

IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

THE OHIO BELL TELEPHONE COMPANY, :
: Appellee, :
: Case No. 07-1807
v. :
: Appeal from BTA
WILLIAM W. WILKINS [RICHARD A. :
LEVIN], TAX COMMISSIONER OF OHIO, :
: Case No. 2005-K-202
: Appellant. :

REPLY BRIEF OF APPELLANT

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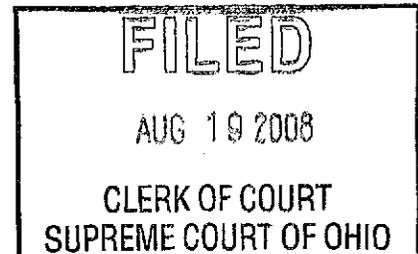


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A. The retroactive appraisal relied on by Ohio Bell at the BTA constituted far more than the presentation of “new evidence”; it constituted an entirely new valuation challenge that Ohio Bell had not raised in its petition for reassessment or in its Notice of Appeal to the BTA.

Ohio Bell blatantly mischaracterizes as the mere presentation of “new evidence” a retroactive appraisal that did not even come into existence until 2006, over a year after Ohio Bell filed its notice of appeal to the BTA from the Commissioner’s final determination. Thus, in his administrative review of Ohio Bell’s 2003 tax year valuation, the Commissioner could not have possibly considered that appraisal and the brand new valuation methodology on which it was based. The appraisal was predicated on a unit-value/income approach valuation methodology, whereas Ohio Bell had raised and presented only a “replacement cost new (RCN)” valuation-methodology challenge in support of its petition for reassessment.

As part of its appraisal-based challenge at the BTA, Ohio Bell did rely on “new evidence” contained in the appraisal that it had not presented to the Commissioner. What Ohio Bell overlooks, however, is that the “evidence” contained in its unit-value/income approach appraisal was in support of a far different valuation claim from the one Ohio Bell had presented to the Commissioner. In fact, at the BTA, Ohio Bell abandoned its RCN-valuation methodology challenge, so that the “new evidence” contained in the appraisal had no relevance to the valuation challenge that Ohio Bell previously had presented to the Commissioner and raised in its notice of appeal to the BTA.

B. In raising and presenting this entirely new appraisal-based valuation challenge for the first time at the BTA, Ohio Bell circumvented the Commissioner’s administrative review process so that the BTA could not benefit from the substantial tax expertise and findings of the Commissioner concerning that newly raised challenge.

As this Court repeatedly has acknowledged, the Commissioner is a tax “expert,” and his determination of taxable true value involves “the highest degree of official judgment and

discretion.” *Bd. of Educ. of South-Western City Schools v. Kinney* (1986), 24 Ohio St.3d.184, 186; *Ashland County Bd. of Comm’rs v. Ohio Dep’t of Taxation* (1992), 63 Ohio St.3d 648, 656. In this case, Ohio Bell never raised a unit-value/income approach valuation challenge in the Commissioner’s administrative proceedings. In bypassing the Commissioner, the BTA did not have the benefit of the Commissioner’s “expert” findings concerning the valuation methodologies, valuation analysis, or valuation evidence set forth in Ohio Bell’s unit-value appraisal.

Accordingly, the BTA’s consideration of the appraisal-based challenge greatly prejudiced the Commissioner and the school district and other taxing district recipients of the personal property tax revenues. Given his tax expertise, the Commissioner’s personal property tax valuation findings “are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.” *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, paragraph one of the syllabus. In the present case, the BTA failed to accord any weight to any valuation findings by the Commissioner concerning the appraisal because the Commissioner was denied the opportunity to make any such findings.

The substantial deference afforded the findings set forth in the Commissioner’s final determinations is well established. This Court has required that affirmative burden of proof to be met by the one challenging the Commissioner’s findings in approximately thirty Tax Commissioner cases decided post-*Hatchadorian*. The Court has done so most recently in three personal property tax cases, *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, ¶7; *Shiloh Automotive, Inc. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68, ¶16; and *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St. 3d 122, 2008-Ohio-511, ¶11.

In its answer brief filed with this Court, Ohio Bell simply ignores the foregoing case law of this Court and the underlying policy reasons for the substantial weight the BTA is required to give to the Commissioner's findings under that case law. Instead, Ohio Bell tacitly asks the Court to overturn decades of established precedent by now allowing those challenging the Commissioner's final determinations to bypass the Commissioner's administrative review process pursuant to which the Commissioner makes "findings" concerning the matter in controversy.

C. As applied to Ohio Bell's new appraisal-based challenge at the BTA, by circumventing the Commissioner's administrative review process, Ohio Bell did not permit the Commissioner to discharge the responsibilities and discretionary authority vested in the Commissioner by the General Assembly under R.C. 5727.10 and R.C. 5727.11(A).

By permitting Ohio Bell to bypass the Commissioner's administrative review proceedings, the BTA's decision further clashes with the governing principles applicable to the Commissioner's legislatively designated role as the assessor of the public utility personal property tax. Namely, under R.C. 5727.11(A) and R.C. 5727.10, the Commissioner is charged with performing special, unique duties regarding the valuation of public utility personal property and is conferred with discretionary authority in his exercise of those duties. Because the BTA allowed Ohio Bell to raise and present its new valuation challenge for the first time at the BTA, the Commissioner was thus precluded from discharging those special duties and exercising the discretionary authority granted to him by the General Assembly.

Specifically, pursuant to R.C. 5727.11(A), the General Assembly grants to the Commissioner discretion to depart from the methodology otherwise mandated by the General Assembly, as follows:

(A)*** [T]he true value of all taxable property *** 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.

(Emphasis and underlining added.)

Further, R.C. 5727.10 requires the Commissioner, in the exercise of that discretion, to be “guided by” the evidence presented to him, as follows:

***[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 him to make these determinations.

(Emphasis added.)

Thus, reading R.C. 5727.11(A) in pari materia with R.C. 5727.10 establishes that under those statutes the General Assembly has imposed on the Commissioner several special duties and has conferred the Commissioner with discretionary authority concerning his discharge of those duties. First, under the first sentence of R.C. 5727.11(A), **the Commissioner** is required to establish “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.”

Second, under R.C. 5727.10, in determining the “true value of taxable property,” **the Commissioner** is required to be “guided by the information contained in the report [i.e., the annual Ohio public utility personal property tax return] and such other evidence and rules as will enable him to make these [the true value] determinations.” Thus, **the Commissioner** is required to determine the true value of taxable public utility personal property using the information in the Ohio public utility tax returns and such other evidence as is presented to, or considered by, him.

Third, under the second sentence of R.C. 5727.11(A), if **the Commissioner** finds that a “method of valuation” other than the legislatively prescribed method better reflects true value

the Commissioner “may,” in the exercise of his discretion, apply that other “method of valuation.”

In the present case, the course of conduct by Ohio Bell precluded the Commissioner from discharging these obligations as applied to Ohio Bell’s appraisal-based challenge. Specifically, the contents of the appraisal, including the appraisal methodology, appraisal analysis and appraisal evidence therein, were not presented to the Commissioner – either in the Commissioner’s pre-assessment review of Ohio Bell’s 2003 tax return, or subsequently, upon Ohio Bell’s filing of its petition for reassessment. Because Ohio Bell “kept its powder dry” by deciding to create and present its appraisal-based challenge for the first time at the BTA, Ohio Bell prevented the Commissioner from discharging his responsibility of being “guided by *** such other evidence ****” regarding that challenge.

D. The facts of *Texas Eastern* fundamentally differ from those here because in that case the taxpayer timely presented its appraisal-based challenge to the Commissioner and the Commissioner, accordingly, had full and fair opportunity to review and consider the valuation methodology, analyses and evidence set forth in that appraisal in determining whether to depart from the legislatively prescribed method for valuing public utility personal property.

In its answer brief filed with this Court, Ohio Bell simply ignores the foregoing considerations and statutory analysis in Sections B and C, supra. In fact, Ohio Bell’s only attempt by brief to address that subject is through a fundamentally deficient and misleading discussion of this Court’s decision in *Texas Eastern Transm. Corp. v. Tracy* (1997), 78 Ohio St.3d 83. As we emphasized in our opening brief, in *Texas Eastern* this Court read R.C. 5727.11(A) and R.C. 5727.10 in pari materia to conclude that, for purposes of valuing public utility personal property pursuant to a petition for reassessment, the Commissioner is required to consider the evidence presented to him in the administrative proceedings on the petition, including the evidence contained in a unit-value appraisal. See T.C. Br. 24-25.

Ohio Bell's brief ignores that entire statutory analysis. Instead, Ohio Bell appears to erroneously imply that the taxpayer litigant in *Texas Eastern* had raised its appraisal-based challenge for the first time at the BTA. See Ohio Bell's answer brief (O.B. Br.) at 18-19 (suggesting that the Commissioner in *Texas Eastern* had not reviewed or considered the appraisal-based challenge presented by the taxpayer in that case). As we noted in our opening brief, any such implication is wholly untrue. In *Texas Eastern*, the taxpayer introduced its appraisal-based challenge in the administrative proceedings on its petition for reassessment. Accordingly, the Commissioner's final determination fully addressed the substantive merits of the *Texas Eastern* appraisal challenge. See T.C. Br. 25; and T.C. Br. Appx. 147-151 (Tax Commissioner's Final Determination in *Texas Eastern*, dated May 27, 1993).

By stark contrast to the express findings in his final determination in *Texas Eastern* concerning the appraisal-based challenge raised therein, the Commissioner did not (and could not) address the merits of Ohio Bell's appraisal-based challenge in his final determination in the present case. Thus, in direct contradiction to this Court's reasoning in *Texas Eastern*, if the BTA's decision below is permitted to stand, rather than exercising its role as a reviewer of the Commissioner's valuation findings, the BTA would assume the role of the Commissioner. The Commissioner's valuation responsibilities and discretionary authority would vanish. Under Ohio Bell's (and the BTA's) erroneous approach, the General Assembly's directives to the Commissioner in R.C. 5727.11(A) and R.C. 5727.10 would be judicially erased.

E. Ohio Bell failed to confer jurisdiction on the Commissioner and the BTA to consider its appraisal-based challenge because such untimely challenge violated the jurisdictional mandates set forth in R.C. 5727.47 (governing petitions for reassessment) and R.C. 5717.02 (governing notices of appeal to the BTA).

The BTA's consideration of Ohio Bell's appraisal-based challenge violated the mandatory, jurisdictional requirements of two separate appeals statutes, R.C. 5727.47 and R.C.

5717.02. Under R.C. 5727.47, a petitioning public utility personal property taxpayer must set forth its objections to the Commissioner's valuation assessment in its petition for reassessment or in writing during the Commissioner's review of the petition. This Court, the courts of appeal, and the BTA itself long have held that taxpayer/petitioners must comply strictly with that requirement in order to confer jurisdiction on the Commissioner and, subsequently, on the BTA and courts of appeal, to consider an objection.¹

Similarly, under R.C. 5717.02, in its notice of appeal to the BTA a taxpayer (or county auditor) challenging the Commissioner's final determination must "specify * * * the errors complained of" in the final determination. In our opening brief, we cited a long, continuous line of decisions from this Court holding that strict compliance with this requirement is required in order for an appellate taxpayer to confer jurisdiction on the BTA and the appellate courts to consider a specific issue, beginning with *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579 and ending with the Court's most recent application of this established principle in *Lovell v. Levin*, 116 Ohio St. 3d 200, 2007-Ohio-6054, ¶35 (quoting *Queen City Valves* at 583). T.C. Br. 19-21.

In addition to the vast body of decisions by this Court applying the "specification of error" requirement as a jurisdictional bar that we cited and relied on in our opening brief, the Franklin County Court of Appeals recently issued a cogent decision that undertook a detailed discussion and analysis of this Court's case law on that subject. *Candy & Tobacco, LLC v. Levin*, 10th Distr. No. 08AP-126, 2008-Ohio-3173.

¹ See T.C. Br. 16-18 (citing *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28; *Shugarman Surgical Supply v. Zaino*, 97 Ohio St. 3d 183, 186; 2002-Ohio-5809; *Nimon v. Zaino*, 8th Distr. No. 01CA007918, 2002-Ohio-822, T.C. Br. Appx. 90-92 .

In *General Commodities*, the taxpayer argued that its notice of appeal to the BTA sufficiently “specified” as error a challenge to the Commissioner’s final determination. After setting forth its discussion of this Court’s fifty years of decisions, the *General Commodities Candy* Court distilled and applied the essence of this Court’s controlling precedent, as follows:

Based upon the well-established case law outlined above, we cannot conclude that appellant's notice of appeal "specified" "clearly" and "distinctly" the error(s) complained of. The language employed by the Ohio Supreme Court is unambiguous. **A party appealing from a commissioner's determination must set forth its specific argument. The notice of appeal filed by appellant set forth no specific argument as to how the tax commissioner erred or why the assessment was erroneous.**

(Emphasis added.) Id. at ¶8. Accordingly, the court of appeals affirmed the BTA’s dismissal of the taxpayer’s notice of appeal to the BTA.

In the present case, in its petition for reassessment and in its notice of appeal to the BTA, Ohio Bell did “clearly” and “distinctly” set forth a “specific argument as to how the tax commissioner erred or why the assessment was erroneous.” Namely, as we outlined in our opening brief, in its petition for reassessment, Ohio Bell claimed that the Commissioner erred because:

“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 reasonably reflect true value.”

See T.C. Br. 13, quoting Ohio Bell’s petition for reassessment, S.T. 198-199, Supp. 193-194.

Thereafter, in the administrative proceedings on the petition, Ohio Bell supplemented its petition with a “replacement cost new” (RCN) valuation study containing estimates of the current costs and service lives of its taxable Ohio telecommunications plant property and equipment and the estimated service lives of such property. T.C. Br. 13-15, S.T. 10-121, Supp.

315-420. In other words, Ohio Bell further specified the reasons why the Commissioner's assessment was erroneous under its RCN-methodology-based challenge. Then, in its notice of appeal to the BTA, Ohio Bell specified this same error, using the identical wording that it had in its petition for reassessment. See, T.C. Br. 15, quoting directly from Ohio Bell's notice of appeal to the BTA.

By specifying as error in its petition for reassessment and notice of appeal to the BTA that the Commissioner should have determined the true value of its taxable Ohio personal property using an RCN-valuation methodology, analysis and evidence, however, Ohio Bell failed to "specify" the far different valuation challenge set forth in its unit-value appraisal. In the words of the *General Commodities* Court, Ohio Bell failed to set forth any other "specific argument as to how the Commissioner's assessment and final determination was erroneous." Id. at ¶8.

By specifying one kind of valuation challenge (i.e., its RCN-valuation methodology challenge), Ohio Bell did not thereby "specify" any other one – particularly one entailing entirely different valuation methodologies, valuation analyses, and valuation evidence (i.e., its unit-value/income approach methodology appraisal challenge). Thus, Ohio Bell plainly failed to comply with the mandatory jurisdictional requirements set forth in R.C. 5727.47 and R.C. 5717.02.

F. In response to the Commissioner's jurisdictional grounds for barring Ohio Bell's appraisal-based challenge, Ohio Bell ignores all of the cases involving these jurisdictional issues and, instead, erroneously relies on cases wholly inapposite to the jurisdictional issues.

In its answer brief, Ohio Bell does not cite or discuss a single case involving the error-specification requirement of R.C. 5717.02 or a single case involving the like requirement in R.C. 5727.47 and in the various other "petition for reassessment" statutes in the various other tax chapters contained throughout R.C. Title 57. Instead, in response to the Commissioner's

jurisdictional arguments, Ohio Bell relies on cases that do not involve application of either of these jurisdictional requirements. O.B.Br. 14-16 (citing *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 16; *Bloch v. Glander* (1949), 151 Ohio St. 381; and *Higbee Co. v. Evatt* (1942), 140 Ohio St. 325).

In our opening brief, we detailed why *Key Serv.* was of no help to Ohio Bell in defending its untimely appraisal-based challenge against the Commissioner's jurisdictional bases for reversing the BTA. See the discussion in the Commissioner's Proposition of Law No. 5, T.C. Br. 25-26. In *Key Serv.*, this Court held that the Commissioner was not barred from defending his denial of a sales tax refund claim on a legal and factual basis that he did not expressly address in his final determination. In so holding, the Court distinguished the situation before it from one in which an appellant taxpayer contests the Commissioner's final determination on a basis not specified in its notice of appeal to the BTA, as follows:

R.C. 5717.02 authorizes an appeal to the BTA from final determinations of the Tax Commissioner and requires the appellant to "specify the errors * * * complained of." ***

There is no statutory procedure for the Tax Commissioner to file any answer or cross-appeal to the taxpayer's notice of appeal. Likewise, there is no statutory limitation on what the commissioner may contest. **The only statutory constraints are imposed upon the appellant's appeal to the BTA.**

(Emphasis added.) Id. at 12-13.

By contrast to the challenge involved in *Key Serv.* in which **the taxpayer** jurisdictionally challenged the Commissioner's raising of a defense to his assessment for the first time at the BTA, in the present case, **the Commissioner** jurisdictionally has challenged Ohio Bell's raising of a new basis for questioning the Commissioner's assessed valuation that Ohio Bell did not raise in proceedings before the Commissioner or in its notice of appeal to the BTA. In this latter

situation, the jurisdictional requirements in R.C. 5727.47 and R.C. 5717.02 apply to bar Ohio Bell's appraisal-based challenge.

Thus, *Key Serv.*, by its own terms, is expressly inapposite to the present case. As established by a long and continuous line of this Court's decisions beginning with *Queen City Valve*, an appellant taxpayer has no right to present "additional evidence" to the BTA in support of specifications of error that have not been timely raised in the appellant taxpayer's notice of appeal to the BTA. Nothing in *Key Serv.* undermines this established precedent. Indeed, the *Key Serv.*'s Court went out of its way to expressly make this point. Thus, the fact that Ohio Bell's unit-value appraisal contained "new evidence" that Ohio Bell did not present to the Commissioner provides no defense to Ohio Bell's jurisdictional failures to have timely raised its appraisal-based challenge in the Commissioner's administrative proceedings or in its notice of appeal to the BTA.

Moreover, this Court's decisions in *Higbee* and *Bloch* are even less pertinent to the jurisdictional issues presented here. In *Higbee*, the Court affirmed the BTA's affirmance of the Commissioner's personal property tax inventory valuations against the appellant taxpayer's assertion that the taxpayer was not afforded "due process." The Court held that the BTA administrative hearing provided to the appellant taxpayer, pursuant to which the taxpayer was afforded the right to present additional evidence, provided the taxpayer due process ("[n]ew evidence may be introduced and the burden of proof is on the taxpayer"). 140 Ohio St. at 332. By contrast to the present case, in *Higbee*, the additional evidence presented by the taxpayer appellant was in support of the valuation challenge that the taxpayer had raised below in the administrative proceedings and which it specified in its notice of appeal. No jurisdictional question was before the Court in that case.

Bloch, a 1949 sales tax case, is even more inapposite than *Higbee*. As in *Higbee*, no jurisdictional issue was presented to the Court. Rather, in *Bloch*, this Court temporarily established a burden of proof standard that accorded no presumptive validity to the Commissioner's findings in his final determinations. See *Bloch*, paragraph two of the syllabus, as follows:

2. The rule generally applied by the courts, that the action of a public officer or board within the limits of the jurisdiction conferred by law is presumed to be valid, in good faith and in the exercise of sound judgment, is **not** applicable in an appeal from the Tax Commissioner to the Board of Tax Appeals pursuant to Sections 5611 and 5611-1, General Code [currently R.C. 5717.02], which require such board to grant the appellant a full hearing on his complaint.

(Emphasis added.)

Subsequently, as we have detailed supra and in our opening brief, in *Hatchadorian*, paragraph one of the syllabus, this Court held that the Commissioner's findings in his final determinations are "presumptively valid absent a demonstration that they are clearly unreasonable or unlawful." Thus, *Hatchadorian* (and approximately thirty additional cases of this Court post-*Hatchadorian*) implicitly overruled paragraph two of *Bloch*. Accordingly, that part of *Bloch* recognizing that taxpayers are afforded a "full hearing on his complaint," i.e., a "de novo hearing," remains good law, but *Bloch* is no longer good law regarding the burden of proof standard applicable to the Commissioner's findings. Contrary to *Bloch*, the Commissioner's findings are accorded presumptive validity. Thus, not only is *Bloch* of no help to Ohio Bell regarding the jurisdictional issues presented to this Court, its holding that the Commissioner's findings have no presumptive validity has been overruled.

In its decision and order below, the BTA erroneously followed the lead of Ohio Bell's briefing by relying on *Key Serv.* citing to *Bloch*, to resolve the Commissioner's jurisdictional challenges to Ohio Bell's untimely appraisal-based challenge. See *BTA Decision and Order* at 7-

8, T.C. Br. Appx. 12-13, quoting from the BTA's interim order dated Feb. 3, 2006, T.C. Br. Appx. 33. The BTA thus acted unreasonably and unlawfully in failing to apply this Court's decades of established precedent holding that, in order to confer jurisdiction on the BTA, taxpayers must timely raise specific claims in the Commissioner's administrative proceedings and in their notices of appeal to the BTA.

In sum, in the administrative proceedings on its petition for reassessment and in its notice of appeal to the BTA, Ohio Bell failed to provide the Commissioner with the requisite notice of the appraisal-based challenge that it subsequently raised at the BTA, over a year after it filed its notice of appeal with the BTA. This failure to have raised timely any such valuation challenge highly prejudiced the Commissioner and made it impossible for him to discharge his statutory duties under R.C. 5727.11(A) and R.C. 5727.10 regarding that newly raised challenge.

Moreover, by this failure, the BTA did not have the benefit of any Commissioner findings concerning: (1) the valuation methodology used by Ohio Bell in its unit-value appraisal; (2) the analysis used by Ohio Bell in that appraisal; and (3) the evidence relied on in that appraisal. Rather, the Commissioner was placed in the untenable position of having to defend an entirely new valuation challenge several years after his issuance of the 2003 tax year assessment, having had no notice of such challenge at any earlier time. Accordingly, the BTA's decision permitting Ohio Bell to circumvent the Commissioner's administrative proceedings was unreasonable and unlawful because, pursuant to R.C. 5727.47 and R.C. 5717.02, Ohio Bell failed to confer jurisdiction on the BTA to consider Ohio Bell's untimely appraisal-based challenge.

G. At the BTA, the Commissioner's determination to apply the legislatively prescribed valuation method, rather than an alternative valuation method, is subject to an "abuse of discretion" standard which Ohio Bell failed to meet in this case.

- 1. The plain meaning of R.C. 5727.11(A) requires public utility taxpayers to show at the BTA that the Commissioner “abused his discretion” in choosing to utilize the valuation method prescribed in that Section, rather than an alternative valuation method.**

In Proposition of Law No. 6 of our opening brief, we provided a detailed textual analysis of R.C. 5727.11(A) and this Court’s case law involving similarly worded statutes. This analysis and case law establishes that the plain meaning of R.C. 5727.11(A) requires appellant public utility taxpayers to demonstrate at the BTA that the Commissioner “abused his discretion” in choosing to value the utility’s taxable property using the methodology prescribed in that Section. T.C. Br. 26-28.

Notably, in its answer brief, Ohio Bell does not address any of this textual analysis or case law, apparently conceding that the plain meaning of R.C. 5727.11(A), in fact, does require taxpayers to meet an “abuse of discretion” standard when, on appeal to the BTA, they seek their public utility personal property to be valued other than pursuant to the legislatively prescribed method. Moreover, nowhere in its brief does Ohio Bell contest the factual and legal analysis in our opening brief that the Commissioner did not abuse his discretion. Ohio Bell does not even assert, let alone attempt to establish, that the Commissioner’s valuation decision constituted an abuse of discretion. Thus, under the “abuse of discretion” standard, Ohio Bell’s appeal to the BTA fails.

The plain meaning of R.C. 5727.11(A) should be controlling here. As this Court long has held: “[t]he court must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged; ***.” *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, paragraph five of the syllabus; accord, *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549. Thus, given Ohio Bell’s failure to assert, let alone affirmatively demonstrate, that the Commissioner’s

valuation of Ohio Bell's taxable personal property constituted an abuse of discretion, the Court should reverse the BTA, even if the Court finds the BTA had been conferred with jurisdiction to consider Ohio Bell's appraisal-based challenge.

Rather than address our statutory and case law analysis of the plain meaning of R.C. 5727.11(A), Ohio Bell relies on other purported authority in support of its contention that it was not required to show that the Commissioner abused his discretion in valuing Ohio Bell's property under the valuation methodology prescribed by the General Assembly in R.C. 5727.11(A). Unfortunately for Ohio Bell, its arguments fail to provide this Court with a reasonable or lawful basis for judicially rewriting that statute and departing from its plain meaning.

2. The right granted appellants under R.C. 5717.02 to present “additional evidence” at a BTA hearing in support of a timely specified error in the Commissioner’s final determination provides no lawful basis for this Court to depart from the plain meaning of R.C. 5727.11(A) and to reject established case law requiring appellants to prove an abuse of discretion.

Perhaps the most pervasive error in legal analysis in Ohio Bell's answer brief is its assertion that the right afforded appellants in R.C. 5717.02 to present additional evidence at a BTA evidentiary hearing means that no presumptive validity attaches to the Commissioner's final determinations. Throughout its answer brief, Ohio Bell refers to the BTA proceedings as “de novo,” and then proceeds with the erroneous claim that, because such proceedings are “de novo,” R.C. 5727.11(A) “does not *** give *** [the Commissioner's valuation decision] *** any special weight on appeal.” O.B. Br. 19. See also, Section C of Ohio Bell's Fourth Proposition of Law (captioned “A Preponderance of the Evidence Supported the Board's Decision to Reverse the Commissioner's Determination.”), O.B. Br. 23.

Ohio Bell's assertion is a non sequitur for several reasons. First, that assertion directly conflicts with this Court's well-established, generally applicable principle set forth in paragraph

one of the syllabus of *Hatchadorian*, i.e., that the Commissioner’s findings are presumptively valid absent a showing that those findings are “clearly unreasonable or unlawful.” If Ohio Bell’s contention were correct, on appeal to the BTA the Commissioner’s findings never would be given “special weight.” Rather, under Ohio Bell’s theory, because R.C. 5717.02 generally grants appellant taxpayers the right to present “additional evidence” at a BTA hearing and, thus, making such hearing “de novo,” no presumptive validity would attach to the Commissioner’s tax decisions in any case appealed to the BTA.

In its most recent personal property tax valuation case, this Court applied the *Hatchadorian* principle to uphold the reasonableness and lawfulness of the Commissioner’s determination of the taxable true value of a general taxpayer’s personal property and the BTA’s affirmance of that determination. *Shiloh Automotive*, supra, 117 Ohio St.3d 4, 2008-Ohio-68.

The *Shiloh* Court undertook a detailed discussion of the Commissioner’s valuation findings, holding that the BTA was required to uphold those findings absent a showing that they clearly were unreasonable or unlawful. *Id.* at ¶¶ 16, 22-27. Thus, Ohio Bell’s bare contention that the Commissioner’s valuation decisions “cannot be given any special weight,” flies directly in the face of *Shiloh*, as well as a myriad of other Ohio Supreme Court cases likewise recognizing the presumptive validity of the Commissioner’s findings in his final determinations. In essence, Ohio Bell is arguing for this Court to return to the long-overruled paragraph two of the syllabus of *Bloch v. Glander*. See Section F, supra.

Second, Ohio Bell’s contention is directly refuted by the tax cases this Court has decided under Ohio tax statutes granting the Commissioner discretion in making tax determinations. In our opening brief, we identified several of this Court’s various decisions holding that, under such statutes, to successfully challenge the Commissioner’s exercise of discretion, an appealing

taxpayer must demonstrate at the BTA that the Commissioner abused his discretion. See T.C. Br. 28 (citing the following tax penalty-remission cases: *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 483 (highway use tax); *General Motors Corp. v. Tracy* (1995), 73 Ohio St. 3d 29 (use tax); *Smucker v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, ¶14 (personal property tax) (citing *State ex rel. Niles v. Bernard* (1978), 53 Ohio St.2d 31, 34).

Furthermore, the Court likewise has applied this same “abuse of discretion” burden on appellants appealing to the BTA from county budget commissions’ discretionary allocation determinations under R.C. 5747.53. *Chester Township v. Geauga Co. Budget Comm.* (1976), 48 Ohio St.2d 372, 373. As held by the Court in *Chester*, “[i]n the use of the alternative method of apportionment authorized by R.C. 5747.53, a county budget commission is limited to factors deemed to be appropriate and reliable **in the sole discretion of that commission.**” (Emphasis added.) *Id.* at 374. Moreover, those challenging the county budget commission’s exercise of discretion have the burden of showing that the county budget commission “abused its discretion.” *Id.* at 374 (“after careful review of the record, this court concludes that there is no abuse of discretion [by the county budget commission] *** [citations omitted]”).

Chester is particularly instructive because the statutory language conferring discretion on county budget commissions employed by the General Assembly in R.C. 5747.53 closely parallels the statutory language conferring discretion on the Tax Commissioner in R.C. 5727.11(A). Namely, under R.C. 5747.53(B) [previously codified at R.C. 5747.53(A)], in lieu of applying the statutory method the General Assembly mandates in R.C. 5747.51, a county budget commission “**may** provide for the apportionment of such fund [the undivided local government fund] under an alternative method or on a formula basis as authorized by this section.” (Emphasis added.)

In sum, if Ohio Bell's and the BTA's disregard of the plain meaning of R.C. 5727.11(A) were to be followed by this Court, it would require the Court to overrule or ignore *Chester* and a long line of tax-penalty remission cases beginning with *Interstate Freight* and continuing through to its most recent decision in *Smucker*. Similarly, it would require the Court to overrule or ignore all of this Court's decisions applying the first paragraph of the syllabus of *Hatchadorian*.

3. **By contrast to R.C. 5727.11(A), under R.C. 5711.18 of the general personal property tax law, the General Assembly did not mandate the Commissioner to determine true value under a method of valuation using capitalized costs less prescribed annual allowances, subject only to the Commissioner's discretion to use another valuation method. Accordingly, Ohio Bell errs in relying on this Court's case law under R.C. 5711.18 to avoid the plain meaning of R.C. 5727.11(A).**

In its answer brief, Ohio Bell erroneously contends that at the BTA the Commissioner's valuation applying the legislatively prescribed method of valuation set forth in R.C. 5727.11(A) is only "prima facie" valid, so that Ohio Bell could rebut that "prima facie" validity by submitting probative evidence of a different true value at the BTA. Ohio Bell relies on cases decided under R.C. 5711.18 for that contention.² See O.B.Br. 20-23. Ohio Bell's reliance on cases applying R.C. 5711.18 to support its interpretation of R.C. 5727.11(A) is erroneous for several reasons.

First, Ohio Bell ignores the fundamentally different statutory language of R.C. 5727.11(A) from that of R.C. 5711.18. In R.C. 5727.11(A), the General Assembly mandates that the Commissioner "shall" apply "a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the

² R.C. 5711.18 is the valuation statute applicable to general-business personal property taxpayers, whereas R.C. 5727.11(A) is the valuation statute applicable to public-utility personal property taxpayers.

commissioner.” In contrast, in R.C. 5711.18, the General Assembly did not mandate any such “capitalized cost less prescribed allowances” method. Moreover, in R.C. 5727.11(A), the General Assembly vests the Commissioner with discretion to depart from that “capitalized cost less prescribed allowances” methodology. Significantly, in contrast, R.C. 5711.18 does not grant any discretionary authority to the Commissioner.

Rather, the Commissioner’s authority to apply his so-called “302 computation” methodology derives solely from an administrative rule promulgated by the Commissioner under the authority of R.C. 5727.18. Ohio Adm. Code 5703-03-10, T.C. Br. Appx. 152. Moreover, by its express terms, Ohio Adm. Code 5703-03-10 provides that the “302 computation” methodology is merely a “prima facie valuation.” In stark contrast, under the plain language of R.C. 5727.11(A), a “capitalized cost less prescribed allowances” methodology is **mandated by the General Assembly**, subject only to the Commissioner’s discretion to depart from that method.

Finally, this Court’s decision in *Texas Eastern* is of no help to Ohio Bell’s erroneous interpretation of R.C. 5727.11(A). In that case, the narrow issue raised by the Commissioner’s appeal did not present the Court with whether the Commissioner’s determination to use the legislatively prescribed valuation method was subject to an “abuse of discretion” standard. Rather, in his appeal the Commissioner had contended that a “unit-value appraisal” was properly excluded by the Commissioner from his consideration.

The Commissioner’s asserted basis for the exclusion of the appraisal from his consideration was *Texas Eastern*’s alleged failure to have demonstrated that, for the tax years at issue, it had experienced “special or unusual circumstances” adverse to the natural gas pipeline industry generally. *Id.* at 85. The Court held that a Commissioner finding of “special or unusual

circumstances” is not a prerequisite to the Commissioner’s consideration of the appraisal evidence. *Id.* In fact, the Court in *Texas Eastern* undertook the very kind of textual/plain-meaning analysis of R.C. 5727.11(A) that we have undertaken above to establish that the Commissioner’s determination to apply the legislatively prescribed valuation method is subject to an abuse of discretion standard.

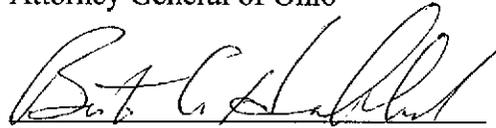
To summarize, in 1989 when R.C. 5727.11(A) was enacted, the General Assembly had the benefit of the existing statutory language in R.C. 5711.18. Yet, the General Assembly chose to enact a far different valuation directive to the Commissioner in R.C. 5727.11(A) than set forth in R.C. 5711.18. Had the General Assembly intended the Commissioner’s public utility personal property tax valuations to be subject to the same directives and standards that are applicable under R.C. 5711.18, the General Assembly simply would have adopted the same or similar language that it already had set forth in R.C. 5711.18. Instead, it enacted far different statutory language mandating the Commissioner to use a “capitalized-cost-less-prescribed-allowances” methodology, subject only to the Commissioner’s discretion to depart from that methodology.

CONCLUSION

For all these reasons, together with the further factual and legal analysis in our opening brief, the BTA’s decision and order should be reversed and the Commissioner’s valuation under the method prescribed by the General Assembly pursuant to R.C. 5727.11(A) should be affirmed.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellee was sent by regular U.S. mail to James F. Lang 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 19th day of August, 2008.

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

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