

IN THE SUPREME COURT

STATE OF OHIO

APPEAL FROM THE BOARD OF TAX APPEALS

AMERICAN FIBER SYSTEMS, INC.,)

Appellant,)

v.)

RICHARD A. LEVIN, FORMERLY)
WILLIAM J. WILKINS, TAX)
COMMISSIONER OF THE STATE)
OF OHIO,)

Appellee.)

SUPREME COURT CASE
NUMBER 2008-1338

BOARD OF TAX APPEALS
CASE NO. 2006-B-118

BRIEF OF APPELLANT AMERICAN FIBER SYSTEMS, INC.

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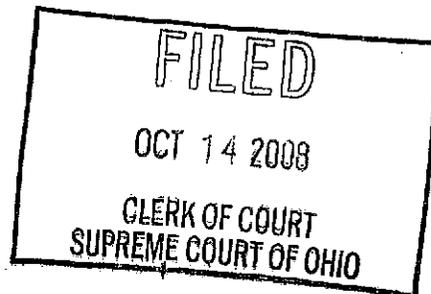


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STATEMENT OF THE CASE

This case comes to the Court from a decision and order of the Ohio Board of Tax Appeals that affirmed the final determination of the Appellee Tax Commissioner with respect to the assessment of the Appellant's property for tax year 2004. The case involves a public utility property tax assessment. A motion on the issue of collateral estoppel filed by the Appellant with the Board of Tax Appeals was overruled and the Tax Commissioner's tax year 2004 assessment of Appellant's assets was affirmed by the Board of Tax Appeals. The Record in this appeal is identical to the record before the Board of Tax Appeals in case no. 2004-K-1222, involving the assessment of Appellant's assets for the tax year 2003, decided September 16, 2005, upon which the Appellant's motion on the issue of collateral estoppel was based. See Transcript on Appeal filed by the Tax Commissioner with the Board of Tax Appeals on March 31, 2006, Supp. at pages 1-167. The parties agreed to waive the hearing before the Board of Tax Appeals scheduled for February 16, 2007 and submit the case to the Board of Tax Appeals based on the Record. The Record in the appeal is as follows.

STATEMENT OF THE FACTS

The Appellant owns a 41.26 mile fiber optic loop in Cuyahoga County, Ohio. Supp. at pages 132 and 133. The Appellant constructed the fiber optic loop and utilizes only 12.5% (36 strands\ 288 strands) of the fiber that comprises the loop. Supp. at pages 134 and 135. The Appellee Tax Commissioner acknowledged this fact in his final determination on the Appellant's 2003 tax year assessment and reduced the assessed taxable value of Appellant's unused and unlit fiber optic cable from \$1,758,057 to \$219,757 (an 87.5% decrease). Supp. at pages 126 and 127.

The 2003 tax year final determination of the Tax Commissioner was affirmed by the

Ohio Board of Tax Appeals in case no. 2004-K-1222, decided September 16, 2005. Supp. at page 213. A copy of the Board's decision 2003 tax year decision and order was attached as Exhibit A to Appellant's motion on the issue of collateral estoppel before the Board of Tax Appeals. Supp. at pages 207-213. The 2003 tax year Board of Tax Appeals decision and order on the Tax Commissioner's 2003 tax year final determination was issued prior to the 2004 tax year final determination by the Tax Commissioner at issue in this appeal. Supp. at pages 207, 3. The Tax Commissioner did not reduce the assessment of the same assets for the tax year 2004 even though the Tax Commissioner in his 2004 tax year final determination explicitly found "[t]he petitioner's assets and business have not changed materially since the Board's ruling on the petitioner's public utility property tax for the 2003 tax year." Supp. at page 5. This finding by the Tax Commissioner served as the basis for the motion by the Appellant on the issue of collateral estoppel before the Board of Tax Appeals and its appeal to this Court.

The Transcript on Appeal prepared by the Tax Commissioner contains the evidence submitted by the Appellant in support of their position that the entire cost of Appellant's network should be reduced by approximately 87.5%. Supp. at pages 9-113, 119-135, and 137. The Appellant's appeal to the Board of Tax Appeals in this case raised the exact same issues raised before the Board of Tax Appeals and the Tax Commissioner in the 2003 tax year appeal. See Supp. at pages 124-130. Only assignments of error 1 and 2 were unique to the 2004 appeal, they raised the collateral estoppel issue addressed in the Appellant's motion.

The hearing before the Ohio Board of Tax Appeals in case no. 2004-K-1222 (the tax year 2003 appeal) and the hearing before the Tax Commissioner on the 2004 tax year assessment were held on the same day. Supp. at pages 12 and 115. At both hearings the Appellant submitted the testimony of Gary Azzolina, Director of Project Management at American Fiber

Systems, Inc. Mr. Azzolina planned and built the fiber optic loop whose value is at issue in this appeal. Supp. at pages 21-23 (Transcript at pages 11-13). In addition to Mr. Azzolina's testimony four (4) exhibits were marked and admitted into evidence at both hearings. Supp. at pages 14, 101-13, and 110-113 (Transcript at pages 4, 95-97). And, the court reporter transcript of the hearing before the Board of Tax Appeals in case no. 2004-K-1222 was filed with the Tax Commissioner in the 2004 tax year petition. Supp. at pages 9-106 (Transcript at pages 2-99).

In sum, the evidence and issues before the Tax Commissioner in the tax year 2004 case and the Board of Tax Appeals in case no. 2004-K-1222 were the same.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I

THE TAX COMMISSIONER OF OHIO AND OHIO BOARD OF TAX APPEALS AS ADMINISTRATIVE TRIBUNALS ARE BOUND BY THE PRINCIPLE OF COLLATERAL ESTOPPEL.

This proposition of law addresses the following assignments of error:

ASSIGNMENT OF ERROR NO. 1

The Board of Tax Appeals decision and order is unreasonable and unlawful because it is inconsistent with the 2003 assessment of Appellant's property that was affirmed by the Board in Case No. 2004-K-1222.

ASSIGNMENT OF ERROR NO. 2

The Board of Tax Appeals decision and order violates the principle of collateral estoppel to the extent that it is inconsistent with the 2003 assessment affirmed by the Board in Case No. 2004-K-1222.

ASSIGNMENT OF ERROR NO. 3

The Board of Tax Appeals findings on the issue of collateral estoppel are unreasonable and unlawful.

The final determination of the Tax Commissioner in this case recognized the Board of Tax Appeals Decision and Order in case no. 2004-K-1222 but did not follow it. Supp. at page 5. Tax Commissioner's finding that "[t]he petitioner's assets and business have not materially changed since the Board's ruling on the petitioner's public utility property tax for the 2003 tax year" estopps the Tax Commissioner from making a different finding on the assessment issues in this case. See Supp. at page 5, See also Superior's Brand v. Lindley (1980), 62 Ohio St.2d 133 (collateral estoppel applied in context of a sales tax assessment) (hereinafter Superior's Brand). The facts and issues in the 2003 and 2004 tax year cases are identical; the final determinations of the Tax Commissioner and the decisions and orders of the Ohio Board of Tax Appeals are not. The Tax Commissioner cannot ignore the findings of the Board of Tax Appeals in case no. 2004-K-1222. The Board of Tax Appeals cannot ignore the findings that it affirmed in case no. 2004-K-1222.

The purpose of the doctrine of Collateral Estoppel is to avoid the relitigation of issues. By ignoring the Board of Tax Appeals decision and order in case no.2004-K-1222 the Tax Commissioner successfully forced Appellant to relitigate the issues decided by the Board of Tax Appeals in that case, this is contrary to the purpose and policy behind the doctrine of Collateral Estoppel. "See Judicial Application of Issue Preclusion in Tax Litigation: Illusion or Illumination", Vol. 59, No. 1, The Tax Lawyer, by Grover Hartt, III and Jonathan L. Blacker. Supp. at pages 232-267. The Tax Commissioner final determination and the Board of Tax Appeal decision and order affirming that determination are unreasonable and unlawful.

Since the Appellant was forced to relitigate the issues previously decided by the Board of

Tax Appeals¹, the Appellant incorporated the issues and arguments raised by the Appellant in their tax year 2003 tax year appeal even though they had been decided by the Board of Tax Appeals in case no. 2004-K-1222. The Appellant requested that the Board of Tax Appeals, as the Tax Commissioner did below, reconsider the all the issues it raised in the 2003 tax year appeal and find for the Appellant on all issues.

PROPOSITION OF LAW NO. II

IT IS UNREASONABLE AND UNLAWFUL TO ASSESS UNLIT FIBER OPTIC CABLE FOR THE REASON THAT IS NOT USED IN BUSINESS.

This proposition of law addresses the following assignments of error.

ASSIGNMENT OF ERROR NO. 4

The Board of Tax Appeals decision and order taxing unlit and unused fiber optic cable and the costs incurred to install, support, and monitor unlit and unused fiber is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 5

The Board of Tax Appeals decision and order affirming the Tax Commissioner's final determination is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 6

The Board of Tax Appeals decision and order affirming the Tax Commissioner's determination to reject the Appellant's petition for reassessment is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 7

The Board of Tax Appeals findings on the issues raised in the Appellant's Petition for reassessment are unreasonable and unlawful.

In order to be subject to tax in Ohio personal property must be "used in business." See Revised Code 5701.08. The Tax Commissioner in the 2003 tax year case correctly found that

¹ The Board of Tax Appeal did not rule on Appellant's motion on the issue on collateral estoppel prior to the hearing in the case.

Appellant's unlit/unused fiber optic cable was not used in business and the Board of Tax Appeals affirmed this determination. Appendix at page 40, Supp. at page 213. See also United Telephone v. Tracy (1999), 84 Ohio St.3d 506. This determination should have been applied by the Tax Commissioner and Board of Tax Appeals in their review of the Appellant's 2004 tax year assessment.

The Appellant raised the issue of collateral estoppel in its notice of appeal from the final determination of the Tax Commissioner for the tax year 2004 to the Ohio Board of Tax Appeals. Supp. at page 175. The underlying petition for reassessment in the 2004 tax year appeal was filed December 2, 2004 and incorporated the Appellant's appeal of the 2003 tax year assessment to the Ohio Board of Tax Appeals. Supp. at pages 119-138. As a result, the pending 2003 appeal and final determination by the Tax Commissioner in that tax year were clearly included in Appellant's 2004 tax year appeal and the issue of collateral estoppel preserved for purposes of the appeal. The Board of Tax Appeals finding that the Appellant had somehow waived the issue is unreasonable and unlawful.

The Board of Tax Appeals reviewed the 2003 tax year determination of the Tax Commissioner under Revised Code Sections 5717.02 and 5717.03 and affirmed the Tax Commissioners' final determination in that appeal. Supp. at pages 207-213. The Tax Commissioner in its tax year 2004 final determination expressly found that the facts had not changed, and even though the Tax Commissioner advanced a different theory for purposes of assessing the Appellant (that has no basis in law or fact as discussed below), the Board of Tax Appeals decision not to apply the doctrine of collateral estoppel in this appeal was an abuse of discretion.

As noted above, the doctrine of collateral estoppel applies to administrative proceedings.

Superior's Brand, supra. In this appeal (1) The issues in the 2003 and 2004 tax years were identical, (2) there had been no change in the facts or law between the Tax Commissioner final determinations and Board of Tax Appeal decision and orders in the 2003 and 2004 tax year cases, and (3) no special circumstances which would warrant an exception to the application of collateral estoppel exist in this case. See Montana v. United States, 440 U.S. 147, 155 (1979) as discussed in "Judicial Application of Issue Preclusion in Tax Litigation: Illusion or Illumination" Tax Lawyer, Vol. 59, No. 1, contained and in the Supplement to the Briefs at pages 232-267, page 219.

The Tax Commissioner in his 2003 final determination reduced the assessed taxable value of Appellant's unused and unlit fiber optic cable from \$1,758,057 to \$219,757 (a 87.5% decrease). Supp. at page 127. The Appellant did not challenge that portion of the assessment in its 2003 tax year appeal. Supp. at pages 124-130. The Tax Commissioner in its 2003 final determination did not reduce his assessment of the remainder of Appellant's taxable property comprised of \$3,275,000 for the installation of conduit pipe, \$306,000 for poles and above ground support, and \$37,954 for monitoring equipment. Supp. at pages 126-127. If the Court does not find that collateral estoppel applies in this appeal the Appellant submits the following for the Courts consideration.

In support of its appeal to the Board of Tax Appeals in the 2003 and 2004 tax year appeals, the Appellant submitted the testimony of Gary Azzolina, Director, Project Management, at American Fiber Systems, Inc. Supp. at pages 21-100 (Transcript at pages 11-94).

In his testimony before this Board Mr. Azzolina's discussed the installation of the conduit line, the extra cost associated with running two additional conduit lines through the Shaker Heights tax district (District 510) in order to get a permit from the municipality (Supp. at pages

33-35, Transcript at pages 24-25), which no one (including American Fiber) is using (Supp. at page 71, Transcript at page 63), at a excess or additional cost of \$161,977.76 (Supp. at pages 51-54, Transcript at pages 42-45).² And, that make ready costs for the loop (Supp. at pages 57-60, Transcript at pages 49-51), which constituted improvements to the property of others, totaled \$25,000 per mile, or \$4.78 per foot (Supp. at pages 62-65, Transcript at pages 54-56). The role played by the monitoring equipment is discussed at pages 58-63 in the Transcript and the cost at page 38. Supp. at pages 66-71 and 47. This evidence supports a deduction from Appellant's network cost of \$161,977.76 for the two Shaker Heights conduit lines, \$1,031,250 in make ready costs or fees (41.26 miles x \$25,000), in addition the reduction of Appellant's remaining conduit cost by the 87.5% figure previously approved by the Tax Commissioner, and Board of Tax Appeals in the 2003 year appeal for Appellant's unlit and unused fiber optic cable.

In the alternative, the Appellant submits that the conduit, pole and make ready fees, and monitoring equipment should be treated in the same manner as the unused and unlit fiber and that Appellant should only be assessed for that portion of the costs utilized to support the lit fiber (\$4,925,514 x .125% x .25 = \$153,922 total taxable value). Supp. at page 140.

The Tax Commissioner did not submit the testimony of any witnesses in the appeal. The

² As noted by Mr. Azzolina at page 45 of the Transcript in this case (Supp. at pages 53-54), his calculation includes the cost of the fiber, the calculation below does not.

\$ 5,439,057	(Supp. at page 70, Transcript at page 62 – excludes the \$37,954 in monitoring equipment included in Appellant's return)
- \$ 1,758,057	(Supp. at pages 5 and 9 = fiber cost)
\$ 3,681,000	
÷ 41.26 miles	(Supp. at pages 5 and 9)
\$89,214.74	
x 4.07	Shaker Heights (Supp. at pages 5 and 9)
\$363,103.99	
x .30	(Supp. at page 53, Transcript at page 45)
\$108,931.20	

only exhibits offered by the Tax Commissioner on appeal were the Guidelines for Filing Public Utility Tax Reports. Supp. at pages 178-179.

The final determination of the Tax Commissioner in the 2003 tax year appeal recognized that Appellant's unused and unlit fiber should not be assessed for tax purposes. There was no change in the law in Ohio between the tax years 2003 and 2004. For the same reasons, the Appellant submits that the conduit, poles and above ground support, and monitoring equipment should only be taxed in accord with the taxation of Appellant's fiber since one would not exist without the other. Supp. at page 71, Transcript at page 63. The costs incurred for conduit, poles and above ground support, and monitoring equipment were only incurred to support the fiber optic cable, of which only 12.5% is being used. And, the inclusion of the excess cost for the Shaker Heights conduit results in the Appellant having to pay tax on something they don't own, did not want or need to install, and can't use.

PROPOSITION OF LAW NO. III

IT IS UNREASONABLE AND UNLAWFUL TO ASSESS UNLIT FIBER OPTIC CABLE AS INVENTORY SINCE IT IS NOT SALABLE AS A PHYSICAL OBJECT, IT IS AN ASSET USED IN RENDERING A SERVICE.

This proposition of law addresses the following assignments of error.

ASSIGNMENT OF ERROR NO. 8

The Board of Tax Appeals decision and order applying the valuation method contained in the Department of Taxation's "Valuation of Public Utility Property" booklet with respect to the taxation of unlit and unused fiber optic cable, conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 9

The Board of Tax Appeals decision and order affirming the Tax Commissioner's determination to reject the Appellant's petition for reassessment with respect to unlit and unused fiber optic cable and the installation and cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 10

The Board of Appeals decision and order did not determine the true value of the unlit and unused fiber optic cable, the installation and cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable as required by Statute, and is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 11

The Board of Tax Appeals decision and order did not determine the true value of unlit and unused fiber optic cable, the installation and cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable as required by Ohio Law, and is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 12

The Board of Tax Appeals decision and order with respect to the taxation of unlit and unused fiber optic cable, the installation and cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable is unreasonable and unlawful for the reason that the Record does not contain evidence to support the taxation of these items.

ASSIGNMENT OF ERROR NO. 13

The Board of Tax Appeals abused its discretion, acted unreasonably, unlawfully and arbitrarily in taxing unlit and unused fiber optic cable, the installation and cost of conduit pipe, poles and monitoring equipment for unused and unit fiber optic cable.

ASSIGNMENT OF ERROR NO. 14

The Board of Tax Appeals decision and order to tax unlit and unused fiber optic cable, and the installation and the cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable constitutes the taking of property without due process and is therefore in violation of Amendment XIV, Section I of the United States Constitution.

ASSIGNMENT OF ERROR NO. 15

The taxing unlit and unused fiber optic cable, and the installation and the cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable violates the right of "equal protection" under Article I, Section 2, and Article II Section 26, Ohio Constitution and Amendment XIV, Section I, United States Constitution.

ASSIGNMENT OF ERROR NO. 16

The taxing unlit and unused fiber optic cable, and the installation and the cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable violates the Ohio and United States Constitutions.

The final determination of the Tax Commissioner, affirmed by the Board of Tax Appeals, to assessing Appellant's unlit fiber as inventory has no basis in law or fact. Inventory is not specifically identified in Revised Code 5727.06 (c) or defined in Revised Code 5701.03. Inventory is not addressed in the Guidelines for Filing Ohio Public Utility Tax Reports (Supp. at pages 178-199) and the forms for the reporting of the assets of an interchange telecommunications company do not provide for the reporting of inventory. Supp. at pages 150-167. The Appellant did not report any assets as inventory (Supp. at pages 150-167) and the Tax Commissioner in its initial assessment of the Appellant's assets did not classify any of Appellant's assets as inventory. Supp. at page 142.

The Appellant does not sell fiber optic cable. The Appellant provides telecommunication capacity to its clients, which is not a tangible asset. There is no evidence in the Record to support the assessment of Appellant's unlit fiber as inventory. The Appellant submits that the Tax Commissioner's determination to assess Appellant's unlit fiber as inventory, as affirmed by the Board of Tax Appeals, is unreasonable and unlawful.

CONCLUSION

For the foregoing reasons the Appellant, American Fiber Systems, Inc. respectfully requests that the Court reverse the decision and order of the Ohio Board of Tax Appeals and remand the case with instructions to reverse the final determination of the Tax Commissioner and assess the Appellant's property in accord with the Tax Commissioner's 2003 tax year final determination. In the alternative, the Appellant respectfully requests that the conduit, pole and make ready fees, and monitoring equipment be treated in the same manner as the unused and unlit fiber and that American Fiber Systems, Inc. should only be assessed for that portion of the costs utilized to support the lit fiber ($\$4,925,514 \times 12.5\% \times .25 = \$153,922$ total taxable value).
Supp. at page 140.

Respectfully submitted,

SLEGGs, DANZINGER & GILL CO., LPA



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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant American Fiber Systems, Inc. was mailed via regular U.S. mail postage prepaid, the 13th day of October 2008, to Barton A. Hubbard, Attorney General'S Office, Tax Division, State Office Tower, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215-3428, Attorney for the Appellee Tax Commissioner of Ohio.


Todd W. Sleggs, Esq. (0040921)

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IN THE SUPREME COURT

STATE OF OHIO

APPEAL FROM THE BOARD OF TAX APPEALS

AMERICAN FIBER SYSTEMS, INC.,)

Appellant,)

v.)

RICHARD A. LEVIN, FORMERLY)

WILLIAM J. WILKINS,)

TAX COMMISSIONER OF THE)

STATE OF OHIO,)

Appellee.)

SUPREME COURT CASE

NUMBER:

~~08-1338~~

BOARD OF TAX APPEALS

CASE NUMBER 2006-B-118

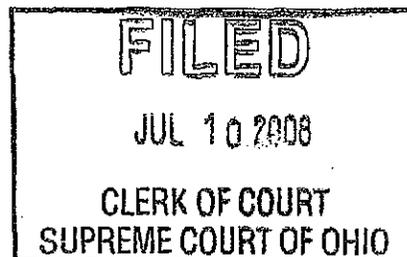
NOTICE OF APPEAL

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IN THE SUPREME COURT

STATE OF OHIO

APPEAL FROM THE BOARD OF TAX APPEALS

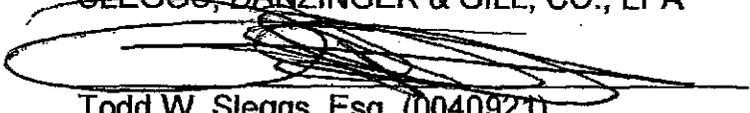
AMERICAN FIBER SYSTEMS, INC.,)	SUPREME COURT CASE
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RICHARD A. LEVIN, FORMERLY)	BOARD OF TAX APPEALS
WILLIAM W. WILKINS,)	CASE NO. 2006-B-118
TAX COMMISSIONER OF THE)	
STATE OF OHIO,)	
)	
)	<u>NOTICE OF APPEAL TO THE</u>
)	<u>SUPREME COURT OF OHIO</u>
)	<u>PURSUANT TO SECTION</u>
Appellee.)	<u>5717.04 REVISED CODE</u>
)	

The Appellant, American Fiber Systems, Inc., by and through counsel, hereby gives notice of its appeal to the Supreme Court of The State of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals, rendered on the 10th day of June 2008, a copy of which is attached hereto as "Exhibit A" and which is

incorporated herein as though fully rewritten in this Notice of Appeal. The Errors complained of are attached hereto as "Exhibit B" which are incorporated herein by reference.

Respectfully submitted,

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OHIO BOARD OF TAX APPEALS

American Fiber Systems, Inc.,)
)
 Appellant,) (PUBLIC UTILITY PERSONAL
) PROPERTY TAX)
)
 vs.) DECISION AND ORDER
)
 William W. Wilkins,)
 Tax Commissioner of Ohio,)
)
 Appellee.)

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Entered June 10, 2008

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

Appellant, American Fiber Systems, Inc. ("AFS"), challenges a final determination issued by the Tax Commissioner denying its petition for reassessment and affirming a public utility property tax assessment for tax year 2004. 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,

Exhibit "A"
-4-
(inf 13)

the hearing, and the briefs filed herein by the parties. Appellant waived hearing before this board; however, appellee appeared and a hearing was held.

Following the filing of appellant's 2004 annual report as an interexchange telecommunications company, the Tax Commissioner issued an assessment which reflected an increase in the taxable value of appellant's property. Appellant subsequently filed a petition for reassessment, asserting that the total taxable value of its property should be reduced by \$1,075,180 to \$156,200. S.T. at 117. Thereafter, the commissioner affirmed his previous assessment, stating as follows, in relevant part:

"Within Ohio, the petitioner has built a communications fiber loop in Cuyahoga County. This consists of a forty-one mile fiber optic loop and other network equipment associated with the loop. The fiber loop contains 288 strands of fiber, bundled together. The bundle of fiber runs through one conduit throughout the forty-one mile loop. At the hearing, the petitioner stated that only 36 of the 288 strands have ever been lit, and that the remaining 252 strands have never been lit. The petitioner stated at the hearing that four miles of its fiber loop goes through Shaker Heights, Ohio, which required it to run three conduit pipes through this four mile section. Two of the three conduit sections in Shaker Heights are empty and have never had fiber in them.

"The petitioner has stated that it does not provide telecommunication services, and under its business model it has no intention to do such. The petitioner has stated that its business is to lease fiber to telecommunications carriers and other organizations, which can use the fiber to provide telecommunications services to their customers. It built the fiber loop in order that it could lease fiber to Cable and Wireless, a provider of telecommunication services. The

petitioner started building the fiber loop only after it signed an indefeasible right to use agreement in which Cable and Wireless agreed to lease some of its fiber.

“Subsequent to filing its 2004 Annual Report an assessment was issued reflecting the taxable value of its property as required by statute. The petitioner timely filed a petition for reassessment. The petitioner’s contentions are addressed below.

“Regarding its fiber cable, the petitioner has shown that 252 of its 288 fibers, or 87.5% have never been lit. It now requests that 87.5% of the value of the fiber assessed should be removed from the assessment, arguing that this 87.5% of the fiber is “dark fiber.” This contention is not well taken.

“The petitioner’s business model is to lease or sell fiber to telecommunication service providers and others. These third party lessees control when they want to light the fiber and use it in their telecommunication endeavors. Thus, the petitioner built the fiber loop in order to lease fiber to outside parties.

“R.C. 5701.08 defines “used in business,” in pertinent part:

(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. Machinery and equipment classifiable upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be “used” by the owner of such plant or other facility within the meaning of “used in business” until such machinery and equipment is installed and in operation or capable

of operation in the business for which acquired. Agricultural products in storage in a grain elevator, a warehouse, or a place of storage which products are subject to control of the United States government and are to be shipped on order of the United States government are not used in business in this state. [Emphasis added.]

“As described in R.C. 5701.08, property is used in business when it is “employed or utilized with ordinary or special operations,” or when “held as means or instruments for carrying on the business.” In the instant case, the petitioner held the completed fiber for lease, and the fiber was used in its “ordinary operations” as property available for lease. Also, the petitioner’s inventory of fiber is necessary in order for the petitioner to carry out its leasing business. For without fiber available for leasing, the petitioner would have no property to lease, and could not fulfill any upcoming lease arrangements.

“In its petition, the petitioner argues that its unleased fiber is exempt from taxation as “dark fiber.” However, in the petitioner’s business of leasing fiber, such unlit fiber held in inventory is used in its business as inventory awaiting leasing.” S.T. at 1-2. (Emphasis sic.)

In its notice of appeal, AFS alleges thirteen specifications of error. Therein, appellant disagrees with the commissioner’s ruling that its unlit fibers are “used in business” and subject to tax. Appellant also asserts that the taxable value of the remainder of its property, i.e., conduit pipe, above-ground poles, and computer monitoring system, should be reduced on a pro rata basis to correlate with the unlit, i.e., unused, fiber optic wire within its network. In addition, appellant claims the commissioner’s refusal to make such an adjustment results in a violation of rights guaranteed by the Ohio and United States Constitutions.

Finally, AFS argues that the commissioner's determination violates the principle of collateral estoppel as it is inconsistent with this board's decision in *Am. Fiber Systems, Inc. v. Wilkins* (Sept. 16, 2005), BTA No. 2004-K-1222, unreported.

We first dispense with appellant's constitutional challenges by pointing out that the Board of Tax Appeals is a statutorily created quasi-judicial administrative agency, which lacks jurisdiction to declare a statute unconstitutional. *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herrie v. Kosydar* (1975), 44 Ohio St.2d 128, 130; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 8; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, paragraph one of the syllabus. As discussed in *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 197-198, the court agreed with this board's conclusion that we are equally without jurisdiction to consider whether a statute has been applied in an unconstitutional manner. See, also, *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9, 2002-Ohio-2984. Given our inability to grant the relief requested, we must decline to rule upon the constitutional arguments which appellant has advanced within its notice of appeal.

In considering the remainder of appellant's arguments, we refer to the court's decision in *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215, in which it held that "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." *Id.* Subsequently, in *Alcan Aluminum Corp.*

v. Limbach (1989), 42 Ohio St.3d 121, the court succinctly set forth the standard which this board is to use in conducting our review:

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See, also, *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, paragraph one of the syllabus; *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 499, 2003-Ohio-2149, ¶ 26.

On February 8, 2007, AFS filed a “Motion on the Issue of Collateral Estoppel.” We overrule appellant’s motion. In its attached memorandum, appellant argues as follows:

“The Appellant owns a 41.26 mile fiber optic loop in Cuyahoga County, Ohio. See Tax Commissioner Transcript (hereinafter TR) at pages 130 and 131. The Appellant constructed the fiber optic loop and utilizes only 12.5% (36 strands\288 strands) of the fiber that comprises the loop. TR at pages 132 and 133. The Appellee Tax Commissioner acknowledged this fact in his final determination on the Appellant’s 2003 tax year assessment and reduced the assessed taxable value of Appellant’s unused and unlit fiber optic cable from \$1,758,057 to \$219,757 (an 87.5% decrease). TR at pages 124 and 125.

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2003 tax year final determination was issued prior to the 2004 tax year final determination at issue in this appeal. The Tax Commissioner did not reduce his assessment of these same assets for the tax year 2004 even though the Tax Commissioner in his final determination explicitly found '[t]he petitioner's assets and business have not changed materially since the Board's ruling on the petitioner's public utility property tax for the 2003 tax year.'

"The purpose of the doctrine of Collateral Estoppel is to avoid the relitigation of issues. See *Mentor Industrial Park Limited Partnership v. Lake Cty. Bd. of Revision*, Board of Tax Appeals Case no. 89-X-907, et al., decided June 30, 1992, Slip op. A copy is attached as Exhibit B. By ignoring this Board's decision and order in case no. 2004-K-1222 the Tax Commissioner is attempting to relitigate the issues decided by this Board in that case, this is contrary to the purpose and policy behind the doctrine of Collateral Estoppel. 'See Judicial Application of Issue Preclusion in Tax Litigation. Illusion or Illumination.' Vol. 59, No. 1, *The Tax Lawyer*, by Grover Hart, III and Jonathan L. Blacker."¹ Id. at 2,4.

The Tax Commissioner filed his reply brief on July 3, 2007.

Therein, the commissioner argues three propositions of law. First, that the unlit dark fiber was "used in business" within the meaning of R.C. 5701.08 and therefore subject to taxation. Id. at 3-11. Next, that AFS failed to meet its burden of proof of showing the "extent" of the claimed error by reason of its estimates of value. Id. at 11-14. And, finally, that appellant never raised the issue of collateral

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estoppel in its petition for reassessment and is now precluded from doing so before this board. *Id.* at 14-16.

The appellee contends that the threshold question is whether AFS addressed the collateral estoppel issue in its petition for reassessment. This proposition, in the context of public utility property tax appeals, has been approved by the board in *Ohio Edison Co. v. Tracy* (Interim Order, May 21, 1999), BTA No. 1997-K-322, unreported, as well as *Am. Fiber Systems*, *supra*, based upon R.C. 5727.47 and *CNG Dev. Corp. v. Limbach* (1992), 63 Ohio St.3d 28. The present appeal was taken from a final determination issued by the commissioner on November 30, 2005. By that time, not only was the appellant aware of the commissioner's position for the prior year, but it also had the board's decision in *Am. Fiber Systems*. Clearly, appellant could have asserted before the commissioner that by virtue of his actions taken with respect to the 2003 tax year, the same result was compelled for the subsequent tax year. Therefore, we agree that this argument could and should have been raised by the appellant previously and its failure to do so precludes it from consideration on appeal. However, even if appellant were entitled to pursue such argument, it falls within the general rule announced by the court in *Recording Devices, Inc. v. Bowers* (1963), 174 Ohio St. 518, paragraph one of the syllabus, that "[e]stoppel does not apply against the state of Ohio as to a taxing statute." See, also, *NDM Acquisition Corp. v. Tracy* (1996), 76 Ohio St.3d 83. Herein, we find no circumstances warranting an exception to this rule.

Even if we were to consider AFS's contention that the judgment in *American Fiber Systems Inc.*, supra, has a collateral estoppel effect on the commissioner's final determination, we would not find merit in appellant's argument. In the modern view, collateral estoppel is embraced by the broader doctrine of res judicata. *Hicks v. De La Cruz* (1977), 52 Ohio St.2d 71.

The doctrine of res judicata has been defined as follows by the Ohio Supreme Court:

"A final judgment or decree rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties or those in privity with them. The prior judgment is res judicata as between the parties or their privies. (Paragraph No. 1 of syllabus of *Norwood v. McDonald*, 142 Ohio St. 299, approved and followed.)" *Whitehead v. General Telephone Co.* (1969), 20 Ohio St.2d 108 paragraph one of the syllabus.

And in the second syllabus of the same case, the court defined collateral estoppel:

"A final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter. However, a point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn in question in a subsequent action between the same parties or their privies. The prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in

the prior action. (Paragraphs Nos. 2 and 3 of syllabus of *Norwood v. McDonald*, 142 Ohio St. 299, approved and followed.)”

However, in the matter before us, the subject issue of the taxability of dark fiber was never litigated before this board in the earlier case.

In *Am. Fiber Systems*, supra, we stated as follows:

“Following the filing of appellant’s 2003 annual report as an interexchange telecommunications company, the Tax Commissioner issued an assessment which reflected an increase in the taxable value of appellant’s property. Appellant subsequently filed a petition for reassessment, asserting that the total taxable value of its property should be reduced from \$1,323,740 to \$156,200. The commissioner granted a reduction, but only to the extent of \$943,000, which comported with that amount of fiber optic wire which was “unlit” and not used in appellant’s business. In reaching this conclusion, the commissioner dispensed with the issues raised by appellant in the following manner:

“Within Ohio, the petitioner operates a communications network in Cuyahoga County. This network consists of a forty-one mile optic loop and other network equipment. The fiber loops contains 288 strands of fiber, bundled together. The bundle of fiber runs through one conduit throughout the forty-one mile loop. The petitioner states that only 36 of the 288 strands have ever been lit, and that the remaining 252 strands have never been lit.

“The petitioner contends that the assessed taxable value should be reduced from \$1,323,740 to \$156,200, a reduction of \$1,167,540, to compensate for the unused and unlit fiber optic cable on its books. This contention is well taken in part.

“In a telephone conversation, the petitioner stated that the total network cost of \$5,439,057 is comprised of approximately \$3,275,000 for installation of the one

conduit pipe that traverses the entire 41 mile fiber loop, \$406,000 for poles for the above-ground part of the fiber loop, \$1,758,057 for fiber costs, and \$38,000 for monitoring equipment. The petitioner is requesting an 87.5% reduction in the value of all of its personal property due to its primarily unlit fiber optic cable system. While the petitioner can be granted a reduction in the value of its fiber cable due to the unlit fiber in its system, the fact that it has unlit fiber does not reduce the value of all of its other equipment besides its fiber. The fiber that has been lit uses the conduit pipe, the above-ground poles, and the monitoring system. As the lit fiber uses these components, the components are considered used in business pursuant to R.C. 5701.08. However, the petitioner has shown that 252 of its 28 fibers, or 87.5%, have never been lit, are not used in business and therefore the value of the fiber assessed, \$1,758,057.00, shall be reduced by 87.5% to reflect this.' S.T. 1-2.

“Although appellant agrees with that aspect of the commissioner’s ruling that its unlit fibers are not used in business and, as a result, are not to subject to tax, through multiple specifications of error, appellant asserts that the taxable value of the remainder of its property, i.e., conduit pipe, above-ground poles, and computer monitoring system, should be reduced on a pro rata basis to correlate with the unlit, i.e., unused, fiber optic wire within its network.” Id. at 2-3.

In that case, the board simply recounted the decision of the Tax Commissioner on the issue of the unlit dark fiber. The matter was not litigated before the BTA. The issue which was litigated dealt with the remainder of AFS’s property, i.e., conduit pipe, above-ground poles, and computer monitoring system. Therein, the board determined that said property should not be reduced on a prorated basis to correlate with the unlit fiber optic wire within its network.

Collateral estoppel does not apply to the issue of taxability of the dark fiber and is hereby rejected.

AFS also contended that the dark fibers were not "used in business" as they were unlit and therefore not subject to taxation. Appellant cited *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506 in support. The record reflects that AFS owned a 288 fiber optic strand network, of which 36 were lit and 252 were unlit. S.T. at 107. However, AFS was in the business of leasing these fiber optic strands to other entities. S.T. at 1, 88, 138. Therefore, we must disagree with AFS's application of *United Tel.* That case is distinguishable given that appellant leases the property in issue rather than using it in its own right. Thus, absent other evidence before us, we would conclude that the dark fiber was indeed "used in business" and therefore taxable. See *Equilease Corp. v. Donahue* (1967), 10 Ohio St.2d 18; *CC Leasing Corp. v. Limbach* (1986), 23 Ohio St.3d 204

AFS has waived an evidentiary hearing before this board and has provided no new evidence before the commissioner.² In doing so, we have no detailed breakdown of costs involved if we were to accept, which we do not, AFS's proposition that only 36 lit fibers were "used in business" and the rest were exempted from taxation. We have no way of determining the costs which should be considered fixed and those which are variable and the proper allocation of costs. AFS's proposition is far too simplistic to be useful. Therefore, we have no

evidence before us which would show error in the Tax Commissioner's final determination.

Based upon the foregoing, we must conclude that appellant has failed to satisfy its burden of proof by providing competent and probative evidence which would support its claims. It is therefore the decision of the Board of Tax Appeals that appellant's arguments are not well taken and the Tax Commissioner's final determination must be, and hereby is, affirmed.

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² AFS provided the commissioner with a transcript of this board's hearing on the previously cited 2003 AFS property tax appeal. S.T. at 7-103.

EXHIBIT "B"

ASSIGNMENT OF ERROR NO. 1

The Board of Tax Appeals decision and order is unreasonable and unlawful because it is inconsistent with the 2003 assessment of Appellant's property that was affirmed by the Board in Case No. 2004-K-1222.

ASSIGNMENT OF ERROR NO. 2

The Board of Tax Appeals decision and order violates the principle of collateral estoppel to the extent that it is inconsistent with the 2003 assessment affirmed by the Board in Case No. 2004-K-1222.

ASSIGNMENT OF ERROR NO. 3

The Board of Tax Appeals findings on the issue of collateral estoppel are unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 4

The Board of Tax Appeals decision and order taxing unlit and unused fiber optic cable and the costs incurred to install, support, and monitor unlit and unused fiber is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 5

The Board of Tax Appeals decision and order affirming the Tax Commissioner's final determination is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 6

The Board of Tax Appeals decision and order affirming the Tax Commissioner's determination to reject the Appellant's petition for reassessment is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 7

The Board of Tax Appeals findings on the issues raised in the Appellant's Petition for reassessment are unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 8

The Board of Tax Appeals decision and order applying the valuation method contained in the Department of Taxation's "Valuation of Public Utility Property" booklet with respect to the taxation of unlit and unused fiber optic cable, conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 9

The Board of Tax Appeals decision and order affirming the Tax Commissioner's determination to reject the Appellant's petition for reassessment with respect to unlit and unused fiber optic cable and the installation and cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 10

The Board of Appeals decision and order did not determine the true value of the unlit and unused fiber optic cable, the installation and cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable as required by Statute, and is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 11

The Board of Tax Appeals decision and order did not determine the true value of unlit and unused fiber optic cable, the installation and cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable as required by Ohio Law, and is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 12

The Board of Tax Appeals decision and order with respect to the taxation of unlit and unused fiber optic cable, the installation and cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable is unreasonable and unlawful for the reason that the Record does not contain evidence to support the taxation of these items.

ASSIGNMENT OF ERROR NO. 13

The Board of Tax Appeals abused its discretion, acted unreasonably, unlawfully and arbitrarily in taxing unlit and unused fiber optic cable, the installation and cost of conduit pipe, poles and monitoring equipment for unused and unit fiber optic cable.

ASSIGNMENT OF ERROR NO. 14

The Board of Tax Appeals decision and order to tax unlit and unused fiber optic cable, and the installation and the cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable constitutes the taking of property without due process and is therefore in violation of Amendment XIV, Section I of the United States Constitution.

ASSIGNMENT OF ERROR NO. 15

The taxing unlit and unused fiber optic cable, and the installation and the cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable violates the right of "equal protection" under Article I, Section 2, and Article II Section 26, Ohio Constitution and Amendment XIV, Section I, United States Constitution.

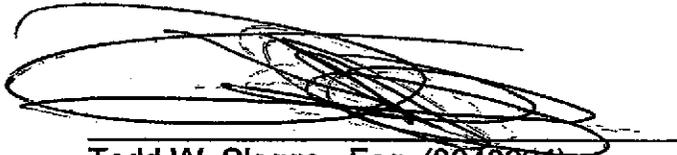
ASSIGNMENT OF ERROR NO. 16

The taxing unlit and unused fiber optic cable, and the installation and the cost of conduit pipe, poles and monitoring equipment for unused and unlit fiber optic cable violates the Ohio and United States Constitutions.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing NOTICE OF APPEAL was mailed via Certified United States Mail, postage prepaid, to Barton A. Hubbard, Assistant Ohio Attorney General, Taxation Section, State Office Tower, 16th Floor, 30 East Broad Street, Columbus, Ohio 43215-3428, Attorney for Appellee Tax Commissioner of the State of Ohio on this 9th day of July, 2008.



Todd W. Sleggs, Esq. (0040921)

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OHIO BOARD OF TAX APPEALS

American Fiber Systems, Inc.,)
)
) Appellant,)
) (PUBLIC UTILITY PERSONAL
) PROPERTY TAX)
)
) vs.)
) DECISION AND ORDER
)
William W. Wilkins,)
Tax Commissioner of Ohio,)
)
) Appellee.)

APPEARANCES:

For the Appellant - Sleggs, Danzinger, & Gill Co., LPA
 Todd W. Sleggs
 820 West Superior Avenue
 Suite 400
 Cleveland, Ohio 44113

For the Tax - Attorney General of Ohio
Commissioner Barton A. Hubbard
 Asst. Attorney General
 State Office Tower, 25th Floor
 30 East Broad Street
 Columbus, Ohio 43215

Entered June 10, 2008

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

Appellant, American Fiber Systems, Inc. (“AFS”), challenges a final determination issued by the Tax Commissioner denying its petition for reassessment and affirming a public utility property tax assessment for tax year 2004. 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 hearing, and the briefs filed herein by the parties. Appellant waived hearing before this board; however, appellee appeared and a hearing was held.

Following the filing of appellant's 2004 annual report as an interexchange telecommunications company, the Tax Commissioner issued an assessment which reflected an increase in the taxable value of appellant's property. Appellant subsequently filed a petition for reassessment, asserting that the total taxable value of its property should be reduced by \$1,075,180 to \$156,200. S.T. at 117. Thereafter, the commissioner affirmed his previous assessment, stating as follows, in relevant part:

"Within Ohio, the petitioner has built a communications fiber loop in Cuyahoga County. This consists of a forty-one mile fiber optic loop and other network equipment associated with the loop. The fiber loop contains 288 strands of fiber, bundled together. The bundle of fiber runs through one conduit throughout the forty-one mile loop. At the hearing, the petitioner stated that only 36 of the 288 strands have ever been lit, and that the remaining 252 strands have never been lit. The petitioner stated at the hearing that four miles of its fiber loop goes through Shaker Heights, Ohio, which required it to run three conduit pipes through this four mile section. Two of the three conduit sections in Shaker Heights are empty and have never had fiber in them.

"The petitioner has stated that it does not provide telecommunication services, and under its business model it has no intention to do such. The petitioner has stated that its business is to lease fiber to telecommunications carriers and other organizations, which can use the fiber to provide telecommunications services to their customers. It built the fiber loop in order that it could lease fiber to Cable and Wireless, a provider of telecommunication services. The

petitioner started building the fiber loop only after it signed an indefeasible right to use agreement in which Cable and Wireless agreed to lease some of its fiber.

“Subsequent to filing its 2004 Annual Report an assessment was issued reflecting the taxable value of its property as required by statute. The petitioner timely filed a petition for reassessment. The petitioner’s contentions are addressed below.

“Regarding its fiber cable, the petitioner has shown that 252 of its 288 fibers, or 87.5% have never been lit. It now requests that 87.5% of the value of the fiber assessed should be removed from the assessment, arguing that this 87.5% of the fiber is “dark fiber.” This contention is not well taken.

“The petitioner’s business model is to lease or sell fiber to telecommunication service providers and others. These third party lessees control when they want to light the fiber and use it in their telecommunication endeavors. Thus, the petitioner built the fiber loop in order to lease fiber to outside parties.

“R.C. 5701.08 defines “used in business,” in pertinent part:

(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. Machinery and equipment classifiable upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be “used” by the owner of such plant or other facility within the meaning of “used in business” until such machinery and equipment is installed and in operation or capable

of operation in the business for which acquired. Agricultural products in storage in a grain elevator, a warehouse, or a place of storage which products are subject to control of the United States government and are to be shipped on order of the United States government are not used in business in this state. [Emphasis added.]

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¹ Appellant also filed a brief on this matter consistent with the above. Therein AFS noted that the parties waived the evidentiary hearing before the board. This brief was filed on April 24, 2007.

estoppel in its petition for reassessment and is now precluded from doing so before this board. *Id.* at 14-16.

The appellee contends that the threshold question is whether AFS addressed the collateral estoppel issue in its petition for reassessment. This proposition, in the context of public utility property tax appeals, has been approved by the board in *Ohio Edison Co. v. Tracy* (Interim Order, May 21, 1999), BTA No. 1997-K-322, unreported, as well as *Am. Fiber Systems*, *supra*, based upon R.C. 5727.47 and *CNG Dev. Corp. v. Limbach* (1992), 63 Ohio St.3d 28. The present appeal was taken from a final determination issued by the commissioner on November 30, 2005. By that time, not only was the appellant aware of the commissioner's position for the prior year, but it also had the board's decision in *Am. Fiber Systems*. Clearly, appellant could have asserted before the commissioner that by virtue of his actions taken with respect to the 2003 tax year, the same result was compelled for the subsequent tax year. Therefore, we agree that this argument could and should have been raised by the appellant previously and its failure to do so precludes it from consideration on appeal. However, even if appellant were entitled to pursue such argument, it falls within the general rule announced by the court in *Recording Devices, Inc. v. Bowers* (1963), 174 Ohio St. 518, paragraph one of the syllabus, that "[e]stoppel does not apply against the state of Ohio as to a taxing statute." See, also, *NDM Acquisition Corp. v. Tracy* (1996), 76 Ohio St.3d 83. Herein, we find no circumstances warranting an exception to this rule.

Even if we were to consider AFS's contention that the judgment in *American Fiber Systems Inc.*, supra, has a collateral estoppel effect on the commissioner's final determination, we would not find merit in appellant's argument. In the modern view, collateral estoppel is embraced by the broader doctrine of res judicata. *Hicks v. De La Cruz* (1977), 52 Ohio St.2d 71.

The doctrine of res judicata has been defined as follows by the Ohio Supreme Court:

"A final judgment or decree rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties or those in privity with them. The prior judgment is res judicata as between the parties or their privies. (Paragraph No. 1 of syllabus of *Norwood v. McDonald*, 142 Ohio St. 299, approved and followed.)" *Whitehead v. General Telephone Co.* (1969), 20 Ohio St.2d 108 paragraph one of the syllabus.

And in the second syllabus of the same case, the court defined collateral estoppel:

"A final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter. However, a point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn in question in a subsequent action between the same parties or their privies. The prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in

the prior action. (Paragraphs Nos. 2 and 3 of syllabus of *Norwood v. McDonald*, 142 Ohio St. 299, approved and followed.)”

However, in the matter before us, the subject issue of the taxability of dark fiber was never litigated before this board in the earlier case.

In *Am. Fiber Systems*, supra, we stated as follows:

“Following the filing of appellant’s 2003 annual report as an interexchange telecommunications company, the Tax Commissioner issued an assessment which reflected an increase in the taxable value of appellant’s property. Appellant subsequently filed a petition for reassessment, asserting that the total taxable value of its property should be reduced from \$1,323,740 to \$156,200. The commissioner granted a reduction, but only to the extent of \$943,000, which comported with that amount of fiber optic wire which was “unlit” and not used in appellant’s business. In reaching this conclusion, the commissioner dispensed with the issues raised by appellant in the following manner:

“Within Ohio, the petitioner operates a communications network in Cuyahoga County. This network consists of a forty-one mile optic loop and other network equipment. The fiber loops contains 288 strands of fiber, bundled together. The bundle of fiber runs through one conduit throughout the forty-one mile loop. The petitioner states that only 36 of the 288 strands have ever been lit, and that the remaining 252 strands have never been lit.

“The petitioner contends that the assessed taxable value should be reduced from \$1,323,740 to \$156,200, a reduction of \$1,167,540, to compensate for the unused and unlit fiber optic cable on its books. This contention is well taken in part.

“In a telephone conversation, the petitioner stated that the total network cost of \$5,439,057 is comprised of approximately \$3,275,000 for installation of the one

conduit pipe that traverses the entire 41 mile fiber loop, \$406,000 for poles for the above-ground part of the fiber loop, \$1,758,057 for fiber costs, and \$38,000 for monitoring equipment. The petitioner is requesting an 87.5% reduction in the value of all of its personal property due to its primarily unlit fiber optic cable system. While the petitioner can be granted a reduction in the value of its fiber cable due to the unlit fiber in its system, the fact that it has unlit fiber does not reduce the value of all of its other equipment besides its fiber. The fiber that has been lit uses the conduit pipe, the above-ground poles, and the monitoring system. As the lit fiber uses these components, the components are considered used in business pursuant to R.C. 5701.08. However, the petitioner has shown that 252 of its 28 fibers, or 87.5%, have never been lit, are not used in business and therefore the value of the fiber assessed, \$1,758,057.00, shall be reduced by 87.5% to reflect this.' S.T. 1-2.

“Although appellant agrees with that aspect of the commissioner’s ruling that its unlit fibers are not used in business and, as a result, are not to subject to tax, through multiple specifications of error, appellant asserts that the taxable value of the remainder of its property, i.e., conduit pipe, above-ground poles, and computer monitoring system, should be reduced on a pro rata basis to correlate with the unlit, i.e., unused, fiber optic wire within its network.” Id. at 2-3.

In that case, the board simply recounted the decision of the Tax Commissioner on the issue of the unlit dark fiber. The matter was not litigated before the BTA. The issue which was litigated dealt with the remainder of AFS’s property, i.e., conduit pipe, above-ground poles, and computer monitoring system. Therein, the board determined that said property should not be reduced on a prorated basis to correlate with the unlit fiber optic wire within its network.

Collateral estoppel does not apply to the issue of taxability of the dark fiber and is hereby rejected.

AFS also contended that the dark fibers were not “used in business” as they were unlit and therefore not subject to taxation. Appellant cited *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506 in support. The record reflects that AFS owned a 288 fiber optic strand network, of which 36 were lit and 252 were unlit. S.T. at 107. However, AFS was in the business of leasing these fiber optic strands to other entities. S.T. at 1, 88, 138. Therefore, we must disagree with AFS’s application of *United Tel.* That case is distinguishable given that appellant leases the property in issue rather than using it in its own right. Thus, absent other evidence before us, we would conclude that the dark fiber was indeed “used in business” and therefore taxable. See *Equilease Corp. v. Donahue* (1967), 10 Ohio St.2d 18; *CC Leasing Corp. v. Limbach* (1986), 23 Ohio St.3d 204

AFS has waived an evidentiary hearing before this board and has provided no new evidence before the commissioner.² In doing so, we have no detailed breakdown of costs involved if we were to accept, which we do not, AFS’s proposition that only 36 lit fibers were “used in business” and the rest were exempted from taxation. We have no way of determining the costs which should be considered fixed and those which are variable and the proper allocation of costs. AFS’s proposition is far too simplistic to be useful. Therefore, we have no

evidence before us which would show error in the Tax Commissioner's final determination.

Based upon the foregoing, we must conclude that appellant has failed to satisfy its burden of proof by providing competent and probative evidence which would support its claims. It is therefore the decision of the Board of Tax Appeals that appellant's arguments are not well taken and the Tax Commissioner's final determination must be, and hereby is, affirmed.

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² AFS provided the commissioner with a transcript of this board's hearing on the previously cited 2003 AFS property tax appeal. S.T. at 7-103.

RECEIVED DEC 12 2005

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FINAL DETERMINATION

Date: NOV 30 2005

American Fiber Systems, Inc.
ATTN: Gary Azzolina, Project Management
100 Meridian Centre, Suite 250
Rochester, NY 14618

Re: Case No. 05-01174
Public Utility Property Tax
Cuyahoga County
Tax Year: 2004

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5727.47 concerning a public utility property tax assessment. A personal appearance hearing was held on this matter in Columbus, Ohio.

Within Ohio, the petitioner has built a communications fiber loop in Cuyahoga County. This consists of a forty-one mile fiber optic loop and other network equipment associated with the loop. The fiber loop contains 288 strands of fiber, bundled together. The bundle of fiber runs through one conduit throughout the forty-one mile loop. At the hearing, the petitioner stated that only 36 of the 288 strands have ever been lit, and that the remaining 252 strands have never been lit. The petitioner stated at the hearing that four miles of its fiber loop goes through Shaker Heights, Ohio, which required it to run three conduit pipes through this four mile section. Two of the three conduit sections in Shaker Heights are empty and have never had fiber in them.

The petitioner has stated that it does not provide telecommunication services, and under its business model it has no intention to do such. The petitioner has stated that its business is to lease fiber to telecommunications carriers and other organizations, which can use the fiber to provide telecommunications services to their customers. It built the fiber loop in order that it could lease fiber to Cable and Wireless, a provider of telecommunication services. The petitioner started building the fiber loop only after it signed an indefeasible right to use agreement in which Cable and Wireless agreed to lease some of its fiber.

Subsequent to filing its 2004 Annual Report an assessment was issued reflecting the taxable value of its property as required by statute. The petitioner timely filed a petition for reassessment. The petitioner's contentions are addressed below.

Regarding its fiber cable, the petitioner has shown that 252 of its 288 fibers, or 87.5%, have never been lit. It now requests that 87.5% of the value of the fiber assessed should be removed from the assessment, arguing that this 87.5% of the fiber is "dark fiber." This contention is not well taken.

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The petitioner's business model is to lease or sell fiber to telecommunication service providers and others. These third party lessees control when they want to light the fiber and use it in their telecommunications endeavors. Thus, the petitioner built the fiber loop in order to lease fiber to outside parties.

R.C.5701.08 defines "used in business", in pertinent part:

(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. Machinery and equipment classifiable upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be "used" by the owner of such plant or other facility within the meaning of "used in business" until such machinery and equipment is installed and in operation or capable of operation in the business for which acquired. Agricultural products in storage in a grain elevator, a warehouse, or a place of storage which products are subject to control of the United States government and are to be shipped on order of the United States government are not used in business in this state. [Emphasis added.]

As described in R.C. 5701.08, property is used in business when it is "employed or utilized with ordinary or special operations", or when "held as means or instruments for carrying on the business". In the instant case, the petitioner held the completed fiber for lease, and the fiber was used in its "ordinary operations" as property available for lease. Also, the petitioner's inventory of fiber is necessary in order for the petitioner to carry out its leasing business. For without fiber available for leasing, the petitioner would have no property to lease, and could not fulfill any upcoming lease arrangements.

In its petition, the petitioner argues that its unleased fiber is exempt from taxation as "dark fiber". However, in the petitioner's business of leasing fiber, such unlit fiber held in inventory is used in its business as inventory awaiting leasing.

In *United Telephone v. Tracy* (1999), 84 Ohio St. 3d 506, the taxpayer was a telephone company providing telephone service to its customers. The Ohio Supreme Court held that the taxpayer did not owe tax on its "dead pairs", those pairs of fiber or wire contained within a telephone cable that are not connected to either a main distribution frame or to a customer's drop line. However, the facts in the instant case are much different from those in *United Telephone*. In *United Telephone, supra*, the taxpayer was a telephone company providing telephone service to its customers, while in the case at hand the petitioner is not providing telephone service, but is merely in business to construct and lease fiber lines. The dead pairs in *United Telephone* are not "used" in the business of providing telephone service to United's customers because they are not "capable of operation" in United's own plant. By contrast, in the instant case the unlit fiber is an inventory item held for lease to customers. The petitioner never intended for its fiber to become part of its physical plant, but rather intended for others to light and use the fiber. The petitioner's business is leasing fiber, and the unlit fiber is used in business as being held for lease. In the

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case at hand, the fiber at issue has the character of a type of inventory that is used in business by being held for use by other entities.

Thus, the petitioner, which leases fiber, is merely a lessor of property, while the taxpayer in *United Telephone*, by providing its customers with a dial tone and the right to use its telecommunications system, is providing services to its customers. Therefore, the petitioner, as a lessor of property to its customers, is in a much different business than the taxpayer in *United Telephone*, which is a service provider.

In *United Telephone, supra*, the "dead pairs" were not in operation or capable of operation on the tax listing date "in the business for which acquired" pursuant to R.C. 5701.08(A). The same is not true of the unlit fiber in the instant case, since "the business for which" the unlit fiber was "acquired" was precisely to be held out for lease by third parties. Under R.C. 5701.08(A), the petitioner's fiber held is "stored or kept on hand as material, parts, products, or merchandise", as well as "held as means or instruments for carrying on the business".

The petitioner contends that its conduit, poles, make ready fees, and monitoring equipment should receive an 87.5% reduction in value under the dark fiber argument. This contention is not well taken.

The conduit pipe is the piping that traverses the entire length of the fiber loop, that the fiber is installed within. The poles carry the fiber in those parts of the loop where the fiber and conduit is above-ground. The monitoring equipment shoots a laser through the fiber to check the fiber for degradation. Make ready fees are the costs to move other lines and other equipment on poles to make room for the petitioner's equipment on the poles.

In a recent Board of Tax Appeals decision, *American Fiber Systems v. Wilkins* (Sept. 16, 2005), BTA No. 2004-K-1222, unreported, the Board ruled that the petitioner's poles, conduit pipe, and computer equipment were fully taxable even though 87.5% of its fiber strands were unlit. The Board explained that the use of the poles, conduit and computer equipment with those fibers that were lit made these items used in business under R.C. 5701.08, even though the majority of the fibers were unlit. The petitioner's assets and business have not changed materially since the Board's ruling on the petitioner's public utility property tax for the 2003 tax year.

Moreover, it should be noted that in *United Telephone v. Tracy, supra*, only fiber was exempted under the dark fiber exemption granted in that case. Other equipment such as conduit, poles, make ready fees, and monitoring equipment was not granted the "dark fiber" exemption in *United Telephone*.

Further, as explained above, equipment such as conduit, poles, make ready fees, and monitoring equipment also is not dark fiber because the petitioner is a not a telecommunications carrier. As explained above, because the doctrine of *United Telephone* does not apply to the petitioner, the doctrine of the dark fiber exemption as explained in *United Telephone* cannot operate to render the conduit, poles, and monitoring equipment nontaxable.

The petitioner contends that \$406,000 of make ready costs should be removed from the assessment, arguing that these costs were not costs to build its fiber loop, but merely costs to get the telephone poles and electric poles ready for hanging fiber. This contention is not well taken.

The methodology for the valuation of assets is described in detail in the Department's *Guidelines for Filing Ohio Personal Property Tax Returns* in pertinent part:

Full costs must be shown. Costs must include inbound freight, millwrighting, overhead, investment credits, assembly and installation labor (including premium pay and payroll taxes), material and expenses, and sales and use taxes.

Further, pursuant to *Gruen Watch Co. v. Evatt* (1944), 143 Ohio St. 461, all costs incurred in getting equipment in place for use are part of the cost of the equipment for valuation purposes. Installation and relocation costs such as the make ready costs at issue herein are part of the cost of the equipment pursuant to *Gruen Watch*.

Moreover, generally accepted accounting principles also require that all costs in readying an asset for use are capitalized. The *2002 Miller GAAP Guide*, by J. Williams (2002), which analyzes generally accepted accounting principles, provides the following:

Asset Cost

The basis of accounting for depreciable fixed assets is cost, and all normal expenditures of readying an asset for use are capitalized.

In the book *Fundamental Accounting Principles*, the following is written:

The cost of an item of plant and equipment includes all normal and reasonable expenditures necessary to get the asset in place and ready for use. * * * Cost also includes any special concrete base or foundation, electrical or power connections, and adjustments needed to place the machine in operation. W. Pyle & J. White, *Fundamental Accounting Principles* (1975).

As the above-referenced sources show, make ready costs such as installation and relocation costs are clearly part of the cost of fixed assets.

Furthermore, the petitioner indicated at the hearing that the \$406,000 of make ready costs that it seeks exemption for is a rough estimate of such costs, based on an estimate of \$25,000 per mile for some miles and some other estimated amount for other fiber mileage. At best, the petitioner is providing merely a crude approximation of the cost of the make ready costs. Such approximations of value are not probative evidence for a deduction from taxable personal property. See *United Telephone, supra*. In *Anheuser-Busch Companies, Inc. v. Zaino* (Sept. 24, 2004), BTA No. 2003-K-699, unreported, the Board of Tax Appeals has recently reaffirmed established case law holding that estimates of value are not sufficient to carry the burden of proof needed for such a reduction. Thus, in challenging the assessed value, the petitioner has the burden of establishing the value of its taxable property. The information submitted for make ready costs does not meet this burden.

Accordingly, the assessment is affirmed.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD

PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND NOTICE WILL BE SENT PURSUANT TO R.C. 5727.47 TO THE APPROPRIATE COUNTY AUDITOR, WHO SHALL PROCEED IN ACCORDANCE WITH R.C. 5727.471.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

William W. Wilkins
WILLIAM W. WILKINS
TAX COMMISSIONER

/s/ William W. Wilkins

William W. Wilkins
Tax Commissioner

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FINAL DETERMINATION

Date: SEP 15 2004

American Fiber Systems, Inc.
ATTN: Martin Constable, Director of Finance
100 Meridian Centre, Suite 250
Rochester, NY 14618

RECEIVED SEP 27 2004

Re: Case No. 04-01315
Public Utility Property Tax
Cuyahoga County
Tax Year: 2003

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5727.47 concerning a public utility property tax assessment. The petitioner did not request a personal appearance hearing. The Department of Taxation has had significant communications with this taxpayer after it filed its petition, through two letters sent to the taxpayer's representative and numerous telephone conversations with both the taxpayer and its representative, discussing the documentation needed by the Department.

The petitioner is an interexchange telecommunications company. Subsequent to filing its 2003 Annual Report an assessment was issued reflecting the taxable value of its property as required by statute. The petitioner timely filed a petition for reassessment. The petitioner's contentions are addressed below.

Within Ohio, the petitioner operates a communications network in Cuyahoga County. This network consists of a forty-one mile fiber optic loop and other network equipment. The fiber loop contains 288 strands of fiber, bundled together. The bundle of fiber runs through one conduit throughout the forty-one mile loop. The petitioner states that only 36 of the 288 strands have ever been lit, and that the remaining 252 strands have never been lit.

The petitioner contends that the assessed taxable value should be reduced from \$1,323,740 to \$156,200, a reduction of \$1,167,540, to compensate for the unused and unlit fiber optic cable on its books. This contention is well taken in part.

In a telephone conversation, the petitioner stated that the total network cost of \$5,439,057 is comprised of approximately \$3,275,000 for installation of the one conduit pipe that traverses the entire 41 mile fiber loop, \$406,000 for poles for the above-ground part of the fiber loop, \$1,758,057 for fiber costs, and \$38,000 for monitoring equipment. The petitioner is requesting an 87.5% reduction in the value of all of its personal property due to its primarily unlit fiber optic cable system. While the petitioner can be granted a reduction in the value of its fiber cable due

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to the unlit fiber in its system, the fact that it has unlit fiber does not reduce the value of all of its other equipment besides its fiber. The fiber that has been lit uses the conduit pipe, the above-ground poles, and the monitoring system. As the lit fiber uses these components, the components are considered used in business pursuant to R.C. 5701.08. However, the petitioner has shown that 252 of its 288 fibers, or 87.5%, have never been lit, are not used in business and therefore the value of the fiber assessed, \$1,758,057.00, shall be reduced by 87.5% to reflect this.

The petitioner originally reported all of its taxable property in the Berea taxing district. However, the petitioner recently supplied information showing that it has no taxable property in Berea, but rather that its taxable property should be listed in ten other Cuyahoga County taxing districts. The petitioner has determined, through a review of maps, the mileage that its fiber loop has through the ten taxing districts traversed. The assessment shall be adjusted to list the taxable value of the property (true value x 25%) in the correct taxing districts, by prorating taxable property value according to the fiber optic mileage in each taxing district.

For the reasons stated above, the assessment is modified as follows:

<u>Taxing District Name</u>	<u>Taxing District</u>	<u>Taxable Value (as assessed)</u>	<u>Taxable Value (as adjusted)</u>
Berea	18-0080	\$1,323,740	0
Cleveland	18-0740	0	\$571,380
Brook Park	18-0150	0	\$25,600
Brooklyn City	18-0130	0	\$84,790
Parma	18-0510	0	\$10,060
Newburgh Hts	18-0410	0	\$42,050
Cuyahoga Hts	18-0200	0	\$15,080
Garfield Hts	18-0250	0	\$53,480
Cleveland Hts	18-0180	0	\$18,970
Shaker Hts	18-0600	0	\$93,020
Maple Hts	18-0350	0	\$28,570
Total		\$1,323,740	\$943,000

In all other respects, the assessment stands as issued.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND NOTICE WILL BE SENT PURSUANT TO R.C. 5727.47 TO THE APPROPRIATE COUNTY AUDITOR, WHO SHALL PROCEED IN ACCORDANCE WITH R.C. 5727.471.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

William W. Wilkins

WILLIAM W. WILKINS
TAX COMMISSIONER

/s/ William W. Wilkins

William W. Wilkins
Tax Commissioner

[§ 124-355]

Sec. 5555.91. Annual tax levy by board; additional to other levies.—After the annual estimate for the county has been filed with the board of county commissioners by the county engineer, and the board has made such changes and modifications in the estimate as it deems proper, the board shall then make its levy for the purposes set forth in the

estimate, upon all taxable property of the county, not exceeding in the aggregate two mills upon each dollar of the taxable property of said county. Such levy shall be in addition to all other levies authorized for said purposes, but subject to the limitation upon the combined maximum rate for all taxes. This section does not prevent the board from using any surplus in the general funds of the county for the purposes set forth in said estimate.

TITLE LVII—TAXATION

[All Chapters are reproduced in full unless otherwise indicated.—CCH]

CHAPTER 5701—DEFINITIONS

[§ 125-000]

Sec. 5701.01. Person defined.—As used in Title LVII[57] of the Revised Code, "person" includes individuals, firms, companies, business trusts, estates, trusts, partnerships, limited liability companies, associations, corporations, and any other business entities.

(As amended by S.B. 74, Laws 1994; H.B. 215, Laws 1997, effective June 30, 1997.)

[§ 125-030]

Sec. 5701.02. Definitions relating to real property.—As used in Title LVII[57] of the Revised Code:

(A) "Real property," "realty," and "land" include land itself, whether laid out in town lots or otherwise, all growing crops, including deciduous and evergreen trees, plants, and shrubs, with all things contained therein, and, unless otherwise specified in this section or section 5701.03 of the Revised Code, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto. "Real property" does not include a manufactured home as defined in division (c)(4) of section 3781.06 of the revised code or a mobile home, travel trailer, or park trailer, each as defined in section 4501.01 of the revised code, that is not a manufactured or mobile home building as defined in division (b)(2) of this section.

(B)(1) "Building" means a permanent fabrication or construction, attached or affixed to land, consisting of foundations, walls, columns, girders, beams, floors, and a roof, or some combination of these elemental parts, that is intended as a habitation or shelter for people or animals or a shelter for tangible personal property, and that has structural integrity independent of the tangible personal property, if any, it is designed to shelter. "Building" includes a manufactured or mobile home building as defined in division (B)(2) of this section.

(2) "Manufactured or mobile home building" means a mobile home as defined in division (O) of section 4501.01 of the Revised Code or a manufactured home as defined in division (C)(4) of section 3781.06 of the Revised Code, if the home meets both of the following conditions:

(a) The home is affixed to a permanent foundation as defined in division (C)(5) of section 3781.06 of the Revised Code and is located on land owned by the owner of the home.

(b) The certificate of title for the home has been inactivated by the clerk of the court of common pleas that issued it pursuant to section 4505.11 of the Revised Code.

(C) "Fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the realty and not the business, if any, conducted by the occupant on the premises.

(D) "Improvement" means, with respect to a building or structure, a permanent addition, enlargement, or alteration that, had it been constructed at the same time as the building or structure, would have been considered a part of the building or structure.

(E) "Structure" means a permanent fabrication or construction, other than a building, that is attached or affixed to land, and that increases or enhances utilization or enjoyment of the land. "Structure" includes, but is not limited to, bridges, trestles, dams, storage silos for agricultural products, fences, and walls.

(As amended by H.B. 431, Laws 1991; S.B. 272, Laws 1992; S.B. 142, Laws 1998; H.B. 672, Laws 2000, effective April 9, 2001.)

[§ 125-060]

Sec. 5701.03. "Personal property" and "business fixture" defined.—As used in Title LVII[57] of the Revised Code:

(A) "Personal property" includes every tangible thing that is the subject of ownership, whether animate or inanimate, including a business fixture, and that does not constitute real property, as defined in section 5701.02 of the Revised Code. "Personal property" also includes every share, portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, used or designed to be used in business either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the

jurisdiction of this state or elsewhere. "Personal property" does not include money as defined in section 5701.04 of the Revised Code; motor vehicles registered by the owner thereof; electricity; or, for purposes of any tax levied on personal property, patterns, jigs, dies, or drawings that are held for use and not for sale in the ordinary course of business, except to the extent that the value of the electricity, patterns, jigs, dies, or drawings is included in the valuation of inventory produced for sale.

(B) "Business fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. "Business fixture" includes, but is not limited to, machinery, equipment, signs, storage bins and tanks, whether above or below ground; and broadcasting, transportation, transmission, and distribution systems, whether above or below ground. "Business fixture" also means those portions of buildings, structures, and improvements that are specially designed, constructed, and used for the business conducted in the building, structure, or improvement, including, but not limited to, foundations and supports for machinery and equipment. "Business fixture" does not include fixtures that are common to buildings, including, but not limited to, heating, ventilation, and air conditioning systems primarily used to control the environment for people or animals, tanks, towers, and lines for potable water or water for fire control, electrical and communication lines, and other fixtures that primarily benefit the realty and not the business conducted by the occupant on the premises.

(As amended by S.B. 73, Laws 1955; S.B. 272, Laws 1992; S.B. 3, Laws 1999, effective July 6, 1999, as unofficially determined by the Legislative Service Commission's Division of Legal Review and Technical Services.)

¶ 125-090

[***→ *Caution: The tax on intangibles, except for the tax on dealers in intangibles, has been repealed. See ¶ 20-223 in the "Property" division. CCH.*]

Sec. 5701.04. Money defined.—As used in Title LVIII[57] of the Revised Code, "money" includes gold, silver, and other coin, circulating notes of national banking associations, United States legal tender notes, and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency.

¶ 125-120

[***→ *Caution: The tax on intangibles, except for the tax on dealers in intangibles, has been repealed. See ¶ 20-223 in the "Property" division. CCH.*]

¶ 125-090 § 5701.04

Sec. 5701.05. Deposits defined.—As used in Title LVII of the Revised Code other than in division (A)(7) of section 5733.056 of the Revised Code, "deposits" includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not; and whether evidenced by commercial or checking account, certificate of deposit, savings account, certificates of running, or other withdrawable stock, or otherwise, excepting:

(A) Unearned premiums and surrender values under policies of insurance;

(B) Such deposits in financial institutions outside this state as yield annual income by way of interest or dividends in excess of four per cent of the principal sum so withdrawable.

(As amended by H.B. 215, Laws 1997, effective June 30, 1997.)

¶ 125-150

[***→ *Caution: The tax on intangibles, except for the tax on dealers in intangibles, has been repealed. See ¶ 20-223 in the "Property" division. CCH.*]

Sec. 5701.06. Investments defined.—As used in Title LVII[57] of the Revised Code, "investments" includes:

(A) Shares of stock in corporations, associations, and joint-stock companies, under whatever laws organized or existing, excepting:

(1) Those which are instrumentalities of the federal government for the taxation of which by the several states no provision is made by act of the congress of the United States;

(2) Those in financial institutions, dealers in intangibles, and domestic insurance companies as defined in section 5725.01 of the Revised Code;

(3) Those defined as deposits by section 5701.05 of the Revised Code.

(B) Interest-bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures, and notes; certificates of deposit, savings, and other like deposits in financial institutions outside this state yielding income by way of interest or dividends in excess of four per cent of the principal sum withdrawable; and other similar evidences of indebtedness; whether negotiable or not, and whether or not secured by mortgage of or lien upon real or personal property or income, by whomsoever issued, excepting those issued:

(1) By the United States or any of its territories, districts, or dependencies;

(2) By any instrumentality of the federal government;

(3) Prior to January 1, 1913, by the state of Ohio or any political or other subdivision or school district in this state;

(4) Pursuant to Section 2a of Article VIII, Ohio Constitution;

(5) Which are defined in sections 5701.05 and 5701.07 of the Revised Code as deposits and current accounts.

(C) Annuities, royalties, and other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature from which income is or may be derived, however evidenced; excepting:

(1) Interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates;

(2) Contracts of employment or partnership, salaries, wages, commissions, seniority and other incorporeal rights derived from any such contract, and retirement annuities or plans that result from contracts of employment;

(3) Contracts of insurance, and dividends paid or applied thereunder, but dividends under contracts commonly known as "combination life and annuity policies" or "cash refund annuities" shall not be excluded from taxation;

(4) Stock purchase, pension, or profit-sharing plans established by an employer for the benefit of his employees or those of his subsidiaries;

(5) Ownership interests of the depositors in an incorporated financial institution, the capital of which is not divided into shares, or which has no capital stock.

(D) All equitable interests, life or other limited estates, and annuity interests in any investment described in this section, or in any fund made up in whole or in part of any such investments, wherever located.

(As added by H.B. 944, Laws 1955, 2nd Sp. Sess.; as amended by H.B. 694, Laws 1981, effective January 1, 1983.)

[§ 125-225]

Caution: The tax on intangibles, except for the tax on dealers in intangibles, has been repealed. See § 20-223 in the "Property" division, CCH.

Sec. 5701.07. Credits; current accounts; prepaid items defined.—As used in Title LVII [57] of the Revised Code:

(A) "Credits" means the excess of the sum of all current accounts receivable and prepaid items used in business when added together, estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments.

(B) "Current accounts" includes items receivable or payable on demand or within one year from the date of inception, however evidenced.

"Prepaid items" does not include tangible property.

The sum of current accounts payable shall not take into account an acknowledgment of indebtedness, unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor, nor an acknowledgment for the purpose of diminishing the amount of credits to be listed for taxation.

[§ 125-255]

Caution: The tax on intangibles, except for the tax on dealers in intangibles, has been repealed. See § 20-223 in the "Property" division, CCH.

Sec. 5701.08. "Used in business" and "business" defined.—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. Machinery and equipment classifiable upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be "used" by the owner of such plant or other facility within the meaning of "used in business" until such machinery and equipment is installed and in operation or capable of operation in the business for which acquired. Agricultural products in storage in a grain elevator, a warehouse, or a place of storage which products are subject to control of the United States government and are to be shipped on order of the United States government are not used in business in this state.

(B) Merchandise or agricultural products shipped from outside this state and held in this state in a warehouse or a place of storage without further manufacturing or processing and for storage only and for shipment outside this state are not used in business in this state. Such property qualifies for this exception if division (B)(1) or (2) of this section applies:

(1) During any period that a person owns such property in this state:

(a) The property is to be shipped from a warehouse or place of storage in this state to the owner of the property or persons other than customers at locations outside this state for use, processing, or sale; or

(b) The property is located in public or private warehousing facilities in this state which are not subject to the control of or under the supervision of the owner of the property or manned by its employ-

ees and from which the property is to be shipped to any person, including a customer, outside this state.

(2) During the first twenty-four calendar months that a person first owns such property in this state, the property is held in a warehouse or place of storage in this state located within one mile of the closest boundary of an airport, and is shipped to any person, including a customer, outside this state.

For the purposes of division (B)(2) of this section, "airport" means any airport, as defined in division (C) of section 4561.01 of the Revised Code, which is approved by the department of transportation under section 4561.11 of the Revised Code to be used for commercial purposes, is regularly served by only one air carrier authorized to do so under 14 C.F.R., and is not a public airport as defined in 49 U.S.C. Appx. 2202(a)(17) as existing on the effective date of this amendment.

(3) For property that may meet the condition for the exception provided in division (B)(2) of this section, if it is not known at the conclusion of a reporting period whether the property yet qualifies for such exception, the owner of such property shall return it for taxation. If it is later determined that the returned property does so qualify, the owner may apply for a final assessment and refund on the property as provided in section 5711.26 of the Revised Code.

(C) Leased property used by the lessee exclusively for agricultural purposes and new or used machinery and equipment and accessories therefor that are designed and built for agricultural use and owned by a merchant as defined in section 5711.15 of the Revised Code are not considered to be "used" within the meaning of "used in business."

(D) Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are "used" when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.

(E) "Business" includes all enterprises, except agriculture, conducted for gain, profit, or income and extends to personal service occupations.

(As amended by H.B. 480, Laws 1967; H.B. 298, Laws 1991, effective July 26, 1991.)

¶ 125-300

Caution: The tax on intangibles, except for the tax on dealers in intangibles, has been repealed. See ¶ 20-223 in the "Property" division. CCH.]

Sec. 5701.09. Other taxable intangibles; other intangible property defined.—As used in Title LVIII(57) of the Revised Code, "other taxable intangibles" and "other intangible property" include every valuable right, title, or interest not comprised within or expressly excluded from any of the other

definitions set forth in sections 5701.01 to 5701.09, inclusive, of the Revised Code.

¶ 125-330

Caution: The tax on intangibles, except for the tax on dealers in intangibles, has been repealed. See ¶ 20-223 in the "Property" division. CCH.]

Sec. 5701.10. Income yield defined.—As used in Title LVII of the Revised Code, "income yield" means the aggregate amount paid as income by the obligor, trustee, or other source of payment to the owner or holder of an investment, whether including the taxpayer or not, during such year, and includes the following:

(A) In the case of an obligation bearing interest, the amount of interest separately charged and paid during such year exclusive of payments on the principal.

(B) In the case of shares of stock, except as otherwise provided, the dividends or other distributions so paid or distributed, other than distributions in liquidation and distributions by an investment company of a gain it realizes on the sale of real property or investments, whether such payment or distribution is in cash, notes, debentures, bonds, other property, or shares of stock, except that shares of the capital stock of a corporation, or rights to acquire such shares, distributed to its shareholders in respect of its outstanding shares shall not be reflected in the amount of the income yield of such outstanding shares, unless the distribution is, at the election of any shareholder, payable in either:

(1) Shares of stock or rights to acquire such shares;

(2) Cash, notes, debentures, bonds, or other property;

(C) The income yield of shares of stock which were not outstanding for the full calendar year next preceding the date of listing of like kind as other shares of the same corporation outstanding for such year shall be the same as the income yield of the shares of like kind outstanding for such year, except that if such shares were distributed as a stock dividend or distribution or as a stock split and such shares are of like kind as the shares on which the distribution was made, the income yield of such shares and the shares on which they were so distributed shall be the amount determined by totaling the dividends or distributions paid or distributed during such year on such shares and the shares on which they were distributed and dividing such total by the number of such shares and the shares on which they were distributed.

(D) In the case of annuities or other obligations for periodical installment payments including both principal and interest, not separately charged and paid, four per cent of half the principal used to purchase the same, or if there is no such principal, or

CHAPTER 5717—APPEALS

§ 135-100

Sec. 5717.01. Appeal from county board of revision to board of tax appeals; procedure; hearing.—An appeal from a decision of a county board of revision may be taken to the board of tax appeals within thirty days after notice of the decision of the county board of revision is mailed as provided in division (A) of section 5715.20 of the Revised Code. Such an appeal may be taken by the county auditor, the tax commissioner, or any board, legislative authority, public official, or taxpayer authorized by section 5715.19 of the Revised Code to file complaints against valuations or assessments with the auditor. Such appeal shall be taken by the filing of a notice of appeal, in person or by certified mail, express mail, or authorized delivery service, with the board of tax appeals and with the county board of revision. If notice of appeal is filed by certified mail, express mail, or authorized delivery service, as provided in section 5703.056 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. Upon receipt of such notice of appeal such county board of revision shall by certified mail notify all persons thereof who were parties to the proceeding before such county board of revision, and shall file proof of such notice with the board of tax appeals. The county board of revision shall thereupon certify to the board of tax appeals a transcript of the record of the proceedings of the county board of revision pertaining to the original complaint, and all evidence offered in connection therewith. Such appeal may be heard by the board of tax appeals at its offices in Columbus or in the county where the property is listed for taxation, or the board of tax appeals may cause its examiners to conduct such hearing and to report to it their findings for affirmation or rejection.

The board of tax appeals may order the appeal to be heard on the record and the evidence certified to it by the county board of revision, or it may order the hearing of additional evidence, and it may make such investigation concerning the appeal as it deems proper.

(As amended by H.B. 920, Laws 1976; S.B. 6, Laws 1981; H.B. 260, Laws 1983; H.B. 612, Laws 2000; H.B. 675, Laws 2002, effective March 14, 2003.)

§ 135-101

Sec. 5717.011. Appeals from municipal board of appeal.—(A) As used in this chapter, "tax administrator" has the same meaning as in section 718.01 of the Revised Code.

(B) Appeals from a municipal board of appeal created under section 718.11 of the Revised Code may be taken by the taxpayer or the tax administrator to the board of tax appeals or may be taken by

the taxpayer or the tax administrator to a court of common pleas as otherwise provided by law. If the taxpayer or the tax administrator elects to make an appeal to the board of tax appeals or court of common pleas, the appeal shall be taken by the filing of a notice of appeal with the board of tax appeals or court of common pleas, the municipal board of appeal, and the opposing party. The notice of appeal shall be filed within sixty days after the day the appellant receives notice of the decision issued under section 718.11 of the Revised Code. The notice of appeal may be filed in person or by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code. If the notice of appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 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 decision issued under section 718.11 of the Revised Code and shall 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.

(C) Upon the filing of a notice of appeal with the board of tax appeals, the municipal board of appeal shall certify to the board of tax appeals a transcript of the record of the proceedings before it, together with all evidence considered by it in connection therewith. Such appeals 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 administrator, but upon the application of any interested party the board shall order the hearing of additional evidence, and the board may make such investigation concerning the appeal as it considers proper.

(D) If an issue being appealed under this section is addressed in a municipal corporation's ordinance or regulation, the tax administrator, upon the request of the board of tax appeals, shall provide a copy of the ordinance or regulation to the board of tax appeals.

(As added by H.B. 95, Laws 2003, effective January 1, 2004.)

§ 135-120

Sec. 5717.02. Appeals from final determination; 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 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.

(As amended by S.B. 174, Laws 1973; H.B. 920, Laws 1976; H.B. 634, Laws 1977; H.B. 351, Laws 1981; H.B. 260, Laws 1983; S.B. 124, Laws 1985; H.B. 321, Laws 1985; S.B. 19, Laws 1994; H.B. 612, and S.B. 287, Laws 2000; S.B. 200, Laws 2002, effective September 6, 2002.)

Sec. 5717.03. Decisions of the board of tax appeals; certification effect.—(A) A decision of the board of tax appeals on an appeal filed with it pursuant to section 5717.01, 5717.011, or 5717.02 of the Revised Code shall be entered of record on the journal together with the date when the order is filed with the secretary for journalization.

(B) In case of an appeal from a decision of a county board of revision, the board of tax appeals shall determine the taxable value of the property whose valuation or assessment by the county board of revision is complained of, or in the event the complaint and appeal is against a discriminatory valuation, shall determine a valuation which shall correct such discrimination, and shall determine the liability of the property for taxation, if that question is in issue, and the board of tax appeals decision and the date when it was filed with the secretary for journalization shall be certified by the board by certified mail to all persons who were parties to the appeal before the board, to the person in whose name the property is listed, or sought to be listed, if such person is not a party to the appeal, to the county auditor of the county in which the property involved in the appeal is located, and to the tax commissioner.

In correcting a discriminatory valuation, the board of tax appeals shall increase or decrease the value of the property whose valuation or assessment by the county board of revision is complained of by a per cent or amount which will cause such property to be listed and valued for taxation by an equal and uniform rule.

(C) In the case of an appeal from a review, redetermination, or correction of a tax assessment, valuation, determination, finding, computation, or order of the tax commissioner, the order of the board of tax appeals and the date of the entry thereof upon its

Journal shall be certified by the board by certified mail to all persons who were parties to the appeal before the board, the person in whose name the property is listed or sought to be listed, if the decision determines the valuation or liability of property for taxation and if such person is not a party to the appeal, the taxpayer or other person to whom notice of the tax assessment, valuation, determination, finding, computation, or order, or correction or redetermination thereof, by the tax commissioner was by law required to be given, the director of budget and management, if the revenues affected by such decision would accrue primarily to the state treasury, and the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue.

(D) In the case of an appeal from a municipal board of appeal created under section 718.11 of the Revised Code, the order of the board of tax appeals and the date of the entry thereof upon the board's journal shall be certified by the board by certified mail to all persons who were parties to the appeal before the board.

(E) In the case of all other appeals or applications filed with and determined by the board, the board's order and the date when the order was filed by the secretary for journalization shall be certified by the board by certified mail to the person who is a party to such appeal or application, to such persons as the law requires, and to such other persons as the board deems proper.

(F) The orders of the board may affirm, reverse, vacate, modify, or remand the tax assessments, valuations, determinations, findings, computations, or orders complained of in the appeals determined by the board, and the board's decision shall become final and conclusive for the current year unless reversed, vacated, or modified as provided in section 5717.04 of the Revised Code. When an order of the board becomes final the tax commissioner and all officers to whom such decision has been certified shall make the changes in their tax lists or other records which the decision requires.

(G) If the board finds that issues not raised on the appeal are important to a determination of a controversy, the board may remand the cause for an administrative determination, and the issuance of a new tax assessment, valuation, determination, finding, computation, or order, unless the parties stipulate to the determination of such other issues without remand. An order remanding the cause is a final order. If the order relates to any issue other than a municipal income tax matter appealed under sections 718.11 and 5717.011 of the Revised Code, the order may be appealed to the court of appeals in Franklin county. If the order relates to a municipal income tax matter appealed under sections 718.11 and 5717.011 of the Revised Code, the order may be appealed to the court of appeals for the county in which the municipal corporation in which the dispute arose is primarily situated.

Ohio Tax Reports

(As amended by H.B. 920, Laws 1976; H.B. 634, Laws 1977; H.B. 260, Laws 1983; H.B. 95, Laws 2003; effective January 1, 2004.)

§ 135-2001

Sec. 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

§ 5717.04 § 135-200

(B) This division applies to tax years before tax year 2007.

In the case of an interexchange telecommunications company, all taxable property shall be subject to the provisions of this chapter and shall be valued by the commissioner in accordance with division (A) of section 5727.11 of the Revised Code. A person described by this division shall file the report required by section 5727.08 of the Revised Code. Persons described in this division shall not be considered taxpayers, as defined in division (B) of section 5711.01 of the Revised Code, and shall not be required to file a return and list their taxable property under any provision of Chapter 5711 of the Revised Code.

(C) The lien of the state for taxes levied each year on the real and personal property of public utilities and interexchange telecommunications companies and on the personal property of public utility property lessors shall attach thereto on the thirty-first day of December of the preceding year.

(D) Property that is required by division (A)(3)(b) of this section to be assessed by the tax commissioner under this chapter shall not be listed by the owner of the property under Chapter 5711 of the Revised Code.

(E) The tax commissioner may adopt rules governing the listing of the taxable property of public utilities and interexchange telecommunications companies and the determination of true value.

[* Caution: There are three versions of Sec. 5727.06. The third version, as reproduced below, amended by H.B. 530, Laws 2006, is effective March 30, 2006. For alternate versions, see above. CCH.]**

Sec. 5727.06. Taxable property of public utility or interexchange telecommunications company. (A) Except as otherwise provided by law, the following constitutes the taxable property of a public utility, interexchange telecommunications company, or public utility property lessor that shall be assessed by the tax commissioner:

(1) For tax years before tax year 2006:

(a) In the case of a railroad company, all real property and tangible personal property owned or operated by the railroad company in this state on the thirty-first day of December of the preceding year;

(b) In the case of a water transportation company, all tangible personal property, except watercraft, owned or operated by the water transportation company in this state on the thirty-first day of December of the preceding year and all watercraft owned or operated by the water transportation company in this state during the preceding calendar year;

(c) 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:

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

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

(2) For tax years 2006, 2007, and 2008:

(a) In the case of a railroad company, all real property used in railroad operations and tangible personal property owned or operated by the railroad company in this state on the thirty-first day of December of the preceding year;

(b) In the case of a water transportation company, all tangible personal property, except watercraft, owned or operated by the water transportation company in this state on the thirty-first day of December of the preceding year and all watercraft owned or operated by the water transportation company in this state during the preceding calendar year;

(c) In the case of all other public utilities except telephone and telegraph companies, all tangible personal property that on the thirty-first day of December of the preceding year was both located in this state and either owned by the public utility or leased by the public utility under a sale and leaseback transaction.

(3) For tax year 2009 and each tax year thereafter:

(a) In the case of a railroad company, all real property used in railroad operations and tangible personal property owned or operated by the railroad company in this state on the thirty-first day of December of the preceding year;

(b) In the case of a water transportation company, all tangible personal property, except watercraft, owned or operated by the water transportation company in this state on the thirty-first day of December of the preceding year and all watercraft owned or operated by the water transportation company in this state during the preceding calendar year;

(c) In the case of all other public utilities except telephone and telegraph companies, all tangible personal property that on the thirty-first day of December of the preceding year was both located in this state and either owned by the public utility or leased by the public utility under a sale and leaseback transaction;

(d) In the case of a public utility property lessor, all personal property that on the thirty-first day of December of the preceding year was both located in this state and leased, in other than a sale and leaseback transaction, to a public utility other than a railroad, telephone, telegraph, or water transportation company. The assessment rate used under sec.

tion 5727.111 of the Revised Code shall be based on the assessment rate that would apply if the public utility owned the property.

(4) For tax years 2005 and 2006, in the case of telephone, telegraph, or 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 either owned by the telephone, telegraph, or interexchange telecommunications company or leased by the telephone, telegraph, or interexchange telecommunications company under a sale and leaseback transaction.

(5) For tax year 2007 and thereafter, in the case of telephone, telegraph, or interexchange telecommunications companies, all tangible personal property shall be listed and assessed for taxation under Chapter 5711 of the Revised Code.

(B) This division applies to tax years before tax year 2007.

In the case of an interexchange telecommunications company, all taxable property shall be subject to the provisions of this chapter and shall be valued by the commissioner in accordance with division (A) of section 5727.11 of the Revised Code. A person described by this division shall file the report required by section 5727.08 of the Revised Code. Persons described in this division shall not be considered taxpayers, as defined in division (B) of section 5711.01 of the Revised Code, and shall not be required to file a return and list their taxable property under any provision of Chapter 5711, of the Revised Code.

(C) The lien of the state for taxes levied each year on the real and personal property of public utilities and interexchange telecommunications companies and on the personal property of public utility property lessors shall attach thereto on the thirty-first day of December of the preceding year.

(D) Property that is required by division (A)(3)(b) of this section to be assessed by the tax commissioner under this chapter shall not be listed by the owner of the property under Chapter 5711, of the Revised Code.

(E) The tax commissioner may adopt rules governing the listing of the taxable property of public utilities and interexchange telecommunications companies and the determination of true value.

(As amended by H.B. 693, Laws 1970; H.B. 201, Laws 1982; H.B. 171, Laws 1987; S.B. 449, Laws 1988; S.B. 156, Laws 1989; S.B. 257, Laws 1990; H.B. 715, Laws 1994; H.B. 117, Laws 1995; S.B. 3, Laws 1999, effective July 6, 1999, as unofficially determined by the Legislative Service Commission's Division of Legal Review and Technical Services; H.B. 66, Laws 2005, effective June 30, 2005; H.B. 530, Laws 2006, effective March 30, 2006.)

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[**»»»** *Caution: Sec. 5727.08, as reproduced immediately below, is effective through June 29, 2005. For provisions effective June 30, 2005, see below. CCH.*]

Sec. 5727.08. Annual report of utility; penalty.—On or before the first day of March, annually, each public utility shall file a report with the tax commissioner, on a form prescribed by the tax commissioner. The report shall include such information as the tax commissioner requires to enable the tax commissioner to make any assessment or apportionment required under this chapter.

The report shall be signed by either the owner of the public utility or the president, secretary, treasurer, or another duly authorized person.

If a public utility fails to file the report on or before the first day of March, or the date it is due under an extension allowed pursuant to section 5727.48 of the Revised Code, or fails to accurately report all taxable property, the tax commissioner may impose a penalty of up to fifty per cent of the taxable value of the property that was not timely or accurately reported. However, if the public utility files, within sixty days after the first day of March or the extended due date, the report or an amended report and discloses all items of taxable property that are required by this chapter to be reported, the penalty shall not be more than five per cent of the taxable value that was not timely or accurately reported. The penalty shall be added to and considered a part of the total taxable value of the property that was not timely or accurately reported, and may be abated in whole or in part by the tax commissioner pursuant to a petition for reassessment filed under section 5727.47 of the Revised Code.

[**»»»** *Caution: Sec. 5727.08, as reproduced below, amended by H.B. 66, Laws 2005, is effective June 30, 2005. For provisions effective through June 29, 2005, see above. CCH.*]

Sec. 5727.08. Annual report of utility; penalty.—On or before the first day of March, annually, each public utility and interexchange telecommunications company, and, for tax years 2009 and thereafter, each public utility property lessor, shall file a report with the tax commissioner, on a form prescribed by the tax commissioner. The report shall include such information as the tax commissioner requires to enable the tax commissioner to make any assessment or apportionment required under this chapter.

The report shall be signed by either the owner of the public utility, interexchange telecommunications company, or public utility property lessor or the president, secretary, treasurer, or another duly authorized person.

If such a public utility, interexchange telecommunications company, or lessor fails to file the re-