financial statements for a four-year period, 2001-2004, a “super 10-K” that was filed with the SEC. H.R. at 40-42, 57. In the course of identifying the fraudulent listings on the earlier-filed tax returns and filing refund claims in various jurisdictions throughout the country, asset information was assembled by HealthSouth’s asset management group, which, in turn provided it to an outside consultant in order to help him “to determine the property, plant and equipment totals for each facility, which ties back to this schedule [Exhibit 4], and to the 10-K.” H.R. at 45.

Testimony before this board indicates that for purposes of preparing the refund request in question, HealthSouth’s asset management group assembled the asset listing, which was established through “bag and tag” inventory counts at each of HealthSouth’s facilities in Ohio. H.R. at 79, 85. In completing the inventory counts, consultants were given an asset listing of everything that should be at a particular facility. “*** [T]hen any assets that they had at the facility that weren’t on the list, that was added, and then anything that was on the list that wasn’t physically there was removed.” H.R. at 86-87.

As we review the foregoing evidence and testimony offered by appellant, we first note that there appears to be no dispute that a significant accounting fraud occurred at HealthSouth in which its earnings were dramatically

overstated. "Stated most simply, the fraud was accomplished by making over \$2.7 billion in false or unsupported entries in the Company's accounting systems. These improper accounting entries, made for the purpose of inflating HealthSouth's earnings, took two principal forms: (1) exaggeration of reported revenue, primarily through reductions to contractual adjustment accounts, and (2) failure to properly characterize and record operating expenses." Ex. 1 at 13. It is HealthSouth's claim that as a result of this fraudulent activity, its assets were overstated, and correspondingly, the personal property taxes on such assets were overpaid.

It appears from the record that the state's basis for denying HealthSouth's refund stems from HealthSouth's failure to provide the state with evidence, e.g., journal entries, that it had properly written off the "AP SUMMARY" assets from its books. When asked by counsel why those entries had not been provided, HealthSouth's witness, Michael D. Martin, vice-president of tax in charge of the sales and use tax, property tax, and unclaimed property tax departments, stated "I'm not aware of any journal entries to write this stuff off." H.R. at 65. He then went on to testify how the restated financials were determined, indicating "for property, plant and equipment, I know we hired American Appraisal Associates and quite a few other consulting firms to actually go out to our facilities and do a physical inventory of equipment at each facility. And I believe that was one of the primary tools or documents used to restate the property, plant and equipment accounts." H.R. at 66.

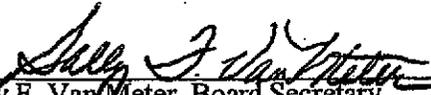
As we review the efforts undertaken by HealthSouth to accurately establish and report its personal property asset listings, we find nothing in the record

to indicate any impropriety in the methodology utilized. While HealthSouth did not provide the documentation requested by the Department of Taxation to establish that the assets listed as AP SUMMARY did not exist, it arguably utilized a viable, alternative means of establishing the assets that did exist. There is nothing in the provisions cited by the Department of Taxation, i.e., R.C. 5711.18 and Ohio Adm. Code 5703-3-10(c), to demonstrate that the means by which this taxpayer chose to establish its assets, and accordingly, the associated value of those assets for personal property taxation purposes, was improper. Further, there is nothing in the record to indicate that the amounts sought through the refund request were erroneous; it simply appears that the refund request was denied solely on the basis that the taxpayer did not provide evidence of its personal property value in the form in which the Department of Taxation requested. We find HealthSouth's evidence of value sufficient and probative in that regard.

Therefore, based upon the foregoing, we find that HealthSouth has sufficiently established that the assets designated as AP SUMMARY never existed. Further, we find that HealthSouth has met its burden of proof with regard to establishing that the denial of its refund request was improper. Accordingly, we find that HealthSouth has rebutted the presumption of correctness of the Tax Commissioner's findings herein. Therefore, it is the decision and order of the Board of Tax Appeals that the determination of the Tax Commissioner must be, and

hereby is, reversed and that the taxpayer's refund request shall be granted.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.


Sally F. Van Meter, Board Secretary

In The Supreme Court of Ohio
Case Information Statement

Case Name:

Case No.:

HealthSouth Corporation v Wilkins

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Case No.: _____

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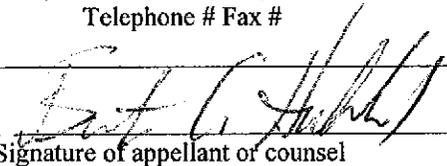
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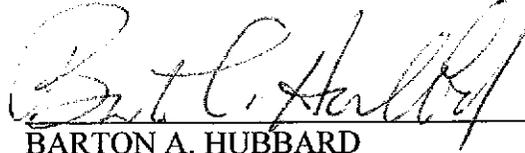
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Address
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City State Zip Code


Signature of appellant or counsel
Counsel for: Tax Commissioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Notice of Appeal was sent by certified U.S. mail to Nicholas Ray, Siegal Siegal Johnson & Jennings Co., LPA. 3001 Bethel Road, Suite 208 Columbus, Ohio 43220 on the 10th day of December, 2007.

A handwritten signature in cursive script, appearing to read "Barton A. Hubbard", is written over a horizontal line.

BARTON A. HUBBARD
Assistant Attorney General