

IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

THE OHIO BELL TELEPHONE COMPANY, :

Appellee, :

v. :

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

Appellant. :

Case No. 07-1807

Appeal from BTA

Case No. 2005-K-202

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APPENDIX TO BRIEF OF APPELLANT

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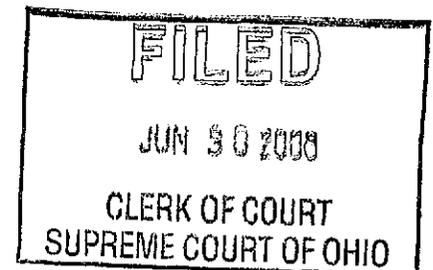
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v. :

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

Appellant. :

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NOTICE OF APPEAL

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IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals

THE OHIO BELL TELEPHONE COMPANY, :  
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 Appellee, :  
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 v. : Case No. \_\_\_\_\_  
 :  
 WILLIAM W. WILKINS [RICHARD A. : Appeal from BTA Case  
 LEVIN], TAX COMMISSIONER OF OHIO, : No. 2005-K-202  
 :  
 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 August 31, 2007, in Case No. 2005-K-202 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.

As set forth in R.C. 5727.11(A), the true value of taxable property of a telephone company's taxable personal property "shall be determined by a method of valuation using cost as capitalized on the public utility's [telephone company's] books and records less composite annual allowances as prescribed by the commissioner [Tax Commissioner]." (Emphasis added.) Such methodology is often referred to for purposes of this Notice of Appeal as the "statutorily-mandated" methodology. As further set forth in R.C. 5727.11(A), the Tax Commissioner, however, "may use another method of valuation," "if the commissioner finds that application of this method will not result in the determination of the true value of the public utility's [telephone

company's] property.” (Emphasis added.) The Tax Commissioner’s determination either to apply the statutorily-mandated methodology or to depart from it is often referred to for purposes of this Notice of Appeal as the Commissioner’s “exercise of discretion.”

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 valuation of the taxable personal property of Ohio Bell Telephone Company (“Ohio Bell”) for the 2003 tax year below the valuation that had been assessed by the Commissioner under application of the statutorily-mandated method for determining “true value” and which the Commissioner had affirmed pursuant to his final determination.
2. The BTA erred, as a matter of fact and law, in failing to apply the proper standard of judicial review of the Commissioner’s valuation of Ohio Bell’s taxable personal property set forth in R.C. 5727.11(A) and his affirmance of that valuation pursuant to his final determination. Under the proper standard of judicial review, Ohio Bell had the affirmative burden of establishing that the Commissioner abused his discretion in determining not to depart from the statutorily-mandated methodology for determining the true value of a telephone company’s taxable property set forth in that statute.
3. The BTA erred, as a matter of fact and law, in mischaracterizing the Commissioner’s position as to the plain meaning of R.C. 5727.11(A). Specifically, the BTA wrongly characterized that position as setting forth the statutorily-mandated method as the “exclusive” method for determining the valuation of a telephone company’s taxable personal property. Rather, the Commissioner’s position is that the Commissioner, in the

exercise of the discretion conferred upon him pursuant to R.C. 5727.11(A), may depart from the statutorily-mandated method if the Commissioner determines that such method does not reflect true value. Thus, the Commissioner's exercise of discretion in determining to apply or depart from the statutorily-mandated methodology is subject to an "abuse of discretion" standard of judicial review.

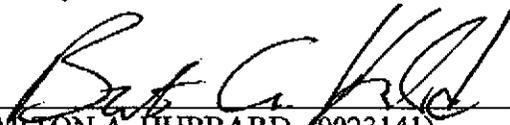
4. Alternatively, even if the Commissioner's valuation is not properly subject to the "abuse of discretion" standard set forth in the preceding paragraphs, the BTA erred, as a matter of fact and law, in failing to hold that Ohio Bell failed to meet an affirmative burden of (1) establishing that the Commissioner's determination of the true value of Ohio Bell's taxable property, as affirmed by the Commissioner in his final determination, was "clearly unlawful or unreasonable," and (2) establishing both the manner and the extent of the claimed errors in the Commissioner's valuation.
5. The BTA erred as a matter of fact and law in admitting into evidence and then considering and relying upon an "appraisal" prepared and authored by Thomas Tegarden ("Tegarden's appraisal") more than a year after Ohio Bell filed its notice of appeal to the BTA, when such appraisal had not been submitted to the Commissioner and, in fact, was not in existence during the Commissioner's administrative proceedings and auditing of Ohio Bell's personal property tax return. In creating such new evidence after the Commissioner's issuance of his final determination, Ohio Bell thereby circumvented the presumptive validity of the Commissioner's findings.
6. The BTA erred as a matter of fact and law in determining that any of the "unit value" of Ohio Bell's system-wide or Ohio-located property as set forth in Tegarden's appraisal

was properly allocated to the "spare parts" property excluded by the Commissioner from the Commissioner's valuation of Ohio Bell's taxable Ohio property.

7. The BTA erred as a matter of fact and law in weighing the evidence presented by the Commissioner and Ohio Bell, even assuming that the Tegarden appraisal was properly admitted into evidence at the BTA and considered and relied upon by the BTA in support of its decision and order.
8. The BTA erred, as a matter of fact and law, in failing to reject the Tegarden appraisal because it failed to consider any comparable sales approach to value and utilized a "back-door" income approach as its "cost approach," and was based upon only cursory, insufficient financial data and information concerning Ohio Bell's own books and records and was based upon unaudited adjustments to those financial records by Ohio Bell's internal personnel.
9. The BTA erred, as a matter of fact and law, by wrongly rejecting or failing to give proper consideration to the "stock and debt" valuation evidence and other evidence presented by the Commissioner's expert appraisal witness, Brent Eyre.

Respectfully submitted,

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**OHIO BOARD OF TAX APPEALS**

The Ohio Bell Telephone Company,	)	CASE NO. 2005-K-202
	)	
Appellant,	)	(PUBLIC UTILITY PERSONAL
	)	PROPERTY TAX)
vs.	)	
	)	DECISION AND ORDER
William W. Wilkins, Tax Commissioner	)	
of Ohio,	)	
	)	
Appellee.	)	

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Entered August 31, 2007

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

Appellant, The Ohio Bell Telephone Company, now operating in Ohio as SBC Ohio, challenges a final determination issued by Tax Commissioner denying its petition for reassessment and affirming a public utility property tax assessment, as previously issued, which reflected an increase in the taxable value of appellant's property for tax year 2003. We consider this matter upon appellant's notice of appeal, the statutory transcript ("S.T.") certified by the Tax Commissioner pursuant to R.C. 5717.02, the

evidence presented at this board's hearing, and the written argument submitted by counsel. In support of its appeal, appellant presented the testimony of three witnesses: Thomas J. Mueller, who oversaw the preparation of appellant's 2003 annual report;<sup>1</sup> Patrick O'Connor, appellant's controller;<sup>2</sup> and appraiser Thomas K. Tegarden, MAI and CAE. In response, the Tax Commissioner called as his witness appraiser Brent Eyre, ASA.

Pursuant to the definition set forth in R.C. 5727.01(D)(2),<sup>3</sup> appellant constitutes a "telephone company" and is required to file, on an annual basis, reports reflecting the value of its personal property used in business in Ohio. R.C. 5727.08. In its 2003 annual report, appellant disclosed the total true value of its public utility property as being \$2,416,838,541, with a corresponding taxable value of \$456,560,536. Following its consideration of appellant's report and the information available to it, the Department of Taxation issued preliminary assessment certificates increasing the overall true and taxable values of appellant's property to \$2,466,085,652 and \$943,372,990, respectively. Through its petition for reassessment, appellant sought a reduction in total true value of \$919,726,091 and, correspondingly, \$351,611,285 in total taxable value.

Although appellant waived hearing before the Tax Commissioner, it submitted a depreciated replacement cost study,<sup>4</sup> prepared by Weber Fick & Wilson, an

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<sup>1</sup> Mueller testified that he is director of property taxes for AT&T, explaining further that appellant is "a subsidiary, at the time of Ameritech, which is a wholly[-]owned company of subsidiary AT&T, at that time SBC Communications, Inc." H.R., Vol. I at 45.

<sup>2</sup> O'Connor testified that he is "the controller of the five midwestern telephone companies of AT&T. That would be Illinois Bell, Indiana Bell, Michigan Bell, Ohio Bell and Wisconsin Bell." H.R., Vol. II at 301.

<sup>3</sup> R.C. 5727.01(D)(2) defines a "telephone company" as any person "primarily engaged in the business of providing local exchange telephone service, excluding cellular radio service, in this state[.]"

<sup>4</sup> Although appellant refers us to this study, its author did not testify before this board and was therefore unavailable to respond to any questions opposing counsel or this board may have had regarding the nature of

operating division of AUS Consultants Utility Services, which suggested that the total true value of appellant's property was \$1,546,359,561. The commissioner rejected appellant's petition, criticizing the probative value of the information presented on its behalf:

"The petitioner contends that its equipment is overvalued due to the technological change and competition in its industry. This contention is not well taken. In the instant case, the petitioner has not shown that the technological change occurring in its industry is any different from the long march of progress that has been taking place for centuries across all sectors of society. The petitioner has not met its burden of proof of demonstrating that 'special or unusual circumstances' exist that make the use of the public utility tax prescribed rates produce an unreasonable and unjust result. The petitioner has not shown that the true value of its equipment as calculated under the standard computation is inaccurate.

"The replacement cost study calculated the value for the petitioner's property using replacement cost new less depreciation. First, replacement cost new was determined using cost indices created by C.A. Turner. This calculation recognizes that certain plant characteristics would not be reproduced in like kind, but substitute technologies would be utilized. Second, replacement cost was adjusted for depreciation using age-life formulas and further reduced by the costs for 'engineering costs.' The study also factors 'economic useful life' and the forecasted effects of future competition. Basically, the estimates in the study are based on estimates and suppositions in other studies, i.e. C.A. Turner Telephone Plant Indexes and Technology Futures, Inc. There is no connection between the estimates of useful lives and value in the study and the useful lives and value of the petitioner's property. The evidence indicates that the

Footnote contd. \_\_\_\_\_

the study or its development. Further, "Ohio Bell has chosen on appeal to rely on the more conservative, and more traditional, appraisal performed by Tegarden \*\*\*." Appellant's brief at 11. While properly part of the record in this matter, given concerns which we have previously expressed regarding similar studies and the absence of supporting testimony, we accord it limited weight. See, generally, *Cincinnati Bell Tel. Co. v. Zaino* (June 10, 2005), BTA Nos. 2003-K-765, et al, unreported; *Omnipoint Holdings, Inc. v. Wilkins* (Oct. 21, 2005), BTA No. 2004-M-428, unreported; *Choice One Communications of Ohio, Inc. v. Wilkins* (June 9, 2006), BTA No. 2003-K-1461, et al., unreported.

petitioner has a significant amount of older property still in use in its business, and there has been provided no disposal study that would permit a comparison of the study's projection to the realities of this petitioner.

"The petitioner is using the equipment at issue to operate a going-concern business. The replacement cost of equipment is not equivalent to the in-place, in-use value that equipment has to an operating business. \*\*\*

"At best, in calculating its estimated valuation, the petitioner is providing a crude approximation of the value of its assets. The value is ultimately based on numerous layers of averages and estimates that are inherent in market indices. Such approximations of value are not probative evidence for a deduction from taxable personal property. \*\*\* In challenging the assessed value, the petitioner has the burden of establishing the value of its taxable property. The information submitted does not meet this burden." S.T. at 7. (Citations omitted.)

The commissioner also commented on appellant's failure to adjust its books and records so as to comport with its claim for reduction:

"The petitioner did not adjust its books and financial records as of the December 31, 2002 listing date at issue to reflect the reductions in asset values it is seeking for tax purposes. Thus, the petitioner is asking the Department to ignore its asset values in its financial records, and make an adjustment to the value of these assets that it did not make on its books as of the listing date at issue. It is well settled that a company is bound by its books and records. \*\*\* The burden is on the taxpayer to show that its book value does not accurately reflect true value. \*\*\*" Id. at 8. (Citations omitted.)

Appellant then filed the present appeal with this board, specifying the following as error:

"[T]he cost less depreciation method utilized by the Tax Commissioner does not reflect the true value in money of SBC's taxable property as required by Ohio law. The Tax

Commissioner's determination is erroneous, unjust and unreasonable because, *inter alia*, it overstates both costs and service lives and utilizes a method that does not reasonably reflect true value."<sup>5</sup>

Initially we acknowledge that in an appeal to this board, the burden of proof "rests on the taxpayer 'to show the manner and extent of the error in the Tax Commissioner's final determination' [and that t]he Tax Commissioner's findings 'are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.'" *Cousino Construction Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, at ¶11. (Citations omitted.)

R.C. 5727.11 establishes the method to be employed by the Tax Commissioner in valuing public utility property, providing in pertinent part:

"(A) Except as otherwise provided in this section, the true value of all taxable property required by division (A)(2) or (3) of section 5727.06 of the Revised Code to be assessed by the tax commissioner shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the commissioner. If the commissioner finds that application of this method will not result in the determination of true value of the public utility's taxable property, the commissioner may use another method of valuation."

The Tax Commissioner devotes considerable discussion to the valuation methodology prescribed by the preceding statute and the standards which this board and

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<sup>5</sup> In its notice of appeal, appellant also challenged that portion of the Tax Commissioner's final determination in which he rejected appellant's argument certain software should not be considered tangible personal property subject to Ohio public utility personal property tax. S.T. at 1-6. However, at hearing and in the brief subsequently filed on its behalf, appellant's counsel confirmed appellant was no longer pursuing this claim. H.R., Vol. I at 31; appellant's brief at 5, fn. 5. Accordingly, this issue will not be further addressed herein.

appellate courts must thereafter apply in reviewing his decision. He points out that R.C. 5727.11 requires that he value public utility property utilizing a cost-based methodology, i.e., capitalized costs less prescribed depreciation. The commissioner then posits that it is only when he determines the use of such methodology will not result in true value, that another valuation method, which he selects, may be employed. As such, the commissioner maintains that his decision to use or reject the cost-based method of valuation set forth in R.C. 5727.11 must be reviewed on appeal under an abuse of discretion standard, a demonstration met only by showing that his decision reflects an attitude that is unreasonable, arbitrary or unconscionable. See *J.M. Smucker, L.L.C. v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, ¶16.

In this instance, the commissioner insists appellant is incapable of demonstrating that he abused his discretion in adhering to the statutory valuation methodology. He argues that since the information offered by appellant in support of its petition for reassessment was clearly insufficient and because the appraisal evidence upon which appellant now relies was not previously presented to him, he could not possibly have abused his discretion in valuing appellant's property in accordance with R.C. 5727.11(A). We find these arguments to be substantially similar to those which have already been considered and rejected in this appeal.

Styled as a "motion for a jurisdictional ruling," the commissioner initially challenged appellant's ability to present appraisal evidence on appeal when such evidence had not been provided to him. The presiding attorney examiner made the following ruling:

“Ultimately, the commissioner’s argument must be viewed as a criticism of appellant’s decision to present evidence in support of its valuation claim \*\*\* that was different than that previously presented. The Supreme Court has expressly rejected the argument now advanced by the Tax Commissioner. In *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 13, the court expressly held:

“The BTA hearing is de novo. *Higbee Co. v. Evatt* (1942), 140 Ohio St. 325, 332 \*\*\*. The BTA is statutorily authorized to conduct full administrative appeals in which the parties are entitled to produce evidence in addition to that considered by the Tax Commissioner. *Bloch v. Glander* (1949), 151 Ohio St. 381, 387 \*\*\*.<sup>6</sup>

“The BTA may investigate to ascertain further facts and make its own findings independent of those of the Tax Commissioner. *Nestle Co., Inc. v. Porterfield* (1971), 28 Ohio St.2d 190, 193 \*\*\*. R.C. 5717.03 authorizes the BTA to modify orders based upon its independent findings. *Id.*’

“See, also, *Gen. Elec. Co. v. Zaino* (Interim Order, Mar. 5, 2004), BTA Nos. 2003-K-569, et al., unreported, at 2, fn. 3.

“As acknowledged by the court in *Key Serv.*, supra, and consistent with its holding more than five decades earlier, an appellant is not restricted on appeal to only that evidence it previously presented before the commissioner. See *Bloch v. Glander* (1949), 151 Ohio St. 381, 387 (‘Sections 5611 and 5611-1, General Code, contemplate 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.’). This is in contrast to the limitations which may be imposed upon an appellant challenging a decision of a

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<sup>6</sup> The commissioner argues in his post-hearing brief that the court’s holding in *Bloch v. Glander* (1949), 151 Ohio St. 381, as it pertains to a taxpayer’s ability to present additional evidence on appeal, was a situation where the “Court judicially inserted language into the statute [i.e., former Sections 5611 and 5611-1, now codified at R.C. 5717.02] that was not written by the General Assembly,” appellee’s brief at 47, and further that this allowance has been implicitly overruled by subsequent decisions. Given the court’s favorable citation to *Bloch* for this proposition in *Key Serv.*, supra, we find nothing that causes us to now deviate from our earlier ruling.

county board of revision. Compare, e.g., R.C. 5715.19(G) ('A complainant who fails to provide such information or evidence is precluded from introducing it on appeal to the board of tax appeals or the court of common pleas, except that the board of tax appeals or court may admit and consider the evidence if the complainant shows good cause for the complainant's failure to provide the information or evidence to the board of revision.'). See, also, *CASA 94, L.P. v. Franklin Cty. Bd. of Revision* (2000), 89 Ohio St.3d 622; *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36." *Ohio Bell Tel. Co. v. Wilkins* (Interim Order, Feb. 3, 2006), BTA No. 2005-K-202, unreported, at 6-7. (Footnote omitted.)

Through motion filed eight months after the issuance of the above-quoted order and one week prior to the hearing convened in this appeal, the commissioner sought our reconsideration, arguing:

"Measured under this standard [i.e., an abuse of discretion], the Commissioner's discretionary decision is not properly subject to challenge through Ohio Bell's submission of an appraisal at this late juncture. The Commissioner's administrative decision below to apply his R.C. 5727.11-mandated methodology for determining the true value of Ohio Bell's taxable property was not informed by any such appraisal. This newly-created [sic] appraisal evidence could not possibly show that the Commissioner's discretionary determination constituted a 'perversity of judgment' – as would be required for Ohio Bell to demonstrate an 'abuse of discretion.'" Motion at 2-3.

We reviewed the commissioner's arguments, our examiner's ruling, and overruled the motion. *Ohio Bell Tel. Co. v. Wilkins* (Interim Order, Sept. 13, 2006), BTA No. 2005-K-202, unreported.

Having been previously unsuccessful in precluding appellant from presenting any additional evidence of value on appeal, comprised principally of Tegarden's "unit

appraisal,” the Tax Commissioner now asks that we ignore it on the basis that the decision to deviate from the valuation methodology set forth in R.C. 5727.11 is exclusively his. As has been frequently acknowledged, the use of a statutory method to ascertain the value of personal property serves a rationale purpose since “it is impractical for the commissioner to personally value all personal property in Ohio \*\*\*.” *Snider v. Limbach* (1989), 44 Ohio St.3d 200, 201. See, also, *Campbell Soup Co. v. Tracy* (2000), 88 Ohio St.3d 473. However, where competent and probative evidence is offered which demonstrates that the valuation methodology set forth in R.C. 5727.11 will not establish true value, it is appropriate to rely upon evidence that will provide for such a result. This was recognized by the Supreme Court in *Texas E. Transm. Corp. v. Tracy* (1997), 78 Ohio St.3d 83, when it rejected the commissioner’s suggestion that, absent a demonstration of “special and unusual circumstances,”<sup>7</sup> alternate valuation methodologies may not be used to determine the value of public utility property:

“The ultimate goal imposed by R.C. 5727.10 clearly is to determine the *true value* of the property taxed. \*\*\* If the statutory method does not yield true value, then another method of valuation may be used, whether or not there are special or unusual circumstances. Although a statute may

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<sup>7</sup> “[T]he words ‘special or unusual circumstances’ do not appear in R.C. 5727.11 and are not a prerequisite for using an alternate valuation method where appellees are contesting true value rather than depreciation rates.” *Id.* at 86. See, also, *MCI Telecommunications Corp. v. Limbach* (Sept. 20, 1990), Franklin App. No. 89AP-870, unreported (“[T]here are two ways in which the taxpayer may contest the commissioner’s valuation. The taxpayer may either offer direct evidence of the property’s true value or the taxpayer may offer evidence that the applicable rate of depreciation does not accurately measure the property’s true value, either because special or unusual circumstances exist or because a rigid application of the directive will create an unjust or unreasonable result.”); *Cincinnati Bell Tel. Co. v. Zaino* (June 10, 2005), BTA Nos. 2003-K-765, et al., unreported, at 21 (“The commissioner concedes that where ‘direct evidence’ of value is offered, such as an appraisal like that relied upon in *Texas E. Transm.*, a public utility need not demonstrate the existence of special and unusual circumstances in order to deviate from booked costs less prescribed allowances.”).

provide a prima facie estimate or presumption of value, where rigid application of the statute would be inappropriate, the presumption of value must yield to other competent evidence reflecting true value. \*\*\*” Id. at 85-86. (Emphasis sic and citations omitted.)

After having reviewed and considered the case authority cited by the commissioner, a significant portion of which relates to his clearly discretionary authority to remit penalties, we conclude that the obligation of this board remains in this appeal to ascertain whether the evidence presented supports a value different from that previously determined by the Tax Commissioner. As noted by the court in *Texas E. Transm.*, “[c]ontrary to the commissioner’s assertion, in deciding true value, the BTA need not adhere to the cost-based statutory method of valuation.” Id. at 86.

As previously indicated, appellant relies upon the written narrative appraisal report and testimony of Thomas Tegarden, an appraiser specializing in the valuation of public utility property. Within his report, Tegarden noted the evolving landscape within the telecommunications industry:

“The \$290 billion telecommunications industry was and is in the throes of transition. Technological advancements and regulatory reforms were driving traditional telecommunications service providers into a competitive environment that required innovative strategy and financial flexibility. Start-ups introduced new business models, and incumbent players made large investments to develop new market opportunities. Capital spending soared in the few years through 2000, far outpacing revenue growth. As a result, in 2002 both incumbents and newer arrivals struggled to survive in this environment of rapid change and heavy competition.” Ex. 5, at 6.

Tegarden expressly noted how substitute markets utilizing wireless and Internet-based technologies, i.e., Voice over Internet Protocol (“VoIP”), have caused a migration of customers from traditional telecommunications devices and, in turn, a decline in retail access lines. Referring to comments made by one telecommunications research analyst, “[i]n the data network era, the Bells circuit-switched networks were like railroad tracks at the dawn of the jet age.” *Id.* at 10.

In order to estimate the value of appellant’s operating telecommunications property, Tegarden concluded that the “unit appraisal concept” was appropriately applied:

“There are problems peculiar to the appraisal of telecommunications companies that make them best suited to the unit appraisal concept of valuation. Usually the property of a company that extends over several taxing districts, such as the property of OBT, has value and maintains value because it is operated as a system or unit.

“The telephone property has its greatest value as a part of a unit or system. The investments in specialized equipment, cable, digital switching systems, fiber optics, conduit, poles and wire would have less value if not used for the communication of messages and data. The individual portions of a telecommunications company would have little value if separated from the system.

“A telecommunications company is operated as a unit, provides telecommunications services as a unit, and reports its financial operating results as a unit. Further, to whatever degree the telecommunications properties are regulated, the state and federal regulatory authorities essentially exert their regulatory controls and decisions over the operating telecommunications property as a unit. Thus, the very nature of a telecommunication company and its property makes it an ideal candidate for the unit appraisal process.” *Id.* at 18.

Tegarden describing the process of developing an ultimate opinion of value under this methodology as follows:

“The unit appraisal concept is the appraisal of an integrated property as a whole, without reference to the value of its component parts. The unit appraisal concept is the opposite of the summation appraisal concept, which is the summing of two or more of the appraisals made of functional parts of the whole.” *Id.* at 17, fn. 22.

He explained the three steps employed in the process:

“First, the unit to be appraised is generally the operating property of the telecommunication company. The non-operating properties, if they exist, are generally appraised individually, independently of the operating unit, or are allocated out of the operating unit.

“Second, following the determination of the unit to be appraised, three indicators or approaches to value are used to determine the market value of the operating properties of the telecommunication company. They are the cost approach, the income approach, and the sales comparison approach. While it may not be possible or practical to use all three approaches in the appraisal process, all should be considered.

“Third, once the unit or system value is determined, a proper value is allocated to the taxing district. The allocation process is accomplished through the use of allocation factors which relate to the property being appraised.” *Id.* at 17-18.

Within his report, Tegarden considered all three appraisal approaches typically relied upon in opining value, i.e., the cost, income, and the market data/sales comparison approaches, but rejected the utility of the latter, as well as “its surrogate the

stock and debt approach,”<sup>8</sup> citing the absence of reliable comparable data. Tegarden testified that while he stays abreast of sales data within the industry, there are relatively few sales that have occurred and the extrapolation of an opinion of value from such information can be difficult and misleading. As for the stock and debt approach, Tegarden noted that neither appellant nor its parent company has publicly traded stock; instead, the traded stock exists in the ultimate parent company which has “some 200 companies under their umbrella that that stock represents the value of.” H.R., Vol. III at 21. Within his report, he addressed at length the reasons why he considered the stock and debt approach to be unreliable:

“Because of the lack of comparable sales price data in the public utility field, appraisers have had to search for proxies or substitutes for such indicators of value. To some appraisers, it appears logical that since there seldom are available objective market evidences of value for business properties, the next best alternative is the market price of the securities of the enterprise owning the properties. It is assumed that the market value of the securities is the market value of the assets of the business enterprise. Thus the stock and debt approach emerges as a substitute for the traditional sales comparison approach.

“It is noteworthy to recognize that during any given day, month, or year, many of the outstanding securities of a particular enterprise are seldom involved in transactions. In fact, some companies have securities which are never publicly traded. Even when a company has common stock actively traded by the public, the portion traded in any time period is a relatively small part of the total shares outstanding. However, an additional problem exists when the company has no (or relatively few) securities publicly outstanding. The stocks of

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<sup>8</sup> Tegarden explained that “[t]he stock and debt approach is based on the accounting theory that assets equal liabilities and equity. The theory is if one can determine the value of the liabilities and equity, by default, one would have determined the value of the life of the assets.” H.R., Vol. II at 472-473.

regional Bell operating companies typically are owned by regional holding companies, which have many other business ventures as well. SBC, ultimate parent company of OBT (OBT's parent company, Ameritech, is owned by SBC) owns many subsidiaries directly or indirectly and thus its stock price includes the effect of all those companies.

"Even when security price data are available, an important question is, does such security price data, especially based on relatively small unit transactions, represent the value of the enterprise? Many financial experts believe the motivation and expectations of the investors, each separately buying insignificant quantities of the outstanding stocks, are geared very much to their individual portfolio and marketability needs. They do not want to own and operate the enterprise; they want to own the stock and all the rights which are attached to such ownership.

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"Another disquieting factor is that the stock market is largely a market of secondary transactions, a market of derived demands. It is very unlike the wheat market, for example, where the ultimate purchasers do not make their purchases with a view to resale but rather to feed livestock or make flour. No investor ordinarily buys stocks to consume either them or their underlying resources. The latter are, of course, legally inaccessible to the shareholders. Instead, stocks are bought for resale, except such few as are from time to time taken off the market in mergers, liquidations, and stock repurchase programs. From year to year, the great majority simply move from hand to hand, bought by shareholders whose expectations of a return of capital and most of the return on capital depend entirely on the willingness of others to share such expectations. \*\*\*

"With different motives in the minds of the purchasers of stocks and purchasers of assets, the stock and debt indicator loses some of its credibility as an indicator of the market value of a company's operating properties." Ex. 5, at 63-65.

In performing his cost approach to value, he noted at page 24 of his report that the "total net telephone plant plus materials and supplies of OBT on January 1, 2003, was \$2,562,919,575," a figure which was confirmed by appellant's controller. He opined that a prospective purchaser would typically expect a rate of return on its investment of 12.35%. However, citing as a major impact the trend of diminished retail access lines, he opined that the most likely return on appellant's assets would only be 12%. Tegarden concluded that this .35% below-market rate of return should be accounted for as external obsolescence, calculated as having a 2.83% negative impact on value. Taking this into account, Tegarden arrived at a rounded value of \$2,490,000,000 through use of the cost approach.

Tegarden next performed an income approach to value, ultimately concluding that it should be accorded the most weight in his final conclusion of value. While considering appellant's net operating income ("NOI") for the prior five years, based upon regulatory changes, various investor trends within the industry, appellant's historical and anticipated loss of retail access lines, and his experience in reviewing various other market conditions, he accorded primary weight to appellant's 2002 NOI in deriving an estimated net operating income for 2003 of \$305,000,000. He then discounted this amount at a rate of 12.35%, derived using a weighted average cost of capital methodology, which measures a company's cost of debt and equity financing weighted by the percentage of debt and percentage of equity in a company's capital structure. Accordingly, Tegarden opined a rounded value through the income approach of \$2,470,000,000.

He then reconciled the values resulting from the two approaches employed, concluding to a value for appellant's operating properties of \$2,475,000,000. As noted in the transmittal letter to his report, he deducted \$830,987,807 from this amount in order to reflect a total true value for taxable property of \$1,672,518,399. However, of the property considered tax exempt, \$30,692,139 was attributed to property identified as "intangibles." Appellant's witness explained that this figure related to its original challenge that software constituted an intangible asset not subject to personal property tax. Since this claim was later withdrawn, appellant acknowledges that this amount should not now be excluded and that the total value of non-taxable items should be adjusted to \$800,295,668. H.R., Vol. I at 70-73. Applying the market-to-book ratio of 96.5696% used by Tegarden, an adjusted non-taxable figure of \$772,842,325 results. Deducting this amount from Tegarden's market value, appellant requests that its true value of its taxable public utility property for tax year 2003 be determined at \$1,702,157,675.

As previously indicated, the Tax Commissioner has asserted that the exclusive means by which to value appellant's property is that set forth within R.C. 5727.11. Although he has elected not to present his own appraisal evidence, independent of his reliance upon the valuation methodology provided for by statute, the commissioner has advanced several reasons why appellant's evidence is insufficient to support an alternative value.

The commissioner first points to appellant's failure to undertake an impairment analysis under Statement of Financial Accounting Standard ("FAS") No. 144 which "addresses financial accounting and reporting for the impairment or disposal of long-

lived assets.” Joint. Ex. 8, at 4. He posits that under generally accepted accounting principles, when appellant became aware of any circumstances which materially impacted the value of its assets, either appellant’s internal staff or its external auditors should have undertaken such an analysis. The absence of such evidence, according to the commissioner, runs contrary to appellant’s position advanced through this appeal that the value of its assets has declined. While an impairment analysis or, as in this instance, the lack thereof may be entitled to *some* consideration, we are unwilling to infer that appellant’s financial reporting is necessarily inconsistent with the relief sought through its appeal.

As for Tegarden’s appraisal, the commissioner suggests that this board “scrutinize that appraisal in light of the critical analysis and evidence presented by the Commissioner’s expert appraiser, Mr. Eyre, through his BTA testimony and the various BTA-admitted exhibits that Mr. Eyre’s [sic] prepared, compiled and authored.”<sup>9</sup> In his

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<sup>9</sup> Eyre indicated that he did not perform an appraisal of appellant’s assets, but instead was asked to “critique” Tegarden’s appraisal, H.R., Vol. IV at 15-16, elaborating during cross-examination as follows:

“I’ve been asked to do what I would characterize as a consulting service, and in that regard I’ve been asked to perform certain types of analysis relating to valuation characteristics of the taxpayer, and also as relates to Mr. Tegarden’s report and showing the effect thereafter. But I haven’t rendered an opinion of value here.” H.R., Vol. IV at 142.

Such an engagement appears to be considered a “review appraisal,” a situation described in the comments to Standard 3 of the Uniform Standards of Professional Appraisal Practice (“USPAP”), promulgated by The Appraisal Standards Board (“ASB”) of The Appraisal Foundation, as “the act or process of developing and communicating an opinion about the quality of all or part of the work of another appraiser that was performed as part of an appraisal, appraisal review, or appraisal consulting assignment. The appraiser’s opinion about quality must encompass the completeness, adequacy, relevance, appropriateness, and reasonableness of the work under review, developed in the context of the requirements applicable to that work. \*\*\* Appraisal review requires the reviewer to prepare a separate report setting forth the scope of work performed and the results of the appraisal review.” This latter element appears tempered by USPAP Rule 3-4, which acknowledges that an oral presentation is permissible: “To the extent that it is possible and appropriate, an oral appraisal review report must address the substantive matters set forth in Standards Rule

brief, the commissioner specifically criticizes Tegarden's decision not to develop an opinion of value using the market approach, i.e., sales comparison approach, and questions the propriety of removing an amount attributable to "spare pairs" from the unit value of the operating properties' total value.

As for his first contention, the Tax Commissioner insists that since the "best evidence" of true value is typically a recent arm's-length sale of the property in issue, Tegarden's failure to develop a market approach within his appraisal is fatal to the reliability of his ultimate opinion. The commissioner directs our attention to Mr. Eyre's commentary, specifically "his testimony and exhibits [which] reflect a detailed 'stock and debt' approach to value,<sup>10</sup> supporting a significantly greater true value for the taxable property than determined by the Commissioner." Appellee's brief at 55. Eyre indicated that the stock and debt approach, the most common approach used in developing a market approach in a unit appraisal, is a very pertinent indicator of value and, contrary to Tegarden's opinion, there exists sufficient market data from which the approach may be developed.

Footnote contd. \_\_\_\_\_

3-2." In a compilation of questions and responses, The Appraisal Foundation indicated that Standards Rule 3-4 was added, in part, in order to "address the fact that appraisal review reports are frequently given orally, in particularly in court testimony settings." *Frequently Asked Questions* (2006 Ed.), at 94.

<sup>10</sup> We consider it appropriate to comment upon the utility of a review appraisal. USPAP contemplates situations where one appraiser will critically evaluate various aspects of another appraiser's work product. See fn. 9. A reviewer's "scope of work" may also include the expression of his or her own opinion of value. See Standards Rule 3-2(d). However, where such an undertaking occurs, the reviewing appraiser must minimally adhere to additional disclosure requirements. See, e.g., Standards Rule 8-2(b). See, also, Advisory Opinion 20. In this instance, Eyre made it clear that he was not engaged to develop, nor did he have, an opinion as to the value of the property in issue in this appeal. See, e.g., H.R., Vol. IV 15-16, 85-86, 110, 141-142.

The practice of appraising property is not an exact science, but instead reflects the development of an opinion, the reliability of which depends upon the basic competence, skill, and ability demonstrated by the appraiser. As we have often noted, “[t]he discipline itself is often inexact; ultimate conclusions involve hearsay, suppositions, and subjective mental impressions as well as specific data. The Webster’s New World Dictionary (2<sup>nd</sup> ed. 1970) defines ‘opinion’ as a ‘belief not based on absolute certainty or positive knowledge but on what seems true, valid or probable to one’s own mind \*\*\* an evaluation, impression or estimation.’” *Cyclops Corp. v. Richland Cty. Bd. of Revision* (May 30, 1985), BTA Nos. 1982-A-566, et seq., unreported, at 6-7.

The Supreme Court has acknowledged this board’s role in weighing and evaluating evidence. For example, in *Snider*, supra, the court reaffirmed the discretion which we are accorded:

“The BTA is granted great latitude in determining the weight to be given evidence and the credibility of witnesses before it. It is not required to adopt the valuation fixed by any expert or witness. Value for tax purposes is a question of fact, and this finding is primarily within the province of the taxing authorities. This court will not disturb such a decision unless it affirmatively appears from the record that such decision is unreasonable or unlawful. *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St. 2d 13, \*\*\* paragraphs two, three, and four of the syllabus.”). *Id.* at 202. (Parallel citations omitted.)

See, also, *Wolf v. Cuyahoga Cty. Bd. of Revision* (1984), 11 Ohio St.3d 205, 207 (“A great deal of appellants’ argument is devoted to the rebuttal of appellees’ expert testimony. Ultimately, they conclude that none of his conclusions is credible enough to be relied on by

the BTA. However, such a determination is precisely the kind of factual matter to be decided by the BTA.”).

While it may be optimal to have an appraisal in which all of the commonly employed methodologies are developed in determining the value of property, the absence of one approach or the fact that an expert places greater emphasis on an approach other than the market approach does not mandate rejection of the opinion in its entirety. In this instance, Tegarden, an expert with considerable experience in valuing public utility property, cogently explained why, in his opinion, a stock and debt approach would not serve as a reliable indicator of value. Although the commissioner disputes this,<sup>11</sup> along with several other aspects of Tegarden’s appraisal, we are not persuaded by his arguments or the criticisms offered by his witness. In his narrative appraisal report and during his testimony, Tegarden described in considerable detail the data he gathered and relied upon, and the steps which he undertook to develop his opinion.

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<sup>11</sup> In an apparent effort to demonstrate an inconsistency, the commissioner’s counsel questioned Tegarden regarding a prior appraisal in which he performed a stock and debt approach. See Ex. S. Tegarden responded by pointing out that while the approach had been developed, in the final reconciliation of value, it was given little consideration.

We also reject the commissioner's contention that it was improper for Tegarden to remove value attributable to "spare pairs," i.e., copper wire not used in business. Because the value of such assets was included in the operating unit valued within Tegarden's unit appraisal, it was appropriate to remove such costs as they cannot be considered used in business and subject to taxation. See, generally, *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506. Although the commissioner's witness offered an alternative means by which such costs could have been accounted for, he nevertheless concedes that it is appropriate to eliminate the costs from an appraisal so as not to render them subject to assessment.

It is apparent from the present record that the telecommunications industry has undergone considerable change during the past decade and that the existence of a variety of factors, e.g., increased competition, dramatic technological advancements, shifts in consumer trends, may influence the value of participants' assets. It is reasonable that such factors be reflected as obsolescence impacting the property which, in this instance, we find has been fairly, reasonably, and more accurately captured by appellant's expert than that which would result from application of the method set forth in R.C. 5727.11(A). Although the commissioner refers us to recent decisions in which we have rejected reduction claims advanced by other providers of telecommunications services, we note that in those cases we had not been provided with an appraisal of the property in issue, but instead depreciation studies which we found unreliable and unpersuasive.

Upon review of the record, we find Tegarden's appraisal to be competent and probative evidence of the value of appellant's personal property and that as a result of such

evidence appellant has rebutted the presumption of correctness which must be accorded the commissioner's findings. It is therefore the order of this board that the final determination of the Tax Commissioner must be, and hereby is, reversed and that the true value of appellant's taxable property for 2003 be established at \$1,702,157,675.

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**In The Supreme Court of Ohio**  
**Case Information Statement**

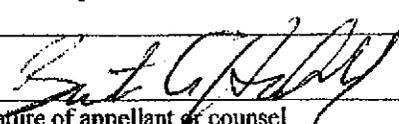
<b>Case Name:</b> <u>The Ohio Bell Telephone Company</u>	<b>Case No.:</b> _____
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**I. Has this case previously been decided or remanded by this Court?** Yes  No   
If so, please provide the Case Name: \_\_\_\_\_  
Case No.: \_\_\_\_\_  
Any Citation: \_\_\_\_\_

**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. 5727.11  
**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) public utility personal property taxation  
2) \_\_\_\_\_  
3) \_\_\_\_\_

**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: \_\_\_\_\_

**Contact information for appellant or counsel:**  
Barton A. Hubbard                      0023141                      (614) 466-5967; (614) 466-8226  
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30 East Broad Street, 25<sup>th</sup> Floor  
Address      
Columbus                      OH 43215-3428                      Signature of appellant or counsel  
City                      State                      Zip Code                      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 James F. Lang, Michael T. Mulcahy, and Peter A. Rosato, Calfee, Halter & Griswold LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688, counsel for appellee, on this 18 day of October, 2007.

  
BARTON A. HUBBARD  
Assistant Attorney General

The Ohio Bell Telephone Company, Appellant, vs. William W. Wilkins, Tax  
Commissioner of Ohio, Appellee.

2006 Ohio Tax LEXIS 145

February 3, 2006, Entered

ORDER

(Overruling Motion for Jurisdictional Ruling)

This matter is now before the Board of Tax Appeals as a result of a "motion for a jurisdictional ruling" filed on behalf of the Tax Commissioner. The commissioner does not claim that appellant failed to comply with the requirements imposed by R.C. 5717.02 so as to entirely divest this board of jurisdiction over this appeal. Instead, he asserts that evidence which he anticipates appellant intends to present at an upcoming hearing cannot be considered by this board as it is premised upon a theory not previously advanced. n1

n1 Although the commissioner's motion is styled as one requesting a jurisdictional ruling, he does not, as noted above, seek the dismissal of appellant's appeal. Instead, he seeks an order limiting the evidence appellant is permitted to offer during hearing. See discussion, *infra*. It is therefore appropriate to acknowledge this board's often expressed reluctance to render evidentiary rulings in advance of hearing. See, e.g., *Cleveland Hts./Univ. Hts. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Interim Order, Oct. 30, 1992), BTA Nos. 1991-A-1051, et seq., unreported, at 3-5. See, also, *Columbia Gas Transmission Corp. v. Zaino* (Interim Order, June 6, 2005), BTA No. 2003-K-1876, unreported; *Seven Seventeen HB Philadelphia No. 2 v. Franklin Cty. Bd. of Revision* (Interim Order, Feb. 4, 2005), BTA Nos. 2002-A-1925, et al, unreported. [\*2]

This appeal was scheduled to proceed to evidentiary hearing on January 9, 2006. On December 13, 2005, appellant requested that the hearing be continued in order to allow it to "provide the Board with an alternative valuation of its public utility property that reasonably reflects its true value." *Id.* at 1. Appellant indicated that in light of this board's decision in *Cincinnati Bell Tel. Co. v. Zaino* (June 10, 2005), BTA Nos. 2003-K-765, et al., unreported, which rejected a valuation study similar to that upon which appellant apparently intended to rely, it has now engaged Thomas Tegarden to prepare an appraisal of its public utility personal property. However, due to Tegarden's schedule, appellant found it necessary to request a postponement of the hearing.

Without objection, the January 9, 2006 hearing was cancelled. However, as a result of the preceding disclosure, the filing of the motion now under consideration ensued through which the Tax Commissioner requests that this board preclude appellant's introduction of an appraisal and accompanying testimony on the basis that it is attempting, on appeal, "to raise a completely different valuation claim." Tax Commissioner's motion [\*3] at 7. Citing to the statutory provisions allowing for the filing of petitions for reassessment and notices of appeal, the commissioner insists that appellant is restricted on appeal to the same methodology and evidence of valuation it relied upon below.

The commissioner correctly notes that the authority of the Board of Tax Appeals to consider an appellant's arguments is restricted by two separate, but similar,

statutory provisions. R.C. 5727.47 makes clear the need for a public utility to initially disclose its objections to an assessment before the Tax Commissioner, providing in pertinent part:

"(A) \* \* \* If a public utility objects to any assessment certified to it pursuant to such sections [i.e., R.C. 5727.23 and 5727.38], it may file with the commissioner \* \* \* a written petition for reassessment. \* \* \* *The petition shall indicate the utility's objections, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination by the commissioner.*" (Emphasis added.)

Analogous provisions have been found to run to the core of procedural efficiency since a taxpayer's objections provide the Tax Commissioner with [\*4] notice of the scope of the requested review. As the Supreme Court ultimately concluded in CNG Dev. Co. v. Limbach (1992), 63 Ohio St.3d 28, 32, "a taxpayer has not substantially complied with the statute, so as to invoke the right to review of a particular error, if he has not set forth that error with specificity in the petition for reassessment." See, also, Shugarman Surgical Supply, Inc. v. Tracy, 97 Ohio St.3d 183, 186, 2002-Ohio-5809; Nimon v. Zaino, Lorain App. No. 01CA007918, 2002-Ohio-822; American Fiber Systems, Inc. v. Wilkins (Sept, 16, 2005), BTA No. 2004-K-1222, unreported; Ohio Edison Co. v. Tracy (Interim Order, May 21, 1999), BTA No. 1997-K-322, unreported.

Similarly, R.C. 5717.02 restricts this board's jurisdiction to a consideration of those errors set forth with specificity in an appellant's notice of appeal:

"The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner \* \* \* to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, and *shall also specify the errors [\*5] therein complained of \* \* \*.*" (Emphasis added.)

See, also, Queen City Valves v. Peck (1954), 161 Ohio St. 579, syllabus ("On an appeal from an order of the Tax Commissioner to the Board of Tax Appeals, Section 5611, General Code (Section 5717.02, Revised Code), requires that the notice of appeal shall *specify* the errors complained of; a notice of appeal which does not enumerate in definite and specific terms the precise errors claimed but uses language so broad and general that it might be employed in nearly any case is insufficient to meet the demands of the statute; and a decision of the Board of Tax Appeals dismissing for want of jurisdiction an appeal predicated on such a notice of appeal will not be reversed by this court as unlawful or unreasonable."); Lenart v. Lindley (1980), 61 Ohio St.2d 110; Ellwood Engineered Castings Co. v. Zaino, 98 Ohio St.3d 424, 427, 2003-Ohio-1812 (quoting from Cleveland Elec. Illum. Co. v. Lindley (1982), 69 Ohio St.2d 71, 75, "'under R.C. 5717.02, a notice of appeal does not confer jurisdiction upon the Board of [\*6] Tax Appeals to resolve an issue, unless that issue is clearly specified in the notice of appeal.'"); Gen. Motors Corp. v. Wilkins, 102 Ohio St.3d 33, 2004-Ohio-1869.

Accordingly, as pointed out by the court in DeWeese v. Zaino, 100 Ohio St.3d 324, 2003-Ohio-6502:

"The only issues that can be determined by the Tax Commissioner on a petition for reassessment are those that are presented to him in writing by the taxpayer. In turn, the only issues that can be appealed to the BTA from a final determination by

the Tax Commissioner are those that were considered by him, as set forth in his final determination." n2 Id. at P 21.

n2 As noted above, this board's ability is generally considered to be limited to those errors specified by an appellant in its notice of appeal. However, the board *may* have the authority to consider additional issues not raised in a notice of appeal where obvious error exists, the board exercises its investigatory powers, or where the commissioner himself contests an issue neither addressed in his final determination nor raised by an appellant in a notice of appeal. See, e.g., *Buckeye Internatl., Inc. v. Limbach* (1992), 64 Ohio St.3d 264, 267-268; *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 15-17; *Howard Gas & Oil Co. v. Limbach* (May 21, 1993), Lucas App. No. L 92-128, unreported. [\*7]

Relevant to the commissioner's motion, n3 appellant initially objected to the commissioner's assessment by asserting in its petition:  
"The cost less depreciation method utilized by the Tax Commissioner does not reflect the true value in money of SBC Ohio's n4 taxable property as required by Ohio law." S.T. at 199.

n3 Appellant also challenged the taxability of certain software costs. However, this claim is not the subject of the commissioner's motion as he concedes this issue was raised by appellant in its petition for reassessment and in its notice of appeal.

n4 In its petition for reassessment, appellant disclosed that appellant operates in Ohio as SBC Ohio.

Subsequently, in its notice of appeal filed with this board, appellant specified the following as error existing in the commissioner's final determination:  
"Second, the cost less depreciation method utilized by the Tax Commissioner does not reflect the true value in money of SBC's taxable property as required by Ohio law. The Tax Commissioner's determination is erroneous, unjust and unreasonable because, inter alia, it overstates both costs and service lives and utilizes a method that does not [\*8] reasonably reflect true value."

It must be emphasized that this board is not predisposed to imposing jurisdictional limitations where none are expressly set forth. Cf. *Nucorp, Inc. v. Montgomery Cty. Bd. of Revision* (1980), 64 Ohio St.2d 20, 22 ("While this court has never encouraged or condoned disregard of procedural schemes logically attendant to their pursuit of a substantive legal right, it has also been unwilling to find or enforce jurisdictional barriers not clearly statutorily or constitutionally mandated, which tend to deprive a supplicant of a fair review of his complaint on the merits."). Although the commissioner suggests that a much more restrictive interpretation be accorded appellant's objections and specifications, this board declines his invitation as being inconsistent with the Supreme Court's admonition that such notices not be read in a hypertechnical manner. See, e.g., *Abex Corp. v. Kosydar* (1973), 35 Ohio St.2d 13; *Goodyear Tire & Rubber Co. v. Limbach* (1991), 61 Ohio St.3d 381; *Buckeye Internatl., Inc. v. Limbach* (1992), 64 Ohio St.3d 264. [\*9]

Moreover, even if appellant's petition for reassessment and notice of appeal were to

be viewed with the most critical eye, the commissioner and this board were clearly put on notice that appellant was objecting to the application of the cost less depreciation method typically employed by the commissioner in valuing its public utility property. R.C. 5727.47 and 5717.02 contemplate that pleadings invoking review will provide the commissioner with *notice* of the errors claimed by a public utility, not necessarily all of the *evidence*, which it is reasonable to assume, will be gathered during the appellate process and ultimately offered in support thereof.

Ultimately, the commissioner's argument must be viewed as a criticism of appellant's decision to present evidence in support of its valuation claim n5 that was different than that previously presented. The Supreme Court has expressly rejected the argument now advanced by the Tax Commissioner. In *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 13, the court expressly held:

"The BTA hearing is de novo. *Higbee Co. v. Evatt* (1942), 140 Ohio St. 325, 332 \* \* \*. The [\*10] BTA is statutorily authorized to conduct full administrative appeals in which the parties are entitled to produce evidence in addition to that considered by the Tax Commissioner. *Bloch v. Glander* (1949), 151 Ohio St. 381, 387 \* \* \*.

"The BTA may investigate to ascertain further facts and make its own findings independent of those of the Tax Commissioner. *Nestle Co., Inc. v. Porterfield* (1971), 28 Ohio St.2d 190, 193 \* \* \*. R.C. 5717.03 authorizes the BTA to modify orders based upon its independent findings. Id."

See, also, *Gen. Elec. Co. v. Zaino* (Interim Order, Mar. 5, 2004), BTA Nos. 2003-K-569, et al., unreported, at 2, fn. 3.

n5 The commissioner posits that appellant has mischaracterized this board's jurisdiction as being predicated upon the statement of a claim rather than the specification of error. Since appellant did not previously present an appraisal of its property, the commissioner asserts that he could have committed no appealable error with respect to either its consideration or rejection. This view, rejected above as overly restrictive, confuses a claim of error, which indeed limits jurisdiction, with the type of evidence an appellant chooses to present in support of such claim. [\*11]

As acknowledged by the court in *Key Serv.*, supra, and consistent with its holding more than five decades earlier, an appellant is not restricted on appeal to only that evidence it previously presented before the commissioner. See *Bloch v. Glander* (1949), 151 Ohio St. 381, 387 ("Sections 5611 and 5611-1, General Code, contemplate 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."). This is in contrast to the limitations which may be imposed upon an appellant challenging a decision of a county board of revision. Compare, e.g., R.C. 5715.19(G) ("A complainant who fails to provide such information or evidence is precluded from introducing it on appeal to the board of tax appeals or the court of common pleas, except that the board of tax appeals or court may admit and consider the evidence if the complainant shows good cause for the complainant's failure to provide the information or evidence to [\*12] the board of revision."). See, also, *CASA 94, L.P. v. Franklin Cty. Bd. of Revision* (2000), 89 Ohio St.3d 622; *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36.

Based upon the foregoing, the Tax Commissioner's motion is hereby overruled. As previously indicated, the evidentiary hearing in this appeal was cancelled and has not yet been rescheduled. Accordingly, the parties are hereby ordered, within fourteen days of the issuance of this order, to jointly propose dates upon which this appeal may proceed to hearing.

**Champion Spark Plug** Company 900 Upton Avenue Toledo, Ohio 43607 Appellant  
vs. Edgar L. **Lindley** Tax Commissioner of Ohio Appellee

CASE NOS. E-1578; E-1579 (PERSONAL PROPERTY)

STATE OF OHIO -- BOARD OF TAX APPEALS

1978 Ohio Tax LEXIS 493

April 10, 1978

**OPINION:  
ENTRY**

These causes and matters came on to be considered by the Board of Tax Appeals upon two notices of appeal filed herein by the above named appellant under date of August 31, 1976, from four Final Assessment Certificates of Valuation, each dated August 6, 1976, concerning appellant's personal property valuation for the tax years 1972 and 1973 wherein the Tax Commissioner found deficiencies in each year in three separate taxing districts concerned with appellant's Inter-County Corporation Tangible Personal Property returns for the tax years 1972 and 1973, as set forth on said certificates.

The notices of appeal concerning 1972 and 1973 are identical except for the naming of the year involved and the body of appellant's notice of appeal concerning the year 1973, reads as follows:

"Notice is hereby given [\*2] by **Champion Spark Plug** Company, Appellant herein, of its appeal to the Board of Tax Appeals from the final order of Edgar L. **Lindley**, Appellee herein, in the form of two Final Certificates of Valuation, each dated August 6, 1976 and assessing deficiencies to Appellant on its Inter-County Corporation Return of Taxable Property for the year 1973. Copies of said Final Certificates of Valuation are attached hereto and made a part hereof by reference.

"The errors complained of herein are the erroneous and unlawful actions of Appellee as follows:

"(1) Appellee erred in refusing to allow Appellant's Claim for Deduction From Book Value filed with Appellant's tax return.

"(2) Appellee erred in not accepting Appellant's appraisal of certain of its property as the basis for determining the true value of that property included in its tax return for said year.

"(3) Appellee erred in applying his '302 Computation' in determining the true value for taxation of certain of Appellant's property for said year.

"(4) Appellee erred in assessing certain of the property of Appellant at values in excess of the true value thereof for said year 1973.

"Because of the errors stated above, the Appellant [\*3] requests that the Appellee's order as to the matters included in this appeal, be reversed as unlawful and unreasonable.

"Appellant states that Marshall, Melhorn, Bloch & Belt, its attorneys, 1434 National Bank Building, Toledo, Ohio 43604, will represent it in this appeal."

These cases were consolidated for hearing and disposition since the testimony and evidence was identical in each case except for dates and dollar amounts. The legal issues are identical.

The matters were submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcript supplied by the Tax Commissioner, which includes both cases, the testimony and evidence presented to the Board of Tax Appeals at a record hearing in Columbus, Ohio, on February 24 and 25, 1977, and the briefs supplied by counsel.

The facts in this case are not in dispute. It is only the application of the law to these facts which must be determined by the Board of Tax Appeals.

The appellant corporation is the owner (in this matter) of three manufacturing plants which are used in the manufacture of **spark plugs**. Two of these plants are located in Toledo, Ohio, and the third plant involved in this appeal is located at [\*4] or near Cambridge, Ohio.

The issue in the matter is the value of appellant's machinery used in each plant in the manufacture of **spark plugs**.

The appellant filed its Ohio Personal Property Tax Returns on an Inter County basis for the years in question. The return for each year included a claim for deduction on Form 902.

Such claims were not denied by the Tax Commissioner by a Preliminary Assessment Certificate of Valuation, issued August 14, 1972, for the year 1972 and an Amended Preliminary Assessment Certificate of Valuation, issued September 7, 1973, for the year 1973.

On August 6, 1976, Final Assessment Certificates of Valuation were issued to appellant for both years. The effect of the final assessment was to disallow the claims for deduction which had been made by the appellant in the two returns when originally filed.

The dollar amounts of the listed values involved in the deficiency assessments according to the Final Assessment Certificates issued were as follows:

1972

Toledo City--Toledo SCD	\$2,684,890.
Toledo City--Washington LSD	\$ 620,600.
Cambridge Township	\$ 235,920.

1973

Toledo City--Toledo SCD	\$1,022,390.
Toledo City--Washington LSD	\$ 803,700.
Cambridge Township	\$ 680,580.

[\*5]

Thereafter, on August 31, 1976, the appellant filed its Notices of Appeal to this Board

from each of the Final Assessment Certificates.

The testimony was clear that the records of both Toledo plants are computerized but that the Cambridge plant is not computerized. The Cambridge plant records are kept on cards which contain essentially the same information as the computer printouts of the two Toledo plants.

The appellant keeps a record of its inventory of machinery and equipment by the use of computer printouts which list all assets by tag number, acquisition cost, the date of acquisition, the depreciation for the year and to date and the net book value of each of its assets. The same information is kept on cards for the Cambridge plant.

The testimony of appellant's Tax Manager, Edward C. Slabe was clear as to the early developments. Appellant's Personal Property Tax Returns for 1972 and 1973 were prepared from the property records and financial statements of appellant. The information with respect to assets was gathered together by cost of assets on a year to year basis in order to be usable for the "302" computation. Each plant was handled separately in listing the assets [\*6] by year and applying the applicable allowance. These figures listed plant by plant were thereafter collected together and totaled on Schedules of the tax return. The returns for both years were made initially on the basis of the "302" computation at a five percent (5%) annual rate based upon appellant's manufacturing category.

With each return the appellant filed a Form 902 Claim for Deduction from Book Value. Mr. Slabe testified that these claims for deduction were based upon an appraisal of machinery and equipment of the appellant on behalf of the appellant by Manufacturer's Appraisal Company with the exception of such machinery and equipment having a value of less than \$1,000.00 each. Upon these items with a value of less than \$1,000.00 each the "302" valuations were conceded by the appellant to be at book value.

Secondly, on each schedule was the amount of idle equipment which also was not appraised.

Finally there was added the value of machinery and equipment which was appraised by the appraisal company and the total value of all was the sum of all these values which resulted in a claimed true value of the machinery and equipment on the schedules, one of which was created [\*7] and reported for each of the three plants.

The appraisals were performed and took the tangible form of reports to the appellant. These reports were introduced into evidence before the Board of Tax Appeals. The total appraisal was used as the basis for the preparation of the tax return for the year 1972. The appraised values stated in the appraisal were reported as the true values on Form 902 for the assets appraised.

This appraisal for 1972 was updated for the tax year 1973 by applying to the appraisals the additions and disposals which the appellant made during the year 1972. This update information on additions and disposals was furnished to the appraisal company by the appellant. The appraisal company then gave the appellant an appraisal letter for each of the plants which letter gave effect to the additions and disposals during the year 1972. The content of these appraisal letters were reflected in the 1973 Ohio Personal Property Tax Return as the true value in lieu of the "302" computation of value with respect to the items of property appraised. These values

were also reported on the Forms 902.

Appellant's next witness was John Lever, an Assistant Vice President of [\*8] **Champion** in charge of special assignments in manufacturing. He has been in the machinery development and production engineering department of the appellant for 35 years.

He described the general manner in which the **spark plugs** are manufactured and the nature of the machinery and equipment used at the various stages. He explained the two general types of machinery and equipment which **Champion** purchases and uses as being standard equipment which is merely modified for **Champion** use and other equipment which is strictly **Champion** designed and engineered for specific **Champion** use in connection with its special methods of manufacture. He estimated that approximately 75% of the machinery and equipment in the three plants involved are special purpose equipment. He testified that **Champion** had some type of proprietary right in the processes in which the special machinery was used. He explained the meaning of this proprietary right as including the exclusive **Champion** right to use the machinery because it is of special application and use only if used in connection with the **Champion** patent on the sillment seal and on the end product itself, the **Champion spark plug**.

**Champion's** third witness [\*9] was Hugh McMullen, a Vice President of Manufacturers'. He testified as to the general types of appraisals which the company performs and discussed a number of the customers ordering those appraisals. His personal qualifications in the appraisal profession included being a senior member of the American Society of Appraisers and a senior member of the National Society Review Appraisers. He indicated that he was familiar with the appraisal conducted by Manufacturers' for **Champion** in 1972 and with respect to the proposal made by Manufacturers' to **Champion** for instituting that appraisal.

He described the number of different approaches which Manufacturers' could have taken to the matter of the appraisal of the value of the machinery and equipment and described five of them: the reproduction approach, the going-concern approach, the fair market value approach, the orderly liquidation approach and the quick liquidation approach. He said that the fair market value approach was chosen as Manufacturers' felt that it was the most appropriate approach to value. He defined the term "fair market value" as being:

"\* \* \* synonymous with true value and what other states may term in other fashions [\*10] actual cash value. They may use the term true value and we would define it as the price expressed in terms of money that a willing buyer would pay to a willing seller in a normal market allowing reasonable time to find a purchaser who is familiar with the property's advantages and disadvantages and neither acting under compulsion."

Mr. McMullen also testified as to the time spent by the appraisal team in the **Champion** plants and at their home office.

Jerome Sigler, an employee of Manufacturers' also was called to testify for **Champion**. He is Director of Market Valuation of Manufacturers' and has been engaged in some aspect of the machinery and equipment business for 36 years. He is an associate member of American Society of Appraisers and has performed approximately 600 appraisals of machinery and equipment since he has been with

Manufacturers'.

He related how the **Champion** appraisal was performed, commencing in April of 1972. The crew of men met with various responsible people at **Champion** and made a tour of the plant, meeting the negineering people who were consulted in connection with the appraisal. The information thus obtained in the plant and from Exhibits 1, 2 and 3 was [\*11] transferred to the field notes being created by the appraiser. The field notes (Exhibits 21, 22 and 23) constituted the worksheet of the appraiser. He identified a sample of these field notes as Exhibit 24. The description of the equipment came from the effort of the appraiser in getting the serial and tag number during visual inspection of the machinery. This description was expanded by reference to the accounting records of **Champion** and to Exhibits 1, 2 and 3. From the same exhibits also was taken the acquisition costs.

On the field notes was entered the number of shifts the machinery was used. This was entered under the heading "Code - Condition". The cost was entered on the field notes as "Acquisition - Total", which included cost of installation. The column headed "Acquisition - Year" referred to the age of the machinery--the year of manufacture, which was keyed to the serial number.

To determine the cost of reproducing the machinery currently and to reflect the influences of inflation or deflation on the cost of reproduction, multipliers prepared by Marshall & Swift Publications (Exhibit 25) were applied to the acquisition cost. This was done by taking the year of [\*12] manufacture and applying the Marshall & Swift multiplier to convert the original cost (the Acquisition - Total) to a reproduction cost figure.

Mr. Sigler described the manner in which guidelines were applied for the converting of the reproduction costs of the specific piece of machinery or equipment which was being appraised to a fair market value. He identified the primary factors in such conversion as being age and the type of the equipment.

Mr. Sigler identified Exhibit 26 as a combination of guidelines which gave effect to age and type of equipment, and whether it is (A) - standard equipment, (B) - modified equipment, (C) - specialized or single-purpose equipment and (D) - highly specialized equipment. The designation of the type of equipment assigned to any piece of machinery and equipment being appraised was entered in the filed notes (Exhibit 24) under the heading "Code - MKT".

The market value factors assigned to the types of equipment shown on Exhibit 26 reflected a composite determination as a result of investigations of what was going on in the market place, including dealers' offerings and what other users had paid for similar equipment and knowledge which the appraiser [\*13] obtained from his own sources. Mr. Sigler testified that such things as obsolescence, etc., were not reflected in the market factors shown in Exhibit 26, but were considered by the appraiser in making the final judgment on market value. Depreciation was worked into the age groupings and types of equipment.

Mr. Sigler stated that he reviewed each of the entires of cents per dollar on the worksheets (see Exhibit 24). This factor of cents per dollar, was then applied to the reproduction cost to determine the final figure of fair market value.

Mr. Sigler stated that he was personally responsible for assigning a final value on

each of the pieces of equipment and that the final value was based on an as-is, where-is orderly sale where it was assumed there was sufficient time to find a buyer who would be willing to pay a reasonable price for the equipment. This he stated is a fair market value appraisal.

Based upon the factors, assumptions and procedures to which he had testified, he stated that, in his opinion, the true value of the machinery and equipment located in the plants of **Champion** and included in the appraisal as of December 31, 1971, were those stated on Exhibits [\*14] 8, 9 and 10 and were the following:

Plant 1	\$5,083,640
Plant 3	\$ 395,550
Plant 4	\$1,138,680

He indicated that the appraisal would normally have been lower as the appraisers were not aware at the time of the appraisal that installation costs had been included in **Champion's** acquisition cost on its printouts. Normally, these costs would not be included in a where-is, as-is appraisal.

**Champion's** last witness was George Sees. He identified Exhibits 34, 35 and 36 as representing the procedures in updating the 1972 appraisal to cover the tax year 1973, with values as of December 31, 1972. This procedure was essentially to start with the schedules of disposals, additions and transfers furnished by **Champion** (Exhibit 4). The first step was to deduct the December 31, 1971, appraised fair market value of assets which were disposed of or transferred out of Ohio in 1972, then to add in such value of assets transferred into Ohio in that year, giving the residual December 31, 1971, appraised fair market value of assets as of December 31, 1972. This value was updated by the Marshall & Swift inflation adjustment for one year. To the resulting value was added the December 31, 1972, [\*15] appraised fair market value of assets which were purchased and added in 1972. The ultimate figure then was the December 31, 1972, fair market value. The values so computed were prepared by Mr. Sigler and another employee of Manufacturers' but the basic determination of the market value was made by Mr. Sigler with respect to additions during the year 1972.

Mr. Sees stated that the figures reported to **Champion** in Exhibits 11, 12 and 13 were the fair market values of the machinery and equipment at December 31, 1972, and were the same values as he arrived at in his worksheets (Exhibits 34, 35 and 36).

However, Mr. Sigler stated that he took final responsibility for the appraisal of each item in the appraisal. He further testified that his appraisal on an "as-is-where-is" basis was a price for each item which he believed would be the price charged by a used equipment dealer to a potential user or purchaser. Such a price obviously does not include freight, tax, installation, additions or any other incidental expense incurred by a purchaser in putting the equipment to use.

The appellant presented no testimony or evidence of disposals or actual use or life of its machinery.

According [\*16] to appellant's testimony approximately 75% of its equipment is either special purpose or extra special purpose equipment so as to fall into Mr.

Sigler's category "C" or "D", plus the fact that without the legal rights to use this special purpose machinery no one could legally use a sizeable portion of this "C" or "D" equipment.

The appellee presented the testimony of Mr. Dudgeon, the supervisor of the personal property tax section of the Department of Taxation and of Mr. Witzel, the administrator of the Property Tax Division of the Department of Taxation.

The testimony of these witnesses included a study made of the disposals by the appellant which was prepared from values submitted by the appellant in its 1969 to 1976 tax returns. This dollar disposal study relates to the aggregate plant as a whole and is not tied to specific additions or disposals.

However, such a study, lacking presentation of actual additions or disposals by the appellant gives the remaining life of machinery and equipment of plant #1 (Toledo) of 17 years, that in plant #4 of 41 years and plant #3 of 689 years.

There is no question but that appellant had available to it on its computer and cards the full [\*17] history of every piece of equipment in its plants and chose to not present this evidence to the Board of Tax Appeals.

Appellant contends and both parties agree with the series of cases decided by the Supreme Court of Ohio which hold that the best evidence of the true value of either real or personal property is a sale of that property by a willing seller to a willing buyer in an arms-length transaction with neither party being under compulsion to either buy or sell.

In effect, this is the basis of the "302" computation of the Tax Commissioner as applied under the statute which delineates what the value of personal property should be, namely; appellant's book value.

The appellant's book value, in each case, is and should be, the cost to the appellant to buy and install, ready for use, a piece of machinery and equipment. Surely, this is a sale, an arms-length transaction, and is the basis of appellant's book value.

This book value is affected by depreciation to reach a depreciated book value but the whole composite grouping of machinery and equipment is based upon that original purchase by the purchaser (in this case the appellant) as purchased from the seller in an arms-length [\*18] transaction.

Revised Code Section 5709.01 authorizes taxation of personal property "used in business." That section provides in pertinent part:

"\* \* \* All personal property located and used in business in this state, \* \* \* [is] subject to taxation \* \* \*." (Parenthetical matter added) (Emphasis added)

The spectrum of property subject to personal property tax is described in Revised Code Section 5701.03 as follows:

"As used in Title LVII of the Revised Code, 'personal property' includes every tangible thing which is the subject of ownership, whether animate or inanimate, \* \* \*."

(Emphasis added)

Revised Code Section 5701.08 (A) defines "used in business" as follows:

"As used in Title LVII [57] of the Revised Code:

"(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise."

(Emphasis added)

The tax levied on personal property [\*19] is based on the value of the property as listed on the taxpayer's personal property tax return. Revised Code Section 5711.18 sets forth the manner in which property is to be listed and valued as follows:

"\* \* \* In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. \* \* \*"

(Emphasis added)

While Revised Code Section 5711.18 appears to suggest that depreciated book value of personal property is true value, in fact, it is a finding of fact made by the Tax Commissioner which ultimately determines the true value of personal property. The significance of the Tax Commissioner's role in determining true value is apparent from the language of the statute. Depreciated book value is true value unless the Tax Commissioner finds otherwise. Therefore, only if the Tax Commissioner accepts depreciated book value as reported by the taxpayer can that figure be accepted as true value.

The prima [\*20] facie quality of the determination of the Tax Commissioner regarding the true value of tangible personal property "used in business" was recognized by the Supreme Court of Ohio in Wheeling Steel Corp. v. Evatt (1944), 143 Ohio St. 71. In that case, the Court approved the Commissioner's use of his "302 Computation" to determine the true value of machinery and equipment. This "302 Computation," which is no more than the application of a slightly modified straight-line depreciation schedule to the original cost of equipment, is a calculation devised and used by the Tax Commissioner to test the taxpayer's valuation of its property. The Supreme Court's approval of the use of this computation in Wheeling Steel, supra, despite the existence of equipment valuation appraisals, not only validated the formula, it also revealed the Court's preference for a uniform system of valuation keyed to a single, administratively enforceable formula. The Court held:

"So far as the record in this case discloses, we see no reason for criticism of the application of the so-called '302 Computation' especially as the evidence shows \* \* \*, it is applied generally to all taxpayers [\*21] in similar situations. \* \* \*."

(Emphasis added) (143 Ohio St. 81)

The Supreme Court's endorsement of the "302 Computation" in Wheeling Steel, supra, not only established a valuation procedure for that particular taxpayer, it established the valuation procedure for all taxpayers in the State.

After Wheeling Steel, supra, the "302 Computation" was again approved in W. L. Harper v. Peck (1954), 161 Ohio St. 300. There, the Court held that the application of the "302 Computation" to depreciable property establishes a prima facie true value, subject to adjustment for "special" or "unusual" circumstances or conditions. Although this case introduced exceptions to the use of the "302 Computation," it also reinforced the Court's approval of the application of the formula on a state-wide basis in lieu of a piece-by-piece appraisal of every machine in the State. The Court held:

"The law of Ohio requires that personal property used in business be taxed at its true value. Since it is impractical for the Department of Taxation to personally value all such personal property in the state, it is reasonable and lawful to use the straight-line method of depreciation [\*22] in arriving at true value. \* \* \* That is what the directive of the Department of Taxation [which established depreciation rates for the '302 Computation'] purports to accomplish, \* \* \*." (Emphasis added; parenthetical matter added) (161 Ohio St. 303)

By recognizing the necessity of a single, administratively workable formula for valuing personal property, and approving the use of the "302 Computation" in that role, the Court in Wheeling Steel, supra; and W. L. Harper, supra, effectively established the principle that deviations from the "302 Computation" should be the "exception," not the rule. Only in the case of special circumstances or a particular injustice is the application of the formula unreasonable.

Subsequent cases reinforced the Court's stand on the use of the "302 Computation" by imposing the burden of proving "special" or "unusual" circumstances on the taxpayer. In Gahanna Heights, Inc. v. Porterfield (1968), 15 Ohio St. 2d 189, the Court held:

"The burden is on the taxpayer to show that the rate of depreciation arrived at under the '302 Computation Directive' does not reflect the true value of its personal property. \* \* \*."

(Emphasis [\*23] added) (15 Ohio St. 2d 190)

See also, Adams v. Bowers (1958), 167 Ohio St. 369; Calhio Chemical Co. v. Bowers (1957), 5 Ohio Op. 2d 308 (taxpayers cannot prevail before the Board by attacking the Commissioner's formula). This matter decided in Calhio, supra, has not been passed upon by higher Courts.

Moreover, the burden imposed on the taxpayer is not simply a matter of bringing forth "some" evidence. In Syro Steel Co. v. Kosydar (1973), 34 Ohio St. 2d 9, for instance, the Court found statements made by the taxpayer's accountant with regard to the depreciation rate actually used by the taxpayer to be insufficient to meet the taxpayer's burden.

Thus, in the instant case, if appellant had presented disposal studies to establish that its equipment was used in an unusual manner or much more than comparable equipment in normal use or special circumstances under which it was compelled to

operate, the Board of Tax Appeals would have at least an indication of the use of the machinery and equipment. The only testimony in this case was that most equipment was operated on a two shift basis and no indication that this was any different from industry wide practice. [\*24]

The appellant has the burden of proving that the Tax Commissioner's calculations are incorrect and that it is entitled to the claimed deductions on its Forms 902.

This burden can only be met if the appellant brings forth competent evidence of special or unusual circumstances or can demonstrate that a particular injustice will occur. Disposal records indicating a shorter actual life have been used as an indication of such injustice.

In this case the appellant offered no evidence of the existence of special or unusual circumstances in the operation of its machinery and equipment. No evidence of economic or functional obsolescence was presented.

However, it is not just the taxpayer's failure to meet its burden of proof which supports the Tax Commissioner's assessment. The Tax Commissioner also adduced independent evidence to substantiate the true value determination on which the assessment was based. This evidence consisted of an analysis of the taxpayer's records of machinery and equipment disposals.

The significance of equipment disposal records in verifying true value determinations has been recognized by the Supreme Court and the Board of Tax Appeals. In Vroman Ice Cream [\*25] Co. v. Porterfield (1969), 21 Ohio St. 2d 9, the Supreme Court reversed a Board of Tax Appeals' decision affirming the use of a depreciation rate chosen by the Tax Commissioner on the single ground that the Board had indicated it had not considered an exhibit of the taxpayer which contained equipment disposal records. On remand, the Board considered the disposal records and held that they supported the Tax Commissioner's determination. Vroman Ice Cream Co. v. Porterfield (November 13, 1967), BTA Case No. 65881. This decision was then affirmed by the Supreme Court in Vroman Ice Cream Co. v. Porterfield (1971), 26 Ohio St. 2d 157, where the Court held that it would not disturb the Board's finding since it had been assured that the taxpayer's disposal records had been reviewed.

The disposal records available in this case are cost schedules prepared and submitted by the taxpayer as part of its personal property tax returns for the years 1969 - 1976. These schedules set forth the total cost of machinery and equipment on hand at the beginning of the year, the cost of additional equipment transferred in during the year, the cost of equipment retired or transferred [\*26] out during the year, and the total cost of machinery on hand at the end of the year. From these figures, the rate at which the taxpayer disposes of its equipment in any one year can be determined. This disposal rate provides an analytical look with which the validity of the Commissioner's annual allowance can be measured. The theory of the analysis is that since depreciation measures the using up of equipment, an ongoing business will be discarding equipment at the same rate it is wearing out the equipment. Consequently, the closer a depreciation rate approaches the actual disposal rate the more accurately it is predicting the actual life of the equipment.

It is to be noted that the statutes require all the personal property located and used in business in this state to be subject to taxation. The "as-is, where-is" method used by Mr. Sigler attempts to avoid many parts of all the personal property by removing

the equipment and deleting the costs of installation, freight, taxes, etc.

It is the finding of the Board of Tax Appeals that the appraisal studies presented by the appellant are not sufficient to overcome the values found by the Tax Commissioner in his assessment [\*27] made in denying appellant's claimed deduction on its Forms 902.

Giving consideration to the facts, the statutes, the case law and the finding of the Board of Tax Appeals, it is the decision of the Board of Tax Appeals that the Final Assessment Certificates of Valuation herein must be and hereby are, affirmed.

It is further ordered that a copy of this entry be certified to counsel of record and to the Auditors of Lucas and Guernsey Counties, Ohio.

Choice One Communications of Ohio, Inc., Appellant, vs. William W. Wilkins, Tax  
Commissioner of Ohio, Appellee.

CASE NOS. 2003-K-1461; 2004-K-409 (PUBLIC UTILITY PERSONAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

2006 Ohio Tax LEXIS 696

June 9, 2006, Entered

**OPINION:**  
DECISION AND ORDER

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

Through separate appeals filed with this board on October 10, 2003 and May 24, 2004, n1 appellant, Choice One Communications of Ohio, Inc., challenges final determinations issued by the Tax Commissioner on August 13, 2003 and March 18, 2004, respectively. Through his determinations, the commissioner denied appellant's petitions for reassessment in which it objected to public utility personal property tax assessments issued for tax years 2001 through 2003. We proceed to consider this matter upon appellant's notices of appeal, the statutory transcripts ("S.T.") certified by the Tax Commissioner pursuant to R.C. 5717.02, the evidence presented during a hearing convened before this board, and the post-hearing briefs of counsel.

n1 Through its appeal in BTA No. 2003-K-1461, appellant challenged the commissioner's rulings with respect to tax years 2001 and 2002, while a similar ruling was challenged for tax year 2003 in BTA No. 2004-K-409. Given the commonality of facts and law presented, these appeals were consolidated by an order issued by this board on June 11, 2004. [\*2]

Appellant is a telephone company n2 and, as a result of its entrance into the market following congressional enactment of the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, is considered a competitive local exchange carrier ("CLEC"). As a CLEC, it competes with established local telephone businesses, i.e., incumbent local exchange carriers ("ILECs"), by providing its own network and switching services. It provides voice, high-speed data, long distance, and toll-free calling services to small and medium-sized businesses in second-tier markets. Following the filing of its annual reports in which it listed the value of its Ohio personal property, the Tax Commissioner issued preliminary notices of assessment reflecting increases in the reported values of such property. Appellant then filed petitions for reassessment, asserting that the preliminary assessments not only included costs attributable to customized applications software, but that the amounts assessed failed to adequately account for obsolescence negatively impacting the value of its taxable property. The commissioner rejected each of these arguments, concluding first that all computer software, whether "canned" [\*3] or custom, systems or application, constitutes tangible personal property and is therefore subject to taxation. With respect to appellant's claims as to valuation, the commissioner found that appellant had failed to prove that the values resulting from the application of depreciation schedules prescribed for general use by public utilities, in particular telephone companies, did not fairly and accurately reflect the value of appellant's property.

n2 R.C. 5727.01(D)(2) defines a "telephone company" as a person "primarily engaged in the business of providing local exchange telephone service, excluding cellular radio service, in this state." Continuing, R.C. 5727.01(D) explains that: "As used in division (D)(2) of this section, 'local exchange telephone service' means making available or furnishing access and a dial tone to all persons within a local calling area for use in originating and receiving voice grade communications over a switched network operated by the provider of the service within the area and for gaining access to other telecommunication services."

From these determinations, appellant appealed, specifying the following as error in its notices of appeal: **[\*4]**

"2. For the assessment amounts for the 2001 and 2002 [and 2003] tax years, the Tax Commissioner erred in assessing tax on certain non-taxable intangible assets, including but not limited to customized software.

"3. For the assessment amounts for the 2001 and 2002 [and 2003] tax years, the Tax Commissioner erred in assessing tax by miscalculating the true value of property by not including adjustments and/or deductions for the overstatement of values caused by obsolescence and other factors." n3

n3 In its notices of appeal, appellant identified the impact of its claims as being as follows:

<b>Tax Year</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>
Taxable Value per Appellant	\$ 2,705,160	\$ 2,481,848	\$ 2,149,456
Taxable Value per Tax Commissioner	\$ 3,792,740	\$ 4,066,370	\$ 3,759,170
Difference	\$ 1,087,580	\$ 1,584,522	\$ 1,609,714

Before we consider the merits of appellant's claims, we must first address a number of jurisdictional issues which have now been raised by the Tax Commissioner for the first time through his post-hearing brief. n4 Initially, the commissioner suggests that he was without jurisdiction to consider appellant's 2001 tax year petition for reassessment in its entirety, **[\*5]** making reference to the statutory requirements with which a public utility must comply in order to challenge an assessment.

n4 We recognize that the subject matter jurisdiction of a tribunal cannot be waived and may be raised at any time, even during a subsequent appeal. See, e.g., Columbus City School Dist. Bd. of Edn. v. Wilkins, 101 Ohio St.3d 112, 2004-Ohio-296; H.R. Options, Inc. v. Zaino, 100 Ohio St.3d 373, 2004-Ohio-1, other issues subsequently clarified at 102 Ohio St.3d 1214, 2004-Ohio-2085; Shawnee Twp. v. Allen Cty. Budget Comm. (1991), 58 Ohio St.3d 14; Jenkins v. Keller (1966), 6 Ohio St.2d 122; In re Claim of King (1980), 62 Ohio St.2d 87; Sekerak v. Fairhill Mental Health Center (1986), 25 Ohio St.3d 38. Nevertheless, under the circumstances presented in this instance, we find it appropriate to comment upon the commissioner's delay in questioning the jurisdictional sufficiency of appellant's 2001 tax year petition filed with him in December 2001. Parties are encouraged to bring issues to this board's attention via motion "within a reasonable period of time following filing of the notice of appeal so as to permit the board to consider and

respond thereto in the orderly course of the board's business." Ohio Adm. Code 5717-1-12(A). The rationale underlying such rule is to not only allow the board a reasonable period within which to consider issues raised, but also to avoid the expenditure of unnecessary resources by both parties and this board. Although presumably aware of the jurisdictional limitations set forth in R.C. 5727.47 and the now-claimed jurisdictional deficiency, suggested by language included within the department's letters to which reference is now made, see discussion *infra*, the commissioner neither dismissed appellant's petition himself nor sought to raise this issue until he filed his post-hearing brief more than two years after the 2001 tax year appeal had been filed with this board, five days of evidentiary hearing had been convened, and appellant had filed its initial brief. Further, highlighting the waste of resources which can result from such delay, the commissioner suggests by way of brief that yet another hearing be convened for purposes of receiving evidence as to this claimed defect. As indicated in the body of our decision, the commissioner has failed to establish, as a threshold matter, that he complied with the preliminary requirements expressly imposed upon him by statute or that he is capable of making such a demonstration should an additional hearing be convened as now proposed. By commenting in this regard, it is hoped that in the future, where the commissioner questions his own jurisdiction or that of this board, he will raise such issues in a more timely manner. **[\*6]**

R.C. 5727.47(A) provides for the commissioner's mailing of assessments to public utilities, indicating that such mailing shall constitute *prima facie* evidence of its receipt by the utility. n5 Thereafter, in order to challenge an assessment, a public utility must file a petition for reassessment within sixty days n6 from the date of its mailing. Although no proof of mailing is included within the statutory transcript, the commissioner's preliminary assessments are dated October 1, 2001. BTA No. 2003-K-1461, S.T. at 290-307. Through a letter dated November 30, 2001, and bearing a Department of Taxation receipt date of December 5, 2001, n7 appellant's representative, Cynthia L. Janeway, of Ernst & Young, notified the Tax Commissioner of appellant's intent to challenge the assessments on two grounds, i.e., the commissioner erroneously included within the assessments customized applications software and overstated the value of its taxable property in light of obsolescence factors impacting the telecommunications industry. BTA No. 2003-K-1461, S.T. at 289.

n5 The statute is silent as to the method by which assessments are to be mailed.  
n6 H.B. 612, effective September 29, 2000, 148 Ohio Laws, Part III, 6896, extended the time within which a petition for reassessment could be filed by a public utility from thirty to sixty days. While making other adjustments to the petition process which are pertinent to the issues now raised by the commissioner, Sub.H.B. 589, 148 Ohio Laws, Part III, 6412-6417, with a subsequent effective date of October 17, 2000, referred to the former thirty-day rather than sixty-day period for the filing such petitions. Citing R.C. 1.52 and noting that these two bills had been enacted by the 123rd General Assembly, the Legislative Service Commission viewed the bills as not being irreconcilable and capable of harmonization so as to give effect to each amendment. **[\*7]**

n7 Although the receipt date appearing on appellant's petition suggests that it may have been filed more than sixty days after the dates appearing on the preliminary assessment certificates, the commissioner has not argued that the petition itself was untimely. As indicated above, the record fails to reveal whether the assessments were in fact mailed on the date reflected thereon or whether the petition for

reassessment was filed by certified mail, a fact which would have resulted in a constructive filing date being accorded the document. R.C. 5727.47 ("If the petition is filed by certified mail, the date of the United States postmark placed on the sender's receipt by the postal employee to whom the petition is presented shall be treated as the date of filing.").

While the initial filing of appellant's petition is not challenged as being untimely, the commissioner argues that appellant failed to timely notify him as to the amount of the reduction in taxable values claimed to result from the errors asserted in the petition. Effective September 29, 2000, the General Assembly amended R.C. 5727.47 so as to provide, relevant to the commissioner's arguments, as follows: "(A) \* **[\*8]** \* \* In the case of a petition seeking a reduction in taxable value filed with respect to an assessment issued under section 5727.23 of the Revised Code, the petitioner shall state in the petition the total amount of reduction in taxable value sought by the petitioner. \* \* \*

"\* \* \* If a petitioner fails to state the reduction in taxable value sought in the original petition or in additional objections properly raised after the petition is filed, the tax commissioner shall notify the petitioner of the failure by certified mail. If the petitioner fails to notify the tax commissioner in writing of the reduction in taxable value sought in the petition or in an additional objection within thirty days after receiving the tax commissioner's notice, the tax commissioner shall dismiss the petition or the additional objection in which that reduction is sought."

In its initial application, appellant did not disclose the amount of its claimed reduction. In a correspondence dated February 20, 2002, n8 from William T. Peters, then-administrator of the department's public utility tax division, appellant's representative was advised of the need for taxable value disclosure:

"We have received **[\*9]** and recorded your 2001 petition for reassessment for Choice One Communications, Inc. which was filed in accordance with Section 5727.47 of the Ohio Revised Code. The petition objects to the taxable value as assessed on the 2001 Public Utility Personal Property Preliminary Assessments. Because of legislative changes enacted by Substitute House Bill Number 589 that became effective for the filing of 2001 petitions for reassessments, additional information is needed before your petition can be further processed.

"Section 5727.47 of the Ohio Revised Code now requires that when a petition for reassessment requests a reduction in value, that reduction must be stated in the petition. Also, if the petition objects to the classification of certain types of personal property as taxable, the taxable cost of such personal property must be identified by location. Your petition did not list the reduction in value being sought nor the taxable cost and location of personal property that is objected to as being classified as taxable personal property.

"Please send the necessary information to the undersigned at the address listed above so your petition can be processed. This information will be **[\*10]** included with and made a part of your original petition for reassessment. \* \* \*" BTA No. 2003-K-1461, S.T. at 278.

n8 The record does not disclose the manner by which this notice was sent to

appellant's representative.

In a correspondence dated April 18, 2002, with the record again not disclosing the manner by which it was sent, Peters wrote to appellant's representative: "I have not received a response to my letter of February 20, 2002 (attached) requesting additional information related to your 2001 Petition for Reassessment for Choice One Communications, Inc. [sic]

"This information is necessary to complete the processing of your 2001 Petition for Reassessment. Because of changes in the petition process mandated in Section 5727.47 of the Ohio Revised Code, your petition can be dismissed if our office does not receive this information. Please send the requested information to the undersigned by May 3, 2002 so your petition can be processed. Otherwise, your Petition for Reassessment shall be dismissed according to Section 5727.47(A) of the Ohio Revised Code." n9 BTA No. 2003-K-1461, S.T. at 277.

n9 If we were to conclude that the period within which appellant could supplement its petition began at or near the time of the alleged mailing of the February 20, 2002 letter, as now argued by the commissioner, the suggestion in the April 18, 2002 letter that appellant would have until May 3, 2002 to bring itself into compliance with the requirements of R.C. 5727.47(A) appears to exceed the authority granted the commissioner by the General Assembly. As this board commented in *Great American Ins. Co. v. Limbach* (Mar. 19, 1993), BTA No. 1990-J-632, unreported, affirmed (1994), 70 Ohio St.3d 357:

"The Tax Commissioner, as well as all other state officers, have [sic] only those powers conferred by statute. *Ohio Utilities Co. v. Collins* (1976), 48 Ohio St.2d 169; *In re Application of Milton Hardware* (1969), 19 Ohio App.2d 157. The only implied powers which the Tax Commissioner may possess, are those necessary to carry out his statutory function. *Dreger v. Pub. Emp. Retirement System* (1987), 34 Ohio St.3d 17. The Tax Commissioner possesses no other implied powers. *Standard Oil Co. v. Zangerle* (1937), 133 Ohio St. 33. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend, or improve the provisions of a statute to meet a situation not provided for. *State ex rel. Cunningham v. Indus. Comm.* (1987), 30 Ohio St.3d 73." Id. at 5-6.

See, also, *VeriFone, Inc. v. Limbach* (1994), 69 Ohio St.3d 699, 702 (" [S] tatutory filing requirements are mandatory, jurisdictional requirements which cannot be waived even by a tax official."); *Strongsville Bd. of Edn. v. Wilkins*, 108 Ohio St.3d 114, 2006-Ohio-248 ("The Tax Commissioner, however, does not have authority to waive the R.C. 5713.08(A) jurisdictional requirement, and sending such letters [indicating otherwise] is not consistent with the language of the statute."). [\*11]

Thereafter, in a correspondence sent by appellant's representative by fax on May 3, 2002, appellant submitted an "amended appeal valuation" in which it quantified the taxable amount of its tax exempt software as \$ 400,800 and its obsolescence claim at twenty percent of stated true value, or \$ 676,300. BTA No. 2003-K-1461, S.T. at 262. The Tax Commissioner now argues that because appellant did not initially disclose the taxable values sought through its reduction claim, nor amplify its original petition with such amounts within thirty days of Peters' February 20, 2002 letter, appellant's tax year 2001 petition was defective, depriving the commissioner and, in

turn, this board, of jurisdiction over the 2001 tax year. In further support of its arguments as to appellant's alleged untimely supplementation, the commissioner has attached to his post-hearing brief a certification from Peters which provides as follows:

"The undersigned, William T. Peters, Administrator, Personal Property Tax Division, Ohio Department of Taxation, and former Administrator of the Public Utility Tax Division of the Ohio Department of Taxation, hereby avers, from his personal knowledge, and after a diligent [\*12] search of the Commissioner's records maintained regarding the matter, that the following statements are true and correct:

"(1) In my capacity as then-Administrator of the Public Utility Tax Division of the Ohio Department of Taxation, I authored a letter dated February 20, 2002 to Ernst & Young LLP, Attn: Cynthia L. Janeway, 8484 Westpark Drive, McLean VA 22102, concerning Choice One Communications of Ohio, Inc.'s Petition for Reassessment for the 2001 tax year (a true and accurate photocopy of this letter is attached to this Certification);

"(2) In accordance with my uniform practice, and that of the Public Utility Tax Division generally during 2002, the February 20, 2002 letter referred to in paragraph one of this Certification was deposited in the U.S. mail either that day (a Wednesday) or, at the very latest, the following business day, February 21, 2002 (a Thursday);

"(3) In those instances where a mailing from the Public Utility Tax Division is returned as undeliverable, a notation is made in the assessment file to that effect, and a new letter is sent, once a correct address is determined;

"(4) Based upon a diligent search of the records, at no time subsequent to the [\*13] sending of the February 20, 2002 letter referred to in paragraphs one and two of this Certification did the Ohio Department of Taxation ever receive any notification, or any other evidence, that the mailing of the February 20, 2002 letter was undeliverable or otherwise had not been received by the addressee;

"(5) In my capacity as then-Administrator of the Public Utility Tax Division of the Ohio Department of Taxation, I authored a letter dated April 18, 2002 to Ernst & Young LLP, Attn: Cynthia L. Janeway, 8484 Westpark Drive, McLean VA 22102, concerning Choice One Communications of Ohio, Inc.'s Petition for Reassessment for the 2001 tax year (a true and accurate photocopy of this letter is attached to this Certification);

"(6) My April 18, 2002 letter referred to in paragraph five of this Certification was sent as a follow-up to my earlier February 20, 2002 letter to the same addressee, and was deposited in the U.S. mail on April 18, 2002, or, at the very latest, the next business day;

"(7) Based upon a diligent search of the records, at no time subsequent to the sending of the April 18, 2002 letter referred to in paragraph five n10 of the Certification did the Ohio Department [\*14] of Taxation ever receive any notification, or any other evidence, that the mailing of the April 18, 2002 letter was undeliverable or otherwise had not been received by the addressee."

n10 The reference to paragraph five is handwritten with a line striking reference to paragraphs one and two of the certification.

Apparent from the preceding representations, the commissioner acknowledges that Peters' February 2002 letter was not sent to appellant by certified mail in compliance with the express terms of R.C. 5727.47(A). Nevertheless, he now suggests that we rely upon Peters' representation regarding the date of mailing and assume that appellant's receipt of the letter occurred more than thirty days prior to the filing of its amended petition. In the alternative, the commissioner suggests that this board reconvene an additional hearing in an attempt to ascertain appellant's actual date of receipt of Peters' February letter.

It is to avoid precisely the type of situation at hand that R.C. 5727.47(A) requires the commissioner to send his notice by certified mail, documentation of which would obviously be relevant to the claims now advanced. n11 There exists nothing in the record [\*15] which evidences the date of appellant's receipt of Peters' February letter. Cf. *Troll Construction, Inc. v. Wilkins* (July 8, 2005), BTA No. 2005-K-299, unreported. In the absence of a preliminary demonstration that jurisdiction is lacking, we decline to make the assumptions proposed by the commissioner nor are we willing to allow him to engage in what is tantamount to discovery at this late stage of proceedings by convening yet another hearing in what has become already protracted litigation. Accordingly, this aspect of the commissioner's jurisdictional arguments is denied.

n11 The requirement that this type of notice be sent to public utilities by certified mail and that the additional information requested be filed within sixty days of the public utility's receipt thereof, stands in contrast with the initial notice of assessment, the mailing of which is to constitute prima facie evidence of receipt with objections thereto to be made within sixty days of the mailing.

Next, the commissioner argues that with respect to all three tax years in issue in these appeals, i.e., 2001 through 2003, this board's jurisdiction is restricted to only those claims raised before him and [\*16] then only to that extent of the taxable values previously asserted. With respect to the first of these arguments, the commissioner posits that during the administrative review process before him, appellant only challenged the inclusion of costs associated with customized applications software, whereas, on appeal, appellant has attempted to expand its claims to a much broader category of "soft costs" so as to also include a variety of other costs such as engineering services, activation fees, and right-to-use fees.

In considering this argument, we again refer to R.C. 5727.47, the relevant portion of which provides:

"(A) \* \* \* If a public utility objects to any assessment certified to it pursuant to such sections, it may file with the commissioner \* \* \* a written petition for reassessment. \* \* \* *The petition shall indicate the utility's objections, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination by the commissioner.*" (Emphasis added.)

Similar notice provisions have been found by the Supreme Court to run to the core of procedural efficiency in that the requisite notice serves to advise the [\*17] commissioner of the scope of the requested review. In *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28, 32, the court concluded that "a taxpayer has not

substantially complied with the statute, so as to invoke the right to review of a particular error, if he has not set forth that error with specificity in the petition for reassessment." See, also, *Shugarman Surgical Supply, Inc. v. Tracy*, 97 Ohio St.3d 183, 186, 2002-Ohio-5809; *American Fiber Systems, Inc. v. Wilkins* (Sept, 16, 2005), BTA No. 2004-K-1222, unreported; *Ohio Edison Co. v. Tracy* (Interim Order, May 21, 1999), BTA No. 1997-K-322, unreported.

In its initial petition for reassessment challenging the commissioner's assessment for tax year 2001, appellant indicated that:

"The issues under appeal are as follows:

"1. Customized application software was included in the assessment. This software is exempt from taxation under the Ohio Code and should be removed from taxable value.

"2. The assessment exceeds the true value and does not properly reflect the obsolescence associated with Choice One's Ohio System. Several important economic factors that impact [\*18] all communications companies, including Choice One, are having an effect on the fair market value of the Company's taxable assets for 2001. \* \* \*" BTA No. 2003-K-1461, S.T. at 289.

Although appellant subsequently filed an amended 2001 petition for reassessment, as previously discussed, this filing simply delineated the taxable values claimed. BTA No. 2003-K-1461, S.T. at 262. For tax years 2002 and 2003, n12 appellant set forth claims substantially similar to those identified for tax year 2001. BTA No. 2003-K-1461, S.T. at 11; BTA No. 2004-K-409, S.T. at 50. Appellant has not brought to this board's attention, nor have we found through a review of the documents filed by appellant with the commissioner, that the expanded soft costs claims advanced on appeal were raised by appellant during the proceedings before the commissioner. It is the responsibility of a taxpayer to expressly identify the claims it wishes the commissioner to consider. Cf. *Gen. Motors Corp. v. Wilkins*, 102 Ohio St.3d 33, P 74, 2004-Ohio-1869 (addressing the specificity requirement of R.C. 5717.02, the court held that "[t] he BTA is not required to decipher a notice of appeal"); *Columbia Toledo Corp. v. Lucas Cty. Bd. of Revision* (1996), 76 Ohio St.3d 361, 362 [\*19] (addressing the statutory requirements imposed upon a complainant who seeks to challenge the value of real property within an interim period, the court noted that "it is not the responsibility of a county board of revision to analyze raw data submitted by a taxpayer to determine whether any of the circumstances enumerated in R.C. 5715.19(A)(2) is applicable. The statute clearly places the burden on the taxpayer \* \* \*"). Accordingly, we agree that appellant is now precluded from advancing claims not previously raised while its petitions for reassessment were pending before the commissioner. We therefore find our jurisdiction to be limited to appellant's claims regarding the inappropriate inclusion of software costs and the alleged overvaluation of its taxable property due to obsolescence. n13

n12 Appellant's petitions for tax years 2002 and 2003 were made via correspondence dated October 29, 2002 and October 24, 2003, respectively. As in its original 2001 tax year petition, appellant failed to disclose the reduction in taxable value sought and, following notice from the commissioner, this additional information was provided. BTA No. 2003-K-1461, S.T. at 10. The Tax Commissioner has not challenged the timeliness of appellant's petitions for either 2002 or 2003. [\*20]

n13 Even if we were to consider appellant's "soft costs" arguments, the evidence suffers from many of the same deficiencies addressed within the body of this decision. See, e.g., discussion *infra* regarding experts paid by contingent fee.

Finally, with respect to the issues properly before this board, the commissioner asserts that appellant is restricted in its claims to those values set forth in its petitions for reassessment or as amended by its supplemental filings. As noted earlier, the General Assembly amended R.C. 5727.47(A), effective September 29, 2000, so as to require a public utility to state in its petition, or timely thereafter, the total amount of reduction in taxable value sought. As a result, the commissioner infers that this board may not grant a reduction in value greater than that claimed by appellant through its petitions. While this statute indeed requires the disclosure of the reduction sought, it is silent as to the consequences of such disclosure. In the absence of a legislative mandate that the value initially alleged in a petition serves as a ceiling, or cap, on the valuation a public utility may claim, we decline to impose one in the present appeals. [\*21] Cf. Jones & Laughlin Steel Corp. v. Lucas Cty. Bd. of Revision (1974), 40 Ohio St.2d 61; Cleveland Elec. Illum. Co. v. Lake Cty. Bd. of Revision (1998), 80 Ohio St.3d 591.

We now proceed to consider those aspects of appellant's appeals which are properly before us. In Hatchadorian v. Lindley (1983), 3 Ohio St. 3d 19, paragraph one of the syllabus, the Supreme Court held that "the Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful." As a result, "when an assessment is contested, the taxpayer has the burden \* \* \* to show in what manner and to what extent \* \* \* the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect." Federated Dept. Stores, Inc. v. Lindley (1983), 5 Ohio St.3d 213, 215. See, also, R.K.E. Trucking, Inc. v. Zaino, 98 Ohio St.3d 495, 499, 2003-Ohio-2149; Nusseibeh v. Zaino, 98 Ohio St.3d 292, 293-294, 2003-Ohio-855. "Furthermore, it is error for [\*22] the BTA to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect." Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St.3d 121, 124.

We first address appellant's contention that certain intangibles, i.e., software programs, were improperly subjected to ad valorem taxation by the commissioner. Relying upon Community Mut. Ins. Co. v. Tracy (1995), 73 Ohio St.3d 371, this board has recently rejected this argument with respect to both "canned," i.e., off-the-shelf, and customized software. See Andrew Jergens n14 Co. v. Zaino (Feb. 18, 2005), BTA No. 2002-P-403, unreported, appeal pending, Sup. Ct. No. 2005-502; Reed Elsevier, Inc. v. Wilkins (Aug. 5, 2005), BTA No. 2004-A-1322, unreported, appeal pending, Sup. Ct. No. 2005-1568; AAP St. Marys Corp. v. Zaino (Dec. 2, 2005), BTA Nos. 2003-M-1100, et seq., unreported, appeal pending, Sup. Ct. No. 2005-2444; Tigerpoly Manufacturing, Inc. v. Zaino (Dec. 9, 2005), BTA No. 2003-M-1382, unreported. As we find no basis for departing from our prior rulings, several [\*23] of which are currently pending on appeal, we overrule appellant's claimed error.

n14 The spelling of the appellant's name was corrected via order issued on February 25, 2005.

We next turn to appellant's assertion that its taxable personal property should have a taxable value below that calculated by the commissioner. As previously indicated,

appellant constitutes a CLEC and is therefore capable of targeting niche markets comprised of smaller- and medium-sized businesses in specific markets. In order to provide its communications services, appellant has in place a substantial equipment infrastructure, with its primary equipment being a "switch," the device which performs required custom-calling features. The size of the switch deployed is dependent upon the amount of traffic served. Since appellant's business plan anticipated a growing customer base, it elected to place in service larger switches. Several other components also comprise appellant's system including the lines which interconnect appellant and its customers, as well as a variety of other data equipment, e.g., digital loop carriers, routers, circuit cards, ports, etc.

Although a certain level of redundancy in systems [\*24] equipment is desirable in order to insure a consistent and reliable communications system, due to dramatic and unexpected events in the telecommunications industry, appellant soon found its system to be overbuilt. Among the factors cited as adversely affecting appellant's business and, in turn, the value it asserts for its taxable personal property, were the deployment of packet-based technologies which allows for expanded capacity with less equipment, consumer shifts to non-traditional services of voice communications, e.g., Voice Over Internet Protocol ("VOIP"), and the increased numbers of competitors within the newly-deregulated market and the numerous bankruptcies among these market participants.

In an effort to substantiate its claim that the value of its personalty has substantially declined due to inutility, i.e., obsolescence, appellant engaged PricewaterhouseCoopers ("PwC") to not only confirm the existence of such inutility but also to calculate the resulting diminished value for its property during the tax years in issue. Jay Belinfante, a senior manager with PwC, testified regarding the property tax study which was submitted on appellant's behalf. n15 This study separated [\*25] appellant's taxable property into four categories, i.e., voice equipment, data equipment, support equipment, and infrastructure. n16 For each of these categories of property and for each of the years in question, PwC's study identified historical costs, and calculated reproduction costs, replacement costs (the latter two figures being identical), replacement costs after accounting for physical depreciation, and suggested values reflecting PwC's recommended obsolescence adjustments. n17

n15 As previously noted, a soft costs study was also prepared by PwC. However, as we have already found jurisdiction to be lacking and that the software constitutes taxable tangible personal property, we do not address that study herein.

n16 The categories were described as follows:

"(1) Voice Equipment includes: Transmission, Switch Equipment, Cap Leased Network Cost, Collocation Equipment, and Routing & SMS;

"(2) Data Equipment includes: Data Equipment (ATM);

"(3) Support Equipment includes: Misc. Support Equipment, Computer Equipment, Furniture & Fixtures;

"(4) Infrastructure includes: Leasehold Improvements, CAP LBR LHI, and Intangibles." Ex. 1 at 2.

n17 For each of the tax years in issue, the combined costs for all four categories of

property were as follows:

#### Tax Year 2001

Historical Costs -- \$ 22,132,933; Reproduction/Replacement Costs -- \$ 20,477,172; Replacement Costs after Physical Depreciation -- \$ 15,254,362; and PwC Value after Obsolescence Adjustment -- \$ 11,428,009

#### Tax Year 2002

Historical Costs -- \$ 24,212,178; Reproduction/Replacement Costs -- \$ 22,664,852; Replacement Costs after Physical Depreciation -- \$ 13,652,742; and PwC Value after Obsolescence Adjustment -- \$ 10,228,370

#### Tax Year 2003

Historical Costs -- \$ 25,514,519; Reproduction/Replacement Costs -- \$ 24,217,878; Replacement Costs after Physical Depreciation -- \$ 10,966,098; and PwC Value after Obsolescence Adjustment -- \$ 8,270,592. Ex. 1, at 2.

However, during the course of the evidentiary hearing, appellant offered Exhibit 4, also prepared by PwC, which it suggests simplifies the valuation process by removing the calculations previously included for reproduction costs and replacement costs new, thereby reflecting the following figures:

#### Tax Year 2001

Historical Costs -- \$ 22,132,933; Ohio Depreciated Value -- \$ 20,650,026; and PwC Value after Obsolescence Adjustment -- \$ 15,073,981

#### Tax Year 2002

Historical Costs -- \$ 24,212,178; Ohio Depreciated Value -- \$ 20,082,822; and PwC Value after Obsolescence Adjustment -- \$ 14,577,730

#### Tax Year 2003

Historical Costs -- \$ 25,514,519; Ohio Depreciated Value -- \$ 18,196,546; and PwC Value after Obsolescence Adjustment -- \$ 13,140,095. [**\*26**]

In calculating the physical depreciation to be attributed to appellant's assets, an effort was undertaken to determine their remaining useful life, which was accomplished through various means, including reliance upon information acquired through interviews with various company personnel, utilization of "Iowa Dispersion Type Analysis Curves," a study prepared by Technologies Future, Inc., and other "objective empirical and industry data," described as being used to support "inutility as a measurement of economic obsolescence in lieu of the discounted cash flow." Ex. 1 at 8. PwC indicated that inutility served to define the extent to which appellant's property was impacted by economic obsolescence, in this instance, the excess capacity of appellant's equipment demonstrated by its idled property, and the contributory penalty such excess capacity has upon equipment actually being utilized. Consistent with appellant's other evidence, the PwC tax study cited to the factors giving rise to the excess capacity existing in appellant's network, e.g., new

and/or improved technologies, an overabundance of equipment, and rapid expansion/contraction of telecommunications providers.

The process [\*27] of valuing, and ultimately taxing, the property of public utilities, begins with R.C. 5727.08 which requires public utilities to file annual reports with the Tax Commissioner which will enable him to "make any assessment or apportionment required under this chapter." Guided by the information submitted by the utility, as well as "such other evidence and rules as will enable him to make these determinations," the commissioner annually determines the "true value in money" of the utility's taxable property. n18 R.C. 5727.11 prescribes the method to be employed by the commissioner in valuing public utility property, providing in pertinent part:

"(A) Except as otherwise provided in this section, the true value of all taxable property required by division (A)(2) or (3) of section 5727.06 of the Revised Code to be assessed by the tax commissioner shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the commissioner. If the commissioner finds that application of this method will not result in the determination of true value of the public utility's taxable property, the commissioner [\*28] may use another method of valuation."

n18 The property which is subject to assessment by the commissioner is identified in R.C. 5727.06 as follows:

"(A) Except as otherwise provided by law, the following constitutes the taxable property of a public utility \* \* \* company that shall be assessed by the tax commissioner:

\* \* \*

"(3) In the case of all other public utilities \* \* \*, all tangible personal property that on the thirty-first day of December of the preceding year was both located in this state and:

"(a) Owned by the public utility \* \* \*; or

"(b) Leased by the public utility \* \* \* under a sale and leaseback transaction."

Consistent with the legislative mandate of R.C. 5727.11(A), the Tax Commissioner has published "Guidelines for Filing Ohio Public Utility Tax Reports" wherein he has established valuation procedures and assessment percentages for all types of public utility property. Ex. Q. In valuing such property, a cost less depreciation method is utilized, whereby property is classified into one of several property groups, and, beginning with the initial cost of the property, percentage reductions, expressed in terms of "percent good," are applied annually [\*29] until a floor value is reached for the property until it is ultimately disposed of by the utility.

According to the commissioner's guidelines, "[t]he property groups and class life assigned to each group as set forth in this publication reflect conclusions developed by the Department of Taxation in which public utilities and interexchange

telecommunications companies from each class participated." Ex. Q, at 2. Relying upon account references contained within the Code of Federal Regulations, Telecommunications, Title 47, Parts 20 to 39, the commissioner divided telephone company property into one of four classifications: (1) central office and information plant, examples of which include "central office, analog electronic, digital electronic, electromechanical switching equipment, operating systems, central office transmission equipment, station apparatus, customer premises wiring, large private branch exchanges, public telephone terminal equipment, and other terminal equipment"; (2) cable and wire plant account, including "cable and wire facilities, poles, aerial cable, underground cable, buried cable, submarine cable, deep sea cable, intrabuilding network cable, aerial wire, and [\*30] conduit systems"; and (3) general plant, exemplified by "motor vehicles, aircraft, special purpose vehicles, garage work equipment, buildings classified as personal property, furniture, office equipment, general purpose computers, amortizable tangible assets, capital leases, leasehold improvements, and intangibles." Id. at 15. Central office and information plant property, as well as general plant property are designated as Class C-10, while cable and wire plant property is designated Class C-20. Other taxable property is denoted as being valued at "cost or net book value." Id. at 7, 15. Although the "floor value" is reached in 10 years for property having a Class C-10 designation, class life ranges from 7.5 to 12.5 years. Similarly, property having a Class C-20 designation has a useful life of between 17.5 and 22.5 years with a floor value being reached at 20 years. In each instance, the ultimate floor, or lowest "percent good," reflected for property which continues to be used in business at and beyond the last year for the particular class of property is fifteen percent. Id. at 8.

As indicated within the introductory portion of the guidelines, and consistent with R.C. 5727.11(A), [\*31] the valuation methodology for public utility property is achieved by applying prescribed composite annual allowances to the utility's capitalized costs, a method comparable in purpose and effect to that which is employed in valuing taxable personal property of general business taxpayers, the latter commonly referred to as the "302 computation." Compare R.C. 5711.18. Since limited case law exists addressing efforts by public utilities to deviate from the commissioner's prescribed composite annual allowances, as this board found beneficial in *Cincinnati Bell Tel. Co. v. Zaino* (June 10, 2005), BTA Nos. **2003-K-765**, et al., unreported, we refer to those situations involving the valuation of general business taxpayer property.

In *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71, the Supreme Court first accepted as reasonable the use of a predetermined formula to value taxable personal property:

"So far as the record in this case discloses, we see no reason for criticism of the application of the so-called '302 Computation' especially as the evidence shows and as appellant admits, it is applied generally to all taxpayers in similar situations.

[\*32] Of course, situations may arise where such computation would not be proper. \* \* \* Percentage depreciation is used almost universally in industry and in accounting." Id. at 81.

Continuing, the court stated:

"The '302 Computation' as we understand from the record and argument in this case is a rule adopted by [the] former Tax Commission [sic] and carried over under the provisions of Section 1464-4, General Code. While it has not been duly promulgated

and filed, we are of the opinion that the use of such rule in the instant cases is within the powers delegated to the Department of Taxation." Id. at 83.

Ten years later, in W.L. Harper Co. v. Peck (1954), 161 Ohio St. 300, the court reaffirmed general use of the 302 computation:

"The law of Ohio requires that personal property used in business be taxed at its true value. Since it is impractical for the Department of Taxation to personally value all such personal property in this state, it is reasonable and lawful to use the straight-line method of depreciation in arriving at true value. This method consists of depreciating the cost of the personal [\*33] property in accordance with its useful life. That is what the directive of the Department of Taxation purports to accomplish \* \* \*." Id. at 303.

See, also, PPG Industries v. Kosydar (1981), 65 Ohio St.2d 80, 83 ("This directive has been approved by this court as a practical, reasonable and lawful method and device to achieve uniform valuation of plant equipment in Ohio by prescribing annual depreciation rates in lieu of book depreciation for Ohio personal property tax purposes.").

Accordingly, the Supreme Court has consistently accepted the use of an industry-wide n19 method of valuation which takes the original cost of equipment less the depreciation percentages prescribed by the commissioner as a prima facie means by which to determine true value for tax purposes. However, it has also repeatedly held that the commissioner's valuation methodology should not be applied where it is affirmatively demonstrated by a taxpayer that true value will not result due to the existence of "special or unusual circumstances" or because rigid application would be inappropriate. See, e.g., Wheeling Steel, supra; [\*34] Monsanto Co. v. Lindley (1978), 56 Ohio St.2d 59; Towmotor Corp. v. Lindley (1981), 66 Ohio St.2d 53; Campbell Soup Co. v. Tracy (2000), 88 Ohio St.3d 473.

n19 In Monsanto Co. v. Lindley (1978), 56 Ohio St.2d 59, 62, the court noted "[i]n order to promote industry-wide uniformity in determining the true value of depreciable property used in business, the commissioner has prescribed composite annual allowances to be used in lieu of book depreciation."

In order to substantiate a claim for deviation from the commissioner's valuation method, "[t]he burden is on the taxpayer to show that the rate of depreciation arrived at under the '302 Computation Directive' does not reflect the true value of its personal property." Alcoa v. Kosydar (1978), 54 Ohio St.2d 477, 482 (quoting Gahanna Hts., Inc. v. Porterfield (1968), 15 Ohio St.2d 189, 190). See, also, RPS, Inc. v. Tracy (Oct. 30, 1998), BTA No. 1996-M-1209, unreported, at 15 ("To successfully challenge the values [\*35] assessed by the Commissioner, the appellant must bring forth competent and probative evidence of the value of its listed property. \* \* \* There are three acceptable methods of meeting this burden. [An appellant] may offer direct evidence of the personalty's true value. \* \* \* Alternatively, [an appellant] may prove the special circumstances exist or that the use of the 302 computation produces an unjust or unreasonable result. \* \* \*").

In Cincinnati Bell, supra, an appeal in which we were asked to reject the commissioner's valuation of the taxpayer's property, we commented that "[t]he preceding reasoning appears equally applicable, in large measure, when determining

the value of public utility property. Recognizing the difficulty inherent in requiring the commissioner to personally value all public utility property within Ohio, it is reasonable that a predetermined formula be developed and applied. However, as with the 302 computation, a statutorily authorized method of valuation should not be applied when true value will not result." *Id.* at 19.

This reasoning emanated from our reading of *Texas E. Transm. Corp. v. Tracy* (1997), 78 Ohio St.3d 83, a [\*36] decision in which the Supreme Court approved this board's reliance upon an appraisal to value the personal property of a natural gas pipeline company. In reaching its conclusion, the court held that a statutorily prescribed method of valuation should not be used to the exclusion of evidence which demonstrates that another *method* would more accurately result in true value: "Although R.C. 5727.11 identifies the cost-based method of valuation as a means of assessing true value, the General Assembly has not restricted the commissioner's use of alternate valuation methods. In fact, in these statutes, the General Assembly specifically states that the commissioner may use 'another method of valuation' and that he may consider 'other evidence' to determine true value. Contrary to the commissioner's assertion, in deciding true value, the BTA need not adhere to the cost-based statutory method of valuation.

\* \* \*

"The ultimate goal imposed by R.C. 5727.10 clearly is to determine the *true value* of the property taxed. *R.H. Macy Co., Inc. v. Schneider* (1964), 176 Ohio St. 94, 97 \* \* \*. If the statutory method does not yield true value, then another [\*37] method of valuation may be used, whether or not there are special or unusual circumstances. Although a statute may provide a *prima facie* estimate or presumption of value, where rigid application of the statute would be inappropriate, the presumption of value must yield to other competent evidence reflecting true value. *Monsanto Co. v. Lindley* (1978), 56 Ohio St.2d 59, 61, 10 O.O.3d 113, 114 \* \* \*; *W.L. Harper Co. v. Peck* (1954), 161 Ohio St. 300 \* \* \*." *Id.* at 85-86. (Emphasis sic and parallel citations omitted.)

We now review the evidence presented in the instant case in order to determine whether appellant has met its affirmative burden. For the reasons which follow, we conclude that it has not.

This board is accorded considerable discretion in weighing the evidence and judging the credibility of witnesses presented. See, e.g., *Parma Hts. v. Wilkins*, 105 Ohio St.3d 463, 467, 2005-Ohio-2818 (" [W] e always give wide discretion to the BTA in evaluating the credibility of witnesses and the weight that should be given to any evidence presented to it."); *Campbell Soup, supra*, [\*38] (quoting from *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1997), 77 Ohio St.3d 402, 405, "[w] e also affirm the BTA's rulings on credibility of witnesses and weight attributed to evidence if the BTA has exercised sound discretion in rendering these rulings.").

Accordingly, this board is not required to accept the testimony or opinion expressed by any witness or expert, but is instead entitled to evaluate all the circumstances under which such evidence is offered. As the court commented in *Snider v. Limbach* (1989), 44 Ohio St.3d 200:

"The BTA is granted great latitude in determining the weight to be given evidence and the credibility of witnesses before it. It is not required to adopt the valuation

fixed by any expert or witness. Value for tax purposes is a question of fact, and this finding is primarily within the province of the taxing authorities. This court will not disturb such a decision unless it affirmatively appears from the record that such decision is unreasonable or unlawful. *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St. 2d 13, 73 O.O. 2d 83, 336 N.E. 2d 433, [\*39] paragraphs two, three, and four of the syllabus."). Id. at 202.

Significant in this regard, Belinfante acknowledged that the amount of PwC's fee, including the preparation of and the testimony relating to the tax study submitted to this board, is dependent upon the ultimate outcome achieved in these appeals. While appellant made an initial prepayment to PwC of \$ 15,000, PwC is to receive further compensation amounting to thirty percent of any resulting tax savings. See H.R. Vol. 3, at 218-222. In light of this disclosure, the commissioner, citing prior board decisions, asserts that the reliability of the tax study is seriously undermined. In an attempt to distinguish this board's past criticisms of experts whose compensation is contingent upon the outcome of the litigation in which their testimony is offered, appellant advances several arguments, i.e., the issue has generally only arisen in real property valuation appeals, Belinfante will not personally benefit from the contingency fee arrangement which his employer has, PwC will lose money on its engagement even if it receives the maximum contingency fee, the tax study was reviewed by a third party not paid by contingency fee, [\*40] and it is unreasonable to assume that "one of the four largest international accounting firms, PricewaterhouseCoopers, would present false evidence for a fee that represents but a fraction of its total revenue." Appellant's brief at 17.

We are unpersuaded by appellant's arguments. This board has consistently discounted the credibility/reliability of an expert who personally acquires, or whose employer acquires, a pecuniary interest in litigation through a contingent fee arrangement. By acquiring such a direct interest in the litigation, the expert's ability to render an independent and unbiased opinion or evaluation is called into question. For example, in *Witt Co. v. Hamilton Cty. Bd. of Revision* (June 8, 1990), BTA No. 1988-C-875, unreported, this board encountered a situation similar to that presented in the instant appeals. While the taxpayer's expert was to be paid a "straight salary" and would receive no bonuses or contingency fee directly, a fee arrangement existed between the taxpayer and the expert's employer, Property Tax Research Company ("PTR"), whereby PTR would receive a fee of fifty percent of any tax savings resulting from the first two tax years. In light of this [\*41] compensatory arrangement, this board refused to even consider the expert's opinion:

"We must conclude, as urged by the Board of Revision, that Mr. Kennedy's employer, PTR, has obtained an interest in this appeal by virtue of the contract. As such, Mr. Kennedy cannot be considered to be an independent fee appraiser. His testimony and opinion of value are not reliable and credible under the instant circumstances. Accordingly, we hereby find that Mr. Kennedy's testimony and appraisal shall not be considered in determining the fair market and taxable values of the subject property." Id. at 8.

On appeal, the Supreme Court affirmed our decision, stating:

"This court has consistently held that ' [t] he BTA need not adopt any expert's valuation. It has wide discretion to determine the weight given to evidence and the credibility of witnesses before it. Its true value decision is a question of fact which will be disturbed by this court only when it affirmatively appears from the record that

such decision is unreasonable or unlawful. \* \* \* (Citation omitted.) *R.R.Z. Assoc. v. Cuyahoga Cty. Bd. of Revision* (1988), 38 Ohio St.3d 198, 201 \* \* \*. See, also, [\*42] *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St.2d 13, \* \* \* at paragraphs three and four of the syllabus; *Crow v. Cuyahoga Cty. Bd. of Revision* (1990), 50 Ohio St.3d 55, 57 \* \* \*. Moreover, this court 'will not overrule BTA findings of fact that are based upon sufficient probative evidence.' *R.R.Z. Assoc., supra*, 38 Ohio St.3d at 201 \* \* \*.

"Appellant's argument is largely directed at the BTA's refusal to give any reliability and/or credibility to the testimony of and appraisal performed by Kennedy. According to appellant's contention, the BTA erred in finding that Kennedy 'cannot be considered an independent fee appraiser' and in holding that [h]is testimony and opinion of value are not reliable and credible under the instant circumstances.' However, as the case law above clearly demonstrates, the BTA has wide discretion to accept all, part or none of the testimony of any appraiser presented to said board. See *R.R.Z. Assoc., supra*. Absent a showing of an abuse of discretion, the BTA's determination as to [\*43] the credibility of witnesses and the weight to be given their testimony will not be reversed by this court. See *Cardinal Federal, supra*, at paragraphs three and four of the syllabus." *Witt Co. v. Hamilton Cty. Bd. of Revision* (1991), 61 Ohio St.3d 155, at 157. (Parallel citations omitted.)

While we recognize that witnesses may be paid their expenses and that experts will be compensated for their time and efforts, n20 this board has repeatedly questioned the impartiality and, in turn, the credibility of experts whose method of compensation provides them with a direct interest in the litigation. See, e.g., *Keystone Powdered Metal Co. v. Zaino* (Mar. 22, 2002), BTA No. 2000-A-749, unreported, at 12 ("At the outset, we must remark that the credibility of Mr. Russell's study is clouded by his direct financial interest in the subject appeal. \* \* \* We question the reliability of Mr. Russell's conclusions considering that he has such a personal stake in the outcome of this matter."); *Dan Marchetta and Co. v. Summit Cty. Bd. of Revision* (July 19, 1996), BTA No. 1994-P-1268, unreported; *LaSpina v. Summit Cty. Bd. of Revision* (Jan. 12, 1996), BTA [\*44] No. 1994-T-1149, unreported; *Malvern Manor Ltd. v. Carroll Cty. Bd. of Revision* (Nov. 30, 1990), BTA No. 1989-A-395, unreported.

n20 Factually distinguishable from the present case, in *Central Benefits Mutual Benefits Co. v. Franklin Cty. Bd. of Revision* (Dec. 20, 1996), BTA No. 1996-K-1, unreported, this board has rejected assertions that an expert's credibility is impugned simply by his engagement in multiple cases and the prospect of future employment:

"As in the case of any expert witness, \* \* \* it is not uncommon for an opposing party to suggest that the opinion expressed by such a witness is unreliable due to the financial interest inherent in the rendition of a 'favorable' opinion. Cf. *Calderon v. Sharkey* (1982), 70 Ohio St. 2d 218. Since this Board often receives the testimony of an appraiser who has appeared before us on several prior occasions, it may be more inviting to accept the appellees' position. However, absent evidence that the appraiser's fee is directly conditional upon the amount at which the property at issue is ultimately valued, see, e.g., *LaSpina v. Summit Cty. Bd. of Revision* (Jan. 12, 1996), B.T.A. Case No. 94-T-1149, unreported, we will continue to review the opinion expressed by the appraiser in order to determine whether the facts upon which the opinion is based or the assumptions resulting therefrom renders [sic] the

opinion competent, reliable and probative evidence of the property's value on the tax lien date at issue." Id. at 10.

**[\*45]**

Noting that most of our prior decisions addressing the issue of experts paid by contingent fee have involved the valuation of real property, n21 appellant seems to suggest that this manner of compensating an expert is somehow more fatal in those types of tax appeals. We agree with appellant that there have been few occasions in which this issue has arisen. However, we believe that the limited number of instances in which the credibility of an expert has been questioned on the grounds his or her compensation is expressly contingent upon the outcome of the litigation, arising in this state or even nationally, has less to do with the type of case involved and more to do with the generally accepted principle that it is ill advised for an expert witness to acquire a direct financial interest in the case in which his or her testimony is offered. n22

n21 Referring to *Keystone Powdered Metal* as the lone non-real property tax appeal involving this issue, appellant emphasizes the fact that the expert in that case "was slated to receive a 50% contingency fee all to himself." Appellant's brief at 17. While PwC is entitled to receive only thirty percent of any tax savings, given the reductions sought for the three years in question in these appeals, the amounts cannot be considered insignificant. **[\*46]**

n22 "The majority rule in this country is that an expert witness may not collect compensation which by agreement was contingent on the outcome of a controversy. That rule was adopted precisely to avoid even potential bias. *New Eng. Tel. & Tel. Co. v. Bd. of Assessors*, 392 Mass. 865, 468 N.E.2d 263, 265, 267 (Mass. 1984); see *Accrued Fin. Servs., Inc. v. Prime Retail, Inc.*, 298 F.3d 291, 300 (4th Cir. 2002). Maine enforces this policy in part by a Bar Rule which prohibits the hiring of witnesses on a contingent fee basis. Maine Bar Rule 3.7(g)(3)." *Crowe v. Bolduc* (C.A.1, 2003), 334 F.3d 124, 132. While EC 2-19 and EC 5-7 of the Ohio Code of Professional Responsibility acknowledge the long-standing acceptance in the United States of contingent fee arrangements between a client and an attorney in civil litigation, under carefully prescribed circumstances, the view appears more restrictive with respect to the engagement of expert witnesses, as suggested by EC 7-28:

"Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards."

Ohio courts have not adopted a per se rule prohibiting witnesses to be paid on a contingency fee basis, instead allowing the interest acquired by virtue of such arrangement to serve as grounds for potential impeachment. See, e.g., Evid.R. 611(B) ("Cross-examination shall be permitted on all relevant matters and matters affecting credibility."); Evid.R. 616(A) ("Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the

witness or by extrinsic evidence."). Cf. Oberlin v. Akron Gen. Med. Ctr. (2001), 91 Ohio St.3d 169, 171 ("Thus, Evid.R. 611 and 616, by specifically mentioning credibility, bias, and prejudice as appropriate subjects of cross-examination, are a testament to the inherent probative value of such evidence."); State v. Ferguson (1983), 5 Ohio St.3d 160, 165 ("It is beyond question that a witness' bias and prejudice by virtue of pecuniary interest in the outcome of the proceeding is a matter affecting credibility under Evid.R. 611(B)."); Calderon v. Sharkey (1982), 70 Ohio St.2d 218, 223-224 ("Evidence of bias and pecuniary interest is a legitimate subject of inquiry of all expert witnesses within the limits imposed by the trial court in the reasonable exercise of its discretion."); Mullett v. Wheeling & Lake Erie Ry. Co., Cuyahoga App. No. 81688, 2003-Ohio-3347 ("Certainly, an expert's direct pecuniary interest in a matter will be grounds for impeachment because it is a tangible interest."). Accordingly, while a contingent fee expert may not be incompetent to testify, that expert's credibility may certainly be, and typically is, called into question. [\*47]

We also accord little rehabilitative value to the fact that the PwC study was reviewed by a third party not paid by contingent fee. The witness to whom reference was made, i.e., Dennis Nielson, reviewed and confirmed the appropriateness of the *methodologies* employed by PwC in completing its study. While the methods utilized may be generally acceptable within the appraisal field, PwC engaged in the detailed and subjective processes of reviewing, selecting, and interpreting the core information which serves as the basis for the reductions claimed. As we commented in *LaSpina*, supra:

"An appraiser chooses what data he or she wishes to include in the appraisal report. Comparable properties are included, and dissimilar properties excluded, based solely upon the appraiser's own judgment. Moreover, adjustments for such things as location, age, and condition are rarely made according to concrete guidelines; they are more often left to the judgment and experience of the individual appraiser. Thus, once an appraiser's credibility is tainted by a direct financial interest in the appeal, the evidence upon which the appraiser bases his opinion may become suspect." Id. at 15.

It simply [\*48] cannot be overemphasized that the essential effectiveness of an expert depends not only upon his or her ability to persuade the trier of fact as to elements of basic competence, but also his or her ability to demonstrate unyielding impartiality. As pointed out by the Indiana Tax Court in Wirth v. State Bd. of Tax Appeals (1993), 613 N.E.2d 874, 876-877:

"A contingent witness fee arrangement, however, raises the specter of an auctioning of the truth and casts a pall over the entire fact finding process. 'The payment of a sum of money to a witness to "tell the truth" is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true.' In re Robinson (1912), 151 A.D. 589, 600, 136N.Y.S. 548, 556."

Accordingly, given appellant's admission that PwC is entitled to receive thirty percent of the tax savings which may be achieved through these appeals, even in the absence of the other flaws discussed herein, we find no basis for deviating from our previously stated position on this subject and will therefore accord the PwC tax study no more than minimal weight.

Initially, appellant [\*49] argues that it need not demonstrate the existence of

"special and unusual circumstances" in order for its proposed values to be accepted. In *Cincinnati Bell*, supra, we considered a similar argument:

"Initially, the parties express disagreement as to whether or not appellant is first obligated to prove the existence of 'special and unusual circumstances.' In this context, reference is made to the following language in *Texas E. Transm.*:

" 'The commissioner also argues that in order to apply alternate valuation methods, there must be a showing of "special or unusual circumstances." The commissioner's reference to "special or unusual circumstances" stems from language found in his "302" directive for determination of depreciation rates for general personal property. However, the words "special or unusual circumstances" do not appear in R.C. 5727.11 and are not a prerequisite for using an alternate valuation method where appellees are contesting true value rather than depreciation rates.' Id. at 86.

"The commissioner concedes that where 'direct evidence' of value is offered, such as an appraisal like that relied upon in *Texas E. Transm.*, a public utility need not demonstrate [\*50] the existence of special and unusual circumstances in order to deviate from booked costs less prescribed allowances. However, the commissioner argues that the TFI study offered is not an 'alternate valuation method' for valuing appellant's property, but instead merely proposes accelerated depreciation rates compared to those prescribed by the commissioner. Therefore, the commissioner insists that appellant is not relieved of its obligation to prove special and unusual circumstances exist. In response, appellant asserts that the commissioner's position overemphasizes the labeling of its evidence. It maintains that regardless of the name attributed to the analysis set forth in the TFI study, the result is the same in that it demonstrates that the true value of appellant's property is other than that which results from strict application of the cost-based valuation method less the commissioner's prescribed allowances.

"Upon review of appellant's valuation study, we agree with the commissioner that it is not an alternate method of valuing property as was presented in *Texas E. Transm.* The valuation evidence presented in that case was an appraisal which had been prepared by an individual [\*51] holding the designations of Member of the Appraisal Institute and Certified Assessment Evaluator from the International Assessing Officers. In order to derive the opinion of value which he ultimately expressed for the property in his unit-appraisal, he employed approaches often considered in the appraisal of property, i.e., a cost approach, an income approach, and a stock and debt analysis. In this instance, the TFI study is not an alternate valuation method, e.g., an appraisal, but is instead an effort to demonstrate that the depreciation schedules generally applicable to appellant's property fail to adequately account for the competitive and technological changes which are currently impacting the telecommunications industry. Given the nature of appellant's evidence, we consider it appropriate to proceed to address whether appellant has demonstrated the existence of special and unusual circumstances." Id. at 21-22.

With respect to the PwC tax study presented in this case, as suggested by its title, similar to the study submitted in *Cincinnati Bell*, it is clearly not an appraisal and therefore constitutes neither "direct evidence" of the true value of appellant's property nor [\*52] offers a different *method* of valuation. While references are made to commonly employed appraisal methodologies, and while an appraiser approved the methods used in the study, Belifante acknowledged he is not an appraiser and, further, that the study itself is not an appraisal, but instead an

obsolescence study intended to serve as a substitute for the composite annual allowances prescribed by the commissioner. n23 As it is not an "alternate valuation method," e.g., an actual appraisal, see, e.g., *W.L. Harper*, paragraph two of the syllabus, *Cincinnati Bell*, supra, at 21-22, we consider whether appellant has demonstrated sufficient reasons for the adoption of what must simply be described as accelerated depreciation rates reflected within the study.

n23 As previously noted, the original PwC tax study included proposed valuations reflecting physical depreciation calculated using Iowa Retirement Dispersion Type Analysis Curves. In *Campbell Soup Co. v. Limbach* (Dec. 18, 1998), BTA No. 1996-S-1246, unreported, subsequently affirmed by the Supreme Court, (2000), 88 Ohio St.3d 473, we criticized the taxpayer's reliance upon this general type of data: "Although use of the Iowa curves may be an accepted appraisal practice in determining physical depreciation, we find the data derived from such a guide is not persuasive evidence that property is entitled to be valued utilizing a shorter class life than that determined utilizing the 302 computation. As previously stated, application of the 302 computation results in a prima facie true value figure. The presumption of correctness afforded these values may be overcome by direct evidence relating to the actual useful life of the equipment, i.e., through evidence relating to actual disposals of the equipment. However, data derived from a general 'guide,' such as the Iowa curve, is not sufficient to overcome this presumption. The Iowa curve is not based on the experience of a particular industry, such as the food processing industry, but rather is a tool to be utilized in estimating retirement patterns." Id. at 18.

See, also, *PPG Industries, Inc. v. Tracy* (July 21, 2000), BTA No. 1997-A-91, unreported. As a result of the preceding case law, it appears appellant has abandoned its reliance upon this data, asserting entitlement to the values reflected in Ex. 4. **[\*53]**

There exist substantial similarities between appellant's arguments and those made in *Cincinnati Bell* wherein it was asserted that the "bursting bubble" in the telecommunications industry had contributed significantly to the overall devaluation of property and equipment owned by telecommunications providers. Discussing this industry-wide impact, we commented:

"[T]he commissioner posits that the evidence upon which appellant relies itself demonstrates that appellant is in the same position, with its property subject to the same rates, as other telephone companies in Ohio. Referring to the testimony of appellant's witnesses and the valuation study which is based upon national trends experienced within the telecommunications industry as a whole, the commissioner maintains special and unusual circumstances cannot be found to exist.

"Although appellant argues it should not be required to show it is different from the remainder of its industry, \* \* \* such is the fundamental nature of proving the existence of 'special and unusual circumstances.' As previously noted, the purpose of the commissioner's prescribed allowances is to promote industry-wide uniformity in determining the true **[\*54]** value of depreciable property used in business. Cf. *Monsanto*, supra; *Jacob B. Sweeney Equipment Trust v. Limbach* (1991), 74 Ohio App.3d 82, 86; *Mid-Ohio Chemical Co., Inc. v. Limbach* (Feb. 17, 1987), Fayette App. No. CA86-04-002, unreported ('The general goal of Ohio's personal property tax scheme is to tax personal property located in this state which is used in business at established rates based on its true value. Since such property is subject to

deterioration, depreciation is allowed. However, depreciation rates chosen by individual taxpayers may vary, even within a single industry. In order to promote industry-wide uniformity in determining the true value of depreciable property used in business, the tax commissioner established composite annual allowances in what is commonly known as his "302" directive.').

"Special and unusual circumstances have been found to exist when a taxpayer clearly demonstrates its property is subject to conditions atypical within the industry, often exemplified by unusual or unanticipated operating environments, extreme use, obsolescence, unusually high disposal rates, [\*55] poor production flows, or excess manpower. See, e.g., *Defiance Precision Products, Inc. v. Tracy* (Apr. 3, 1998), BTA No. 1995-T-564, unreported (equipment operated at abnormally high speeds for extended periods of time not common within the industry); *Philips Electronics North American Corp. v. Tracy* (June 28, 1996), BTA No. 1993-K-825, unreported (the taxpayer, which was the only remaining entity within the television tube manufacturing industry still using a dry phosphorus application process, demonstrated its equipment was used in an area of poor ventilation and subjected to continuous use, extreme heat and product weight, and caustic chemicals); *Dayton Walther Corp. v. Limbach* (Aug. 24, 1990), BTA No. 1988-J-190, unreported (equipment operated almost continuously and subjected to extreme product weights, high speeds, and corrosive substances); *AmeriData Control Corp. v. Limbach* (Jun. 29, 1990), BTA No. 1987-A-1102, unreported (televisions supplied to hospitals received heavy use and were disposed of in unusually shorter time periods); *Sun Chemical Corp. v. Limbach* (Apr. 21, 1989), BTA Nos. 1986-A-157, et seq., unreported (equipment subjected to caustic chemicals [\*56] and continuous operations, with evidence demonstrating such use was different from other chemical plants in Ohio).

"While several of the preceding cases highlight the hostile conditions under which manufacturing equipment may be operated, they stand for the general proposition that 'special and unusual circumstances' constitute conditions not generally experienced by others within the industry. As this board recently noted in *Alcoa, Inc. v. Zaino* (Oct. 22, 2004), BTA No. 1999-G-1401, unreported, at 17, appeal pending Sup. Ct. No. 04-1953 n24:

"Alcoa must prove that the special or unusual circumstances surrounding the use of its equipment are not experienced generally throughout the industry or that its equipment was subjected to conditions not planned for when the equipment was originally purchased. Alcoa has not presented sufficient evidence to establish that the experience of Alcoa at Cleveland Works, in its forgings for the aerospace business, was special or unusual when compared to the rest of the industry. Indeed, the appellant acknowledges that other large forgers experienced the same decline and left the aerospace industry.'). Id. at 17.

"A review of appellant's [\*57] evidence reveals that it has not demonstrated that special and unusual circumstances exist. Indeed, as asserted by the commissioner, the evidence offered by appellant suggests that the factors impacting the value of its property similarly affect others within its industry. While the providers with whom appellant competes may be unique to its market, appellant's evidence demonstrates that it is far from alone regarding the competitive forces with which it must deal and the impact technological progress is generally having upon participants in the telecommunications industry." Id. at 23-25. (Footnote omitted.)

See, also, *Omnipoint Holdings, Inc. v. Wilkins* (Oct. 21, 2005), BTA No. 2004-M-428, unreported.

n24 Announced by the court on the same day this board's decision in *Cincinnati Bell* was issued, the appeal in *Aloca, Inc. v. Zaino* (Oct. 22, 2004), BTA No. 1999-G-1401, unreported, Sup. Ct. No. 04-1953, was ultimately settled by the parties. See 06/10/2005 Case Announcements, 2005-Ohio-2838.

While appellant argues otherwise, the essential thrust of its arguments is the same as those considered and rejected by this board in *Cincinnati Bell*. For example, the PwC [\*58] tax study claims that the value of appellant's property has declined for reasons common among many participants in the telecommunications market: "The competitive pressures of the telecommunications industry have significantly impacted the sustained economic obsolescence of Choice One. This value decrease correlates with the telecommunications industry overall. Choice One acquired up to date equipment to be competitive, yet has received no increases in value for these expenditures. Inutility is in effect dependent on supply and demand. As Choice One has increased its capacity (supply), demand has dropped on a percentage basis therefore the network continues to lose value. Choice One is not immune to these competitive pressures and industry developments as represented in its equity value decline.

"The inutility calculation is representative of the presence of economic obsolescence as recognition of the impact of an overbuilt network that has not generated a return on and of the invested capital. Choice One's property has been affected as have other competitors in this industry segment by satiation in the market. Until market stability is achieved, the relevance of the inutility [\*59] calculation should be considered as an indication and quantification of economic obsolescence of the associated assets of the operating network." Ex. 1 at 19-20. n25

n25 Whether considered a claim that special and unusual circumstances exist or an effort to demonstrate that the application of the commissioner's prescribed formula creates an unjust or unreasonable result, appellant attempts to bolster its position that the evidence it presented is unique to itself by making reference to its own financial solvency and that of its parent and affiliated corporations. According to appellant, such company-specific information is different than that presented by the appellant in *Cincinnati Bell*. Appellant appears to suggest that the value of property owned by a company which enters into bankruptcy must necessarily constitute justification for deviating from the rates prescribed by the Tax Commissioner. We consider the state of appellant's business to have little probative value in this instance since the obligation of this board is to determine whether appellant has demonstrated that application of the commissioner's valuation formula is not reflective of the true, or fair market, value of its property. Cf. *Forty-Eight Insulations, Inc. v. Limbach* (Nov. 23, 1990), BTA No. 1988-D-323, unreported, at 7 ("More importantly, however, is the recognition that the subject valuation is to be based upon its value in exchange in the open market, not upon its value in use. See, e.g., *Boothe Financial Corp. v. Lindley* (1983), 6 Ohio St. 3d 247, 248."). If we were to accept appellant's proposition, it is not inconceivable that this board could be presented with the converse argument, i.e., that property owned by a company

experiencing financial success must necessarily be more valuable than that reflected by application of the commissioner's prescribed valuation methodology. [\*60]

Accordingly, we are unpersuaded that "special and unusual circumstances" exist in this case. However, as this board has noted, the existence of such unusual conditions is not the only basis for rejecting application of the commissioner's prescribed formula in valuing personal property. Indeed, such deviation is also appropriate where the commissioner's valuation methodology creates an unjust or unreasonable result. See *Texas E. Transm., supra*, at 86 ("Although a statute may provide a prima facie estimate or presumption of value, where rigid application of the statute would be inappropriate, the presumption of value must yield to other competent evidence reflecting true value."); *Centerior Fuel Corp. v. Tracy (2001)*, 90 Ohio St.3d 540; *PPG Industries, supra*, paragraph two of the syllabus ("In determining the true value in money of machinery and equipment for tax assessment purposes, the Tax Commissioner in applying the '302 Computation' directive which prescribes an annual depreciation rate in lieu of book depreciation must adjust such rate not only in unusual or special circumstances but also [\*61] whenever it appears that rigid application of the directive will create an unjust or unreasonable result.").

In considering the PwC tax study, we are unable to conclude that appellant has satisfied its affirmative burden of demonstrating that application of the commissioner's valuation methodology to appellant's personal property will be either unjust or unreasonable. As previously noted, the tax study itself is not an appraisal of appellant's personal property. Although such information presumably exists, appellant has not provided this board with any evidence as to the amount for which its equipment would transfer in the open market during the years in question. The absence of such evidence is particularly disconcerting where it appears appellant seeks to immediately achieve a significant depreciation immediately following its acquisition of its personal property where it is typically the cost of acquisition which provides the best evidence of its value.

Further, while appellant claims that its network is substantially overbuilt and that by having such excess capacity, all of its personalty suffers a contributory negative valuation, as pointed out by the commissioner, appellant [\*62] has not provided this board with evidence that it is disposing of its property at a faster rate than that contemplated by the commissioner's depreciation percentages or that when it does sell its property on the open market it is being disposed of for amounts less than that which would be reflected by the commissioner's formula. This type of disposal/salvage data has often been considered in determining whether the commissioner's prescribed rates fairly represent the value of a taxpayer's equipment. See, e.g., *Monsanto, supra*; *RPS, Inc., supra*. Instead, appellant essentially asks this board to simply adopt its proposed depreciation for that of the commissioner based upon the claimed inutility of its property. While it *may* be true that as a result of the changes which have occurred in the marketplace, appellant has more equipment in place to service its network than it currently requires, this fact alone does not necessarily warrant our adoption of its conclusion that its property has a value different than that which results from application of the commissioner's formula.

Based upon the foregoing, to the extent within this board's [\*63] jurisdiction, appellant's specifications of error are not well taken and they are therefore overruled. It is therefore the order of this board that the final determinations of the Tax Commissioner must be, and hereby are, affirmed.

Cincinnati Bell Telephone Company, Appellant, vs. Thomas M. Zaino, Tax  
Commissioner of Ohio, Appellee.

CASE NOS. 2003-K-765; 2003-K-1612 (PUBLIC UTILITY PERSONAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

2005 Ohio Tax LEXIS 753

June 10, 2005, Entered

**OPINION:**  
DECISION AND ORDER

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

Through separate appeals filed with this board on June 19 and October 31, 2003, appellant, Cincinnati Bell Telephone Company, challenges two final determinations issued by the Tax Commissioner on April 23 and September 4, 2003, respectively. In these determinations, the commissioner denied appellant's petitions for reassessment and affirmed public utility personal property tax assessments previously issued to appellant for tax years 2000, 2001 and 2002. We now proceed to consider this matter upon appellant's notices of appeal, the statutory transcripts ("S.T.") certified by the Tax Commissioner pursuant to R.C. 5717.02, the evidence presented at a hearing convened before this board, n1 and the post-hearing briefs of counsel.

n1 In addition to the documentary evidence offered at hearing by the parties, appellant presented the testimony of several witnesses: Donald V. Daniels, appellant's vice president of marketing; Dennis P. Hinkel, senior vice president of appellant's network and operations organization; Lawrence K. Vanston, president of Technology Futures, Inc. ("TFI"); Ray L. Hodges, a senior consultant with TFI; Randy Hartman, senior manager in the tax department of Cincinnati Bell, Inc., appellant's parent company; and Richard K. Ellsworth, a director in the valuation group of Deloitte & Touche. [**\*2**]

Appellant constitutes a "telephone company" as defined by Ohio statute n2 and for each of the tax years in issue filed annual reports with the Ohio Department of Taxation in which it listed the value of its personal property. Subsequently, the Tax Commissioner issued assessments for each of the years, reflecting increases in the taxable values of appellant's property in the amounts of \$ 218,442,010, \$ 211,183,300, and \$ 203,878,000, respectively. Appellant then filed petitions for reassessment through which it requested that the commissioner reassess and reduce the taxable values of its property. Through final determinations dated April 23, and September 4, 2003, appellant's petitions were denied and the assessments were affirmed as originally issued.

n2 R.C. 5727.01(D)(2) defines a "telephone company" as any person "primarily engaged in the business of providing local exchange telephone service, excluding cellular radio service, in this state[.]"

Appellant has appealed to this board, n3 specifying the following as error:

"2. The determination of taxable values by the Commissioner denies CBT equal protection under the law in violation of the United States Constitution and [\*3] the Ohio Constitution. Under current Ohio Revised Code § 5727.111, CBT is required to compute the true value of property acquired prior to 1994 at 88% of its net taxable cost. In contrast, certain companies which may acquire similar or even identical equipment in constructing and/or operating a telecommunications network are taxed at 25 percent of their net taxable cost. This represents a disparity of listing percentages between similarly situated taxpayers. The discriminatory treatment afforded in assessing CBT's public utility property value violates the Equal Protection Clauses of both the Ohio and the United States Constitutions and is therefore unconstitutional. All of CBT's property should be assessed at the 25% rate afforded its similarly situated competitors.

"\* \* \*

"4. The Commissioner's determination of value for CBT's general plant property does not represent the true value of such property. The Commissioner valued CBT's general plant property by utilizing a 7.5-year class life. The Commissioner defines general plant property as property used in the general operations including such assets as garage work equipment, furniture, office equipment, general purpose computers, [\*4] and more. For CBT, the majority of the taxable property in this category is general purpose computers, such as personal computers. The Commissioner's determination to value these assets utilizing a 7.5-year class life and 15% residual value is erroneous because such depreciation schedule fails to consider the rapid decline in value inherent in such property. In order to accurately reflect the true value of its general plant assets, CBT should be entitled to utilize a Class I true value schedule with a 15% residual value. n4

"5. The Commissioner's determination that CBT must use a 7.5-year class life and 15% residual value while general business taxpayers are entitled to value identical property under the Class II life schedule violates the equal protection requirements of the United States Constitution and the Ohio Constitution. It is unlawful for the Commissioner to value identical property (e.g. personal computers) differently solely by the overall activities of the business.

"6. The Commissioner erred in determining the valuation of CBT's central office and information plant assets by utilizing a 7.5-year class life and 15% residual value. The majority of CBT's assets within [\*5] these categories consist of digital switching equipment and circuit equipment. The Commissioner's determination fails to take into account the functional obsolescence inherent in such property due to the rapid technological advances occurring with respect to such telecommunications equipment. The true value of this property is correctly reflected through the use of the Class I true value schedule with a 15% residual value. n5

"7. The Commissioner erred in determining the valuation of CBT's cable and wire facilities by using a 15-year class life true value schedule. The majority of CBT's assets within this category consists of aerial, underground, and buried cable. This cable consists of both copper twisted pairs and fiber optic cable. The Commissioner's determination fails to take into account the functional obsolescence with respect to both the copper and fiber optic cabling. Rapid technological advances with respect to such cabling results in a decline in the true value of CBT's property at a much faster rate than reflected in the Commissioner's calculation of true value. The true value of this property is accurately reflected through the use of the Class III true value

schedule [\*6] with a 15% residual value. n6

"\* \* \*

"9. The Commissioner erred in issuing a preliminary assessment certificate for 2000 and 2001 [and 2002] with respect to various items of equipment permanently mounted to CBT's vehicles. CBT's vehicles contain various items of equipment that are permanently mounted. R.C. 4503.04 provides that taxes at the rates set forth in that section are in lieu of all taxes on or with respect to the ownership of such motor vehicles. In computing the vehicle weight for purposes of assessing a license tax under R.C. 4503.02, the additional equipment added to the vehicle is included in the computation, and therefore an assessment is levied on this equipment as a motor vehicle. Imposing tax with respect to equipment added to motor vehicles under R.C. 5701, of which the same equipment is used in determining the taxable weight of vehicles for computation of the license tax under R.C. 4503.04 or R.C. 4503.042 results in double taxation of the same property. This directly conflicts with the provisions of R.C. 4503.04 which states that taxes at such rates provided in this section are in lieu of all taxes on or with respect to the ownership of such motor vehicles.' [\*7] Thus, it is unlawful for the Commissioner to assess any additional tax with respect to such property, and CBT objects to the inclusion of motor vehicle equipment its [sic] its personal property tax assessment."

n3 Appellant's notices of appeal are substantially similar, with pertinent differences being noted. Because they set forth general background information and do not, in and of themselves, claim error in the commissioner's determinations, we have not quoted paragraphs one, three, and eight of appellant's notice of appeal in BTA No. 2003-K-765, and paragraphs one, three, and nine of appellant's notice of appeal in BTA No. 2003-K-1612.

n4 In its notice of appeal in BTA No. 2003-K-1612, appellant modified its claim, asserting that: "In order to accurately reflect the true value of its general plant assets, CBT should be entitled to utilize the new valuation schedule for Stand-Alone computers as specified in the Ohio Department of Taxation news release dated 2-14-03." Id. at paragraph 5. However, no evidence or arguments specific to this claim has been pursued by appellant.

n5 In its notice of appeal in BTA No. 2003-K-1612, appellant also included the following: "The Commissioner also errors [sic] in failing to take into consideration the declining value of equipment based upon competition in the telecommunication industry. The true value of this property is correctly reflected through the use of an Average Remaining Life of 4 years and 5 years for Circuit Equipment and Switching Equipment, respectively." Id. at paragraph 7. [\*8]

n6 Again, appellant's notice of appeal in BTA No. 2003-K-1612 varied slightly, citing increased industry competition as a factor negatively impacting the value of its property and further that: "The true value of this property is accurately reflected through the use of an Average Remaining Life of 4.1 years for metallic cable, and 7.8 years for non-metallic cable." Id. at paragraph 8.

Additionally, in BTA No. 2003-K-1612, appellant included the following specifications of error n7:

"4. The Commissioner's determination of value for CBT's equipment does not represent the true value of such property. The Commissioner valued CBT's

equipment as equal to [the] cost of such property less annual allowances as prescribed by the Commissioner. The Commissioner's valuation fails to take into account the technological nature of the equipment used in connection with CBT's business and the rapid decline inherent in such property. CBT has provided a property valuation study prepared by Technology Futures, Inc. and Deloitte & Touche (Valuation Study). The Valuation Study sets forth competent evidence of probative value regarding the true value of the equipment, which takes into account the [\*9] specific information regarding the taxpayer's industry, including, the technological changes and advances occurring in that industry and the impact those changes have on the true value of CBT's equipment.

"\* \* \*

"11. CBT owns and utilizes certain telecommunications switching equipment in connection with its business. The switching equipment is specifically designed and used to hold and process telecommunications signals in connection with CBT's business."

n7 In its post-hearing brief, appellant advised this board of its intention to withdraw paragraph twelve of its specifications of error in BTA No. 2003-K-1612. Id. at 37.

Consistent with its notices of appeal and its post-hearing briefs, appellant's arguments may generally be separated into three distinct categories. First, appellant asserts that the rate at which its personal property is taxed is disproportionate to that of its competition, thereby resulting in violations of the Equal Protection Clauses of the Ohio and United States Constitutions. Second, appellant argues that the method typically applied by the Tax Commissioner in determining the value of depreciable business property reported by telephone companies [\*10] does not accurately reflect the value of appellant's property due to increased market competition, dramatic technological advances, and an absence of a resale market. Finally, appellant claims that the commissioner erred in taxing certain equipment attached to its motor vehicles which are used by appellant in delivering telecommunications services to the public.

We first address appellant's challenge regarding the constitutionality of the assessment rates made applicable to it by virtue of R.C. 5727.111(B). Appellant asserts that the rate at which its property is taxed results in a violation of constitutional rights guaranteed it because its property is taxed at a higher rate than that applicable to similar, or even identical, property reported by other taxpayers, including those with which appellant operates in direct competition. n8 However, this board is without jurisdiction to rule upon the merits of appellant's constitutional claims.

n8 Former R.C. 5727.111(B) provided that telephone companies' taxable property which first became subject to tax in Ohio in 1995 and thereafter would be assessed at a rate of twenty-five percent of true value, while property first subject to taxation prior to 1995 would continue to be assessed at eighty-eight percent of true value. It is the latter property to which appellant's constitutional claims relate. Although not in issue for the years involved in the present appeals, it is noted that the taxable rates applicable to this category of property, as a result of amendments effected by Am.Sub.H.B. 95, effective September 26, 2003, continues to decrease on an annual

basis for tax years 2005, 2006, and 2007 until the last year when such property, regardless of when it first became taxable, is assessed at a rate of twenty-five percent of true value. [\*11]

In *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, the Supreme Court of Ohio commented upon the limited nature of the board's role involving constitutional challenges:

"The BTA understood its role to be a receiver of evidence for constitutional challenges. Accordingly, it did so, giving the parties wide latitude in presenting the evidence. The BTA determined no facts on the constitutional questions. The commissioner, however, in her Proposition of Law No. IV, contends that the BTA not only receives evidence in this type of case, but must weigh the evidence and determine the facts necessary for the court's review of the constitutional questions. Since the BTA did not make findings of fact, the commissioner asserts that we should remand the case for the BTA to comply.

"In *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, \* \* \* paragraph three of the syllabus, we held:

"The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence [\*12] concerning this question if presented, even though the Board of Tax Appeals may not declare the statute unconstitutional. (*Bd. of Edn. of South-Western City Schools v. Kinney* [1986], 24 Ohio St.3d 184, \* \* \* construed.)"

"We explained the process, 35 Ohio St.3d at 232 \* \* \*:

"When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view.

"To accommodate this court's need for extrinsic facts and to provide a forum where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum. The BTA is statutorily created to receive evidence in its role as factfinder."

"Under *Cleveland Gear*, the BTA need only receive evidence for us to make the constitutional finding. This is because the BTA accepts facts but cannot rule on the question. On the other hand, we can decide the constitutional questions but have a limited ability to receive evidence. Thus, the BTA receives evidence [\*13] at its hearing, but we determine the facts necessary to resolve the constitutional question." Id. at 197-198. (Parallel citations omitted.)

See, also, *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9, 2002-Ohio-2984.

While the parties were accorded an opportunity to develop the evidentiary record necessary for further appellate review of appellant's constitutional claims and have presented arguments relating to such claims, given our inability to grant the relief requested, we must overrule the arguments which appellant has advanced.

As we proceed to review the remainder of appellant's arguments, we note the applicable standard by which such review is to be conducted. In Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St.3d 121, the Supreme Court held: "Absent a demonstration that the commissioner's findings are clearly unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for the BTA to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect. \* \* \*" Id. at 124. [\*14] (Citation omitted.)

It is therefore the burden of a taxpayer challenging a finding of the commissioner to rebut this presumption by establishing a clear right to the relief requested. It must further demonstrate in what manner and to what extent the Tax Commissioner's determination is in error. Midwest Transfer Co. v. Porterfield (1968), 13 Ohio St.2d 138; Ohio Fast Freight, Inc. v. Porterfield (1968), 29 Ohio St.2d 69; Federated Dept. Stores, Inc. v. Lindley (1983), 5 Ohio St.3d 213.

Appellant maintains that the assessments issued by the commissioner for the years in issue result in an overvaluation of its property. In this context, appellant identified several factors negatively impacting the value of its property and offered evidence in support of the reduced values claimed. Among the factors cited by appellant is the increased competition which it has experienced since 1996 following congressional passage of the federal Telecommunications Act of 1996. n9 Due to its existence in the local telephone market at the time of congressional passage of the Telecommunications Act of 1996, it is [\*15] considered an incumbent local exchange carrier ("ILEC"), as opposed to a competitive local exchange carrier ("CLEC"). According to appellant, inherent in its designation as an ILEC are certain service obligations not imposed upon new entrants to its market, which has an overall effect of placing it at a competitive disadvantage.

n9 In AT&T Communications of Ohio, Inc. v. Pub. Util. Comm. (2000), 88 Ohio St.3d 549, the court succinctly described the purpose and effect of the Telecommunications Act of 1996:

"In 1996, Congress passed the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, 61, which was designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local phone service to facilitate the entry of competing companies into local telephone service markets across the country. Specifically, the 1996 Act forces an incumbent LEC (1) to permit a requesting new entrant in the incumbent LEC's local market to interconnect with the incumbent LEC's existing local network and thereby use the incumbent LEC's network to compete with the incumbent LEC in providing local telephone services (interconnection); (2) to provide its competing telecommunications carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell to its competing telecommunications carriers, at wholesale rates, any telecommunications service that the incumbent LEC provides to its customers at retail rates in order to allow the competing carriers to resell the service. Sections 251(c)(2), (3), and (4), Title 47, U.S. Code. The Ohio General Assembly expressly sanctioned the commission's exercise of authority under the 1996 Act. See R.C. 4905.04(B)." Id. at 551-552, fn. 6.

See, also, Cincinnati Bell Tel. Co. v. Pub. Util. Comm. (2001), 92 Ohio St.3d 177,

**178. [\*16]**

Appellant continues, noting that it has experienced direct competition in several aspects of its operations. For example, it directly competes with both "resale" companies, which purchase telephone access at wholesale rates and then resell such services to end consumers, and "facilities-based" companies, which have built their own telephone service facilities within appellant's market. Exemplifying the competitive disadvantage in which it finds itself, appellant's senior vice president of network and operations organization elaborated upon the distinction between appellant and facilities-based companies. He indicated that appellant is still required, by existing governmental regulations, to make telephone service access available to all potential customers within its market. However, newer entrants to the telephone service market are not subject to such regulations. In doing so, such providers can be more selective in the deployment of a network and build facilities in a more efficient manner, targeting specific high density users within smaller geographic areas.

Appellant also cites technological advancements as having dramatically impacted the value of its property. As background, [\*17] appellant first explained the origins of its operations and the nature of its equipment. Although it now offers voice and data access, including Internet access and high speed broadband, appellant's network was originally constructed to provide traditional voice-only communication services to residential and business customers located in the Cincinnati metropolitan area. With regard to the "traditional" telephone services appellant offers, the "intelligence" behind appellant's network remains the circuit switches which are used to provide a variety of voice-type services to its customers. These switches contain the information and logic necessary for call origination, routing, termination, and custom calling features such as call-waiting, caller ID, and voice messaging. When a call is made, circuit switches recognize the digits dialed and route the call over the network, using a dedicated path between the caller and the recipient. That portion of appellant's network that interconnects its circuit switches is referred to as its inner office network, while the connection from a circuit switch to the end user is considered the outside plant network. Appellant's outside plant network [\*18] is comprised of a feeder network and a distribution network, the former being located closest to the circuit switch, such as in a neighborhood or business park locale, and the latter providing the connection feeder to the end user.

Originally, all telephone calls were transmitted over twisted pairs of copper wire. However, beginning in the 1980s, appellant began deploying fiber optic cable within its network, which allowed for increased capacity. By 1997, all of appellant's central offices, or main switches, were connected to the network by fiber optic cable, and within two years after that, approximately twenty-five percent of the access lines between appellant's central offices and distribution lines were similarly wired. While it continues to extend fiber optic cabling closer to the end user, particularly due to increased customer demand for data transmission in addition to voice communications, appellant still installs copper wire pairs into residential neighborhoods. Although appellant believes it installs more wire pairs than will be needed in the future, because such pairs are part of a larger, buried cable, any wire pairs determined to be unnecessary are simply abandoned in [\*19] place due to the excess costs which would be incurred to effect their removal.

Appellant proceeded to then compare the "foundation" of its network system to those providers with which it competes that have more recently entered the

telecommunications industry. In doing so, appellant noted the recent shift from the use of circuit switching technologies to "packet-based" technologies. Unlike traditional circuit switches, which were designed to provide reliable voice communications and involved a dedicated line for transmissions, packet-based technologies are designed to transmit "packets" of data, which results in expanded capacity. In addition, packet switches are less costly to install, replace, and upgrade than circuit switches. As a result, appellant has experienced a decline in market prices for circuit switches, with its used switches essentially being sold for scrap value.

Alternate types of technologies used in the industry have likewise impacted appellant's business operations. During the "infancy" of widespread consumer demand for Internet access, appellant experienced a significant growth in secondary telephone access lines since customers accessing the Internet were required [\*20] to commit their telephone lines for the length of their connection. However, newer technologies, e.g., cable access, not only offered significantly increased connection speeds, but do not utilize a voice channel on existing telephone lines. As a result, primary telephone lines become available for use regardless of a customer's connection to the Internet, resulting in a decline in the number of secondary lines.

Cable providers have also begun a "crossover" process, emerging as telephone service competitors. In doing so, they offer telephone access services comparable to those provided by appellant via cable by virtue of "Voice Over Internet Protocol" ("VOIP"), or IP telephony. Through this technology, telephone calls are transmitted over a data network such as the Internet. Also affecting both secondary and primary telephone line acquisitions are customer shifts to wireless telephone service. Due to the increased reliability of the service and the mobility which results, appellant anticipates more consumers will consider using wireless telephone service exclusively.

In an effort to demonstrate the extent to which its property has been overvalued by the Tax Commissioner, appellant [\*21] presented the testimony of and valuation study prepared by Ray L. Hodges, a senior consultant with Technology Futures, Inc. ("TFI"). According to its president, Lawrence Vanston, TFI is a research and consulting firm which specializes in technology forecasting. TFI's efforts are typically aimed at attempting to forecast the nature of the impact new technology will have upon a particular industry and how quickly such technology will be adopted, allowing market participants, as well as governmental entities, to engage in effective strategic planning.

In the TFI study, Hodges reviewed specific categories of appellant's plant and equipment, i.e., switching equipment, circuit equipment, aerial and buried metallic cable, and non-metallic cable, n10 and concluded that they should be depreciated at faster rates with lower floor values than applicable under the rates prescribed by the commissioner. Applying the resulting rates to the net cost of assets within these categories, the TFI study ultimately expressed values for each category for each of the years in issue.

n10 The TFI study discloses that: "This report develops Percent Good Tables and provides an opinion of and value for major categories of telecommunications plant for Cincinnati Bell Telephone (CBT). CBT has over \$ 1.8 billion in telecommunications plant in service. The major network categories, the subject of this report, comprise 58% of this investment. These categories are switching (19%), circuit equipment

(17%), and cable (22%) [the latter being subdivided into aerial metallic cable, buried metallic cable and non-metallic, i.e., fiber optic, cable]." Ex. A at 1. The "percent good tables" set forth the percentages to be applied against the original costs of assets in order to reflect the depreciated values of such assets. [\*22]

Before addressing the sufficiency of the evidence offered by appellant in support of its claim, it is first appropriate to review the method generally applicable in determining the value of public utility property. Pursuant to R.C. 5727.08, public utilities are required to annually file reports with the Tax Commissioner which will enable him to "make any assessment or apportionment required under this chapter." R.C. 5727.10 imposes a duty upon the commissioner to annually determine the "true value in money" of all such property required to be assessed. n11 In determining the value of a public utility's property, the commissioner is guided not only by the information contained within the utility's annual report, but also by "such other evidence and rules as will enable him to make these determinations." Id.

n11 Pertinent in this instance, the property which is to be assessed by the commissioner pursuant to R.C. 5727.10 is identified in R.C. 5727.06 as follows: "(A) Except as otherwise provided by law, the following constitutes the taxable property of a public utility or interexchange telecommunications company that shall be assessed by the tax commissioner:

"\* \* \*

"(3) In the case of all other public utilities and interexchange telecommunications companies, all tangible personal property that on the thirty-first day of December of the preceding year was both located in this state and:

"(a) Owned by the public utility or interexchange telecommunications company; or

"(b) Leased by the public utility or interexchange telecommunications company under a sale and leaseback transaction."

[\*23]

R.C. 5727.11 prescribes the specific method to be employed by the commissioner in valuing public utility property, providing in relevant part:

"(A) Except as otherwise provided in this section, the true value of all taxable property required by division (A)(2) or (3) of section 5727.06 of the Revised Code to be assessed by the tax commissioner shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the commissioner. If the commissioner finds that application of this method will not result in the determination of true value of the public utility's taxable property, the commissioner may use another method of valuation."

In furtherance of the preceding mandate, the commissioner has published instructions for use by public utilities in filing their annual tax reports, entitled "Guidelines for Filing Ohio Public Utility Tax Reports," which details the valuation procedures and assessment methods to be employed. See Ex. 4. Consistent with R.C. 5727.11(A), these guidelines reiterate the legislative mandate that unless it is found that true value will not result, the commissioner [\*24] is to determine the value of public utility property utilizing the statutorily prescribed cost-based method

of valuation.

The standard process as described by the Tax Commissioner in the referenced publication is as follows:

**"The valuation method applicable to most taxable property** of a public utility or interexchange telecommunications company is set forth in Section 5727.11(B).  
n12 It is similar to the 302 computation' used by general taxpayers in determining the true value of their taxable property. Under this method, the true value is determined by taking the cost of the property less composite annual allowances prescribed by the Tax Commissioner. If application of this method does not result in the determination of true value of the taxable property, the Tax Commissioner may use another method of valuation.

"A table of ten useful lives ranging from five to fifty years and the composite annual allowances for each is included in this publication. A letter and number has been assigned to each useful life: Class C-5 for a five-year useful life, Class C-10 for a ten-year useful life, etc. The annual allowances are expressed as percents good and decrease with the age of [\*25] the property. The minimum percent good for taxable property in any class is 15%. The true value is determined by multiplying the cost of taxable property for each year by the applicable percent good.

""One or more property groups have been established for each public utility and interexchange telecommunications class. Each property group contains properties that have integrated functions. The Tax Commissioner has assigned a class life to each property group. The class life represents a composite of the various useful lives of properties in the group. **In general, segregation of short-lived property for the purpose of using a different class life is not permitted.** A listing of the property groups for each class of public utility and interexchange telecommunications company together with a description of the properties in each group and the class life is included in this publication.

"The property groups and class life assigned to each group as set forth in this publication reflect conclusions developed by the Department of Taxation in which public utilities and interexchange telecommunications companies from each class participated." Id. at 2. (Emphasis sic.)

n12 Pursuant to Am.Sub.S.B. 3, 148 Ohio Laws, Part IV, 8083, the portion of former R.C. 5727.11(B) previously quoted within this decision was relettered and reflected in paragraph (A) of that statute. [\*26]

The valuation of property owned by telephone companies is broken down into four major categories and valued as follows:

Central Office & Information Plant n13	Class C-10 -- 10 years n14
Cable & Wire Plant n15	Class C-20 -- 20 years n16
General Plant n17	Class C-10 -- 10 years
Other Taxable Property	Cost or net book value

n13 The commissioner's guidelines, which rely upon account references contained

within the Code of Federal Regulations, Telecommunications, Title 47, Parts 20 to 39, offer the following examples of items included within central office and information plant accounts: central office, analog electronic, digital electronic, electromechanical switching equipment, operating systems, central office transmission equipment, station apparatus, customer premises wiring, large private branch exchanges, public telephone terminal equipment, and other terminal equipment. Id. at 15.

n14 Class C-10 indicates that such property has a useful life expectancy of at least 7.5 but less than 12.5 years. Id. at 8.

n15 Cable and wire plant account examples include cable and wire facilities, poles, aerial cable, underground cable, buried cable, submarine cable, deep sea cable, intrabuilding network cable, aerial wire, and conduit systems. Id. at 15.

n16 Class C-20 indicates that such property has a useful life expectancy of at least 17.5 but less than 22.5 years. Id. at 8.

n17 The general plant examples offered include motor vehicles, aircraft, special purpose vehicles, garage work equipment, buildings classified as personal property, furniture, office equipment, general purpose computers, amortizable tangible assets, capital leases, leasehold improvements, and intangibles. Id. at 15.

**[\*27]**

In each instance, the floor, or lowest "percent good," reflected for property which continues to be used in business at and beyond the last year for the particular class of property is fifteen percent. Id. at 8.

As indicated within the introductory portion of the instructions, the composite annual allowances prescribed by the commissioner for use by public utilities in valuing their taxable property is similar in purpose and effect to the "302 computation" used by general business taxpayers. See, generally, R.C. 5711.18. In the context of the 302 computation, the Supreme Court in Snider v. Limbach (1989), 44 Ohio St. 3d 200, 201, recognized that "it is impractical for the commissioner to personally value all personal property in Ohio; thus, she may resort to a predetermined formula to ascertain value." Thus, the purpose of utilizing a "predetermined formula" for valuation is "to promote industry-wide uniformity in determining the true value of depreciable property used in business." Monsanto Co. v. Lindley (1978), 56 Ohio St. 2d 59, 62. In PPG Industries v. Kosydar (1981), 65 Ohio St. 2d 80, [\*28] the court elaborated, stating that "this directive [i.e., the 302 computation] has been approved by this court as a practical, reasonable and lawful method and device to achieve uniform valuation of plant equipment in Ohio by prescribing annual depreciation rates in lieu of book depreciation for Ohio personal property tax purposes."

In Wheeling Steel Corp. v. Evatt (1944), 143 Ohio St. 71, the Supreme Court accepted the 302 computation as a prima facie means by which to determine true

value. While recognizing that the 302 computation provides a generally effective means for determining value, the court has repeatedly held that a valuation directive issued by the commissioner should not be applied where it is affirmatively demonstrated by a taxpayer that the true value will not result due to the existence of "special or unusual circumstances" or because rigid application would be inappropriate. See, also, W.L. Harper Co. v. Peck (1954), 161 Ohio St. 300; Monsanto, supra; Towmotor Corp. v. Lindley (1981), 66 Ohio St.2d 53; Campbell Soup Co. v. Tracy (2000), 88 Ohio St.3d 473; [\*29] RPS, Inc. v. Tracy (Oct. 30, 1998), BTA No. 1996-M-1209, unreported, at 15 ("To successfully challenge the values assessed by the Commissioner, the appellant must bring forth competent and probative evidence of the value of its listed property. \* \* \* There are three acceptable methods of meeting this burden. [An appellant] may offer direct evidence of the personalty's true value. \* \* \* Alternatively, [an appellant] may prove the special circumstances exist or that the use of the 302 computation produces an unjust or unreasonable result. \* \* \*").

The preceding reasoning appears equally applicable, in large measure, when determining the value of public utility property. Recognizing the difficulty inherent in requiring the commissioner to personally value all public utility property within Ohio, it is reasonable that a predetermined formula be developed and applied. However, as with the 302 computation, a statutorily authorized method of valuation should not be applied when true value will not result.

In Texas E. Transm. Corp. v. Tracy (1997), 78 Ohio St.3d 83, the court concluded that the appellant, a natural gas pipeline transmission company, could [\*30] rely upon an appraisal in order to prove the value of its property. In doing so, the court expressly held that a statutorily prescribed method of valuation should not be used to the exclusion of evidence which demonstrates that another method will more accurately result in true value:

"Although R.C. 5727.11 identifies the cost-based method of valuation as a means of assessing true value, the General Assembly has not restricted the commissioner's use of alternate valuation methods. In fact, in these statutes, the General Assembly specifically states that the commissioner may use another method of valuation' and that he may consider other evidence' to determine true value. n18 Contrary to the commissioner's assertion, in deciding true value, the BTA need not adhere to the cost-based statutory method of valuation.

"\* \* \*

"The ultimate goal imposed by R.C. 5727.10 clearly is to determine the *true value* of the property taxed. R.H. Macy Co., Inc. v. Schneider (1964), 176 Ohio St. 94, 97 \* \* \*. If the statutory method does not yield true value, then another method of valuation may be used, whether or not there are special or unusual circumstances.

[\*31] Although a statute may provide a prima facie estimate or presumption of value, where rigid application of the statute would be inappropriate, the presumption of value must yield to other competent evidence reflecting true value. Monsanto Co. v. Lindley (1978), 56 Ohio St.2d 59, 61, 10 O.O.3d 113, 114 \* \* \*; W.L. Harper Co. v. Peck (1954), 161 Ohio St. 300 \* \* \*." Id. at 85-86. (Emphasis sic and parallel citations omitted.)

n18 In Texas E. Transm., the taxpayer's appraiser employed a "unit-appraisal

method," in which he used commonly accepted appraisal techniques to express an opinion of value for the property in issue. In this regard, the court succinctly described the analysis and results as follows:

"Under this method, the value of the unit is first determined. Then, the value of the properties being appraised is determined by measuring their contribution to the unit. Since TET's interstate pipeline systems operate as an integrated group of properties that work together to provide a service, Tegarden testified that the unit-appraisal method is the proper valuation procedure to be applied. He explained that due to the very nature of a natural gasline property, it is more appropriate to value the property as a unit rather than to value the individual components separately. In addition, he pointed out that TET's rates, earnings and accounting methods are regulated as a unit by the Federal Energy Regulatory Commission.

"Using the unit-appraisal method, Tegarden first valued the entire transmission system as a whole by using a cost-approach analysis, an income-approach analysis, and a stock-and-debt-approach analysis. In giving greatest weight to the income approach, Tegarden arrived at a total system value of \$ 1,425,000,000. Next, Tegarden apportioned 8.14 percent of the unit value to Ohio, which resulted in a valuation of \$ 115,995,000 for TET's Ohio property." *Id.* at 84.

**[\*32]**

See, also, *MCI Telecommunications Corp. v. Limbach* (Sept. 20, 1990), Franklin App. No. 89AP-870, unreported ("There are two ways in which the taxpayer may contest the commissioner's valuation. The taxpayer may either offer direct evidence of the property's true value or the taxpayer may offer evidence that the applicable rate of depreciation does not accurately measure the property's true value, either because special or unusual circumstances exist or because a rigid application of the directive will create an unjust or unreasonable result.").

Initially, the parties express disagreement as to whether or not appellant is first obligated to prove the existence of "special and unusual circumstances." In this context, reference is made to the following language in *Texas E. Transm.*:

"The commissioner also argues that in order to apply alternate valuation methods, there must be a showing of special or unusual circumstances.' The commissioner's reference to special or unusual circumstances' stems from language found in his 302' directive for determination of depreciation rates for general personal property. However, the words special or unusual circumstances' do not [\*33] appear in R.C. 5727.11 and are not a prerequisite for using an alternate valuation method where appellees are contesting true value rather than depreciation rates." *Id.* at 86.

The commissioner concedes that where "direct evidence" of value is offered, such as an appraisal like that relied upon in *Texas E. Transm.*, a public utility need not demonstrate the existence of special and unusual circumstances in order to deviate from booked costs less prescribed allowances. However, the commissioner argues that the TFI study offered is not an "alternate valuation method" for valuing appellant's property, but instead merely proposes accelerated depreciation rates compared to those prescribed by the commissioner. Therefore, the commissioner insists that appellant is not relieved of its obligation to prove special and unusual circumstances exist. In response, appellant asserts that the commissioner's position overemphasizes the labeling of its evidence. It maintains that regardless of the name attributed to the analysis set forth in the TFI study, the result is the same in that it

demonstrates that the true value of appellant's property is other than that which results from strict application [\*34] of the cost-based valuation method less the commissioner's prescribed allowances.

Upon review of appellant's valuation study, we agree with the commissioner that it is not an alternate method of valuing property as was presented in *Texas E. Transm.* The valuation evidence presented in that case was an appraisal which had been prepared by an individual holding the designations of Member of the Appraisal Institute and Certified Assessment Evaluator from the International Assessing Officers. In order to derive the opinion of value which he ultimately expressed for the property in his unit-appraisal, he employed approaches often considered in the appraisal of property, i.e., a cost approach, an income approach, and a stock and debt analysis. In this instance, the TFI study is not an alternate valuation method, e.g., an appraisal, but is instead an effort to demonstrate that the depreciation schedules generally applicable to appellant's property fail to adequately account for the competitive and technological changes which are currently impacting the telecommunications industry. Given the nature of appellant's evidence, we consider it appropriate to proceed to address whether appellant [\*35] has demonstrated the existence of special and unusual circumstances.

Initially, the commissioner posits that the evidence upon which appellant relies itself demonstrates that appellant is in the same position, with its property subject to the same rates, as other telephone companies in Ohio. Referring to the testimony of appellant's witnesses and the valuation study which is based upon national trends experienced within the telecommunications industry as a whole, the commissioner maintains special and unusual circumstances cannot be found to exist.

Although appellant argues it should not be required to show it is different from the remainder of its industry, n19 such is the fundamental nature of proving the existence of "special and unusual circumstances." As previously noted, the purpose of the commissioner's prescribed allowances is to promote industry-wide uniformity in determining the true value of depreciable property used in business. Cf. *Monsanto, supra; Jacob B. Sweeney Equipment Trust v. Limbach* (1991), 74 Ohio App.3d 82, 86; *Mid-Ohio Chemical Co., Inc. v. Limbach* (Feb. 17, 1987), Fayette App. [\*36] No. CA86-04-002, unreported ("The general goal of Ohio's personal property tax scheme is to tax personal property located in this state which is used in business at established rates based on its true value. Since such property is subject to deterioration, depreciation is allowed. However, depreciation rates chosen by individual taxpayers may vary, even within a single industry. In order to promote industry-wide uniformity in determining the true value of depreciable property used in business, the tax commissioner established composite annual allowances in what is commonly known as his 302' directive.").

n19 Appellant also suggests that the commissioner's prescribed depreciation rates should be considered questionable given the fact that several other telecommunications companies currently have appeals pending through which similar challenges are being made. However, we are not persuaded that merely because other taxpayers may be challenging the applicability of the commissioner's prescribed rates to their property, a blanket rejection of the industry-wide depreciation rates developed by the commissioner is justified. Instead, consistent with our rejection of a similar argument advanced in *Philips Electronics North Am. Corp. v. Tracy* (June 28, 1996), BTA No. 1993-K-825, unreported, at 16-17, fn. 2, we find it appropriate to review each case in the context of the particular evidence

presented. [\*37]

Special and unusual circumstances have been found to exist when a taxpayer clearly demonstrates its property is subject to conditions atypical within the industry, often exemplified by unusual or unanticipated operating environments, extreme use, obsolescence, unusually high disposal rates, poor production flows, or excess manpower. See, e.g., *Defiance Precision Products, Inc. v. Tracy* (Apr. 3, 1998), BTA No. 1995-T-564, unreported (equipment operated at abnormally high speeds for extended periods of time not common within the industry); *Philips Electronics North American Corp. v. Tracy* (June 28, 1996), BTA No. 1993-K-825, unreported (the taxpayer, which was the only remaining entity within the television tube manufacturing industry still using a dry phosphorus application process, demonstrated its equipment was used in an area of poor ventilation and subjected to continuous use, extreme heat and product weight, and caustic chemicals); *Dayton Walther Corp. v. Limbach* (Aug. 24, 1990), BTA No. 1988-J-190, unreported (equipment operated almost continuously and subjected to extreme product weights, high speeds, and corrosive substances); *AmeriData Control Corp. v. Limbach* [\*38] (Jun. 29, 1990), BTA No. 1987-A-1102, unreported (televisions supplied to hospitals received heavy use and were disposed of in unusually shorter time periods); *Sun Chemical Corp. v. Limbach* (Apr. 21, 1989), BTA Nos. 1986-A-157, et seq., unreported (equipment subjected to caustic chemicals and continuous operations, with evidence demonstrating such use was different from other chemical plants in Ohio).

While several of the preceding cases highlight the hostile conditions under which manufacturing equipment may be operated, they stand for the general proposition that "special and unusual circumstances" constitute conditions not generally experienced by others within the industry. As this board recently noted in *Alcoa, Inc. v. Zaino* (Oct. 22, 2004), BTA No. 1999-G-1401, unreported, at 17, appeal pending Sup. Ct. No. 04-1953:

"Alcoa must prove that the special or unusual circumstances surrounding the use of its equipment are not experienced generally throughout the industry or that its equipment was subjected to conditions not planned for when the equipment was originally purchased. Alcoa has not presented sufficient evidence to establish that the experience of Alcoa at Cleveland [\*39] Works, in its forgings for the aerospace business, was special or unusual when compared to the rest of the industry. Indeed, the appellant acknowledges that other large forgers experienced the same decline and left the aerospace industry."). Id. at 17.

A review of appellant's evidence reveals that it has not demonstrated that special and unusual circumstances exist. Indeed, as asserted by the commissioner, the evidence offered by appellant suggests that the factors impacting the value of its property similarly affect others within its industry. While the providers with whom appellant competes may be unique to its market, appellant's evidence demonstrates that it is far from alone regarding the competitive forces with which it must deal and the impact technological progress is generally having upon participants in the telecommunications industry.

However, as the court emphasized in *Texas E. Transm.*, and in numerous cases involving challenges to the applicability of the 302 computation, where a party demonstrates through competent and probative evidence that application of the commissioner's prescribed rates creates an unjust or unreasonable result, reliance

upon the statutory [\*40] method is inappropriate and must give way to more reliable evidence of value. See, e.g., *Centerior Fuel Corp. v. Tracy* (2001), 90 Ohio St.3d 540; *PPG Industries, supra*; *Towmotor, supra*.

In *W.L. Harper, supra*, the court rejected the notion that the existence of special and unusual circumstances is the only basis which would justify deviation from the commissioner's valuation directives:

"In other words, the thesis of the Department of Taxation is that its directive must be applied regardless of any evidence as to what the actual life of equipment is, that the directive is, like the law of the Medes and the Persians, rigid and undeviating, and that any evidence as to realities is without probative force unless it shows special or unusual circumstances or conditions of use."

"It is our opinion that such an application of the directive is in many cases and in the present ones unreasonable.

"We are fully in accord with the use of a directive in the ascertainment of the true value of personal property, but in our opinion the Board of Tax Appeals is required [\*41] to ascertain from the evidence before it whether in a particular case the application of such a directive will produce an unreasonable result.

"In the present cases the evidence of appellants presented a question whether the application of a 10 per cent depreciation rate is reasonable, and the Board of Tax Appeals must consider the evidence before it and, in making a determination, attempt to arrive at the truth rather than to rigidly apply the directive in spite of any evidence.

"Our conclusion is that it is proper to ascertain the true value of construction equipment by the use of proper directives, but that such directives must be applied so that they are subject to adjustment not only in the case of special or unusual circumstances or conditions of use, as provided in the directive under consideration herein, but also to adjustment in all cases where the evidence shows that a rigid application will result in injustice." *Id.* at 304-306.

With this in mind, we now consider the probative value of appellant's evidence. The TFI study finds that appellant's property has been, and will continue to be, impacted significantly by increased competitive forces [\*42] arising from several sources, rapid technological change occurring within the telecommunications industry, the growth of the Internet, and, in some instances, anticipated mortality factors. With respect to each category of property reviewed, the nature and extent of these factors was elaborated upon. n20

n20 Appellant also called as a witness Richard Ellsworth, a director of the valuation group at Deloitte & Touche, who indicated that the approach utilized in the TFI study was the preferred method for valuing assets like those in issue in the present appeals.

In estimating the rates at which appellant's property would effectively be displaced, the TFI study indicated that various other publications, studies, and models had been relied upon. Among those apparently most heavily relied upon was a recent publication in a series of forecasting studies undertaken by TFI for incumbents within the telecommunications industry entitled "Transforming the Local Exchange

Network." Apparently periodically updated, this study forecasts the impact new technology and increased competition has upon existing businesses and technology. Reliance is also placed upon the Fisher-Pry and Gompertz models, [\*43] the former apparently used to predict the rate at which businesses engage in technology substitution while the latter is apparently used to predict the rate at which consumers begin adopting newer technologies.

Ultimately, based upon its review of the telecommunications industry, the market in which appellant operates, and expectations regarding the changes likely to impact both, the TFI study recommends percent good schedules similar in style to those prescribed by the commissioner. Different, however, is the fact that these proposed schedules address individual assets within the composite groups reflected within the commissioner's prescribed allowances and the rates and time periods at which such assets should be depreciated. With respect to switching and circuit equipment, for all three years, the TFI study recommends a ten-year life span with a five percent floor being reached in the last year, while underground metallic cable, aerial metallic cable, buried metallic cable, and non-metallic cable are ascribed a fifteen-year life span with a floor value at or near zero.

As noted throughout our decision, the thrust of the TFI study is that, for the specific assets considered, increased [\*44] competition, technological advancements, and consumer expectations and demands warrant a faster rate of depreciation than that provided for by the commissioner. In reviewing appellant's evidence, we are persuaded that the telecommunications industry, as a whole, is undergoing continuing and dynamic change. Clearly, since 1996, appellant and other ILECs, and indeed all market participants, have experienced increased and varied competition. Similarly, as is the case in most industries, technological advancements have resulted in the elimination, modification, or enhancement of many preexisting forms of technology.

However, we are not convinced that the manner by which appellant attempts to account for the impact of such factors results in an accurate and reliable representation of true value or, for that matter, that application of the rates prescribed by the commissioner will necessarily create an unjust or unreasonable result. Although the TFI study references certain historical and market data unique to appellant, it is heavily weighted to account for events anticipated to occur generally within the telecommunications industry in the future. Because it is premised upon conjecture [\*45] regarding future events, its conclusions are incapable of objective verification. Where, as here, there exists little or no historical data to effectively test the validity of the numerous assumptions made, errors can easily occur regarding the timing and impact the cited factors may have upon the value of appellant's property.

For example, much of the replacement technology to which reference is made was newly emerging near the years in question and continues, even today, to be at a stage of relative infancy. In the absence of historical data, the actual impact of newer technology upon the value of appellant's property, which it continues to use and, in many instances, deploy within its network, is difficult to measure. Equally unpredictable, despite representations otherwise, are consumer demands and transitions among technologies. While TFI represents that the Fisher-Pry model can be an effective device for making such evaluations, it still requires supposition not immediately capable of confirmation. Along similar lines, we question TFI's ability to effectively predict the extent to which increased competition will impact the value of

appellant's property. Suggested by the numerous [\*46] acquisitions and failures which have occurred within the telecommunications industry during the past several years, even market participants experience difficulty accurately anticipating the effects of competition. Accordingly, while the forecasting studies and models relied upon within the TFI study may be useful to appellant in the development of its long-range business plans, we do not find it a reliable means by which to determine the value of appellant's property for the specific tax listing dates in issues in these appeals.

We also find unsupported and unreasonable the suggestion that appellant's assets would be rendered valueless after a certain number of years despite their continued use with appellant's network. In *Wheeling Steel, supra*, the court considered a manufacturer's claim that once certain assets reached twenty years of age, despite the fact such assets continued to be used in its production line, they should be accorded no value. Expressly rejecting such a position, the court held that "where personal property is still used in the business of manufacturing it must be returned at its true value in money even though 100 percent depreciation [\*47] is claimed by the taxpayer as depreciated book value or otherwise." *Id.* at paragraph four of the syllabus. Although personal property may have a limited resale value, until scrapped or abandoned, it retains value in the hands of the taxpayer who continues to benefit from its use. See, e.g., *BOC Group, Inc. v. Limbach* (June 30, 1989), BTA No. 1985-G-679, unreported; *Col -- X Corp. v. Lindley* (Dec. 16, 1982), BTA No. 1980-B-236, unreported; *AMF Tuboscope, Inc. v. Lindley* (July 1, 1982), BTA No. 1980-A-383, unreported; *Westinghouse Electric Corp. v. Lindley* (Feb. 8, 1980), BTA Nos. F-953, et seq., unreported, affirmed (1980), 64 Ohio St.2d 31. Although appellant's salvage data was apparently reviewed and found to be an inappropriate means by which to measure residual value, see *Campbell Soup, supra*, it appears the projected floor values were again the result of reliance upon the previously referenced forecasting studies and models. Further, the property which the TFI study would deem valueless involves assets which appellant continues to deploy in its network.

This board is accorded wide discretion in weighing [\*48] the evidence and judging the credibility of the witnesses brought before us. *Zukowski v. Franklin Cty. Bd. of Revision* (1994), 70 Ohio St.3d 503, 504. Further, we are not required to accept the opinion of valuation fixed by any expert or witness. *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St.2d 13, paragraph two of the syllabus. In considering the evidence before us, we are unable to conclude that appellant has met its burden of proving, with competent and probative evidence, that application of the commissioner's prescribed rates will result in its property be valued at other than true value.

Finally, we address appellant's argument that personal property tax was erroneously assessed on items which it claims are permanently mounted on its motor vehicles used to deliver telecommunications services to its customers. n21 Although Ohio imposes a personal property tax on tangible personal property located and used in business in this state, R.C. 5709.01, there exist limited statutory exceptions and exemptions which exclude certain property from taxation. Among the property expressly excluded from the definition [\*49] of taxable property is that set forth in R.C. 5701.03(A): "'Personal property' does not include \* \* \* motor vehicles registered by the owner thereof \* \* \*."

n21 Appellant maintains that its vehicles, as well as the equipment attached thereto, are already subject to tax as a result of the annual licensure fee it pays on its

individual commercial vehicles. R.C. 4503.02 ("An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways \* \* \*"). Pursuant to R.C. 4503.042, the amount of the annual license tax is based upon "gross vehicle weight," defined by R.C. 4501.01(JJ) as "the unladen weight of the vehicle fully equipped plus the maximum weight of the load to be carried on the vehicle." Since no distinction is made within the preceding definition as to whether or not the equipment attached to appellant's vehicles is considered separate personal property or inherently part of the vehicle, as discussed above, the license tax paid on such vehicles was necessarily paid on such equipment.

In *Parisi Transportation Co. v. Wilkins*, 102 Ohio St.3d 278, 2004-Ohio-2952, the Supreme Court held that refrigeration [\*50] units built into the taxpayer's semitrailers were an inherent part of the vehicle for which no personal property tax was owed. In reaching this conclusion, the court was guided by a test employed by the Montgomery County Court of Appeals in *State ex rel. Tejan v. Lutz* (1934), 31 Ohio N.P. (N.S.) 473 n22:

"First, does the apparatus become an integral n23 part of the truck and form an addition to its structure so that it may be regarded as a part of the truck, itself?

"Second, whether permanent or detachable, is it *per se* truck equipment?

"Third, does its use indicate it to be functioning as part of the truck for truck uses, or as machinery, in itself, for its special use and results?

"Fourth, does it carry the truck load, or assist in doing so, or does it merely become an object transported?" *Id.* at 512.

n22 In *Tejan, supra*, after reviewing the legislative history regarding the motor vehicle registration and the determination of the annual license tax, the court considered whether certain equipment, apparatus, and machinery which was placed on motor vehicles was part of the taxable truck weight for purposes of registration and assessment of the license tax under former G.C. 6293. [\*51]

n23 The court relied upon the dictionary to define what is meant by the term "integral": "1a: of, relating to, or serving to form a whole: essential to completeness: organically joined or linked." *Id.* at 281, quoting Webster's Third New International Dictionary (1986) 1173.

In *Parisi*, the court elaborated upon these questions, adapted them to more accurately reflect the inquiry necessary for the particular items the taxability of which was in issue, and reviewed the evidentiary record which had been developed in order make its ultimate determination. However, in the instant appeals, the record is substantially inferior to that developed in *Parisi*. The only information regarding the equipment in issue, beyond the assertions made by appellant through written argument, n24 consists of the following findings made by the commissioner in his final determinations:

"The petitioner owns a fleet of trucks that it utilizes in its business. These trucks are commercial cars' as that term is defined in R.C. 4501.01(J), n25 and are required to be licensed pursuant to R.C. 4503.02. The petitioner is required to pay a license tax on each vehicle. However, mounted on the petitioner's [\*52] trucks are various items of equipment such as generators (providing ventilation and heat, compressed

air, low pressure humidity-free air, and power), power ladders, aerial lifts, earth boring machines, digger derricks, trenchers, specialized racks and storage units." BTA No. 2003-K-765, S.T. at 3; BTA No. 2003-K-1612, S.T. at 5.

n24 By way of post-hearing brief, appellant asserts that: (a) the equipment in issue is permanently installed into its vehicles before the vehicles are put into service; (b) the equipment is specially designed to be used only with its vehicles and could not be used in a stand-alone fashion; and (c) the sole purpose for such equipment is to allow appellant to maintain and repair its plant and equipment. However, no evidence was presented which would support these claims. Although appellant makes reference to a portion of the statutory transcript, see BTA No. 2003-K-765, S.T. at 31, the document identified is simply a memorandum which appellant filed in support of its petition for reassessment. Likewise, the schedule attached thereto is of no evidentiary value as it merely ascribes dollar values to aspects of appellant's claim.

n25 R.C. 4501.02(J) provides: "'Commercial car' or truck' means any motor vehicle that has motor power and is designed and used for carrying merchandise or freight, or that is used as a commercial tractor." [\*53]

Although accorded an opportunity to do so, appellant elected to present no additional evidence regarding its motor vehicles and the equipment claimed to have become inherently part of such vehicles following attachment. See H.R. Vol. II, at 175-176. Mere assertions made by counsel do not rise to the level of evidence upon which this board can rely. See, e.g., *Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of Revision* (1998), 82 Ohio St.3d 297, 299; *Rite Aid of Ohio, Inc. v. Cuyahoga Cty. Bd. of Revision* (Jan. 15, 1999), BTA No. 1997-K-1253, unreported. Given the absence of evidence regarding such equipment, we cannot conclude that appellant has met its burden of proof. Accordingly, we reject appellant's arguments relating to this issue.

Based upon the foregoing, appellant's specifications of error are not well taken and they are therefore overruled. It is the order of this board that the final determinations of the Tax Commissioner must be, and hereby are, affirmed.

KENNETH A. NIMON, RESPONSIBLE PARTY OF NIMOM COMPANY, Appellant v.  
THOMAS M. ZAINO, TAX COMMISSIONER OF OHIO, Appellee

C.A. No. 01CA007918

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, LORAIN COUNTY

2002 Ohio 822; 2002 Ohio App. LEXIS 801

February 27, 2002, Decided

DECISION AND JOURNAL ENTRY

Dated: February 27, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BAIRD, Presiding Judge.

Appellant, Kenneth Nimon ("Nimon"), appeals the decision of the Ohio Board of Tax Appeals ("BTA") affirming two final determinations of the Tax Commissioner. We affirm.

I.

Two personal assessments were filed against Nimon pursuant to R.C. 5739.33 as a responsible corporate officer for the delinquent sales tax of the Nimon Company <sup>1</sup> for the periods of October 1978 through September 1982 and November 1982 through December 1982. On July 26, 2000, the Commissioner affirmed the assessment nos. 7990604723 and 7990604724 against Nimon in the respective amounts of \$ 6,201.18 [\*2] and \$ 8,852.23.

**FOOTNOTES**

<sup>1</sup> The record reflects that the Commissioner's assessment of the underlying tax liability against the Nimon Company became conclusive against the Nimon Company prior to the Commissioner's assessment against Nimon as a responsible corporate officer.

Nimon appealed the Commissioner's finding that he was a responsible party to the BTA, which made the following factual findings:

appellant presented no evidence or testimony at the hearing before this Board or apparently at the hearing before the Commissioner on his petition for reassessment to establish that the Commissioner's determination that he was a responsible corporate officer was erroneous. In fact, appellant's testimony before this Board served to support the Commissioner's conclusion that he was a responsible officer of

Nimon Co. Appellant was the president of Nimon Co. The only other officers were his brother, who worked in the business with him, and his mother, who was retired and living out-of-state and not involved with the business [\*3] at all. Appellant and his brother were the only individuals who had checking-signing authority for the company, but, practically speaking, only appellant exercised his authority, as he was the only person who signed the company checks or whose stamp was affixed to the checks for issuance in his absence. Appellant also testified that he signed all of the tax returns for Nimon Co., including those for sales, federal and state withholding taxes, clearly demonstrating his awareness of the duty to file taxes.

The BTA affirmed the Commissioner's final determination of the assessments against Nimon. Pursuant to R.C. 5717.04, this appeal followed.

## II.

Assignment of Error No. 1:

THE BOARD OF TAX APPEALS ERRED IN FINDING THAT APPELLANT, KENNETH A. NIMON, IS A RESPONSIBLE PARTY PERSONALLY LIABLE FOR TAXES DUE FROM NIMON COMPANY.

In his first assignment of error, Nimon challenges the BTA's finding that he was a responsible party personally liable for corporate taxes, pursuant to R.C. 5739.33.

It is well established that <sup>HN1</sup> the BTA is "vested with wide discretion in determining the weight to be given to evidence and the credibility of witnesses [\*4] which come before the board." Cardinal Federal Savings & Loan Assn. v. Cuyahoga Cty. Bd. of Revision (1975), 44 Ohio St.2d 13, paragraph three of the syllabus. Furthermore, pursuant to R.C. 5717.04, our review of the BTA's decision is "limited to a determination, based on the record, of the reasonableness and lawfulness of the Board of Tax Appeals' decision." (Citations omitted.) Federated Dept. Stores v. Lindley (1983), 8 Ohio St.3d 35, 38.

R.C. 5739.33 <sup>HN2</sup> imposes personal liability on certain officers or employees of a corporation which fails to remit sales tax due to the state. During the period in question, the statute provided as follows:

<sup>HN3</sup> If any corporation required to file returns and to remit tax due to the state under the provisions of sections 5739.01 to 5739.31, inclusive, of the Revised Code, fails for any reason to make such filing or payment, any of its officers, or employees having control of supervision of or charged with the responsibility of filing returns and making payments, shall be personally liable for such failure.

In enacting R.C. 5739.33, the legislature [\*5] intended "to hold those officers or employees who were in charge of the operations of a defaulting corporation personally liable for unpaid sales tax if such persons filed returns or paid taxes, or controlled or supervised others who performed those tasks, or had responsibility for such tasks." Spithogianis v. Limbach (1990), 53 Ohio St.3d 55, 57, 559 N.E.2d 449. Indeed, Ohio courts have recognized <sup>HN4</sup> the broad scope of the statutory language R.C. 5739.33 employs in imposing liability on corporate officers or employees. DeLassus v. Tracy (1994), 70 Ohio St.3d 218, 219, 638 N.E.2d 528.

After a careful review of the record, we cannot say that the BTA's decision was

unreasonable or unlawful. Nimon failed to present any evidence to establish error with the Commissioner's final determination of the assessments. Furthermore, Nimon's testimony at the BTA hearing demonstrated that he was the person at Nimon Company who had control or supervision over the person charged with the responsibility of filing the tax returns and making the payments. Accordingly, Nimon's first assignment of error is overruled.

III.

Assignment of Error No. [\*6] 2:

APPELLANT, KENNETH A. NIMON, IS NOT LIABLE AS A RESPONSIBLE PARTY FOR ASSESSMENT NUMBER 7990604724 AS AN ASSESSMENT FOR SALES TAX ON A DIRECT PAY ACCOUNT NUMBER 98-001947.

In his second assignment of error, Nimon challenges the BTA's determination that he was a responsible party for Nimon Company's delinquent taxes of the company's direct payment account.

We begin by noting that <sup>HNS</sup> a taxpayer is required to specify error in his petition for reassessment to the Commissioner, which in turn permits succeeding appellate bodies to have jurisdiction over the error. CNG Dev. Co. v. Limbach (1992), 63 Ohio St. 3d 28, 32, 584 N.E.2d 1180. The record reflects that Nimon failed to raise the argument regarding the company's direct payment account in his petition for review and redetermination to the Commissioner. On further appeal to the BTA, Nimon attempted to challenge the underlying tax liability of Nimon Company with this argument. The BTA found that Nimon failed to raise the argument to the Commissioner and therefore waived the right to raise the error to the board on appeal.

Neither the BTA nor this court has jurisdiction to consider an objection not set forth in Nimon's [\*7] petition for reassessment to the Commissioner. See *Id.* Accordingly, Nimon's second assignment of error is overruled.

IV.

Having overruled Nimon's two assignments of error, we affirm the judgment of the BTA.

*Judgment affirmed.*

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing The Board of Tax Appeals, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Ohio Edison Co., Appellant, vs. Roger W. Tracy, Tax Commissioner of Ohio, Appellee.

CASE NO. 97-K-322 (PUBLIC UTILITY PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

1998 Ohio Tax LEXIS 6

January 2, 1998

**OPINION:**  
**CERTIFICATION**

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This cause and matter is again before the Board of Tax Appeals following this Board's receipt of a judgment entry and a mandate of the Ohio Supreme Court in the case of Ohio Edison Co. v. Roger W. Tracy, Tax Commissioner of Ohio, being Case No. 97-1677 on the Court's docket. Upon consideration thereof, the Board finds that under date of July 11, 1997, this Board issued an interim order overruling a motion by the Tax Commissioner to partially dismiss the present appeal. Thereafter, the Tax Commissioner filed an appeal with the Supreme Court from said interim order. On November 12, [\*2] 1997, the Court granted a motion made by Ohio Edison Co. to dismiss that appeal.

On November 26, 1997, this Board received copies of the court's judgment entry and mandate reflecting the court's decision to dismiss the appeal. Subsequently, on December 23, 1997, the record which had been previously certified to the Supreme Court was returned to this Board. Now giving effect to the Court's decision and acting under the pertinent provisions of R.C. 5717.04, this matter is certified as again being a pending appeal before the Board of Tax Appeals.

**RPS, Inc.** (fka Roadway Package System, Inc.), Appellant, vs. Roger W. **Tracy**, Tax Commissioner of Ohio, Appellee.

CASE NO. 96-M-1209 (PERSONAL PROPERTY TAX)

1998 Ohio Tax LEXIS 1381

October 30, 1998, Entered

**OPINION:**  
DECISION AND ORDER

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This cause and matter comes to be considered by the Board of Tax Appeals as a result of a Notice of Appeal filed herein by **RPS, Inc. (RPS)**, appellant herein. Appellant appeals a final determination of the Tax Commissioner, appellee herein, wherein said official modified, and affirmed as modified, personal property assessments covering various Ohio counties. The tax years in issue are 1990, 1991, and 1992.

Appellant's Notice of Appeal specifies the following as error:

"1. Section 5711.18 of the Ohio Revised Code provides in pertinent part: 'In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property unless the assessor finds [**\*2**] that such depreciated book value is greater or less than the then true value of such property in money.' The Commissioner has erroneously valued the **RPS's** Schedule 4 property other than by reference to such property's depreciated book value, without having made any determination that 'such depreciated book value is greater or less than the then true value of such property in money.'

"2. The Commissioner erroneously valued **RPS'S** Schedule 4 computer equipment by reference to the Class III percentages set forth in his Business Activities and Composite Group-Life Classes, hereinafter referred to as the 302 Computation Directive. The value of such equipment is properly determined by reference to its depreciated book value. Alternatively, the value of such property does not exceed the value determined by reference to the Class I percentages set forth in the 302 Computation Directive.

"3. The Commissioner erroneously valued **RPS's** Schedule 4 material handling equipment by reference to the Class III percentages set forth in his 302 Computation Directive. The value of such equipment is properly determined by reference to its depreciated book value. Alternatively, the value of such property [**\*3**] does not exceed the value determined by reference to the Class II percentages set forth in the 302 Computations Directive.

"4. The Commissioner erroneously included in the value of **RPS's** Schedule 4 material handling equipment the cost of engineering drawings and other intangible costs, which, under section 5701.03 of the Ohio Revised Code, do not constitute personal property and, therefore, are not subject to Ohio's tax on tangible personal property."

**RPS** describes its business as "small package delivery". (H.R. I, p. 81) While described as such, the company does not maintain a fleet of trucks, but instead outsources the actual pick-up and delivery of the packages. **RPS'** actual business appears to be the movement of packages from one location within the continental United States, Alaska, Hawaii, Puerto Rico and Mexico, to another. (The company does distribute some packages under an agreement with a European company). (H.R. I, p. 81) To this end, the company owns or leases satellite terminals and hubs throughout the country where packages are collected, registered, and then directed to other company-owned terminals for eventual delivery. During the pertinent time period, nine satellite [\*4] terminals and two regional hubs were located in Ohio. Hubs were located in Grove City n1 and Toledo. (S.T. p. 427)

n1 A predecessor hub located in Columbus opened in 1985. At least a portion of the equipment located in Columbus was transferred to Grove City when that hub came on-line. However, the two hubs were run concurrently for a short period in 1989. (H.R. I, p. 239)

This matter arose from personal property correction certificates issued by the Commissioner which amended the valuations of personal property as reported by **RPS**. The amendments issued when the Commissioner disallowed **RPS'** classifications of certain machinery and equipment (M&E) as Class II and computer equipment as Class I for the three years in issue. The increase in values caused a corresponding increase in assessments. **RPS** challenged the assessments through the Commissioner's review process. In his final determination the Commissioner modified the assessments, allowing certain hand-held wand readers to be classified as small tools and valued accordingly. n2 All other objections relating to valuation based upon classifications were disallowed. An appeal to this Board followed.

n2 The readers were also referred to as "hand-held scan weight, and key machines." (S.T., p. 1) These devices are provided to drivers to track pickups and deliveries. (S.T. p. 72) The Commissioner permitted the devices to be valued at 50 per cent of cost. [\*5]

This matter is considered upon appellant's Notice of Appeal, the Statutory Transcript certified to this Board by the Tax Commissioner, the record of the hearing held in this matter, and the legal argument provided by counsel. At hearing, the appellant presented a number of witnesses and called a representative of the Tax Commissioner to describe the process by which the tax department updates its 302 computation classifications. The pertinent factual posture of the varying claims raised by this appeal will be discussed as is relevant to the discussion, infra.

**RPS'** first claim is primarily a legal one. Beginning with 1990, **RPS'** books and records reflected a three year depreciation schedule for computers, an eight year depreciation schedule for conveyors and a five year depreciation schedule for scanners and scales. (H.R. I, p. 23) **RPS** provided evidence that these schedules are in accord with generally accepted accounting principles and permitted depreciation schedules for federal income tax purposes. n3

n3 **RPS** never directly claims that its federal depreciation rates should be accepted for ad valorem tax purposes. Indeed, that claim has consistently been rejected. *Gahanna Heights, Inc. v. Porterfield* (1968), 15 Ohio St.2d 189; *Denhart v. Lindley* (Sept. 10, 1976), B.T.A. No. 3-185, unreported. [\*6]

Even though its property tax reports agreed with its books and records, the Commissioner disallowed **RPS'** reported valuations, requiring appellant to instead report value under the Commissioner's 302 computation directives.

The Commissioner's 302 computation directives assemble businesses into groups which, for the most part, mirror the "Standard Industrial Classifications" employed by the federal government. (Appellant's Exh. "H", p. 3) Businesses identify an industrial classification on their personal property tax reports and that identification is then employed by the State of Ohio to classify the company's tangible personal property used in business for 302 computation purposes. **RPS'** reported federal industry code is 4215. (S.T. p. 508, 588, 689) For 302 computation purposes, the Commissioner categorizes all businesses reporting under Standard Industrial Classifications 40 through 47, inclusive, as "Transportation." Under this general heading, business property identified as "motor vehicles, services and terminals" are accorded a Class Life category of III. Class Life III assumes a useful life of 8.4 to 11.6 years. In other words, the Commissioner's class life directive accorded [\*7] a slower depreciation rate than the rate used by **RPS** to report its books. As a result, the Commissioner's directive required the company to report a higher yearly value for the property than the depreciated value indicated by **RPS'** books and records.

**RPS** asserts that R.C. 5711.18 requires that the Commissioner take affirmative action before disallowing a property tax report based upon depreciated book values and turns to R.C. 5711.18 to support its claim. Under R.C. 5711.18, a taxpayer is instructed to list personal property in accordance with the following: "In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money."

Under **RPS'** interpretation, R.C. 5711.18 permits a taxpayer to value personalty in accordance with its books, even if those books do not mirror the depreciation schedules required by the Commissioner's 302 computation, unless the Commissioner makes an affirmative finding that the property [\*8] is worth more or less than the reported book value. **RPS** then argues that, in the present audit, the Commissioner made no investigation to determine whether the reported book values were correct, but instead merely applied value under his 302 computation directives without regard to the actual value of the contested property.

The 302 directives basically accept a straight-line depreciation schedule, applying the depreciation rate against the original cost of the personalty. *Jacob B. Sweeney Equip. Trust v. Limbach* (1991), 74 Ohio App.3d 82. The Commissioner's position is that the 302 computation directives are the approved method of valuing property for personal property tax purposes and the affirmative duty is upon the property owner to show that its property is worth less than the values as arrived under the 302 computation method. The Commissioner's representatives argue that the assessments themselves

are the tangible action sought by the appellant. We must agree.

First, we acknowledge that the Commissioner is instructed to adopt and promulgate rules to carry out the legislature's stated intention that "all taxable property shall be listed and assessed for taxation." R.C. 5711.09. [\*9] To that end, the Commissioner has promulgated Ohio Adm. Code Chapter 5703-03, which "like those of other administrative agencies, issued pursuant to statutory authority, has the force and effect of law unless \* \* \* unreasonable or \* \* \* in clear conflict with statutory enactment governing the same subject matter." *The Kroger Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 120; See, also *VeriFone, Inc. v. Limbach* (1994), 69 Ohio St.3d 699.

Ohio Adm. Code 5703-03-10 speaks directly to the valuation of personal property for tax purposes and provides in pertinent part:

"(A) Tangible personal property used in business in this state must be returned, for purposes of the personal property tax, at its true value in money. The true value of depreciable tangible personal property is its book cost less book depreciation, unless the tax commissioner finds that the depreciated book value is greater or less than the true value of such property.

"(B) Application of the composite annual allowance procedure provided for in rule 5703-3-11 of the Administrative Code shall determine the prima facie true value of depreciable tangible personal property used in business. The prima facie valuations [\*10] can be rebutted by probative evidence of higher or lower valuation.

"\* \* \*

"(3) If a taxpayer believes that the composite annual allowance procedure as determined by the commissioner does not accurately reflect the true value in money of the taxpayer's depreciable tangible personal property on hand, the taxpayer may establish more accurate annual allowances by probative evidence.

"(a) Such evidence must show that the published composite annual allowance procedures are inappropriate because they cause an unjust or unreasonable result, or must be modified because of special or unusual circumstances.

"(b) Such evidence may include, but is not limited to, an aging of disposals study and any other studies, data, or documentation the taxpayer wishes to submit for consideration by the commissioner.

"(c) Such evidence must cover a sufficient number of years to demonstrate a pattern in the history of the useful life of the subject property."

The "composite annual allowance" or "302 computation" is more fully discussed in Ohio Adm. Code 5703-3-11, which provides:

"(A) To assist taxpayers in returning the true value of depreciable tangible personal property used in business in this state [\*11] as required by Chapter 5711. of the

Revised Code and rule 5703-3-10 of the Administrative Code, and to assist in the efficient administration of the personal property tax, the tax commissioner shall determine a composite annual allowance procedure for use in computing the true value of such property. The application of the composite annual allowance procedure to the original cost of tangible personal property may be referred to as the 'true value computation' or the '302 computation.'

"(B) The valuation determined by the true value computation shall be the prima facie true value in money of taxable tangible personal property.

"(C) The composite annual allowance procedure shall take into consideration the type of business conducted, the types and classes of property, the useful life of the property in such classes, physical deterioration, functional and economic obsolescence, repair and maintenance practices, salvage value of property assigned to such classes, and any other factors that the commissioner considers proper in determining the true value of depreciable tangible personal property used in business in this state."

Beginning with *Wheeling Steel Corp. v. Evatt* (1944), [\*12] 143 Ohio St. 71, the Commissioner's 302 computation has enjoyed deferential treatment by the Supreme Court. *W.L. Harper Co. v. Peck* (1954), 161 Ohio St. 300; *Gahanna Heights, Inc. v. Porterfield*, supra; *Alcoa v. Kosydar* (1978), 54 Ohio St.2d 477; *Westinghouse Electric Corp. v. Lindley* (1980), 64 Ohio St.2d 31; *Gannett Satellite Network, Inc. v. Limbach* (1989), 45 Ohio St.3d 148. Thus, this Board must carefully scrutinize any claim which asks this Board to pro forma reject the application of the 302 computation without some evidence that the values derived thereunder have no basis in fact.

Admittedly, early on in the Commissioner's use of the 302 computation, the Court warned against the rigid application of the published class life directives. In *W.L. Harper Co. v. Peck*, supra, the Court cautioned:

"The law of Ohio requires that personal property used in business be taxed at its true value. Since it is impractical for the Department of Taxation to personally value all such personal property in the state, it is reasonable and lawful to use the straight-line method of depreciation in arriving at true value. This method consists of depreciating the [\*13] cost of the personal property in accordance with its useful life. That is what the directive of the Department of Taxation purports to accomplish, and under its '302 computation' the true value of the property can never be below 20 per cent of its cost as long as it is used in business.

"There is no challenge to this general proposition and, in fact, this so-called straight-line depreciation has been recognized by this court as the method most widely used. *Wheeling Steel Corp. v. Evatt*, Tax Commr., \* \* \*. (citation omitted)

"\* \* \*

"We are fully in accord with the use of a directive in the ascertainment of the true value of personal property, but in our opinion the Board of Tax Appeals is required to ascertain from the evidence before it whether in a particular case the application of such a directive will produce an unreasonable result.

"\* \* \* the Board of Tax Appeals must consider the evidence before it and, in making a determination, attempt to arrive at the truth rather than to rigidly apply the directive in spite of any evidence.

"\* \* \*

"Our conclusion is that it is proper to ascertain the true value of construction equipment by the use of proper directives, but that [\*14] such directives must be applied so that they are subject to adjustment not only in the case of special or unusual circumstances or conditions of use, as provided in the directive under consideration herein, but also to adjustment in all cases where the evidence shows that a rigid application will result in injustice."

(Emphasis added)

A review of the relevant case law indicates that, while regularly approving the use of the 302 computation, the Court has also been open to the claim that the directives do not properly identify the value of contested property. *Gahanna Heights, supra*; *Adams v. Bowers* (1958), 167 Ohio St. 389. However, we have not been directed to a single case holding that the Commissioner erred by merely applying uniform depreciation rates to reported personalty. In fact, the Court has consistently held that the burden is upon the taxpayer to prove the 302 computation causes property to be overassessed. *Westinghouse Electric Corp. v. Lindley, supra*; *Alcoa v. Kosydar supra*, *Syro Steel Co. v. Kosydar* (1973), 34 Ohio St.2d 9; *Commonwealth Plan, Inc., v. Kosydar* (1976), 47 Ohio St.2d 39.

In *Ex-Cell-O Corp. v. Kosydar* (1976), 49 [\*15] Ohio App.2d 131, a claim similar to **RPS'** was rejected by Allen County Court of Appeals. Therein, the taxpayer returned certain machinery and equipment at the value carried on its books. Upon audit, the Commissioner assessed the personalty according to the published 302 computation directives. On appeal, the taxpayer argued that under R.C. 5711.18 the depreciated value must be accepted unless the Commissioner, in his role as assessor, found that the value did not reflect the true value of the equipment. In rejecting this argument, the Court held:

"Notwithstanding that [R.C. 5711.18], in effect, establishes the depreciated book value as the prima facie true value the commissioner, by long standing rule, adopted the schedule of 'Composite Prima Facie Annual Allowances' or depreciation rates hereinbefore referred to on which he based his claim, which was upheld by the Board of Tax Appeals, that the taxpayer's book depreciation was at an excessive rate. The Supreme Court of Ohio has on numerous occasions upheld the authority of the commissioner to establish these prima facie rates and their use in determining true value, including the establishment of maximum depreciation percentages [\*16] for equipment still in use, and these methods of depreciation has been known over the years in the Department of Taxation as '302 Computation.' \* \* \* (citations omitted) Although, the tax commissioner and the Board of Tax Appeals must consider evidence which in specific cases or under special circumstances justify application of other rates of depreciation in arriving at true value the 'burden is on the taxpayer to show that the rate of depreciation arrived at under the '302 Computation Directive'

does not reflect the true value of its personal property.' *Gahanna Heights, Inc. v. Porterfield* \* \* \*." (citation omitted)

The use of the 302 computation directives provides uniformity in valuations of personal property for taxpayers throughout the state. Therefore, the burden is correctly upon a taxpayer requesting exception to prove that the 302 computation does not properly value its listed property.

We also reject **RPS'** next claim that the 302 computation directives do not appropriately value its property because the Standard Industrial Classification category used by the Commissioner to identify the correct class life for its property does not accurately describe its business. [\*17] We note that the Commissioner obtained the industry classification from a disclosure made by **RPS** on its personal property reports. (S.T. p. 508, 588, 689) Moreover, **RPS** itself argues that, even if categorized with all other package delivery services, its way of doing business in the early 1990's was so different from its competitors that a category deemed correct for small package delivery in general would not accurately value its property. Thus, we find the tests developed over time will provide **RPS** with sufficient opportunity to prove that the Commissioner's depreciation classifications are not correct.

While **RPS** attempted to extract testimony from the Commissioner's representative to cause the whole of the 302 directives to be suspect, this Board rejected a similar claim in *Philips Electronics North American Corp. v. Tracy* (June 28, 1996), B.T.A. No. 93-K-825, unreported, where, in a footnote, we explained:  
"Appellant suggests \* \* \* that the Tax Commissioner's failure to update the 302 computation warrants abandonment of the above-stated principles. \* \* \*

"Periodically, the Tax Commissioner reviews the 302 computations in order to assure that it 'reflects current technology [\*18] and business experience.' Ohio Adm. Code 5703-3-11(E). In accordance with Ohio Adm. Code 5703-3-11(D), the Tax Commissioner publishes the 302 computation, along with additional instructions and information. In April 1992, the Tax Commissioner published such a document, entitled 'True Value of Tangible Personal Property[:] Composite Annual Allowance Procedure Published in Accordance with Ohio Administrative Code 5703-3-11' in which it stated in the Introduction on page 1:

'For over five decades, the Tax Commissioner has prescribed composite prima facie annual allowances. Since that time, many technological improvements have been made in manufacturing processes and in the machinery and equipment used in these processes. As these changes occurred, revisions in the allowances were reviewed and several changes made.

'In 1978 and 1979, the Department of Taxation conducted a comprehensive review of all annual allowances and the true value computation method itself. The principal objectives were to make whatever changes were necessary to reflect current conditions, including technological changes, and obsolescence and to describe the various business activities more accurately and completely. [\*19] As a result of the study, revisions in the valuation procedure were made and published in January 1980. These were reviewed again in 1986 with no changes. \* \* \*'

"Given the proximity of the review conducted in 1986 to the tax years at issue, as well as the presumption to be accorded public officials in the performance of their

official duties. *Wheeling Steel Corp. v. Evatt* \* \* \* (citation omitted), paragraph seven of the syllabus, we are unwilling to conclude that the prima facie quality generally accorded the 302 computation is no longer justified."

To successfully challenge the values assessed by the Commissioner, the appellant must bring forth competent and probative evidence of the value of its listed property. *Tele-Media Co. v. Lindley* (1982), 70 Ohio St.2d 284. There are three acceptable methods of meeting this burden. **RPS** may offer direct evidence of the personalty's true value. *Alcoa v. Kosydar*, supra. Alternatively, **RPS** may prove the special circumstances exist or that the use of the 302 computation produces an unjust or unreasonable result. *Towmotor Corp. v. Lindley* (1981), 66 Ohio St.2d 53. We proceed to consider the evidence presented [\*20] by **RPS**. We note that **RPS** has divided its personalty into two major categories -- computer equipment and general machinery and equipment. In the interest of clarity, we will consider each category separately.

### Computer Equipment

**RPS** employs at least three identifiable computer systems within its business environment. First, information forming a database resides on the "Hub Master Computer" (HMC). As the name indicates, the HMC is physically located in regional hubs and provides processing power, not only to manage the database of incoming and outgoing packages, but also powers normal administrative and computer tasks such as work processing, e-mail, etc. (H.R. I, p. 211; S.T. p. 95) The HMC is also the contact with the home office's central computer.

Also located in regional hubs are computer systems known by the name of "Sortation Management System" (SMS). A similar, though at some locations less sophisticated version of this system exists in every **RPS** terminal. (H.R. II, p. 50) Originally, the SMS or, in its earlier configuration, the "Realtime Management Processor" (RMP), was a much simpler computer system which stored data regarding incoming packages and outgoing packages. The [\*21] information stored on the RMP would at some point be transferred to the HMC for eventual transmission to the central computer located at the home office. As **RPS** became more automated, the SMS system was revised so that it became a more crucial part of the system, communicating with and working as an intermediary between the "Sortation Control System" (SCS), the computer which actually controls the movement of packages on the line at some terminals, and the HMC.

As will more fully be explained in the "materials handling" discussion, each package delivered by **RPS** has a "barcode" label attached. That label is the familiar label of vertical lines which appears on most product containers. This label contains scannable information necessary to efficiently move packages through the **RPS** system.

The barcode is originally read when a package reaches its first terminal. The information scanned is relayed to the SMS or directly to the HMC for administrative tracking purposes (i.e., billing and tracing). During the audit period, the SMS signalled the SCS at the point at which a package would be diverted to another sortation line for movement through the distribution system. n4 Additionally, the [\*22] packages are continuously monitored while on the conveyor system by overhead scanners which communicate with the SMS to direct the packages to

proper chutes for eventual delivery.

n4 In later configurations, the SCS was able to divert a package without direct communication from the SMS. (H.R. II, p. 15)

While the Commissioner assessed all computer systems under a Class III life, **RPS** claims that the computer systems are appropriately depreciated over a much shorter period. **RPS** first argues that the Commissioner's application of the same class life as its material handling equipment is in error. **RPS** argues that even the Commissioner's 302 computation instructions indicate that "general business purpose integrated computer systems and related peripheral equipment \* \* \*" are appropriately classified as Class II property. (Appellant's Exh. H, p. 3) **RPS** claims that both its HMC and SMS computer systems are in general database systems and, as such, are general business purpose equipment. **RPS** further claims that only the SCS controls and is an integral part of the distribution process.

Notwithstanding its claim that, at the very least, the HMC and the SMS systems should be classified [\*23] as Class II property, **RPS** claims the all three systems should be valued under Class Life I, which assumes a useful life of 6 years or less. **RPS** supports this claim by providing testimony concerning the rapid replacement of these computer systems.

At hearing, **RPS** presented the testimony of Kent A. Chapman, a systems engineer with **RPS**. An employee for 12 years, Mr. Chapman is responsible for support and installation of certain types of computers systems within the **RPS** business environment. Mr. Chapman testified as to the installation and replacement of certain computers in the Columbus and Grove City terminals, beginning with computers which were installed in 1985, when the Columbus hub opened.

It was Mr. Chapman's testimony that because of the rapid growth of its business, the company was in constant need of additional processing power and disk space. The company's growth needs were exacerbated by the computer industry's practice of discontinuing computers after a short time on the market. Mr. Chapman estimated that IBM, a major hardware supplier, would discontinue a model approximately every other year and only maintain that discontinued model for an additional three to four years. [\*24] (H.R. I, p. 222)

To demonstrate its hardware use, **RPS** presented Exhibit G, which was then broken down into three sub-exhibits, one for each computer system. Each sub-exhibit provided a chronological listing of the hardware types and models installed in the Columbus hub and either transferred to or replaced when the Grove City hub came on-line.

The Columbus hub began in 1985 with a single HMC. By 1992, the HMC consisted of three base computers and by 1996, another computer had been added. While Mr. Chapman discussed frequent upgrades to the computers and the need for additional processing and communication power, it does appear that the computer bases survived, in some form or another, for a significant period of time. For example, the IBM S/38, originally installed in Columbus in 1985, remained with the Grove City plant until 1993 when it was replaced. Another computer, coming on-line in 1989 with the move to Grove City was still in service in 1996, the final year for which

history was provided. (Appellant's Exh. G-1)

The physical replacements of the other two computer systems was also documented. The SMS system did not exist in the present form until 1988 and was then moved to Grove [\*25] City in 1989. The system was upgraded in 1991 and replaced in 1995. (Appellant's Exh. G-2) The SCS system was originally installed in 1985, but abandoned in Columbus when the Grove City facility came on-line. The witness did testify that, for a short period of time, the two hubs ran concurrently so there was some need for the SCS to be in place in Columbus. (H.R. I, p. 239) The SCS system installed in Grove City in 1989 remained in place until 1995 when it was replaced with a system that is "PC" compatible. (Appellant's Exh. G-3)

### Material Handling Equipment

**RPS** employs a highly sophisticated package movement system. Initially, packages are picked up by local independent contractors who make delivery to satellite terminals throughout the country. These satellite terminals can be either "origin" or "destination" terminals depending upon the flow of the packages. The satellite terminals direct each package to the regional hub closest to the package's final destination.

Satellite facilities contain conveyor systems where packages are unloaded by a package handler and placed onto a motorized conveyor belt. Prior to placing the package on the belt, a package handler scans the barcode, [\*26] weighs the package and keys the zip code into a computer terminal station. This process, known by its acronym as SWAK, is the first time the barcode attached to the package by the delivery driver is read and the package is entered into the **RPS** system. (H.R. I, p. 94)

From the SWAK station, an incoming package progresses down a conveyor belt until it is placed by a package handler onto a second conveyor system. From the second conveyor system, the package is either moved manually or, in the larger terminals, mechanically through the distribution process until the package is loaded into a truck for delivery to the hub nearest its destination.

Once again, a package handler unloads the packages onto conveyors which take the packages into a "primary sort" where the packages are sorted by destination zip code. The conveyors now take the packages to a second sortation area, which is basically another conveyor system. At the Grove City hub, at this point, a package handler places an individual package on a "tilt tray". The "tilt tray" system, used only five locations throughout the **RPS** system, n5 was a concept developed by **RPS** for materials handling. Running in concert with the SCS, an individual [\*27] package sits on a tilt tray until that package comes to the chute which will take the package to a truck destined for the hub nearest the package's destination. At that point, a computer signals the tray to tilt and gravity causes the package to fall onto a chute for loading onto a truck. The tilt-tray technology allows **RPS** to reduce manpower otherwise necessary to direct the packages along the distribution system.

n5 Grove City is the sole tilt-tray installation in Ohio.

The delivery process reverses itself at the satellite terminal. The package comes in,

is handled by a package handler, diverted to a different conveyor system and eventually to a truck for final delivery to the package's destination.

While the process seems rather uncomplicated when discussing the movement of a single package, the company daily moves millions of packages. At a hub terminal, such as Grove City, it takes an individual package approximately four hours from induction to delivery to the destination chute. The company runs four shifts per day, five days per week, moving approximately 16,000 packages an hour. n6 (Appellant's Exh. C)

n6 By 1997, the Grove City terminal was moving up to 20,000 packages an hour. (H.R. I, p. 157) **[\*28]**

While the tilt-tray system in use at the Grove City hub is the only installation of its kind in Ohio, testimony concerning this system was a major focus of **RPS'** presentation at hearing and its argument in brief. Testimony at hearing indicated that the equipment installed in Grove City had a low tolerance for wear and tear. Mr. Richard Shelton, Director of Hub and Linehaul Operations for the Central Division (which encompasses the Ohio operations), testified that packages regularly fell off the tilt trays for a variety of reasons. The tilt trays are attached to a chain belt. When a package would fall off a tray and onto the chain, the chain drive could be damaged, and the line would have to be slowed until the damaged portion could be repaired. (H.R. I, p. 127) The downtime necessary to fix the chain-driven tracks turned out to be greater than later-installed, conveyor-belt systems. (H.R.I, p. 163) The company also had problems with packages being bundled so that a single tilt tray held more than one package, causing an uneven distribution of weight, causing the tilt trays to fall out of alignment. (H.R. I, p. 128)

Mr. Shelton discussed the need to keep the tilt trays carefully aligned. **[\*29]** The trays were intended to tilt at a specific location, so that the package on that tray would fall directly onto another conveyor belt. If the system was not precisely aligned, the tilt trays would tilt too soon or a little late, and the packages would not fall onto the correct chute, or would miss an intended conveyor belt. The chain tracks were regularly maintained to prevent misalignment.

Maintenance expenses presented for the years in issue were submitted for the Board's consideration. During 1992, the company expended \$ 357,243.18 in maintenance expenses, or 4.47 per cent of its budget. (Appellant's Exh. K-1)

Mr. Shelton did testify that, when Grove City was expanded in 1995, the company installed the tilt-tray technology, even though other locations around the country were employing a newer system based again on conveyor belts. (H.R. I, p. 151) Also, the plant manager, Mr. Robert Noth, disclosed that the two largest hubs in the corporation, Grove City and Harrisburg, Pennsylvania, n7 both employ the largest maintenance staff, which he credited to the size of the buildings and the volume of packages moving through. Mr. Noth did not tie the size of the maintenance staff to the **[\*30]** use of the tilt-tray technology. (H.R. I, p. 203)

n7 Harrisburg also employs the tilt tray technology. (H.R. II, p. 48)

Also in use at the Grove City hub during the audit period were "starburst scanners". The scanners periodically read the barcodes and relayed that information back to the SMS. The SMS would then communicate with the SCS when a package reached the appropriate chute and the SCS would signal the tray to tilt. The scanners in use during the audit period were sensitive to particulates such as dust. When the scanners did not properly relay the information, the computers could not communicate and the tilt system did not properly work. The particular scanners, installed in 1989, were replaced with a more technologically durable version of the scanner in 1995. (H.R. I, p. 161)

As previously indicated, **RPS'** ultimate burden -- that of proving that its property is overvalued when reported in accordance with the Commissioner's classifications directives -- may be met by any of three accepted methods. **RPS** did not provide any appraisal testimony. Therefore, we are unable to determine the true value of appellant's property by that method.

**RPS** attempted to meet its burden by providing [\*31] evidence that special or unusual circumstances exist or that the imposition of the Commissioner's classifications create an unjust or unreasonable result. However, **RPS'** evidence related to specific types of personalty not generally used throughout its business environment. Despite the fact that **RPS** has eleven locations in Ohio and reported all its personal property in a like manner, its evidence was directed to the distribution system in place only in Grove City. Given the specificity of the evidence presented, this Board must conclude that **RPS** has failed in its burden of providing evidence that the material handling equipment located in satellite locations or in Toledo should be valued by a method other than the Commissioner's 302 directives.

With regard to its computer equipment, testimony at hearing revealed that the HMC resides only in hubs. Some version of the SMS is located at every terminal, although testimony relating to any SMS except for the one located at Grove City was scant. The SCS was directly related to the automated distribution system and consequently must be located at only those terminals employing the same.

With regard to the HMC and the SMS (or the earlier RMP), [\*32] we agree that such computers, as database systems, should be classified as general business equipment and valued as such. The HMC is the general computer hardware located at a hub, on which all programming resides. The SMS, while apparently located on the line, appears to be a database communication tool. Testimony at hearing revealed that the **RPS** system cannot run without either of these systems. (H.R. I, p. 244) However that fact does not convince this Board that the computer systems have any part in the control of package movement.

**RPS'** business is package distribution, but the success of that business is also dependent upon the rapid movement of information. Even though the package delivery system may not properly run without the information component, this Board finds that packages are able to move through the distribution line whether or not the information is relayed to the home office. Therefore, the material distribution equipment remains separate from the information distribution system and the equipment which comprises that system. As information transmission and control is a general business requirement, the equipment used in this process should be valued as general business [\*33] equipment. Control of the package delivery system is either handled by package handlers (in the less sophisticated terminals) or the SCS

(in the more sophisticated terminals, like the Grove City hub). Therefore, only the SCS is an integral part of the material handling process.

While **RPS** has requested a Class Life I for its HMC and SMS, we find that such equipment is properly valued in accordance with Class Life II. **RPS** provided testimony that individual pieces of equipment were regularly upgraded. However, that fact does not in itself require a finding that a shorter class life is required. Our review of the testimony indicates that much of the equipment was used in some form for over six years.

**RPS** relies upon *The Reynolds and Reynolds Co. v. Limbach* (Mar. 25, 1988), B.T.A. No. 85-C-219 to support its claim that its computer equipment's forced obsolescence by manufacturers should be taken as a factor in its value. We do not find the above cited case apposite. In that appeal, this Board allowed older computers to be valued in line with newer, less expensive, computers which performed the same function. **RPS** has not provided any testimony regarding the cost of its newer computer [\*34] purchases to allow this Board to evaluate whether the depreciated book value of the newer models should be considered in valuing the older equipment. **RPS** has provided very little evidence of the actual dollars spent either upgrading or replacing the computer systems. Based upon the evidence before us, the Board finds **RPS** had use of its computers for over six years. The evidence therefore supports a Class Life II category.

Remaining for our consideration is the material handling equipment, specifically, the tilt-tray system, in use at the Grove City hub. **RPS** points to its maintenance costs, the fact that it has not employed this technology in any other terminals, and the fact that its major manufacturer no longer supports the system, to buttress its claim that the system should be accorded a shorter class life than that provided by the Commissioner's class life directives.

Counsel has ably directed us to a number of cases in which this Board ultimately determined that business property was overvalued by reference to the Commissioner's 302 computation classifications. See *Dayton Walther Corporation v. Limbach* (Aug. 24, 1990), B.T.A. No. 88-J-190, unreported; *Avco Corp. v. Porterfield* [\*35] (May 26, 1970), B.T.A. No. 72532, unreported; *The Babcock and Wilcox Co. v. Kosydar* (Nov. 20, 1974), B.T.A. No. B-318, unreported; *Crown Cork & Seal Co., Inc. v. Kosydar* (Feb. 25, 1975), B.T.A. No. C-228, unreported; *Midwest Steel and Alloy Corp. v. Kosydar* (July 1, 1974), B.T.A. No. C-85, unreported; *Miller Tool Rental, Inc. v. Kosydar* (Oct. 17, 1975), B.T.A. No. D-54, unreported; *T.J. Paisley Co. v. Bowers* (July 6, 1962), B.T.A. No. 58012, unreported; *Phoenix Dye Works v. Porterfield* (Feb. 16, 1968), B.T.A. No. 65747, unreported and *Spang and Co. v. Porterfield* (July 9, 1970), B.T.A. No. 74978, unreported. However, a review of these cases all exhibit some special circumstance under which business property was operated which does not exist in the present appeal.

In most cases, business equipment was subjected to conditions which were not planned for when the equipment was originally purchased. In *Dayton Walther Corp.*, foundry equipment was run 24 hours per day, six or seven days per week. Additionally, the equipment was subjected to corrosive, wet sand, extreme weight of products, excessive vibration, high operating speeds, and extreme heat. Maintenance [\*36] expenditures ran between 18 and 45 per cent of the equipment's original cost. In *Babcock and Wilcox Co.*, the equipment in use in that appeal was operated round the clock to produce nuclear hardware. Similarly,

equipment was used either in a manner not intended by its original purchase or under conditions not contemplated by the original specifications in Philips Electronics North American Corp., Phoenix Dye Works, and Spang and Co.

In the present appeal, in contrast, while there was testimony that the equipment was in use during four, four-hour shifts, there was no testimony that this mode of operation was outside of the original specifications of the equipment, the equipment was subjected to working conditions beyond its capacity, or harsh conditions causing the equipment to age more rapidly than like equipment. *The Fowler Constr. Co. v. Lindley* (Aug. 24, 1981), B.T.A. No. 79-B-469, unreported.

In other cases, the Commissioner's 302 Computation classifications were successfully challenged by testimony directly addressing the length of the contested property's useful life. In *Avco Broadcasting, Midwest Steel and Alloy Corp., Crown Cork and Seal Company, [\*37] Inc., and T.J. Paisley Co.*, the taxpayers successfully established that its property would not be useful for the time periods accorded by the Commissioner's directives. In the present appeal, however, **RPS** presented no competent evidence that its property would not be useful for the 8.4 to 11.6 years accorded Class Life III. While **RPS** did provide disposal studies and a dollar weighted study of its property in the Grove City location during the Commissioner's appeal process, we agree with the Commissioner's assessment of those studies as reported in his final determination:

"In order to provide that its material handling equipment had a shorter useful life than Class Life III, the petitioner submitted a schedule of all its equipment in use for the tax years at issue showing the cost, date placed in service, years in service, and dollar years (the number of years in service multiplied by the asset's cost). Total dollar years for all items of equipment were then divided by the total cost of all items of equipment to obtain an average life for the equipment. Also, \* \* \* the petitioner submitted disposal information for its material handling equipment \* \* \* for the years at issue. [\*38] The disposal study prepared by the petitioner lists the asset number, asset description, date in service, cost, book value, disposal date, asset category, age at disposal, and dollar years (the number of years in service multiplied by the asset's cost). Total dollar years for all items of equipment were then divided by the total cost of all items of equipment to obtain an average life for the disposed equipment.

"Although both the listing of equipment on hand and the disposal study show the petitioner's equipment having a useful life shorter than Class Life III, this is only because all of the petitioner's equipment is still too new to reflect anything but a shorter useful life than Class Life III. The petitioner did not install the assessed material handling system until 1989, \* \* \*. The listing of equipment on hand reflects equipment acquisitions between 1985 and 1995. \* \* \* For its material handling equipment, which the petitioner denotes as type 3 equipment on its listing of equipment on hand, the petitioner purchased only \$ 24,726.51 out of \$ 11,495,537.34 of total type 3 equipment, or two tenths of one percent, prior to 1989. The average age of the petitioner's equipment on [\*39] hand must be less than seven years old as of December 31, 1995, because the overwhelming majority of petitioner's equipment on hand is less than seven years old. Since Class Life II reflects property with an average useful life of 6.0 to 8.4 years, the petitioner has not supplied probative evidence demonstrating that its equipment has an average useful life shorter than Class Life III."

Despite the fact that the Commissioner criticizes the length of time for which the study was provided, **RPS** did not update the study to the date of hearing or provide any further evidence measuring the length of time property remained useful to the company.

Our conclusion is also supported by **RPS'** 1997 personal property tax returns, submitted by the appellee, which reveal that of the \$ 6,285,269 worth of equipment installed in 1989 in Grove City, \$ 6,281,833 (at cost) was still in use at the end of 1996. Moreover, testimony at hearing revealed that in 1995, an additional line was installed in Grove City. At the time, the tilt-tray technology was installed. (H.R. I, p. 151) While the witness explained that it was necessary for the entire terminal to operate under the same technology, it makes little **[\*40]** business sense to spend significant capital to replicate a system near the end of its business life.

The appellant's evidence regarding maintenance costs does not cause this Board to conclude that the equipment should be accorded a shorter class life. Earlier cases address maintenance expenditures which would run between 18 and 45 per cent of equipment's original cost. Dayton Walther Corp., supra. In Philips Electronics, the excess labor costs amounted to millions of dollars. In the present appeal, maintenance costs appear well within budget norms.

We are most persuaded by **RPS'** own personal property tax reports, which reveal a low turnover of personalty. While we are not in complete agreement with counsel's argument that slow yearly turnover indicates property which holds its value to a greater extent on a yearly basis, n8 we must consider **RPS'** later returns which indicate that the majority of the property purchased in 1989 is still in use in 1996.

n8 Under the Commissioner's calculations, a low turnover rate in early years indicates property that would last for exceedingly long periods of time. That conclusion is not realistic with respect to business property. If, for instance, a company purchased a system which it disposed of in total in the eighth year of ownership, we believe that system would still be entitled to a 12 per cent depreciation deduction each year, even though in the fourth year of ownership, the company's records would indicate a non-existent turnover rate. **[\*41]**

To conclude, we find that **RPS** is correct when it claims a shorter class life for its HMC and SMS located within Ohio. The appropriate class life to be accorded these computers is Class Life II. For all other property under consideration, the Commissioner was correct when he assessed this property under a Class Life III. While there was testimony relating to the scanners, the Class Life directives are a composite calculation, considering both shorter and longer lived articles. See West Baking Co., Inc. v. Lindley (May 30, 1985), B.T.A. No. 81-F-487, unreported, wherein this Board held:

"It is to be recognized, in the final analysis, that the use of the composite annual allowance is an overall rate applicable to a category to property. A use of a composite allowance rate takes into account the fact that some items included might reasonably have a longer useful life and others might reasonably have a short useful

life; such rate is obviously an average rate of allowance. If and when the taxpayer and Tax Commissioner use a composite or average rate of allowance for a type or category of personal property for determining true value in money, it would be inappropriate to separate [\*42] a portion thereof which have a shorter useful life from those having a longer useful life, with the application of the average useful life factor to the longer useful life items and claim an alternate rate respecting the shorter useful life items."

(Emphasis in original)

Therefore, the scanners should be valued in accordance with Class Life III.

Considering the record, the statutes, and the relevant law, it is order of the Board of Tax Appeals that the final order of the Tax Commissioner must be and hereby is affirmed in part and reversed in part, consistent with this Decision and Order.

**Treasure Chest Advertising Company**, Appellant, vs. William W. **Wilkins**, Tax Commissioner of Ohio, Appellee.

CASE NO. 2003-V-285 (PERSONAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

2007 Ohio Tax LEXIS 401

March 9, 2007

**OPINION:**  
DECISION AND ORDER

Ms. Margulies and Mr. Eberhart concur. Mr. Dunlap concurs separately.

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal. Appellant **Treasure Chest Advertising Company** ("**Treasure Chest**") appeals a final order of the Tax Commissioner, appellee herein, denying a petition for reassessment. The underlying assessment relates to **Treasure Chest's** 1998 and 1999 personal property tax returns and the appropriate classification of certain property under the "302 computation."

The matter is considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, and the testimony and other evidence adduced at the hearing ("H.R."). Said hearing record is divided into two volumes, which will be referred to as "H.R. I and II." Appellant has filed a merit brief whereas the [\*2] commissioner has not.

Appellant operates a printing business, focusing upon the printing of newspaper **advertising** inserts. This appeal concerns the appropriate method of valuing appellant's machinery and equipment in its personal property tax returns for 1998 and 1999.

Initially, we note that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *National Tube v. Glander* (1952), 157 Ohio St. 407. The taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213. It is with these authorities in mind that we turn to the merits of the instant appeal.

Every taxpayer engaged in [\*3] 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. R.C. 5711.18 describes the manner in which taxable property is to be listed, providing in pertinent part:

"In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be

taken as the true value of such property, unless the assessor finds that such book value is greater or less than the then true value of such property in money. Claim for any deduction from \*\*\* depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return \*\*\*."

Recognizing that it would be impractical to personally value all personal property in Ohio, the Tax Commissioner developed a formula, referred to as the "302 computation," in order to determine the true value of such property. W. L. Harper v. Peck (1954), 161 Ohio St. 300; [\*4] Snider v. Limbach (1989), 44 Ohio St.3d 200.

In Monsanto Co. v. Lindley (1978), 56 Ohio St.2d 59, the court explained the 302 computation:

"This long standing directive provides for industry-wide uniformity in determining the true value of depreciable property used in business by prescribing annual depreciation rates to be used in lieu of book depreciation. The annual depreciation rates prescribed in this directive vary according to the type of business or the nature of the equipment involved, and are expressed as percentages representing the allowable reduction to be taken each year from the original cost of a modified straight line depreciation formula, and the annual depreciation rates specified in the directive are to be used by the taxpayers in conjunction with this depreciation formula for calculating the reportable value of the depreciable property." Id. at 59.

Ohio Adm. Code 5703-3-10 describes the 302 computation, in pertinent part:

"(A) Tangible personal property used in business in this state must be returned, for purposes of the personal property tax, at its true value in money. The [\*5] true value of depreciable tangible personal property is its book cost less book depreciation, unless the tax commissioner finds that the depreciated book value is greater or less than the true value of such property.

"(B) Application of the composite annual allowance procedure provided for in rule 5703-3-11 of the Administrative Code shall determine the prima facie true value of depreciable tangible personal property used in business. The prima facie valuations can be rebutted by probative evidence of higher or lower valuation.

\*\*\*

"(3) If a taxpayer believes that the composite annual allowance procedure as determined by the commissioner does not accurately reflect the true value in money of the taxpayer's depreciable tangible personal property on hand, the taxpayer may establish more accurate annual allowances by probative evidence.

"(a) Such evidence must show that the published composite annual allowance procedures are inappropriate because they cause an unjust or unreasonable result, or must be modified because of special or unusual circumstances.

"(b) Such evidence may include, but is not limited to, an aging of disposals study and any other studies, data, or documentation the [\*6] taxpayer wishes to submit for consideration by the commissioner.

"(c) Such evidence must cover a sufficient number of years to demonstrate a pattern in the history of the useful life of the subject property."

The Supreme Court has repeatedly accepted the 302 computation as an appropriate method to value personal property. As stated by the Court in PPG Industries v. Kosydar (1981), 65 Ohio St.2d 80, 83, "this directive has been approved by this court as a practical, reasonable and lawful method and device to achieve uniform valuation of plant equipment in Ohio by prescribing annual depreciation rates in lieu of book depreciation for Ohio personal property tax purposes. Wheeling Steel Corp. v. Evatt [(1944, 143 Ohio St. 71) \*\*\*; W.L. Harper Co. v. Peck (1954), 161 Ohio St. 300." While application of the 302 computation results in a prima facie true value figure, the value reflected through its use is not absolute. A taxpayer that objects to the use of the 302 computation may demonstrate, through competent and probative evidence, that a different result is warranted. PPG Industries, supra; [\*7] Gahanna Heights, Inc. v. Porterfield (1968), 15 Ohio St.2d 189.

The 302 computation is not absolute. The formula may be adjusted "not only when special or unusual circumstances or conditions of use exist, but also when evidence shows that rigid application would be inappropriate." Monsanto Co., supra, at 62. Furthermore, the "burden is on taxpayers to show that they may deviate from the computation because special or unusual circumstances or conditions of use exist or because evidence shows that its rigid application would be inappropriate." Campbell Soup Co. v. Tracy, 88 Ohio St.3d 473, 2000-Ohio-389, at 477.

In its 1998 and 1999 personal property tax returns, **Treasure Chest** claimed certain equipment and machinery to be subject to the Class Life II depreciation schedule, rather than Class Life IV, as promulgated by the Department of Taxation ("department"). S.T. at 125, 113-114. The department amended **Treasure Chest's** 1998 and 1999 returns to reflect depreciation under the Class Life IV category for certain equipment and machinery.

On April 20, 2000, **Treasure Chest** filed its petition for [\*8] reassessment, raising the following issues with regard to the department's assessment: the failure of the department to utilize Class Life II depreciation for machinery and equipment; the failure of the department to permit the use of Class Life II depreciation as had been allowed in previous tax years; the failure of the department to utilize more accurate annual allowances; and the department's utilization of values associated with the sale of assets in 1993 as a base year for depreciation rather than historical cost data. S.T. at 71-72.

The commissioner issued his final determination, permitting **Treasure Chest** to use historical cost data, rather than utilizing the 1993 sale of assets as a base year, resulting in a modification of the assessment. The commissioner overruled the remaining objections, reasoning that **Treasure Chest** had failed to demonstrate that special or unusual circumstances exist to justify the use of Class Life II depreciation on certain machinery and equipment, and that **Treasure Chest's** 2001 inventory of machinery and equipment was insufficient to ascertain actual inventories on hand for December 31, 1997 and December 31, 1998. S.T. at 1-3.

#### I. Jurisdiction [\*9]

In CNG Dev. Co. v. Limbach (1992), 63 Ohio St.3d 28, 32, the court concluded that "a taxpayer has not substantially complied with the statute, so as to invoke the right to review of a particular error, if he has not set forth that error with specificity in the petition for reassessment." See, also, Shugarman Surgical Supply, Inc. v. Tracy, 97

Ohio St.3d 183, 186, 2002-Ohio-5809; Kern v. Tracy (1995), 72 Ohio St.3d 347; American Fiber Systems, Inc. v. Wilkins (Sept, 16, 2005), BTA No. 2004-K-1222, unreported; Ohio Edison Co. v. Tracy (Interim Order, May 21, 1999), BTA No. 1997-K-322, unreported. Although R.C. 5711.31 also permits a taxpayer to raise additional objections with the commissioner, if submitted in writing prior to the date upon which the commissioner issues his final determination, under *CNG*, neither the commissioner nor this board has jurisdiction to consider those issues that are not raised in a petition for reassessment or prior to the issuance of the final determination. Where a taxpayer has not advanced such written objections, this board is without jurisdiction [\*10] to consider the issue upon appeal. *CNG, supra; Printing Service Co. v. Tracy (Interim Order, Oct. 15, 1999), BTA No. 1998-N-781, unreported.*

Appellant has not brought to this board's attention, nor have we found through a review of the documents filed by appellant with the commissioner, that some of the issues advanced on appeal were raised by appellant during the proceedings before the commissioner. Specifically, appellant claims for the first time in the notice of appeal that: property not situated in Ohio has been assessed; that property not used in business has been assessed; and the determination unlawfully taxes "jigs and dies." It is the responsibility of a taxpayer to expressly identify the claims it wishes the commissioner to consider. Accordingly, appellant is now precluded from advancing claims not previously raised while its petition for reassessment was pending before the commissioner. We therefore find our jurisdiction restricted to only those issues properly raised in appellant's notice of appeal.

Accordingly, one of appellant's burdens in this case, i.e., proving that its property is overvalued when reported in accordance with the [\*11] commissioner's classification directives, may be met by any of three accepted methods. Appellant may prove that special or unusual circumstances exist, that the use of the 302 computation produces an unjust or unreasonable result, or appellant may offer direct evidence of the property's true value. *RPS, Inc. (fka Roadway Package System, Inc.) v. Tracy (Oct. 30, 1998), BTA No. 1996-M-1209, unreported.*

The 302 computation categorizes property into six different class lives, based upon the business activity in which the property is used (e.g., Class I through Class VI). The Class Life I column provides for the most aggressive levels of depreciation, whereas Class Life VI provides for the least aggressive amounts of depreciation. n1

n1 For example, a five-year-old cement mixer on a truck is to be valued at 20% of its original cost under Class I, whereas a five-year-old canopy at a gasoline service station is to be valued at 72.2% of its original cost under Class VI.

Before the Tax Commissioner, the appellant requested that it be permitted to utilize Class Life II (life range between 6 and 8.4 years) valuation percentages for its printing machines rather than the Class Life [\*12] IV (life range between 11.6 and 14.8 years) valuation percentages as promulgated for items used in the printing industry. Appellant argued that its printing machinery and equipment is in operation twenty-four hours a day, necessitating a departure from industry norms.

## II. Heavy Use of Equipment

The Tax Commissioner rejected appellant's claim that the printing equipment twenty-four-hour-a-day use amounted to a special or unusual circumstance. The

commissioner held that appellant had failed to show that the use of the equipment more than an eight-hour shift per day was atypical for the printing industry, and concluded that it was commonplace for similar printing operations to run their machinery more than eight hours per day. S.T. at 1.

Before this board, appellant offered the testimony of Mr. Myron H. Vansickel, assistant vice president of tax for Vertis Inc. ("Vertis"). Vertis is the parent **company** in which **Treasure Chest** was merged. H.R. I at 213. Mr. Vansickel testified that appellant's Columbus, Ohio facility produced a million newspaper inserts a day because the facility was open and operated twenty-four hours a day, seven days a week. Id. at 222. Mr. Vansickel additionally [\*13] testified that the nineteen other facilities owned by Vertis in other parts of the country operate at a similar pace. Id. When asked why appellant operates its machinery at this pace, Mr. Vansickel testified:

"The cost of capital equipment is not cost effective unless you have it fully loaded and running 24/7. You lose money every time you don't have the press full." Id. at 223.

Mr. Vansickel contrasted the use of appellant's printing equipment with that of a newspaper, and testified that most newspapers do not operate twenty-four hours a day; rather, they may run a twelve-hour shift. Id. at 224.

However, in addressing what is typical for the newspaper insert industry, Mr. Vansickel testified:

"If you are looking at the web press arena and printing in general, most people do not run a web press 24/7. If you look at the newspaper **advertising** group, they are running 24/7. They can't make money without doing it. So I am not saying this is exclusive to **Treasure Chest**, but our particular segment within the printing industry is excess of wear and tear on this equipment." Id. at 244-245.

As was the case before the commissioner, appellant has failed to demonstrate that its constant use of [\*14] its equipment and machinery constitutes a special or unusual circumstance that would permit a departure from the Class Life IV schedule in the 302 computation. The record before us fails to include any meaningful depiction of the printing industry as a whole. n2 Furthermore, Mr. Vansickel's testimony confirms that the constant use of equipment and machinery is commonplace within the **advertising** insert printing industry as well as the telephone directory printing industry. H.R. II at 205.

n2 Although Mr. Vansickel did testify as to his previous experience with a check printing organization and his understanding of newspaper printing practices, we are unable to rely upon said evidence to be representative of the entire printing industry.

Regarding maintenance, Mr. Vansickel testified that of the fifty individual printing presses appearing on appellant's 2001 inventory of machinery and equipment at the Columbus, Ohio facility, only 16 presses are reflected as being rebuilt. H.R. II at 180, Ex. 2. When asked how often it is necessary for the appellant to rebuild a printing press, Mr. Vansickel further testified:

"What I have seen based on the records and in talking to the engineer [\*15] over the last few years, seven to eight years they need to rebuild a press. It depends on

where the press is, how many hours have been on it, uh, and whether or not it is still in tolerance. The average is about seven to eight years. I have seen some be rebuilt in two years because there was a manufacturing defect or they never could get it up and running. I have seen some go as long as 12 years. But those are the ones that are far and few between \*\*\*." H.R. I at 237.

This board has previously found special or unusual circumstances to exist when business equipment was subjected to conditions which were abnormal for the industry and which caused the equipment to age more rapidly than like equipment. See, e.g., *Sun Chemical Corp. v. Limbach* (Apr. 21, 1989), BTA Nos. 1986-A-157, et seq., unreported (finding special or unusual circumstances where taxpayer's equipment was subjected to salt and caustic soda, large quantities of steam, corrosive chemicals, and a full-time operating schedule, and taxpayer presented testimony distinguishing its use of the equipment from other chemical plants in Ohio) and *Defiance Precision Products, Inc. v. Tracy* (Apr. 3, 1998), BTA No. 1995-T-564, [\*16] unreported (finding special or unusual circumstances where taxpayer operated equipment at twice the normal speed for three eight-hour shifts per day, up to six or seven days per week, and taxpayer presented testimony that this usage differs from that normally found in the industry). This board has also found special or unusual circumstances to exist when business equipment was subjected to conditions not planned for when the equipment was originally purchased. In *Dayton Walther Corp. v. Limbach* (Aug. 24, 1990), BTA No. 1988-J-190, unreported, foundry equipment was run twenty-four hours per day, six or seven days per week. Additionally, the equipment was subjected to corrosive wet sand, extreme weight of products, excessive vibration, high operating speeds, and extreme heat. Maintenance expenditures ran between 18 and 45 percent of the equipment's original cost. In *The Babcock and Wilcox Co. v. Kosydar* (Nov. 20, 1974), BTA No. B-318, unreported, the equipment was operated around the clock to produce nuclear hardware. Similarly, equipment was used either in a manner not intended by its original purchase or under conditions not intended by its original purchase or under conditions [\*17] not intended by the original specifications in *Philips Electronics North American Corp. v. Tracy* (June 28, 1996), BTA No. 1993-K-825, unreported; *Phoenix Dye Works v. Porterfield* (July 9, 1970), BTA No. 65747, unreported; and *Spang & Co. v. Porterfield* (July 9, 1970), BTA No. 74978, unreported.

Appellant offers no disposal study or other evidence to support Mr. Vansickel's estimate of the average frequency of rebuilds of the printing presses. Assuming Mr. Vansickel's estimations to be correct, there is no evidence to support that performing rebuilds on printing presses every seven to eight years constitutes indicia of a special or unusual circumstance within the printing industry as a whole. Based on the record before us, the evidence concerning the frequency of rebuilding appellant's individual printing presses fails to persuade us that the property is subjected to abnormal use, when there is no evidence to reflect any industry norms concerning the lifespan of a printing press.

### III. 2001 Inventory

Mr. Vansickel testified that he, along with the former tax director of **Treasure Chest**, Mr. David Path, conducted a physical inventory of the assets in the Columbus, Ohio [\*18] facility as of July 2001 used to prepare appellant's 2002 tax return. H.R. II at 11-12, 47-48. The 2001 inventory was ultimately prepared by Mr. Path. Id. at 11. To gain an historical perspective, Mr. Vansickel had maintenance personnel provide input regarding the years in which the items were first used by the

previous taxpayer, based upon maintenance records. Id.

Appellant argued that the 2001 inventory demonstrated that leased equipment had been erroneously included on the tax returns as taxable machinery and equipment and that the 2001 inventory provides a more accurate depiction of the machinery and equipment at its Columbus, Ohio facility for tax years 1998 and 1999.

#### A. Leased Equipment

Appellant initially advocated that the returns filed for the tax years at issue erroneously included the base values of equipment leased and not owned by appellant.

In support of its position regarding the alleged inclusion of leased equipment, appellant offered the testimony of a tax consultant, Mr. Jack W. Cook, who reconstructed appellant's tax returns for tax years 1998 and 1999 based upon the 2001 inventory. Ex. 1. Specifically, Mr. Cook, in revising appellant's returns for the 1998 [\*19] and 1999 tax years, reduced the overall values for machinery by \$ 5,196,000, in an effort to adjust for the value of the leased equipment alleged to have been erroneously included. H.R. I at 29. However, through the cross-examination of Mr. Cook, it became apparent that said leased equipment valued at \$ 5,186,000 was never reflected as an item on the 2001 inventory to begin with. Therefore, Mr. Cook's reduction was in error and resulted in the total value of appellant's machinery being understated. Counsel for appellant stipulated at hearing that the conclusions of Mr. Cook regarding alleged erroneous inclusion of the leased equipment were in error, and the \$ 5,196,440 should not have been removed from the calculation. Id. at 128.

Appellant offered no evidence to demonstrate that any property leased and not owned by **Treasure Chest** was erroneously subjected to taxation in the first place. Assuming that leased machinery and equipment were being used by appellant for the tax years before us, there is nothing in the record which would allow us to conclude that it was subjected to tax.

#### B. 2001 Inventory as best evidence of value

In his final determination, the commissioner held that [\*20] because the 2001 inventory was created after the relevant tax valuation dates at issue (December 31, 1997 and December 31, 1998), appellant could not account for items disposed of or removed between the relevant valuation dates and the time of the physical inventory. S.T. at 3. We agree.

Mr. Vansickel testified that the 2001 inventory was based upon the physical inspection that occurred in July 2001 and was reconciled in December 2001. H.R. II at 45-46. When asked if the 2001 inventory would reflect machinery and equipment that had existed in tax year 1998 or 1999, but was transferred or otherwise disposed of prior to the July 2001 physical inspection, Mr. Vansickel testified:

"On this particular document [the 2001 inventory], it relates to the 2002 return. We would have to go back and look at what reversed engineering did, uh, to come back with exactly what Mr. Hubbard is asking, what really was there in '99 based on going back and - and taking it back to 2000, take it back to '99. We were able to get close in 2000, close in '99, but we have no clue about '98. We cannot reverse engineering

[sic] and come up with what we thought was really there.

\*\*\*

"Well, let me say that there [\*21] are other reversed engineering documents that Mr. Pathe has done that reflects [sic] what we think is a better representation of what would be in the plant in '99. We could not do that in '98." H.R. II at 55-56.

When asked if there were any transactions, disposals, or transfers in or out relevant to the tax years at issue that would not be accounted for in the 2001 inventory, Mr. Vansickel testified: "Yes." Id. at 56-57. When pressed further as to the reliability of the 2001 inventory as representative of the machinery and equipment at the Columbus, Ohio facility for the listing dates in tax years 1998 and 1999, Mr. Vansickel characterized the 2001 inventory as being "probably pretty reflective," Id. at 57, and "probably fairly reflective," Id. at 62, of what existed during the tax years at issue. Mr. Vansickel then concluded that he "doubt[ed] there is a material difference" in comparison with the actual machinery and equipment that existed for the tax years at issue. Id. at 63.

Based on the record before us, we are unable to conclude that the 2001 inventory provides an accurate picture of appellant's machinery and equipment that existed in its Columbus, Ohio facility for tax years [\*22] 1998 and 1999.

#### IV. Lump Sum Purchase

Appellant argues that the department unlawfully utilized the 1993 sale of the Columbus, Ohio facility to establish a beginning basis and value for property that existed at the time of the sale. Appellant argues that the department had predetermined to lump the assets together and assign the Class Life IV depreciation for the tax years at issue. In support, appellant called Mr. Gary Hughart, tax agent for the Ohio Department of Taxation. Mr. Hughart testified that he lumped the assets together based upon acceptable accounting procedures, i.e. Accounting Principles Board Opinion No. 16. Nevertheless, Mr. Hughart also testified that the "[commissioner] disallowed the portion of us pushing the APB-16 valuation, \*\*\* allowed [the taxpayer] to use the historical costs that was [sic] reflected in their return, \*\*\* and applied Class Life 4 to those costs." H.R. II at 224.

The final determination of the commissioner states, in relevant part:

"The assessments shall be adjusted to give the petitioner the same treatment, valuing its machinery and equipment under Class Life IV valuation percentages using historical cost data, and ignoring the lump sum [\*23] purchase." S.T. at 3.

Based on the evidence before us, we find appellant's claim that the "commissioner's final determination is unlawful because it treats property assessed as having been acquired in a 'lump sum purchase'" to be moot.

#### V. Prior Years' Settlements

Appellant argues that as a result of negotiating previous tax years' appeals concerning the same subject property before this board, the Tax Commissioner and his counsel had previously agreed to allow appellant to utilize the Class Life II depreciation schedule.

Prior years' settlements between the parties are not res judicata for succeeding years. *Freshwater v. Belmont Cty. Bd. of Revision* (1997), 80 Ohio St.3d 26. In holding that a stipulation of value for a prior year was not probative of the property's value for succeeding years, the Ohio Supreme Court stated in *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision* (1998), 81 Ohio St.3d 58, 66:

"In proposition of law No. 5, appellants claim that the BTA should have 'adequately' considered a stipulation in an earlier BTA case that expressed a higher value of the property for tax year 1992 as compared with [\*24] Carelli's valuation for tax year 1993. We disagree.

"We find that the BTA did not abuse its discretion in weighing the stipulation as it did. \*\*\* 'when the BTA makes a determination of true value for a given year, such determination is to be based on the evidence presented to it in that case, uncontrolled by the value assessed for prior years.' The BTA would not know what factors led to the agreement. Did the parties sign the agreement on its merits or for some collateral considerations? The stipulation settled the value for the years stated in the stipulation, but did not settle the valuation for subsequent years."

Based on the record before us, it appears that the appellant and the commissioner have resolved appeals concerning prior years. However, appellant did not submit any evidence showing that any previous stipulation was valid for the tax years before us today.

Given the foregoing, appellant has failed to establish the 302 computation utilized by the commissioner is inappropriate because it causes an unjust or unreasonable result, or must be modified because of special or unusual circumstances. Appellant has failed to establish its right to the relief requested. Accordingly, [\*25] it is the decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and hereby is, affirmed. Mr. Dunlap concurs separately.

I agree with the majority's holding that the appellant has failed to overcome the presumption that the commissioner's 302 computation establishes the true value of the property used in business. In reviewing analogous cases, this board has previously held that taxpayers have been able to overcome the presumption of the commissioner's 302 computation when it has offered probative evidence concerning that the heavy use of the equipment at issue differs from that which is typical in the industry. *Sun Chemical Corp.*, supra; *Defiance Precision Products, Inc.*, supra. Similarly, we have approved requests to deviate from the commissioner's class life schedules when the taxpayer has been able to demonstrate that the machinery is being used in a manner not intended by its manufacturer, *The Babcock and Wilcox Co.*, supra; or when the taxpayer's records demonstrate maintenance costs that rival the value of the equipment, *Dayton Walther Corp.*, supra.

I am sympathetic to appellant's claim, given the appellant [\*26] apparently operates its printing presses around the clock. However, we have insufficient competent and probative evidence provided that paints a clear picture of how appellant's use of its equipment compares to other printing operations broadly described in the commissioner's category of "Printing and Publishing;" and I note a similar lack of reliable evidence concerning any comparison between the appellant's frequency of rebuilds and repairs of the equipment when compared to the rest of the printing industry. Had the appellant maintained and submitted detailed records of the

equipment at issue for the audit period before us thereby providing meaningful contrast to the industry as a whole, I would be inclined to find justification for a departure from the commissioner's 302 computation.

**Vertis, Inc.**, Appellant, vs. William W. **Wilkins**, Tax Commissioner of Ohio, Appellee.

CASE NO. 2004-V-381 (PERSONAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

2007 Ohio Tax LEXIS 402

March 9, 2007

**OPINION:**

DECISION AND ORDER

Ms. Margulies and Mr. Eberhart concur. Mr. Dunlap concurs separately.

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal. Appellant **Vertis, Inc.** ("**Vertis**") appeals a final order of the Tax Commissioner, appellee herein, denying a petition for reassessment. The underlying assessment relates to **Vertis'** 2001 and 2002 personal property tax returns and the appropriate classification of certain property under the "302 computation."

The matter is considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, and the testimony and other evidence adduced at the hearing ("H.R."). Further, the parties have stipulated to the inclusion of the record contained in *Treasure Chest Advertising, Inc. v. Wilkins*, BTA No 2003-V-285, unreported, and decided today.

[\*2] Said previous record is divided into two volumes, which will be referred to as "2003-V-285 H.R. I and II;" exhibits from the previous record will be referred to as "2003-V-285 Ex." Although given an opportunity to do so, neither party has filed a merit brief before this board.

Appellant operates a printing business, focusing upon the printing of newspaper advertising inserts. This appeal concerns the appropriate method of valuing appellant's machinery and equipment in its personal property tax returns for 2001 and 2002.

Initially, we note that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *National Tube v. Glander* (1952), 157 Ohio St. 407. The taxpayer is assigned the burden of showing in what manner and to what extent the [\*3] Tax Commissioner's determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213. It is with these authorities in mind that we turn to the merits of the instant appeal.

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. R.C. 5711.18 describes the manner in which taxable property is to be listed, providing in pertinent part:

"In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such book value is greater or less than the then true value of such property in money. Claim for any deduction from \*\*\* depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return \*\*\*." [\*4]

Recognizing that it would be impractical to personally value all personal property in Ohio, the Tax Commissioner developed a formula, referred to as the "302 computation," in order to determine the true value of such property. *W. L. Harper v. Peck* (1954), 161 Ohio St. 300; *Snider v. Limbach* (1989), 44 Ohio St.3d 200.

In *Monsanto Co. v. Lindley* (1978), 56 Ohio St.2d 59, the court explained the 302 computation:

"This long standing directive provides for industry-wide uniformity in determining the true value of depreciable property used in business by prescribing annual depreciation rates to be used in lieu of book depreciation. The annual depreciation rates prescribed in this directive vary according to the type of business or the nature of the equipment involved, and are expressed as percentages representing the allowable reduction to be taken each year from the original cost of a modified straight line depreciation formula, and the annual depreciation rates specified in the directive are to be used by the taxpayers in conjunction with this depreciation formula for calculating the reportable [\*5] value of the depreciable property." *Id.* at 59.

Ohio Adm. Code 5703-3-10 describes the basis of the 302 computation, in pertinent part:

"(A) Tangible personal property used in business in this state must be returned, for purposes of the personal property tax, at its true value in money. The true value of depreciable tangible personal property is its book cost less book depreciation, unless the tax commissioner finds that the depreciated book value is greater or less than the true value of such property.

"(B) Application of the composite annual allowance procedure provided for in rule 5703-3-11 of the Administrative Code shall determine the prima facie true value of depreciable tangible personal property used in business. The prima facie valuations can be rebutted by probative evidence of higher or lower valuation.

\*\*\*\*

"(3) If a taxpayer believes that the composite annual allowance procedure as determined by the commissioner does not accurately reflect the true value in money of the taxpayer's depreciable tangible personal property on hand, the taxpayer may establish more accurate annual allowances by probative evidence.

"(a) Such evidence must show that [\*6] the published composite annual allowance procedures are inappropriate because they cause an unjust or unreasonable result, or must be modified because of special or unusual circumstances.

"(b) Such evidence may include, but is not limited to, an aging of disposals study and any other studies, data, or documentation the taxpayer wishes to submit for

consideration by the commissioner.

"(c) Such evidence must cover a sufficient number of years to demonstrate a pattern in the history of the useful life of the subject property."

The Supreme Court has repeatedly accepted the 302 computation as an appropriate method to value personal property. As stated by the Court in PPG Industries v. Kosydar (1981), 65 Ohio St.2d 80, 83, "this directive has been approved by this court as a practical, reasonable and lawful method and device to achieve uniform valuation of plant equipment in Ohio by prescribing annual depreciation rates in lieu of book depreciation for Ohio personal property tax purposes. Wheeling Steel Corp. v. Evatt [(1944, 143 Ohio St. 71) \*\*\*; W.L. Harper Co. v. Peck (1954), 161 Ohio St. 300. [\*7] " While application of the 302 computation results in a prima facie true value figure, the value reflected through its use is not absolute. A taxpayer that objects to the use of the 302 computation may demonstrate, through competent and probative evidence, that a different result is warranted. PPG Industries, supra; Gahanna Heights, Inc. v. Porterfield (1968), 15 Ohio St.2d 189.

The 302 computation is not absolute. "[T]he formula must be adjusted when special or unusual circumstances or conditions of use exist or when evidence shows that rigid application would be inappropriate." Monsanto Co., supra, at 62. Furthermore, the "burden is on taxpayers to show that they may deviate from the computation because special or unusual circumstances or conditions of use exist or because evidence shows that its rigid application would be inappropriate." Campbell Soup Co. v. Tracy, 88 Ohio St.3d 473, 2000-Ohio-389, at 477.

In its 2001 and 2002 personal property tax returns, **Vertis** claimed certain equipment and machinery to be subject to the Class Life II depreciation schedule, [\*8] rather than Class Life IV, as promulgated by the Department of Taxation ("department"). S.T. at 42-43, 62-63. The department amended **Vertis'** 2001 and 2002 returns to reflect depreciation under the Class Life IV category for certain equipment and machinery and on August 23, 2002, requested information to support **Vertis'** claim for utilization of the Class Life II schedules, including disposal studies, a fixed asset listing, and other information regarding **Vertis'** acquisition of assets from the previous owner, Treasure Chest Advertising. S.T. at 18. On November 4, 2002, December 10, 2002, and March 19, 2003, the department repeatedly asked for more detail regarding appellant's claim to use Class Life II depreciation schedules. S.T. at 15, 16, 17. On June 16, 2003 the department notified **Vertis** that, having received no response to its previous inquiries, the 2001 and 2002 returns had been adjusted to reflect Class Life IV depreciation schedules. S.T. at 13. On August 1, 2003, an agent for **Vertis** responded with a letter objecting to the assessment:

"This letter is to object to the increase in taxable value and the denial of our claim from book value. We are requesting a review of the increased [\*9] assessment. \*\*\* The commissioner's agent did not allow for our class life adjustment due to our 24/7 use of the equipment.

" We also reported leased equipment " which was not owned by the Corporation." S.T. at 8.

On January 7, 2004, the department sent yet another request for information to **Vertis**, asking for identification of specifically what leased equipment should be removed from the assessment, together with documentation supporting that the

equipment is subject to a lease. S.T. at 6.

After receiving no response from **Vertis**, the commissioner issued his final determination, concluding that **Vertis** had failed to demonstrate that special or unusual circumstances exist to justify the use of Class Life II depreciation on certain machinery and equipment, and that **Vertis** had failed to demonstrate the existence of leased equipment appearing within its returns. S.T. at 1-3.

#### I. Jurisdiction

In CNG Dev. Co. v. Limbach (1992), 63 Ohio St.3d 28, 32, the court concluded that "a taxpayer has not substantially complied with the statute, so as to invoke the right to review of a particular error, if he has not set forth that error with specificity in the petition [\*10] for reassessment." See, also, Shugarman Surgical Supply, Inc. v. Tracy, 97 Ohio St.3d 183, 186, 2002-Ohio-5809; Kern v. Tracy (1995), 72 Ohio St.3d 347; American Fiber Systems, Inc. v. Wilkins (Sept, 16, 2005), BTA No. 2004-K-1222, unreported; Ohio Edison Co. v. Tracy (Interim Order, May 21, 1999), BTA No. 1997-K-322, unreported. Although R.C. 5711.31 also permits a taxpayer to raise additional objections with the commissioner, if submitted in writing prior to the date upon which the commissioner issues his final determination, under *CNG*, neither the commissioner nor this board has jurisdiction to consider those issues that are not raised in a petition for reassessment or prior to the issuance of the final determination. Where a taxpayer has not advanced such written objections, this board is without jurisdiction to consider the issue upon appeal. *CNG, supra*; Printing Service Co. v. Tracy (Interim Order, Oct. 15, 1999), BTA No. 1998-N-781, unreported.

Read broadly, appellant's petition for reassessment challenging the commissioner's assessment for tax years 2001 and 2002 objects [\*11] to the denial of the Class Life II claim based on special or unusual circumstances for its machinery and equipment and its claim that leased equipment not owned by **Vertis** was erroneously subject to taxation. S.T. at 8.

Appellant has not brought to this board's attention, nor have we found through a review of the documents filed by appellant with the commissioner, that many of the issues advanced on appeal were raised by appellant during the proceedings before the commissioner. Specifically, appellant claims for the first time in the notice of appeal that: property not situated in Ohio has been assessed; the commissioner ignored the actual inventory of appellant's property; that the commissioner's determination is contrary to the department's tax agent's "sworn testimony" that the property had been "lumped together" in a previous tax year; the determination unlawfully taxes "jigs and dies;" the determination ignores previous findings regarding the same property in previous tax years; the determination violates appellant's due process rights; and the determination is predicated upon "unreasonable and unlawful instructions." It is the responsibility of a taxpayer to expressly identify [\*12] the claims it wishes the commissioner to consider. Accordingly, appellant is now precluded from advancing claims not previously raised while its petition for reassessment was pending before the commissioner. We therefore find our jurisdiction to be limited to appellant's claims regarding its request to utilize Class Life II depreciation for the valuation of certain equipment and machinery and its claim that leased equipment not owned by appellant was subject to taxation.

Accordingly, one of appellant's burdens in this case, i.e., proving that its property is overvalued when reported in accordance with the commissioner's classification directives, may be met by any of three accepted methods. Appellant may prove that special or unusual circumstances exist, that the use of the 302 computation produces an unjust or unreasonable result, or appellant may offer direct evidence of the property's true value. *RPS, Inc. (fka Roadway Package System, Inc.) v. Tracy* (Oct. 30, 1998), BTA No. 1996-M-1209, unreported.

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Before the Tax Commissioner, the appellant requested that it be permitted to utilize Class Life II (life range between 6 and 8.4 years) valuation percentages for its printing machines rather than the Class Life IV (life range between 11.6 and 14.8 years) valuation percentages as promulgated for items used in the printing industry. Appellant argued that its printing machinery and equipment is in operation twenty-four hours a day, necessitating a departure from industry norms.

## II. Heavy Use of Equipment

The Tax Commissioner rejected appellant's claim that the printing equipment twenty-four-hour-a-day use amounted to a special or unusual circumstance. The commissioner held that appellant had failed to show that the use of the equipment more than an eight-hour shift per day was atypical [\*14] for the printing industry, and concluded that it was commonplace for similar printing operations to run their machinery more than eight hours per day. S.T. at 1.

Before this board, appellant offered the testimony of Mr. Donald Cotler, accounting supervisor for **Vertis**. Mr. Cotler testified that for the tax years at issue, appellant's Columbus, Ohio facility is open and operates twenty-four hours a day, seven days a week. H.R. at 25.

In the prior years' appeal before this board, appellant offered the testimony of Mr. Myron H. Vansickel, assistant vice president of tax for **Vertis**. Mr. Vansickel testified that appellant's Columbus, Ohio facility produced a million newspaper inserts a day because the facility was open and operated twenty-four hours a day, seven days a week. 2003-V-285, H.R. I at 222. Mr. Vansickel additionally testified that the nineteen other facilities owned by **Vertis** in other parts of the country operate at a similar pace. *Id.* When asked why appellant operates its machinery at this pace, Mr. Vansickel testified:

"The cost of capital equipment is not cost effective unless you have it fully loaded and running 24/7. You lose money every time you don't have the press full." [\*15] *Id.* at 223.

Mr. Vansickel contrasted the use of appellant's printing equipment with that of a

newspaper, and testified that most newspapers do not operate twenty-four hours a day; rather, they may run a twelve-hour shift. Id. at 224.

However, in addressing what is typical for the newspaper insert industry, Mr. Vansickel testified:

"If you are looking at the web press arena and printing in general, most people do not run a web press 24/7. If you look at the newspaper advertising group, they are running 24/7. They can't make money without doing it. So I am not saying this is exclusive to Treasure Chest, but our particular segment within the printing industry is excess of wear and tear on this equipment." Id. at 244-245.

As was the case before the commissioner, appellant has failed to demonstrate that its constant use of its equipment and machinery constitutes a special or unusual circumstance that would permit a departure from the Class Life IV schedule in the 302 computation. The record before us fails to include any meaningful depiction of the printing industry as a whole. n2 Furthermore, Mr. Vansickel's testimony confirms that the constant use of equipment and machinery is commonplace [\*16] within the advertising insert printing industry as well as the telephone directory printing industry. 2003-V-285, H.R. II at 205.

n2 Although Mr. Vansickel did testify as to his previous experience with a check printing organization and his understanding of newspaper printing practices, we are unable to rely upon said evidence to be representative of the entire printing industry.

Regarding maintenance, Mr. Vansickel previously testified that of the fifty individual printing presses appearing on appellant's 2001 inventory of machinery and equipment at the Columbus, Ohio facility, only 16 presses had been rebuilt between 1983 and 2002. 2003-V-285, H.R. II at 180, Ex. 2. When asked how often it is necessary for the appellant to rebuild a printing press, Mr. Vansickel further testified:

"What I have seen based on the records and in talking to the engineer over the last few years, seven to eight years they need to rebuild a press. It depends on where the press is, how many hours have been on it, uh, and whether or not it is still in tolerance. The average is about seven to eight years. I have seen some be rebuilt in two years because there was a manufacturing defect or they never [\*17] could get it up and running. I have seen some go as long as 12 years. But those are the ones that are far and few between \*\*\*." 2003-V-285, H.R. I at 237.

At hearing before this board in the instant appeal, Mr. Vansickel testified that appellant's individual printing press units are rebuilt every seven to ten years on average. H.R. at 47. Based on the record before us from the previous case and the instant appeal, Mr. Vansickel's testimony appears to be inconsistent. Assuming his estimate concerning the average time before a rebuild (seven to eight, or seven to ten years) is necessarily correct, more than 16 of appellant's 50 printing presses appearing on the 2001 inventory would have been rebuilt at least once, if not arguably more.

This board has previously found special or unusual circumstances to exist when business equipment was subjected to conditions which were abnormal for the industry and which caused the equipment to age more rapidly than like equipment. See, e.g., *Sun Chemical Corp. v. Limbach* (Apr. 21, 1989), BTA Nos. 1986-A-157, et seq., unreported (finding special or unusual circumstances where taxpayer's

equipment was subjected to salt and caustic soda, large [\*18] quantities of steam, corrosive chemicals, and a full-time operating schedule, and taxpayer presented testimony distinguishing its use of the equipment from other chemical plants in Ohio) and *Defiance Precision Products, Inc. v. Tracy* (Apr. 3, 1998), BTA No. 1995-T-564, unreported (finding special or unusual circumstances where taxpayer operated equipment at twice the normal speed for three eight-hour shifts per day, up to six or seven days per week, and taxpayer presented testimony that this usage differs from that normally found in the industry). This board has also found special or unusual circumstances to exist when business equipment was subjected to conditions not planned for when the equipment was originally purchased. In *Dayton Walther Corp. v. Limbach* (Aug. 24, 1990), BTA No. 1988-J-190, unreported, foundry equipment was run twenty-four hours per day, six or seven days per week. Additionally, the equipment was subjected to corrosive wet sand, extreme weight of products, excessive vibration, high operating speeds, and extreme heat. Maintenance expenditures ran between 18 and 45 percent of the equipment's original cost. In *The Babcock and Wilcox Co. v. Kosydar* (Nov. [\*19] 20, 1974), BTA No. B-318, unreported, the equipment was operated around the clock to produce nuclear hardware. Similarly, equipment was used either in a manner not intended by its original purchase or under conditions not intended by its original purchase or under conditions not intended by the original specifications in *Philips Electronics North American Corp. v. Tracy* (June 28, 1996), BTA No. 1993-K-825, unreported; *Phoenix Dye Works v. Porterfield* (July 9, 1970), BTA No. 65747, unreported; and *Spang & Co. v. Porterfield* (July 9, 1970), BTA No. 74978, unreported.

Appellant offers no disposal study or other evidence to support Mr. Vansickel's estimates of the average frequency of rebuilds of the printing presses. Assuming Mr. Vansickel's estimations to be correct, there is no evidence to support that performing rebuilds on printing presses every seven to eight or ten years constitutes indicia of a special or unusual circumstance within the printing industry as a whole. Based on the record before us, the evidence concerning the frequency of rebuilding appellant's individual printing presses fails to persuade us that the property is subjected to abnormal use, when there [\*20] is no evidence to reflect any industry norms concerning the lifespan of a printing press.

### III. Leased Equipment

Appellant initially advocated that the returns filed for the tax years at issue erroneously included the base values of equipment leased and not owned by appellant.

Mr. Vansickel testified that he, along with the former tax director of **Vertis'** predecessor, Mr. Path, conducted a physical inventory of the assets in the Columbus, Ohio facility as of July 2001 used to prepare appellant's 2002 tax return. 2003-V-285, H.R. II at 11-12, 47-48. The 2001 inventory was ultimately prepared by Mr. Path. *Id.* at 11. To gain an historical perspective, Mr. Vansickel had maintenance personnel provide input regarding the years in which the items were first used by the previous taxpayer, based upon maintenance records. *Id.*

In support of its position regarding the alleged inclusion of leased equipment, appellant offered the testimony of a tax consultant, Mr. Jack W. Cook, who reconstructed appellant's tax returns for tax years 1998 and 1999 based upon the 2001 inventory. 2003-V-285, Ex. 1. Specifically, Mr. Cook, in revising appellant's returns for the 1998 and 1999 tax years, reduced [\*21] the overall values for

machinery by \$ 5,196,000, in an effort to adjust for the value of the leased equipment alleged to have been erroneously included. 2003-V-285, H.R. I at 29. However, through the cross-examination of Mr. Cook, it became apparent that said leased equipment valued at \$ 5,186,000 was never reflected as an item on the 2001 inventory to begin with. Therefore, Mr. Cook's reduction was in error and resulted in the total value of appellant's machinery being understated. Counsel for appellant stipulated at hearing that the conclusions of Mr. Cook regarding alleged erroneous inclusion of the leased equipment were in error, and the \$ 5,196,440 should not have been removed from the calculation. Id. at 128.

As was the case in the previous tax years before us, appellant offered no evidence to demonstrate that any property leased and not owned by **Vertis** was erroneously subjected to taxation in the first place. n3 Even if we were to assume that leased machinery and equipment were being used by appellant for the tax years before us, there is nothing in the record which would allow us to conclude that it was subjected to tax.

n3 Mr. Vansickel testified that "all leases were bought out by January 2000," before the listing dates at issue before us today. H.R. at 126. [\*22]

Given the foregoing, appellant has failed to establish its right to relief requested. Accordingly, it is the decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

Mr. Dunlap concurs separately.

I agree with the majority's holding that the appellant has failed to overcome the presumption that the commissioner's 302 computation establishes the true value of the property used in business. In reviewing analogous cases, this board has previously held that taxpayers have been able to overcome the presumption of the commissioner's 302 computation when it has offered probative evidence concerning that the heavy use of the equipment at issue differs from that which is typical in the industry. *Sun Chemical Corp.*, supra; *Defiance Precision Products, Inc.*, supra. Similarly, we have approved requests to deviate from the commissioner's class life schedules when the taxpayer has been able to demonstrate that the machinery is being used in a manner not intended by its manufacturer, *The Babcock and Wilcox Co.*, supra; or when the taxpayer's records demonstrate maintenance costs that rival the value of the [\*23] equipment, *Dayton Walther Corp.*, supra.

I am sympathetic to appellant's claim, given the appellant apparently operates its printing presses around the clock. However, we have insufficient competent and probative evidence provided that paints a clear picture of how appellant's use of its equipment compares to other printing operations broadly described in the commissioner's category of "Printing and Publishing;" and I note a similar lack of reliable evidence concerning any comparison between the appellant's frequency of rebuilds and repairs of the equipment when compared to the rest of the printing industry. Had the appellant maintained and submitted detailed records of the equipment at issue for the audit period before us thereby providing meaningful contrast to the industry as a whole, I would be inclined to find justification for a departure from the commissioner's 302 computation

§ 5711.28. Notice of penalty assessment; petition for abatement; amended assessment certificate

Whenever the assessor imposes a penalty prescribed by section 5711.27 or 5725.17 of the Revised Code, the assessor shall send notice of such penalty assessment to the taxpayer by mail. If the notice also reflects the assessment of any property not listed in or omitted from a return, or the assessment of any item or class of taxable property listed in a return by the taxpayer in excess of the value or amount thereof as so listed, or without allowing a claim duly made for deduction from the net book value of accounts receivable, or depreciated book value of personal property used in business, so listed, and the taxpayer objects to one or more of such corrections in addition to the penalty, the taxpayer shall proceed as prescribed by section 5711.31 of the Revised Code, but if no such correction is reflected in the notice, or if the taxpayer does not object to any such correction made, the taxpayer shall proceed as prescribed herein.

Within sixty days after the mailing of the notice of a penalty assessment prescribed by this section, the taxpayer may file with the tax commissioner, in person or by certified mail, a petition for abatement of such penalty assessment. If the petition is filed by certified mail, the date of the United States postmark placed on the sender's receipt by the postal employee to whom the petition is presented shall be treated as the date of filing. The petition shall have attached thereto and incorporated therein by reference a true copy of the notice of assessment complained of, but the failure to attach a copy of such notice and incorporate it by reference does not invalidate the petition. The petition shall also indicate that the taxpayer's only objection is to the assessed penalty and the reason for such objection.

Upon the filing of a petition for abatement of penalty, the commissioner shall notify the treasurer of state or the auditor and treasurer of each county having any part of the penalty assessment entered on the tax list or duplicate. The commissioner shall review the petition without the need for hearing. If it appears that the failure of the taxpayer to timely return or list as required under this chapter, or to file a complying report and pay tax under Chapter 5725. of the Revised Code, whichever the case may be, was due to reasonable cause and not willful neglect, the commissioner may abate in whole or in part the penalty assessment. The commissioner shall transmit a certificate of the commissioner's determination to the taxpayer, and if no appeal is taken therefrom as provided by law, or upon the final determination of an appeal which may be taken, the commissioner shall notify the treasurer of state or the proper county auditor of such final determination. If the final determination orders abatement of the penalty assessment, the notification may be in the form of an amended assessment certificate. Upon receipt of the notification, the treasurer of state or county auditor shall make any corrections to the treasurer's or auditor's records and tax lists and duplicates required in accordance therewith and proceed as prescribed by section 5711.32 or 5725.22 of the Revised Code.

The decision of the commissioner shall be final with respect to the percentage of penalty, if any, the commissioner finds appropriate, but neither the commissioner's decision nor a final judgment of the board of tax appeals or any court to which such final determination may be appealed shall finalize the assessment of such property.

**History:**

RS § 2750; S&C 1447; 56 v 175, § 18; GC § 5391; 114 v 714(742); 115 v 567; Bureau of Code Revision, 10-1-53; 139 v H 379 (Eff 9-21-82); 140 v H 379 (Eff 7-2-84); 141 v S 126 (Eff 9-25-85); 141 v H 201 (Eff 7-1-85); 141 v H 428 (Eff 12-23-86); 148 v H 612, Eff 9-29-2000; 151 v H 66, § 101.01, eff. 6-30-05.

§ 5717.02. Appeals from final determinations; procedure; hearing

Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue. Appeals from the redetermination by the director of development under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner concerning an application for a property tax exemption may be taken to the board of tax appeals by a school district that filed a statement concerning such application under division (C) of section 5715.27 of the Revised Code. Appeals from a redetermination by the director of job and family services under section 5733.42 of the Revised Code may be taken by the person to which the notice of the redetermination is required by law to be given under that section.

Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the director of development if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of such appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of such appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 [5703.05.6] of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner or director to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of such notice and incorporate it by reference in the notice of appeal does not invalidate the appeal.

Upon the filing of a notice of appeal, the tax commissioner or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner or director, together with all evidence considered by the commissioner or director in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearings and to report to it

their findings for affirmation or rejection. The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it considers proper.

**History:**

GC § 5611; 106 v 246(260), § 54; 118 v 344; 119 v 34(48); Bureau of Code Revision, 10-1-53; 135 v S 174 (Eff 12-4-73); 136 v H 920 (Eff 10-11-76); 137 v H 634 (Eff 8-15-77); 139 v H 351 (Eff 3-17-82); 140 v H 260 (Eff 9-27-83); 141 v S 124 (Eff 9-25-85); 141 v H 321 (Eff 10-17-85); 145 v S 19 (Eff 7-22-94); 148 v H 612 (Eff 9-29-2000); 148 v S 287 (Eff 12-21-2000); 149 v S 200. Eff 9-6-2002.

§ 5717.04. Appeal from decision of board of tax appeals to supreme court; parties who may appeal; certification

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of budget and management, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be certified, or by any other person to whom the board certified the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and

the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the tax commissioner or all persons to whom the decision of the board appealed from is required by such section to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

**History:**

GC § 5611-2; 107 v 550; 116 v 104(123), § 2; 118 v 344(355); 119 v 34(49); Bureau of Code Revision, 10-1-53; 125 v 250 (Eff 10-2-53); 135 v S 174 (Eff 12-4-73); 137 v H 634 (Eff 8-15-77); 140 v H 260 (Eff 9-27-83); 142 v H 231. Eff 10-5-87.

§ 5727.10. Assessment; hearing; correction

Annually, the tax commissioner shall determine, in accordance with section 5727.11 of the Revised Code, the true value in money of all taxable property, except property of a railroad company, required by section 5727.06 of the Revised Code to be assessed by the commissioner. The commissioner also shall determine the total taxable value of such property based on the percentages of true value at which the property is required to be assessed by section 5727.111 [5727.11.1] of the Revised Code.

The commissioner shall be guided by the information contained in the report filed by the public utility and such other evidence and rules as will enable the commissioner to make these determinations.

Before issuing the preliminary assessment under section 5727.23 of the Revised Code, the commissioner shall notify each public utility of the proposed total taxable value of its taxable property, including any proposed penalty. After receiving such notice, a public utility may, upon written application, within the time prescribed by the commissioner, appear before the commissioner and be heard in the matter of the proposal. The commissioner may, on the application of a public utility, or on the commissioner's own motion, correct the proposal.

**History:**

GC §§ 5423, 5424, 5426, 5427; 102 v 224, §§ 47, 48, 50, 51; Bureau of Code Revision, 10-1-53; 138 v H 145 (Eff 12-31-79); 139 v H 201 (Eff 12-31-82); 142 v S 449 (Eff 11-28-88); 143 v S 156 (Eff 12-31-89); 145 v H 715. Eff 7-22-94; 151 v H 66, § 101.01, eff. 6-30-05.

§ 5727.11. Methods of valuation

(A) Except as otherwise provided in this section, the true value of all taxable property, except property of a railroad company, required by section 5727.06 of the Revised Code to be assessed by the tax commissioner shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the commissioner. If the commissioner finds that application of this method will not result in the determination of true value of the public utility's taxable property, the commissioner may use another method of valuation.

(B) (1) Except as provided in division (B)(2) of this section, the true value of current gas stored underground is the cost of that gas shown on the books and records of the public utility on the thirty-first day of December of the preceding year.

(2) For tax year 2001 and thereafter, the true value of current gas stored underground is the quotient obtained by dividing (a) the average value of the current gas stored underground, which shall be determined by adding the value of the gas on hand at the end of each calendar month in the calendar year preceding the tax year, or, if applicable, the last day of business of each month for a partial month, divided by (b) the total number of months the natural gas company was in business during the calendar year prior to the beginning of the tax year. With the approval of the tax commissioner, a natural gas company may use a date other than the end of a calendar month to value its current gas stored underground.

(C) The true value of noncurrent gas stored underground is thirty-five per cent of the cost of that gas shown on the books and records of the public utility on the thirty-first day of December of the preceding year.

(D) (1) Except as provided in division (D)(2) of this section, the true value of the production equipment of an electric company and the true value of all taxable property of a rural electric company is the equipment's or property's cost as capitalized on the company's books and records less fifty per cent of that cost as an allowance for depreciation and obsolescence.

(2) The true value of the production equipment of an electric company or rural electric company purchased, transferred, or placed into service after the effective date of this amendment is the purchase price of the equipment as capitalized on the company's books and records less composite annual allowances as prescribed by the tax commissioner.

(E) The true value of taxable property, except property of a railroad company, required by section 5727.06 of the Revised Code to be assessed by the tax commissioner shall not include the allowance for funds used during construction or interest during construction that has been capitalized on the public utility's books and records as part of the total cost of the taxable property. This division shall not apply to the taxable property of an electric company or a rural electric company, excluding transmission and distribution property, first placed into service after December 31, 2000, or to the taxable property a person purchases, which includes transfers, if that property was used in business by the seller prior to the purchase.

(F) The true value of watercraft owned or operated by a water transportation company shall be determined by multiplying the true value of the watercraft as determined under division (A) of this section by a fraction, the numerator of which is the number of revenue-earning miles traveled by the watercraft in the waters of this state and the denominator of which is the number of revenue-earning miles traveled by the watercraft in all waters.

(G) The cost of property subject to a sale and leaseback transaction is the cost of the property as capitalized on the books and records of the public utility owning the property immediately prior to the sale and leaseback transaction.

(H) The cost as capitalized on the books and records of a public utility includes amounts capitalized that represent regulatory assets, if such amounts previously were included on the company's books and records as capitalized costs of taxable personal property.

(I) Any change in the composite annual allowances as prescribed by the commissioner on a prospective basis shall not be admissible in any judicial or administrative action or proceeding as evidence of value with regard to prior years' taxes. Information about the business, property, or transactions of any taxpayer obtained by the commissioner for the purpose of adopting or modifying the composite annual allowances shall not be subject to discovery or disclosure.

**History:**

143 v S 156 (Eff 12-31-89); 145 v H 715 (Eff 7-22-94); 146 v H 117 (Eff 9-29-95); 148 v S 3 (Eff 10-5-99); 148 v H 612 (Eff 9-29-2000); 148 v S 287. Eff 12-21-2000; 151 v H 66, § 101.01, eff. 6-30-05.

§ 5727.47. Mailing of assessment to utility; petition for reassessment

(A) Notice of each assessment certified pursuant to section 5727.23 or 5727.38 of the Revised Code shall be mailed to the public utility, and its mailing shall be prima-facie evidence of its receipt by the public utility to which it is addressed. With the notice, the tax commissioner shall provide instructions on how to petition for reassessment and request a hearing on the petition. If a public utility objects to any assessment certified to it pursuant to such sections, it may file with the commissioner, either personally or by certified mail, within sixty days after the mailing of the notice of assessment a written petition for reassessment signed by the utility's authorized agent having knowledge of the facts. If the petition is filed by certified mail, the date of the United States postmark placed on the sender's receipt by the postal employee to whom the petition is presented shall be treated as the date of filing. The petition shall indicate the utility's objections, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination.

In the case of a petition seeking a reduction in taxable value filed with respect to an assessment issued under section 5727.23 of the Revised Code, the petitioner shall state in the petition the total amount of reduction in taxable value sought by the petitioner. If the petitioner objects to the percentage of true value at which taxable property is assessed by the commissioner, the petitioner shall state in the petition the total amount of reduction in taxable value sought both with and without regard to the objection pertaining to the percentage of true value at which its taxable property is assessed. If a petitioner objects to the commissioner's apportionment of the taxable value of the petitioner's taxable property, the petitioner shall distinctly state in the petition that the petitioner objects to the commissioner's apportionment, and, within forty-five days after filing the petition for reassessment, shall submit the petitioner's proposed apportionment of the taxable value of its taxable property among taxing districts. If a petitioner that objects to the commissioner's apportionment fails to state its objections to that apportionment in its petition for reassessment or fails to submit its proposed apportionment within forty-five days after filing the petition for reassessment, the commissioner shall dismiss the petitioner's objection to the commissioner's apportionment, and the taxable value of the petitioner's taxable property, subject to any adjustment to taxable value pursuant to the petition or appeal, shall be apportioned in the manner used by the commissioner in the preliminary or amended preliminary assessment issued under section 5727.23 of the Revised Code.

If an additional objection seeking a reduction in taxable value in excess of the reduction stated in the original petition is properly and timely raised with respect to an assessment issued under section 5727.23 of the Revised Code, the petitioner shall state the total amount of the reduction in taxable value sought in the additional objection both with and without regard to any reduction in taxable value pertaining to the percentage of true value at which taxable property is assessed. If a petitioner fails to state the reduction in taxable value sought in the original petition or in additional objections properly raised after the petition is filed, the commissioner shall notify the petitioner of the failure by certified mail. If the petitioner fails to notify the commissioner in writing of the reduction in taxable value sought in the petition or in an additional objection within thirty days after receiving the commissioner's notice,

the commissioner shall dismiss the petition or the additional objection in which that reduction is sought.

(B) (1) Subject to divisions (B)(2) and (3) of this section, a public utility filing a petition for reassessment regarding an assessment issued under section 5727.23 or 5727.38 of the Revised Code shall pay the tax with respect to the assessment objected to as required by law. The acceptance of any tax payment by the treasurer of state or any county treasurer shall not prejudice any claim for taxes on final determination by the commissioner or final decision by the board of tax appeals or any court.

(2) If a public utility properly and timely files a petition for reassessment regarding an assessment issued under section 5727.23 of the Revised Code, the petitioner shall pay the tax as prescribed by divisions (B)(2)(a), (b), and (c) of this section:

(a) If the petitioner does not object to the commissioner's apportionment of the taxable value of the petitioner's taxable property, the petitioner is not required to pay the part of the tax otherwise due on the taxable value that the petitioner seeks to have reduced, subject to division (B)(2)(c) of this section.

(b) If the petitioner objects to the commissioner's apportionment of the taxable value of the petitioner's taxable property, the petitioner is not required to pay the tax otherwise due on the part of the taxable value apportioned to any taxing district that the petitioner objects to, subject to division (B)(2)(c) of this section. If, pursuant to division (A) of this section, the petitioner has, in a proper and timely manner, apportioned taxable value to a taxing district to which the commissioner did not apportion the petitioner's taxable value, the petitioner shall pay the tax due on the taxable value that the petitioner has apportioned to the taxing district, subject to division (B)(2)(c) of this section.

(c) If a petitioner objects to the percentage of true value at which taxable property is assessed by the commissioner, the petitioner shall pay the tax due on the basis of the percentage of true value at which the public utility's taxable property is assessed by the commissioner. In any case, the petitioner's payment of tax shall not be less than the amount of tax due based on the taxable value reflected on the last appeal notice issued by the commissioner under division (C) of this section. Until the county auditor receives notification under division (E) of this section and proceeds under section 5727.471 [5727.47.1] of the Revised Code to issue any refund that is found to be due, the county auditor shall not issue a refund for any increase in the reduction in taxable value that is sought by a petitioner later than forty-five days after the petitioner files the original petition as required under division (A) of this section.

(3) Any part of the tax that, under division (B)(2)(a) or (b) of this section, is not paid shall be collected upon receipt of the notification as provided in section 5727.471 [5727.47.1] of the Revised Code with interest thereon computed in the same manner as interest is computed under division (E) of section 5715.19 of the Revised Code, subject to any correction of the assessment by the commissioner under division (E) of this section or the final judgment of the board of tax appeals or a court to which the board's final judgment is appealed. The penalty imposed under section 323.121 [323.12.1] of the Revised Code shall apply only to the unpaid portion of the tax if the petitioner's tax payment is less than the amount of tax due based on the taxable value reflected on the last appeal notice issued by the

commissioner under division (C) of this section.

(C) Upon receipt of a properly filed petition for reassessment, the tax commissioner shall notify the treasurer of state or the auditor of each county to which the assessment objected to has been certified. In the case of a petition with respect to an assessment issued under section 5727.23 of the Revised Code, the commissioner shall issue an appeal notice within thirty days after receiving the amount of the taxable value reduction and apportionment changes sought by the petitioner in the original petition or in any additional objections properly and timely raised by the petitioner. The appeal notice shall indicate the amount of the reduction in taxable value sought in the petition or in the additional objections and the extent to which the reduction in taxable value and any change in apportionment requested by the petitioner would affect the commissioner's apportionment of the taxable value among taxing districts in the county as shown in the assessment. If a petitioner is seeking a reduction in taxable value on the basis of a lower percentage of true value than the percentage at which the commissioner assessed the petitioner's taxable property, the appeal notice shall indicate the reduction in taxable value sought by the petitioner without regard to the reduction sought on the basis of the lower percentage and shall indicate that the petitioner is required to pay tax on the reduced taxable value determined without regard to the reduction sought on the basis of a lower percentage of true value, as provided under division (B)(2)(c) of this section. The appeal notice shall include a statement that the reduced taxable value and the apportionment indicated in the notice are not final and are subject to adjustment by the commissioner or by the board of tax appeals or a court on appeal. If the commissioner finds an error in the appeal notice, the commissioner may amend the notice, but the notice is only for informational and tax payment purposes; the notice is not subject to appeal by any person. The commissioner also shall mail a copy of the appeal notice to the petitioner. Upon the request of a taxing authority, the county auditor may disclose to the taxing authority the extent to which a reduction in taxable value sought by a petitioner would affect the apportionment of taxable value to the taxing district or districts under the taxing authority's jurisdiction, but such a disclosure does not constitute a notice required by law to be given for the purpose of section 5717.02 of the Revised Code.

(D) If the petitioner requests a hearing on the petition, the tax commissioner shall assign a time and place for the hearing on the petition and notify the petitioner of such time and place, but the commissioner may continue the hearing from time to time as necessary.

(E) The tax commissioner may make corrections to the assessment as the commissioner finds proper. The commissioner shall serve a copy of the commissioner's final determination on the petitioner in the manner provided in section 5703.37 of the Revised Code. The commissioner's decision in the matter shall be final, subject to appeal under section 5717.02 of the Revised Code. The commissioner also shall transmit a copy of the final determination to the treasurer of state or applicable county auditor. In the absence of any further appeal, or when a decision of the board of tax appeals or of any court to which the decision has been appealed becomes final, the commissioner shall notify the public utility and, as appropriate, the treasurer of state who shall proceed under section 5727.42 of the Revised Code, or the applicable county auditor who shall proceed under section 5727.471 [5727.47.1] of the Revised Code.

The notification made under this division is not subject to further appeal.

(F) On appeal, no adjustment shall be made in the tax commissioner's assessment issued under section 5727.23 of the Revised Code that reduces the taxable value of a petitioner's taxable property by an amount that exceeds the reduction sought by the petitioner in its petition for reassessment or in any additional objections properly and timely raised after the petition is filed with the commissioner.

**History:**

143 v S 156 (Eff 12-31-89); 144 v H 904 (Eff 12-22-92); 144 v S 358 (Eff 1-15-93); 148 v S 3 (Eff 10-5-99); 148 v H 612 (Eff 9-29-2000); 148 v H 589 (Eff 10-17-2000); 149 v S 200. Eff 9-6-2002.

ORC Ann. 5728.10 (2008)

§ 5728.10. Failure to file complying return or remit tax; assessment; petition for reassessment

(A) If any person required to file a fuel use tax return by sections 5728.01 to 5728.14 of the Revised Code, fails to file the return within the time prescribed by those sections, files an incomplete return, files an incorrect return, or fails to remit the full amount of the tax due for the period covered by the return, the tax commissioner may make an assessment against the person, based upon any information in the commissioner's possession, for the period for which the tax was due.

No assessment shall be made against any person for any tax imposed by this chapter more than four years after the return date for the period for which the tax was due or more than four years after the return for the period was filed, whichever is later. This section does not bar an assessment against any person who fails to file a fuel use tax return as required by this chapter, or who files a fraudulent fuel use tax return.

A penalty of up to fifteen per cent may be added to the amount of every assessment made pursuant to this section. The commissioner may adopt rules providing for the imposition and remission of penalties added to assessments made under this section.

The commissioner shall give the party assessed written notice of the assessment in the manner provided in section 5703.37 of the Revised Code. With the notice, the commissioner shall provide instructions on how to petition for reassessment and request a hearing on the petition.

(B) Unless the party assessed files with the tax commissioner within sixty days after service of the notice of assessment, either personally or by certified mail, a written petition for reassessment, signed by the party assessed, or by the party's authorized agent having knowledge of the facts, the assessment becomes final and the amount of the assessment is due and payable from the party assessed to the treasurer of state. The petition shall indicate the objections of the party assessed, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination. If the petition has been properly filed, the commissioner shall proceed under section 5703.60 of the Revised Code.

(C) After an assessment becomes final, if any portion of the assessment remains unpaid, including accrued interest, a certified copy of the tax commissioner's entry making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the party's place of business is located or the county in which the party assessed resides. If the party maintains no office in this state and is not a resident of this state, the certified copy of the entry may be filed in the office of the clerk of the court of common pleas of Franklin county.

Immediately upon the filing of the entry, the clerk shall enter a judgment for the state of Ohio against the party assessed in the amount shown on the entry. The judgment may be filed by the clerk in a loose-leaf book entitled "special judgments for state fuel use tax," and shall have the same effect as other judgments. Execution shall issue upon the judgment upon the request of the commissioner, and all laws

applicable to sales on execution shall apply to sales made under the judgment.

The portion of the assessment not paid within sixty days after the day the assessment was issued shall bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code from the day the commissioner issues the assessment until it is paid. Interest shall be paid in the same manner as the tax and may be collected by the issuance of an assessment under this section.

(D) All money collected by the tax commissioner under this section shall be paid into the state treasury in the same manner as the revenues deriving from the taxes imposed by section 5728.06 of the Revised Code.

**History:**

125 v 369 (Eff 7-16-53); 127 v 136 (Eff 9-5-57); 129 v 582(965) (Eff 1-10-61); 139 v S 530 (Eff 6-25-82); 142 v H 231 (Eff 10-5-87); 143 v H 64 (Eff 1-1-90); 144 v S 358 (Eff 1-15-93); 147 v H 215 (Eff 9-29-97); 148 v H 612 (Eff 9-29-2000); 149 v S 200. Eff 9-6-2002.

§ 5747.53. Alternative method of apportionment

(A) As used in this section:

(1) "City, located wholly or partially in the county, with the greatest population" means the city, located wholly or partially in the county, with the greatest population residing in the county; however, if the county budget commission on or before January 1, 1998, adopted an alternative method of apportionment that was approved by the legislative authority of the city, located partially in the county, with the greatest population but not the greatest population residing in the county, "city, located wholly or partially in the county, with the greatest population" means the city, located wholly or partially in the county, with the greatest population whether residing in the county or not, if this alternative meaning is adopted by action of the board of county commissioners and a majority of the boards of township trustees and legislative authorities of municipal corporations located wholly or partially in the county.

(2) "Participating political subdivision" means a municipal corporation or township that satisfies all of the following:

(a) It is located wholly or partially in the county.

(b) It is not the city, located wholly or partially in the county, with the greatest population.

(c) Undivided local government fund moneys are apportioned to it under the county's alternative method or formula of apportionment in the current calendar year.

(B) In lieu of the method of apportionment of the undivided local government fund of the county provided by section 5747.51 of the Revised Code, the county budget commission may provide for the apportionment of the fund under an alternative method or on a formula basis as authorized by this section.

Except as otherwise provided in division (C) of this section, the alternative method of apportionment shall have first been approved by all of the following governmental units: the board of county commissioners; the legislative authority of the city, located wholly or partially in the county, with the greatest population; and a majority of the boards of township trustees and legislative authorities of municipal corporations, located wholly or partially in the county, excluding the legislative authority of the city, located wholly or partially in the county, with the greatest population. In granting or denying approval for an alternative method of apportionment, the board of county commissioners, boards of township trustees, and legislative authorities of municipal corporations shall act by motion. A motion to approve shall be passed upon a majority vote of the members of a board of county commissioners, board of township trustees, or legislative authority of a municipal corporation, shall take effect immediately, and need not be published.

Any alternative method of apportionment adopted and approved under this division may be revised, amended, or repealed in the same manner as it may be adopted

and approved. If an alternative method of apportionment adopted and approved under this division is repealed, the undivided local government fund of the county shall be apportioned among the subdivisions eligible to participate in the fund, commencing in the ensuing calendar year, under the apportionment provided in section 5747.52 of the Revised Code, unless the repeal occurs by operation of division (C) of this section or a new method for apportionment of the fund is provided in the action of repeal.

(C) This division applies only in counties in which the city, located wholly or partially in the county, with the greatest population has a population of twenty thousand or less and a population that is less than fifteen per cent of the total population of the county. In such a county, the legislative authorities or boards of township trustees of two or more participating political subdivisions, which together have a population residing in the county that is a majority of the total population of the county, each may adopt a resolution to exclude the approval otherwise required of the legislative authority of the city, located wholly or partially in the county, with the greatest population. All of the resolutions to exclude that approval shall be adopted not later than the first Monday of August of the year preceding the calendar year in which distributions are to be made under an alternative method of apportionment.

A motion granting or denying approval of an alternative method of apportionment under this division shall be adopted by a majority vote of the members of the board of county commissioners and by a majority vote of a majority of the boards of township trustees and legislative authorities of the municipal corporations located wholly or partially in the county, other than the city, located wholly or partially in the county, with the greatest population, shall take effect immediately, and need not be published. The alternative method of apportionment under this division shall be adopted and approved annually, not later than the first Monday of August of the year preceding the calendar year in which distributions are to be made under it. A motion granting approval of an alternative method of apportionment under this division repeals any existing alternative method of apportionment, effective with distributions to be made from the fund in the ensuing calendar year. An alternative method of apportionment under this division shall not be revised or amended after the first Monday of August of the year preceding the calendar year in which distributions are to be made under it.

(D) In determining an alternative method of apportionment authorized by this section, the county budget commission may include in the method any factor considered to be appropriate and reliable, in the sole discretion of the county budget commission.

(E) The limitations set forth in section 5747.51 of the Revised Code, stating the maximum amount that the county may receive from the undivided local government fund and the minimum amount the townships in counties having a population of less than one hundred thousand may receive from the fund, are applicable to any alternative method of apportionment authorized under this section.

(F) On the basis of any alternative method of apportionment adopted and approved as authorized by this section, as certified by the auditor to the county treasurer, the county treasurer shall make distribution of the money in the undivided local government fund to each subdivision eligible to participate in the fund, and the auditor, when the amount of those shares is in the custody of the treasurer in the amounts so computed to be due the respective subdivisions, shall at the same time

certify to the tax commissioner the percentage share of the county as a subdivision. All money received into the treasury of a subdivision from the undivided local government fund in a county treasury shall be paid into the general fund and used for the current operating expenses of the subdivision. If a municipal corporation maintains a municipal university, the university, when the board of trustees so requests the legislative authority of the municipal corporation, shall participate in the money apportioned to the municipal corporation from the total local government fund, however created and constituted, in the amount requested by the board of trustees, provided that amount does not exceed nine per cent of the total amount paid to the municipal corporation.

(G) The actions of the county budget commission taken pursuant to this section are final and may not be appealed to the board of tax appeals, except on the issues of abuse of discretion and failure to comply with the formula.

**History:**

134 v H 475 (Eff 12-20-71); 136 v H 1 (Eff 6-13-75); 141 v H 201 (Eff 7-1-85); 144 v H 298 (Eff 7-26-91); 148 v H 185 (Eff 7-26-99); 149 v H 329. Eff 8-29-2002.

§ 5739.15 Liability of vendor and consumer; assessment; petition for reassessment; penalties; appeal; judgment; execution.

If any vendor collects the tax imposed by or pursuant to section 5739.02, 5739.021 [5739.02.1], 5739.023 [5739.02.3], or 5739.026 [5739.02.6] of the Revised Code, and fails to remit the tax to the state as prescribed or if any motor vehicle dealer collects the tax on the sale of a motor vehicle and fails to remit payment to a clerk of a court of common pleas as provided in section 4505.06 of the Revised Code, he shall be personally liable for any amount collected which he failed to remit. The tax commissioner may make an assessment against such vendor based upon any information in his possession.

If any vendor fails to collect the tax or any consumer fails to pay the tax imposed by or pursuant to section 5739.02, 5739.021 [5739.02.1], 5739.023 [5739.02.3], or 5739.026 [5739.02.6] of the Revised Code, on any transaction subject to the tax, the vendor or consumer shall be personally liable for the amount of the tax applicable to the transaction. If any vendor fails to pay the annual license renewal fee required by division (A) of section 5739.17 of the Revised Code, the vendor shall be personally liable for the unpaid fee. The commissioner may make an assessment against either the vendor or consumer, as the facts may require, based upon any information in his possession.

An assessment against a vendor when the tax imposed by or pursuant to section 5739.02, 5739.021 [5739.02.1], 5739.023 [5739.02.3], or 5739.026 [5739.02.6] of the Revised Code has not been collected or paid, shall not discharge the purchaser's or consumer's liability to reimburse the vendor for the tax applicable to such transaction.

In each case, the commissioner shall give to the person assessed written notice of the assessment. Such notice may be served upon the person assessed personally or by certified mail. An assessment issued against either, pursuant to this section, shall not be considered an election of remedies, nor a bar to an assessment against the other for the tax applicable to the same transaction, provided that no assessment shall be issued against any person for the tax due on a particular transaction if the tax on that transaction actually has been paid by another.

The commissioner may make an assessment against any vendor who fails to file a return or remit the proper amount of tax required by this chapter, or against any consumer who fails to pay the proper amount of tax required by this chapter. When information in the possession of the commissioner indicates that the amount required to be collected or paid under this chapter is greater than the amount remitted by the vendor or paid by the consumer, the commissioner may audit a sample of the vendor's sales or the consumer's purchases for a representative period, to ascertain the per cent of exempt or taxable transactions or the effective tax rate and may issue an assessment based on the audit. The commissioner shall make a good faith effort to reach agreement with the vendor or consumer in selecting a representative sample period.

Unless the vendor or consumer, to whom the notice of assessment is directed, files within thirty days after service thereof, either personally or by certified mail a petition in writing, verified under oath by the vendor, consumer, or his authorized agent, having knowledge of the facts, setting forth

with particularity the items of the assessment objected to, together with the reasons for such objections, the assessment shall become conclusive and the amount of the assessment shall be due and payable, from the vendor or consumer so assessed, to the treasurer of state. When a petition for reassessment is filed, the commissioner shall assign a time and place for the hearing of the petition and shall notify the petitioner of the hearing by certified mail, but the commissioner may continue the hearings from time to time if necessary.

The final determination of the commissioner on the assessment shall be served either personally or by certified mail upon the party assessed.

The vendor or consumer may appeal the final determination of the commissioner to the board of tax appeals as provided in section 5717.02 of the Revised Code.

All assessments, exclusive of penalties, if not paid within thirty days after service of the notice of assessment, shall bear interest, which shall be computed at the rate per annum as prescribed by section 5703.47 of the Revised Code.

After the expiration of the period within which the person assessed may appeal to the board of tax appeals, or if no petition for reassessment is filed, and if the assessment remains unpaid, a certified copy of the entry of the commissioner making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the vendor's or consumer's place of business is located or the county in which the party assessed resides. If the party assessed maintains no place of business in this state and is not a resident of this state, the certified copy of the entry may be filed in the office of the clerk of the court of common pleas of Franklin county.

The clerk, immediately upon the filing of such entry, shall enter a judgment for the state against the vendor or consumer in the amount shown on the entry. The judgment may be filed by the clerk in a loose-leaf book entitled "special judgments for state, county, and transit authority retail sales tax."

From the date of the filing of the entry in the clerk's office, the assessment, which includes taxes and penalty, shall bear interest, which shall be computed at the rate per annum prescribed by section 5703.47 of the Revised Code and shall have the same effect as other judgments. Execution shall issue upon such judgment upon request of the commissioner and all laws applicable to sales on execution shall be applicable to sales made under such judgment except as provided in sections 5739.01 to 5739.31 of the Revised Code.

All money collected by the commissioner under this section shall be paid to the treasurer of state, and when paid shall be considered as revenue arising from the taxes imposed by or pursuant to sections 5739.01 to 5739.31 of the Revised Code.

HISTORY: GC § 5546-9a; 115 v P.H. 306, § 9a; 116 v P.H. 69; 116 v 323; 117 v 761; 119 v 34; Bureau of Code Revision, 10-1-53; 126 v 723; 128 v 421 (Eff 7-1-59); 129 v 1164 (Eff 1-1-62); 132 v S 350 (Eff 9-1-67); 132 v H 919 (Eff 12-12-67); 135 v H 258 (Eff 7-22-74); 135 v S 544 (Eff 6-29-74); 136 v H 1 (Eff 6-13-75); 139 v S 530 (Eff 6-25-82); 140 v H 291 (Eff 7-1-83); 141 v H 583 (Eff 2-20-86); 142 v H 231. Eff 10-5-87.

STATE OF OHIO  
DEPARTMENT OF TAXATION

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In re Case No. 92-01857

FINAL DETERMINATION

Texas Eastern Transmission Corp.  
Property Tax Department  
P.O. Box 2521  
Houston, Texas 77252-2521

Public Utility Property Tax  
Twenty Ohio Counties  
Tax Year: 1991

This matter, having been heard, involves review of the above assessment pursuant to R.C. 5727.47.

The applicant, a storer, transporter, and seller of natural gas, contends that the certificate of taxable value for 1991 does not reflect the true value of its property. The certified taxable value was determined upon audit pursuant to the standard formula utilized by the Ohio Department of Taxation for public utility companies and set forth in R.C. 5727.11 and 5727.111. The applicant contends that the cost-based valuation formula does not properly value its property, and that its unit approach appraisal more accurately reflects the true value of its property. This contention is not well taken.

The formula used to assess the applicant's property is set forth in R.C. 5727.11(B) and provided in pertinent part:

(b) Except as provided in divisions (C), (D), (E), and (F) of this section, the true value of all taxable property required by division (A)(2) of section 5727.06 of the Revised Code to be assessed by the tax commissioner shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the commissioner. If the commissioner finds that application of this method will not result in the determination of true value of the public utility's taxable property, he may use another method of valuation....

The listing percentage for a pipe-line company is 85% as set forth in R.C. 5727.11(D).

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The equity of the statutory valuation formula emanates from its foundation in industry-wide experience and application. To deviate from this property valuation method for a particular taxpayer would require that taxpayer to meet the standard established for all property tax taxpayers seeking a valuation determined by other than that established as the proper method of determining prima facie true value, i.e., the establishment of the existence of special or unusual circumstances or the occurrence of an unreasonable or unjust result. Cf. Monanto Co. v. Lindley (1979), 58 Ohio St. 2d 59; PPG Industries v. Kopyda (1981), 65 Ohio St. 2d 80. In the instant case, the applicant has failed to establish either.

The applicant has presented an appraisal as an alternative valuation to the statutory valuation of the applicant's property. The stated purpose of the appraisal is to determine a market value of all of the applicant's property and then allocate portions of the appraised market value to all states in which the applicant has property. The appraisal defines "market value" as, basically, the hypothetical selling price in an arm's-length transaction. This approaches the valuation issue from the perspective of an as of yet untranspired event, whereas the valuation method set forth in R.C. 5727.11 attempts to value a public utility's property on the basis of an already determined cost certain, less depreciation as determined by industry experience reflected in the valuation tables set forth in the public utility annual report.

The statute is clear that an alternative valuation can be used by the Department of Taxation in valuing a public utility's property, but only if it is determined that the statutory valuation method does not reflect true value. In the instant case, it was determined upon audit that the statutory valuation method did determine true value of the applicant's property and, therefore, consideration of an alternative valuation would not be appropriate. At the statutory hearing on this matter, the applicant contended that its appraisal should be considered as a more accurate determination of its property's true value.

The mere fact that a taxpayer submits an alternative valuation for its property does not mandate that the valuation must be accepted or even considered. There was no evidence presented by the applicant at the hearing that would indicate that the assessed valuation did not properly determine true value of the applicant's property. It was explained to the applicant at the hearing that in order for the appraisal to replace the assessed valuation, the applicant would have to demonstrate "special or unusual circumstances" or that the assessed valuations lead to an "unreasonable or unjust result." The applicant agreed to submit by an agreed upon date certain a memorandum demonstrating either or both situations. The applicant was granted by telephone at least two time extensions to submit the memorandum. Subsequent to the extensions, the applicant retained outside counsel to represent it. The applicant's counsel was informed orally by representatives of the Ohio

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Department of Taxation that information demonstrating "special or unusual circumstances and/or an unreasonable or unjust result" had not yet been submitted. By letter dated September 29, 1992 the applicant's counsel indicated that no additional information would be submitted. In that letter, the applicant's counsel informed the Department, "my clients believe that the Department has sufficient information to reduce the valuation of each company's taxable tangible personal property. . . ." However, neither the applicant nor its counsel determine when sufficient information has been submitted. If the Department did not deem additional information necessary in order to consider granting the applicant's contention, then additional information would not have been requested. The Department does not frivolously or capriciously request information from taxpayers.

The applicant has not demonstrated "special or unusual circumstances", or that the assessed valuation leads to an "unreasonable or unjust result." The applicant's failure forces the affirmance of the assessment.

Assuming, arguendo, that the applicant had complied with the Department's request and had met its threshold burden of demonstrating "special or unusual circumstances" or the occurrence of an "unreasonable or unjust result," the appraisal it submitted as reflective of the true value of its property would not be persuasive as such.

The purpose of the statutory valuation method is to determine the true value of the applicant's property as it is used by the applicant. Cf. C.C. Leasing Corp. v. Intech (1986), 21 Ohio St. 3d 204; also State, ex rel. v. Halliday (1979), 61 Ohio St. 152. This determination provides a true value of the applicant's property that incorporates consideration of industry experience so as to utilize the same valuation method used to value the property of its competition, and not an appraiser's subjective estimate as to how much the property would sell for in the open market assuming a hypothetical sale.

Further, the appraisal fails to be persuasive because of certain unsupported conclusions. For instance, the appraisal factored in economic obsolescence in the valuation of the applicant's property. This resulted in a reduction of the value of the applicant's property by \$458,120,515, or 21.22%, in the appraiser's opinion using the cost approach to value. The only support for such a substantial reduction was that economic obsolescence resulted, "from the property's inability to consistently earn a market rate of return. . . . [P]art of the economic obsolescence is attributable to the exclusion of certain portions of the [applicant's] property from the rate base, most notably that plant purchased with deferred income tax dollars." Such an exclusion is not peculiar to the applicant, but could be attributed to any public utility purchasing property with deferred income tax dollars. It is mere compliance with rules regulating what is in the rate base and what is not; further, the appraisal fails to factor in an increase in value in the applicant's property as a result of the advantage given to the applicant for

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any public utility) permitted to purchase property with deferred federal income tax dollars instead of, for example, a loan. To accept this practice as contributing to economic obsolescence of the applicant's property when the practice itself is designed to provide public utilities with an advantage in purchasing property is ludicrous. Additionally, while the appraisal indicates that this exclusion from the rate base is only part of the reason for economic obsolescence, the appraisal offers no further or better examples of economic obsolescence.

Also, the appraisal reaches a market value of the applicant's property via the income approach to valuation, using "primarily . . . projected and anticipated future income estimates." The appraisal indicates reliance on the effect of settled rate cases and the effect of anticipated income from current work in progress, but provides no detail as to what rate cases, what work in progress, and how the effect of either factors into the market value of the property using this approach. With paltry supporting information regarding the "projected and anticipated future income estimates," the appraisal's income approach to the market value of the applicant's property is no more than a circuitous manner in which to say it is a guess. A guess does not provide a reasonable alternative method of valuation and, since the cost approach, income approach, and a stock and debt approach to market value were all weighted in the appraisal in reaching a final value, the approaches to value based on these unsupported conclusions and guesses result in a final value that is no more accurate or reflective of true value than the unsupported conclusions and guesses that went into determining it.

Finally, the market value determined by the appraisal was not a market value for property in Ohio, but rather the market value of all of the applicant's taxable property wherever located. The applicant's unit approach appraisal merely allocated to Ohio a portion of the total appraised market value. The allocation was done by the "ratio of original cost of plant in state compared to total original cost of plant in system and net book cost in state compared to net book cost of plant in system." This fails to take into account the relative age and condition of the applicant's property in the various states. Therefore, the appraised market value of the applicant's property within Ohio is based on unsupported conclusions and admitted guesses and at best results in a market value of the applicant's property in Ohio that is an estimate based upon another estimate. This hardly reflects a more accurate valuation of the applicant's Ohio property than the statutory valuation set forth in R.C. 5727.11, which directly and uniformly values only Ohio property based upon cost and fixed depreciation percentages determined by industry experience.

Accordingly, the subject assessment is affirmed.

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THIS REFLECTS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THE SUBJECT MATTER. UPON EXPIRATION OF THE THIRTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

*Roger W. Tracy*  
Roger W. Tracy  
Tax Commissioner

**5703-3-10. Tangible personal property tax; true value of depreciable assets; application of "true value" or "302" computation.**

**(A)** Tangible personal property used in business in this state must be returned, for purposes of the personal property tax, at its true value in money. The true value of depreciable tangible personal property is its book cost less book depreciation, unless the tax commissioner finds that the depreciated book value is greater or less than the true value of such property.

**(B)** Application of the composite annual allowance procedure provided for in rule 5703-3-11 of the Administrative Code shall determine the prima facie true value of depreciable tangible personal property used in business. The prima facie valuations can be rebutted by probative evidence of higher or lower valuation.

**(1)** When an item of tangible personal property is acquired in an arms-length transaction, its true value at the time of purchase is the acquisition cost, including all costs incurred to put the property in place and make it capable of operation, which are normally capitalized in accordance with generally accepted accounting principles.

**(2)** The true value in money of any tangible personal property may be proved by establishing the amount for which the property would sell in an open market by a willing seller to a willing buyer in an arm's-length transaction. If market value is estimated by an appraisal, the property must be appraised as part of an ongoing business unless the taxpayer can demonstrate that the property is more accurately appraised on the basis of piecemeal liquidation or disposal.

**(3)** If a taxpayer believes that the composite annual allowance procedure as determined by the commissioner does not accurately reflect the true value in money of the taxpayer's depreciable tangible personal property on hand, the taxpayer may establish more accurate annual allowances by probative evidence.

**(a)** Such evidence must show that the published composite annual allowance procedures are inappropriate because they cause an unjust or unreasonable result, or must be modified because of special or unusual circumstances.

**(b)** Such evidence may include, but is not limited to, an aging of disposals study and any other studies, data, or documentation the taxpayer wishes to submit for consideration by the commissioner.

**(c)** Such evidence must cover a sufficient number of years to demonstrate a pattern in the history of the useful life of the subject property.

**(C)** A taxpayer must file a claim for deduction from book value for every tax return on which depreciable tangible personal property is returned at a value less than depreciated book value. Such claim must be made in writing at the time of filing the return on form 902, as prescribed by the commissioner, or in a format containing substantially all information as required on form 902.

**History:**Eff 2-21-86.

Rule promulgated under: RC 5703.14.

Rule authorized by: RC 5703.05.

Rule amplifies: RC 5711.02, 5711.03, 5711.09, 5711.18.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Appendix to Brief of Appellant was sent by regular U.S. mail to James F. Lang, Michael T. Mulcahy and Peter A. Rosato, Calfee, Halter and Griswold, LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688, counsel for appellee, on this

20 day of June, 2008.

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

BARTON A. HUBBARD  
Assistant Attorney General