ORIGINAL

IN THE OHIO SUPREME COURT

On Appeal from the Ohio Board of Tax Appeals

RICH'S DEPARTMENT STORES, INC.,	:	
Appellee,	:	CASE NO. 09-437
vs.	:	Appeal from Board of Tax Appeals Case No. 2005-T-1609
WILLIAM W. WILKINS, TAX COMMISSIONER OF OHIO, [RICHARD A. LEVIN],	:	
Appellant.	:	

REPLY BRIEF OF APPELLANT, TAX COMMISSIONER OF OHIO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLEANOUS

REPLY BRIEF

I. Introduction

The BTA committed no fewer than **five** independent major errors of law in granting the inventory valuation reductions at issue. These reductions resulted in valuations far less than the "true value" of the merchandising inventories that the appellee, Rich's Department Stores, Inc. (" RDS"), held on hand at each of its Ohio store locations at the end of each month of each of the taxable years at issue.

Because RDS used the "retail inventory method" of accounting ("RIM") to determine its own inventory book values, the Commissioner applied the "prima facie" methodology applicable to retailers using the RIM method, as set forth in Ohio Adm. Code 5703-3-17 (the "RIM Rule"). The prima facie methodology set forth in the RIM Rule was highly favorable to RDS. Namely, the Commissioner-assessed true values under the prima facie methodology resulting in valuations averaging **20% less** than RDS' own "book values."[1] On appeal to the BTA, the BTA granted further across-the-board annual reductions below the Commissioner's own reductions from RDS' book values for the 2000-2002 tax years of 6.7395%, 8.536% and 10.187%, respectively, for so-called vendor markdown allowances ("VMDAs").

As detailed below, the BTA's grant of further valuation reductions from RDS' own reported book values is truly unprecedented in the history of Ohio personal property tax valuation. Each of the BTA's errors of law is separately sufficient to render the BTA's decision

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[1] Specifically, the Commissioner's inventory valuations for the 2000, 2001 and 2002 tax years were, in the aggregate, for all taxing districts, 18.1%, 20.9% and 23.3% below RDS' book values, respectively. See the Summary Table attached to the Commissioner's initial merits brief at T.C. Br. Appx. 62 and the citations to the evidentiary record set forth in that Table. As shown from the Table, the Commissioner's valuation reductions below RDS' own RIM book values are attributable to the "next-quarter markdown" reductions used in the computation of "true value" under the prima facie methodology set forth in Ohio Adm. Code 5703-3-17.

unreasonable and unlawful. Collectively these errors provide this Court with a particularly compelling basis for reversing the BTA and upholding the Commissioner's already quite generous valuations of RDS' merchandising inventory.

II. The BTA's decision is unreasonable and unlawful because the BTA committed no less than five independent reversible errors of law.

A. The BTA's valuation reductions ignore the principle of conservatism applicable to determining a merchant's book values of inventory under generally accepting accounting principles ("GAAP"), which requires merchants to use the inventory valuation methodology that presents the "least favorable" picture of their financial condition.

The further inventory valuation reductions granted by the BTA below the Commissioner's approximate 20%-valuation reductions from RDS' own book values are unprecedented. In defending the merits of the additional valuation reductions granted by the BTA, RDS correctly points out that a taxpayer's "book values" establish only a "prima facie" true value for its taxable personal property, and that the Commissioner, as tax assessor, may determine true value to be greater or less than the taxpayer's own book values. See RDS Br. 14 (citing R.C. 5711.18 and *PPG Industries, Inc. v. Kosydar* (1981) 65 Ohio St.2d 80). Yet, what RDS ignores is that, throughout the 160-year existence of the Ohio business personal property tax[2], few, if any, taxpayers have successfully challenged a Commissioner-assessed inventory valuation on the grounds that the taxpayer's own book values **overstated** inventory true value.

Rather, in cases involving taxpayer challenges to the Commissioner's valuation of inventories, this Court, as well as the lower appellate courts, and apparently the BTA as well[3],

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[2] See *General Motors Corp. v. Wilkins*, 102 Ohio St.3d 33, 2004-Ohio-1869, ¶32 (noting that "[s]ince at least the Act of March 2, 1846, 44 Ohio Laws 85," Ohio has imposed a business personal property tax based on the "true value" of the property.)

[3] Moreover, the BTA's decisions include few, if any, cases in which a personal property taxpayer successfully challenged the Commissioner's inventory valuations and was granted valuations

never have ordered the Commissioner to reduce his assessed valuations below "book value." Instead, the courts consistently have rejected the taxpayer's book inventory value as **understating** "true value" and have affirmed the Commissioner's assessment of a true value **greater than** the taxpayer's book inventory value as reasonable and lawful. See, e.g., *R.H. Macy Co., Inc. v Schneider* (1964), 176 Ohio St. 94, 97; *Champion Spark Plug Co. v. Lindley* (1983), 6 Ohio St.3d 56, 57-58; *Howard Paper Mills, Inc. v. Lindley* (Jan. 14, 1980), Montgomery Cty. App. No 6522), unreported; and *Progressive Plastics, Inc. v. Levin*, Cuyahoga App. No. 91614, 2009-Ohio-2033, T.C. Reply Br. Appx. 7-9.

Even in those (few) cases in which the Ohio personal property taxpayer successfully challenged the Commissioner's determinations of inventory true value, the reviewing tribunal reduced the inventory true values only to the taxpayers' book values, but no lower. See, *PPG Industries, Inc.*, supra (reducing a manufacturer's inventories to book value); and *Youngstown Sheet & Tube Co. v. Kosydar* (1975), 44 Ohio St.2d 96 (same). Thus, when viewed from a historical perspective, the Commissioner's valuations in the present case (i.e., at approximately 20% below RDS' own book values) are themselves unprecedentedly favorable to RDS -- even without considering the additional reductions from the Commissioner's assessed valuations granted by the BTA.

Further, the lack of case law in which taxpayers successfully sought reductions in inventory valuation below book value naturally follows from the application of two basic

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below the taxpayer's own reported book inventory values. The Commissioner's search of the BTA case law did not find any such decisions. But, because of the vast number of unreported BTA decisions, it is impossible to state with absolute certainty that the BTA never before has granted inventory valuation reductions below book value and below the Commissioner's assessed true values. In any event, it is reasonably certain that, until this case, the BTA never has ordered the Commissioner to reduce his inventory valuations in the magnitude of the percentage reductions below book value that were granted by the BTA here.

valuation considerations. In this Section II. A., we discuss the first of these two considerations: the inherent "conservatism" required to be applied by taxpayers in determining and reporting to the public the book values of their inventories for financial statement disclosure purposes.

GAAP provides that:

> [t]he concept of conservatism holds that when there is reasonable support for alternative accounting methods or measurement techniques, then **the financial statement preparer should select the method that has the <u>least favorable</u> effect on the financial position and result of operations of the enterprise <u>to avoid the possibility of a misleading overstatement</u>**.

(Emphasis added.) *Basic Accounting for Lawyers* (5^{th} Ed., 1999), §3.05(b)(4) "Conservatism," page 38, T.C. Reply Appx. 6. Thus, under GAAP's conservatism principle, a taxpayer's "book values" for its inventories (and other assets) as disclosed on it statements of financial position (i.e., balance sheets) must err on the side of understating, not overstating, true value.

In the present case, GAAP's conservatism principle required RDS, for book value purposes, to select the inventory valuation methodology resulting in the lowest acceptable valuation of its merchandising inventories under GAAP. Specifically, because RDS' parent corporation is required to file its consolidated financial statements with the U.S. Securities and Exchange Commission ("SEC") quarterly and annually, RDS' book values must be determined in accordance with GAAP.[4]

In light of GAAP's "conservatism" principle, RDS' own inventory book values constitute a powerful admission against interest in the present case. For purposes of the general public's use and the use of all other readers of RDS' parent corporation's financial statements, RDS

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[4] See, e.g., *United States v. Arthur Young & Co.* (1984), 465 U.S. 805; and the certification pages of the annual Forms 10-K filed by RDS' parent corporation with the SEC, at e.g., BTA Ex. 11, Federated Department Stores, Inc.'s Form 10-K for the fiscal year ending January 30, 1999 (relating to the 2000 tax year), at F-3 ("Independent Auditor's Report" certifying that the consolidated balance sheets and related consolidated statements of income are in conformity with generally accepted auditing standards (GAAS) and GAAP).

represented its inventory book values to constitute the lowest acceptable valuations recognizable under GAAP. Further, in its evidentiary presentation at the BTA, RDS failed to provide any factual basis for the Commissioner to value RDS' inventory at any value below RDS' own RIM book values, let alone below the approximate 80%-of-book-value amounts assessed by the Commissioner.

Inexplicably, by ignoring this compelling admission against interest, the BTA granted RDS an unprecedented and wholly unsupported valuation reduction. The BTA compounded this error by contravening the most bedrock of property valuation principles, as set forth in the following Section II. B.

B. The BTA contravened and ignored the basic principle that the "best evidence of true value is a recent arm's-length sale of the subject property" and otherwise completely abdicated its duty to consider and evaluate the valuation evidence.

The BTA further erred as matter of law by failing to consider that RDS' book values, as determined under RIM, are predicated on what this Court has long and uniformly held represents the "best evidence of true value." Namely, this Court consistently has held that the best evidence of true value is a recent arm's-length sale of the property. See, e.g., *Grabler Manufacturing Co. v. Kosydar* (1975), 43 Ohio St.2d 75, 78; *Shiloh Automotive, Inc. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68, ¶20; *Strongsville Bd. of Educ. v. Cuyahoga County Bd. of Revision*, 112 Ohio St. 3d 309, 2007-Ohio-6,¶12 ("[w]hen a piece of property has been sold in a recent arm's-length transaction, the sale price of that property shall be considered the true value for taxation purposes").

All acceptable inventory valuation methods recognized under GAAP, including RIM, are based on arm's-length transactions of that inventory. Thus, an Ohio personal property taxpayer's book inventory values are intrinsically and directly connected to this most important of tax valuation principles. The application of this "best evidence" principle is particularly compelling regarding RIM book inventory values at issue in the present case.

As explained in the Commissioner's initial brief, when inventory book values are determined under RIM, the "arm's-length transactions" used to measure inventory book value are the retail merchant's sales, rather than the merchant's purchases. Specifically, as accounting expert Dr. Ray Stephens testified, RIM book values are determined by using the expected retail prices of the particular kind of inventory item (as determined on the basis of the retail merchant's most recent arm's-length sales) less the merchant's normal profit margin, as set by the department in which that kind of inventory is held for sale. See the extensive factual and legal discussion of this point in the Commissioner's initial merit brief, T.C. Br. 2-6, 13, 14; and Dr. Stephens' BTA testimony at, e.g., Tr. II at 13, 17-20, Supp. 100-02; see also *R.H. Macy*, 176 Ohio St. at 97-98.[5]

Unsurprisingly, therefore, as Dr. Stephens further testified, a retail merchant's RIM book inventory values are at the very lowest possible market "fair values" permitted under GAAP. See the extensive discussion at T.C.Br. 13, 14 and Dr. Stephens' BTA testimony at, e.g., Tr. II at 9, 16-17, 25-27, Supp. 99-104. That is, because the best evidence of true value is the recent arm's-length sales price of the subject property, when the recent arm's-length "sales price" of the inventory is reduced by a "normal profit margin," the resultant inventory valuation necessarily will reflect a market "fair value" at the lowest permissible valuation under GAAP. Id. [6]

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[5] See also the discussion, infra, in Section II. D., infra.

[6] Further, because RIM results in the lowest reasonable "fair value" under GAAP, RDS' use of RIM to value its inventories for book purposes accords with the GAAP "conservatism" principle, which requires that a taxpayer's financial statements must, to the extent possible, avoid overstating the value of the taxpayer's assets, and which requires the taxpayer to utilize the

Finally, the "pièce de résistance" of the foregoing analysis is that GAAP market "fair value" is synonymous with the "best evidence of true value" principle of Ohio personal property tax valuation law. Market "fair value" under GAAP is defined as the price at which a willing buyer and willing seller would agree on for the property with neither party under compulsion to engage in the transaction. See T.C. Br. 14; Dr. Stephens' testimony id., citing Statement No. 6 of Accounting Research Bulletin No. 43 (the highest authoritative GAAP text on the subject of inventory valuation); and this Court's decisional law, including *Shiloh Automotive*, *Grabler Manufacturing* and *Strongsville*, supra.

In Dr. Stephens' expert view, **any** inventory valuation less than RDS' own RIM book values would understate the inventory's "true value." Tr. II at 13, 17-20, Supp. 100-02. So, given that the Commissioner's inventory valuations approximated only 80% of RDS' own RIM book values, any further reductions in true value drastically would violate this Court's best evidence principle. Id. See also the testimony of the Tax Commissioner's Personal Property Tax Administrator, John Nolfi, Tr. I at 238, 245, Supp. 65-66 (opining that, in his view, under application of the "best evidence of true value is a recent arm's-length sale" principle, the Commissioner's valuations were "quite generous").

Instead of ignoring them, the BTA should have accorded great evidentiary value to RDS' book values as strongly supporting the Commissioner's assessed true values. The BTA easily should have affirmed the Commissioner's valuations given Dr. Stephens' cogent and expert testimony explaining why any further reductions from the Commissioner's already generous valuations would violate this Court's "best evidence of true value" principle.

Perhaps most illustrative of the application of this "best evidence" principle are the decisions of this Court and the lower appellate courts in *Champion Spark Plug Co.*, *Progressive*

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valuation methodology that presents the "least favorable" financial picture. See Section II A., supra.

Plastics, and *Howard Paper*, supra. In each of these cases, the court upheld the Commissioner's use of a FIFO inventory valuation method, rather than the taxpayer's use of a LIFO inventory methodology.

Use of FIFO, rather than LIFO, valuations exemplifies the "best evidence" principle. Under FIFO, inventory book value is determined assuming that the earliest acquired inventory of a particular kind is sold first, and that the most recently acquired inventory of that kind is sold last. In contrast, under LIFO, the opposite assumption is made; it is assumed that the most recently acquired inventory of a particular kind will be sold first and that the earliest acquired inventory of that kind will be sold last. Accordingly, use of FIFO reflects the most recent of the taxpayer's arm's-length principles and, thus, use of FIFO, rather than LIFO, accords with the "best evidence of true value is a **recent** arm's-length sales" principle. See, e.g., *Progressive Plastics*, 2009-Ohio-2033, ¶2, f.n. 1.

In *R.H. Macy*, this Court rejected the retailer's use of LIFO inventory valuations and affirmed the Commissioner's use of RIM, holding that LIFO yielded an "unrealistic picture of inventory value." *R.H. Macy*, 176 Ohio St. at 97; see also, *Champion Spark Plug Co. v. Lindley* (1983), 6 Ohio St.3d 56, 57-58. In the present case, if the BTA's decision were permitted to stand, an even more "unrealistic picture of inventory value" would result than the "unrealistic picture" that results when LIFO, rather than FIFO, is used. That is, the further reductions in true value ordered by the BTA in the present case would make an already unrealistically low inventory valuation far more "unrealistic."

To summarize, the BTA erred as matter of law in failing to evaluate, or even to acknowledge, RDS' own RIM book values as constituting compelling "best evidence" of true value.

C. By failing to consider the valuation evidence and blindly relying on the true values resulting from its own (erroneous) interpretation of the *prima facie* methodology for determining true value set forth in Ohio Adm. Code 5703-3-17, the BTA unlawfully elevated the "prima facie" valuation resulting from that methodology to the status of a conclusive presumption of true value, in direct violation of this Court's holding in *Higbee Co. v. Evatt.*

The BTA's failure to consider or analyze any valuation evidence created a conclusive, irrebutable presumption of true value and is particularly inexcusable in light of this Court's holding in *The Higbee Company v. Evatt* (1942), 140 Ohio St. 325, 330-33. As we emphasized in the Commissioner's initial merit brief, see T.C. Br. 24, the BTA's decision directly contravenes *Higbee*'s holding. Similar to this case, in *Higbee*, an Ohio retail merchant that used RIM for book value purposes sought valuation reductions from the Commissioner's assessed true values on the asserted basis that the Commissioner had misinterpreted his own administrative formula.

The *Higbee* Court expressly rejected the very approach taken by the BTA in the present case, in which the BTA treated its own interpretation of the Commissioner's prima facie valuation methodology as **conclusively** binding. Just as RDS has done here, the retail merchant sought a "considerably greater allowance than would be made under the [Commissioner's] formula," which was not reflected in the retail merchant's RIM book inventory values. In *Higbee*, the retailer claimed deductions for post-taxable year markdowns, shrinkages and losses, none of which were recognized as proper deductions under the Commissioner's application of his administrative formula and were not considered by the merchant in its determination of its own RIM book values. Similarly, here RDS claimed deductions for vendor markdown allowances that were not recognized by the Commissioner under application of his *prima facie* methodology for determining true value and were not considered by RDS in its determination of RIM book values.

The *Higbee* Court soundly rejected the retail merchant's challenge to the Commissioner's determination of true value as follows:

> In passing upon the application for deduction the question presented to the taxing authorities was what was the value of the property? In determining that question the Board of Tax Appeals was **not** absolutely bound by the subsequent markdowns, shrinkages and losses suffered. These could be shown as bearing upon the question of value, it is true, but after the evidence was in, **it was for the Tax Commission [now the Tax Commissioner], in the exercise of its [his] discretion, to determine the true value.** A deduction was made, as stated, **upon the whole evidence.** The court cannot say that the decision was unreasonable or unlawful.

Higbee, 140 Ohio St. at 330-331. (Emphasis and bracketed language added.)

In other words, in determining the reasonableness and lawfulness of the Commissioner's determination of true value, this Court held that the Commissioner's valuation methodology must be viewed "upon the whole evidence," recognizing that the taxpayer was seeking "considerably greater allowances" than the Commissioner's own formula provided, and which were considerably lower values than its own RIM book values reflected. Here, in direct conflict with *Higbee*, the BTA did the opposite of the *Higbee* directive, ignoring the compelling valuation evidence and analysis presented by the Commissioner.

The instant case is a far easier one for upholding the Commissioner's assessed true values than this Court was confronted with in *Higbee*. First, in *Higbee*, the Commission [now the Commissioner] did not present any affirmative evidence to refute the taxpayer merchant's claim to lower inventory valuations. Thus, the question presented to the Court in *Higbee* was a closer one than here: was a taxpayer merchant "entitled to the full amount of deduction claimed merely because no evidence is adduced contra to his [the taxpayer's] claim"? Id. at 332. The *Higbee* Court resoundingly answered that question in the negative. Id. Just as the retail merchant in *Higbee* had sought substantial reductions from its own RIM book inventory values, RDS has done so here. In favorable contrast to the evidentiary record presented by the Tax Commission to the BTA in *Higbee*, however, here the Tax Commissioner presented the BTA with substantial affirmative evidence in support of the reasonableness and lawfulness of his assessed true values. See Sections II. A. and B., supra.

Second, in favorable contrast to *Higbee*, the "true values" resulting from the Commissioner's application of the prima facie valuation methodology set forth in Ohio Adm. Code 5703-3-17 are, by the Rule's express terms, only "prima facie" evidence of true value. In other words, the RIM Rule's valuation methodology expressly constitute only rebuttably correct true values, which the Commissioner, in the exercise of his discretion, may or may not use to determine true value.

By contrast, in *Higbee*, the Court did not state whether the Commissioner's valuation formula was expressly "prima facie" or not. Nonetheless, the Court expressly held that the Commission [now the Commissioner] must exercise his discretion in determining true value, considering the "whole evidence." To attribute "conclusive" presumption status for the valuation methodology set forth in the RIM Rule, as the BTA tacitly did, violates the plain meaning of the phrase "prima facie," as well as this Court's holding in *Higbee*.[7]

Finally, *Higbee* directly refutes the legal position espoused by RDS, so it is hardly surprising that RDS omits any citation to *Higbee* in its brief, despite the Commissioner's prominent featuring of *Higbee* in his initial merit brief. See T.C. Br. 3-6, 24. Specifically, in

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[7] Further, this Court has long held that in the absence of express language providing that a presumption shall be irrebutable or conclusive, the presumption shall be treated as a rebuttable one. *Thomas Steel Corp. v. Limbach* (1991), 61 Ohio St. 3d 340 (citing *State v. Myers* (1971), 26 Ohio St.2d 190, 201 ("statutory presumptions not specifically designated to be conclusive, may be rebutted by other evidence.") Thus, even without considering the express "prima facie" language inserted in the RIM Rule, the BTA's treatment of the prima facie methodology as conclusively binding would have been erroneous.

RDS' merit brief filed with this Court at Section D., pages 16-18, RDS asserts that the "generous" reductions from RDS' RIM book value reflected in the Commissioner's assessed true values are simply irrelevant to this appeal. It would be difficult to imagine a position that could more directly conflict with this Court's holding in *Higbee*. As we have emphasized above, in *Higbee*, the Commissioner's assessed true values reflected substantial reductions from RIM book value and that valuation fact was expressly singled out by the Court in its valuation analysis upholding the reasonableness of the Commissioner's assessed valuations. Id. at 330.

As detailed in the following Section II. D., RDS' interpretation of the RIM Rule's prima facie methodology not only conflicts with the Commissioner's own interpretation, but is fundamentally mistaken as a matter of law. Thus, even if the "true values" resulting from the application of the RIM Rule's methodology erroneously were to be deemed "conclusively" binding valuations, RDS' claimed reductions for vendor markdown allowances ("VMDAs") would fail as a matter of law.

D. RDS misinterprets the prima facie valuation methodology set forth in Ohio Adm. Code 5703-3-17 as providing reductions to inventory true value for markdown allowance amounts received by RDS from its vendors (VMDAs).

1. RDS misinterprets the phrase "the 'average inventory value' at cost as disclosed by the books of the taxpayer" as that phrase is used in the RIM Rule.

We begin by providing the Court with a clear statement of the Commissioner's own interpretation of a key phrase of Ohio Adm. Code 5703-3-17 ("the RIM Rule"). The RIM Rule provides, in pertinent part, as follows:

> The true "average inventory value of merchandise" to be estimated for taxation shall prima facie be **the "average inventory value" at cost as disclosed by the books of the taxpayer**, after making proper adjustments for cash discounts and merchandise shrinkage, less the aggregate net markdowns, at cost (taking into consideration markdown cancellations and additional mark-ups at cost) which are

reflected on the books of the taxpayer for the succeeding three months following the close of the annual accounting period of the current tax year.

(Emphasis added.)

Under the Commissioner's interpretation of his own RIM Rule, computing "true value" under the prima facie methodology begins with the Commissioner's ascertaining "the average inventory value at cost as disclosed by the books of the taxpayer." The Commissioner's longstanding understanding of the phrase is that it **is synonymous with the merchant's "book values" under RIM**, as disclosed on the merchant's balance sheets and inventory valuation accounts, as averaged over a 12-month measuring period for each Ohio taxing district.

RDS' (and the BTA's) interpretation of the RIM Rule's prima facie methodology differs from the Commissioner's only regarding this initial step of the computation. RDS claims that the phrase "the 'average inventory value' at cost as disclosed by the books of the taxpayer" is not synonymous with the merchant's RIM book inventory value as set forth on its balance sheets and other inventory valuation accounts, as averaged over the 12-month measuring period. Instead, RDS equates that phrase with the merchant's average "acquisition costs" for its inventory. See RDS Br. 11. Unfortunately for RDS, however, to reach its erroneous interpretation, RDS comprehensively mischaracterizes the testimony in the evidentiary record and confuses or ignores relevant RIM accounting concepts and terms, as we detail in the following sub-section 2.

2. RDS' interpretation of the RIM Rule's prima facie methodology is erroneous for three fundamental reasons.

a. RDS confuses a currently held merchandise item's RIM inventory "cost" (i.e., the item's expected retail price less a normal profit margin) with the merchandise item's original acquisition cost.

As noted, RDS' merit brief asserts that the BTA properly granted reductions for the amounts that RDS received from its vendors as markdown allowances because such amounts assertedly reduce the "acquisition costs" of RDS merchandise under RDS' RIM accounting. In other words, for purposes of interpreting the RIM Rule's phrase "the 'average inventory value' at cost as disclosed by the books of the taxpayer," RDS argues that "cost as disclosed by the books of the taxpayer" equates to "acquisition cost." As we detailed in the Commissioner's initial merit brief, see T.C. Br. 3-6, however, this Court long ago was informed by the retailers' briefing in *Higbee* that, under RIM, a retail merchant does not directly use the acquisition costs of its merchandise to determine the inventory value of its currently held inventories.

Instead, to determine the RIM inventory value of its current inventories held for sale, the retailer uses the expected retail selling price of each particular kind of inventory and then reduces that retail selling price by a normal profit margin, as set by the store department in which those kinds of inventory items are held for sale. See, Section II.B., supra; and the detailed discussion of RIM in *R. H. Macy*, 176 Ohio St. at 97-98. Thus, for accounting purposes, the RIM book value is referred to as RIM inventory "cost." T.C. Br. 3-6. Indeed, the very purpose of a merchant's adoption of RIM is to take the original acquisition costs of its merchandise out of the valuation equation. In this way, RIM simplifies the inventory valuation process and reduces the time and expense entailed when the retailer's personnel undertake physical inventory counts. See Kiseo, Intermediate Accounting (12 Ed. 2007) 436-437, T.C. Br. Appx. 41-43; and T.C. Br. 2-3.

Consequently, RDS' equating of the RIM Rule's phrase "the 'average inventory value' at cost as disclosed by the books of the taxpayer" with the merchant's average inventory "acquisition costs" would render the prima facie valuation methodology impossible to compute, in stark contrast to the Commissioner's interpretation. Under the Commissioner's interpretation of the phrase, his auditing agents are able to compute the prima facie methodology easily and efficiently. In most instances, a retailer's RIM book values for the twelve-month measuring period will be maintained by the merchant by store location and will be made readily available to the Commissioner's agents on audit. By contrast, RDS' interpretation of the phrase as synonymous with the average inventory "acquisition costs" of the merchant's current inventories would make the prima facie methodology of the RIM Rule incapable of application by the Commissioner's agents. Under RIM, inventory items are not tracked by their original acquisition costs. Thus, the average acquisition costs of a merchant's current inventories simply do not factor into the computation of the RIM inventory values for those currently held inventories, and would not be maintained by the merchant or be available to the Commissioner's agents on audit.

In sum, RDS' interpretation of the Commissioner's RIM Rule not only would give the term inventory "cost" as used for RIM purposes a different meaning from its technical meaning under RIM, it would render the determination of true value under the prima facie methodology of the Rule impossible to ascertain or compute. Unsurprisingly, given that RDS' brief erroneously equates the RIM inventory "cost" of an item of merchandise with the item's original acquisition cost, RDS' brief likewise mischaracterizes the BTA witness testimony. That is, when a witness refers to RIM inventory "cost," RDS' brief then erroneously equates that reference with the inventory item's **acquisition** cost, rather than its RIM inventory cost (i.e., its expected retail price less a normal profit margin). Thus, rather than offer any support to RDS' position, the BTA testimony cited by RDS actually refutes that position. As set forth in the following section, RDS' brief then further compounds its mischaracterization of the BTA testimony and confuses basic RIM accounting terms and concepts in a further way.

b. RDS confuses RIM inventory cost for its currently held merchandising inventories, as reported as RIM book inventory value shown on RDS' balance sheets, with inventory "cost of goods sold," as shown on RDS' income statements.

Throughout RDS' brief, RDS erroneously uses the terms "inventory cost" and "cost of inventory" in place of, or interchangeably with, the term "cost of goods sold." Yet, these terms have distinctly different meanings and accounting purposes. Inventory "cost of goods sold" is used for income statement purposes to determine RDS' "gross margin" or gross profit. It is an aggregate amount of the total inventories sold during a given accounting period. In order for RDS to determine its "gross profit" for a given accounting period, RDS subtracts the total inventory "cost of goods sold" from its total retail sales for the period. By contrast, as detailed above, RIM "inventory cost" is a term synonymous with RIM inventory book value for its currently held inventories as reported by RDS on its balance sheets and inventory valuation accounts.

RDS' brief is replete with this terminology error, resulting in RDS' fundamental mischaracterization of the testimony in the evidentiary record. Specifically, without expressly saying that it has done so, RDS cites the testimony concerning its income statement computations of its "costs of goods **sold**" and gross profit margin as support for its claim that its VMDAs properly reduce the "cost" of its inventories **held for sale**, as set forth on its **balance sheets and asset valuation accounts**.

This error is critical because, for Ohio personal property tax purposes, as well as for the merchant's own RIM balance sheet valuation purposes, it is the merchant's inventories currently kept on hand which are subject to Ohio taxation. Thus, a merchant's computation of its gross profit and "costs of goods sold" for income statement purposes is far removed from the merchant's determination of the value of the inventories currently kept on hand for sale. Indeed, for purposes of valuing a retailer's current inventories under RIM, VMDAs simply are not considered by RDS for RIM book inventory value purposes, as both the Commissioner's expert witness, Dr. Ray Stephens and RDS' witnesses clearly testified. See T.C. Br. 7-9 and Section II. B., supra.

It is only when one recognizes that RDS' ubiquitous references in its merit brief to inventory "**cost**" are short-hand for inventory "**cost <u>of goods sold</u>**" that RDS' brief's statements about its RIM accounting even begin to make sense. For example, on its face, RDS' statement in its brief that "[u]nder RIM, a retail department's average inventory cost applies to all inventory within that department," is patently nonsensical. RDS Br. 2 (citing to testimony at Tr. I. 96-98, Supp. 29-30). By this statement, RDS appears to suggest that every item of inventory in a particular retail store department is valued with exactly the same cost, no matter what the expected retail prices for the various kinds of inventory held in that store department may be. Thus, RDS appears to suggest, for example, that it would assign the same cost/value to the least expensive item of inventory in the Women's Clothing Department, e.g., a t-shirt, as it would the most expensive item in that Department, e.g., a fur coat.

In actuality, when the witness testimony cited by RDS in support of that statement is reviewed, it becomes apparent that the witness is referring to RDS' calculation of its gross profit percentage. That is, in determining the gross profit that RDS derived from the sales of its merchandise, RDS uses a department-wide profit margin, and as part of its determination of that department-wide profit margin, RDS reduces its cost of goods sold by the vendor markdown allowances received by the merchant regarding that inventory.

RDS' references to inventory "cost," when RDS actually is referring to inventory "cost of goods sold," are most misleading as applied to the BTA testimony of the Commissioner's expert witness, Dr. Stephens, and RDS' witness Laurie Velardi. Contrary to RDS' mischaracterization of the testimony, and as the Commissioner detailed in his initial merit brief, both Dr. Stephens and

Ms. Velardi clearly testified that RIM book inventory value, i.e., RIM inventory "cost," is **not** reduced by VMDAs. See T.C. Br. 6-9.

In its brief, RDS selectively quotes a portion of Dr. Stephens' testimony that VMDAs "are an allowance against cost of the inventory that would be allowed because the normal selling price was not obtained by the retail merchant." RDS Br. 13 (citing Tr.II. 19, Supp. 102). When that testimony is read in context with Dr. Stephens' testimony immediately thereafter, it is clear that his reference to "cost of inventory" in that one instance was to cost of goods sold. Specifically, Dr. Stephens' directly stated that VMDAs do not reduce the cost of the currently held inventories and do not reduce the RIM book inventory values. See particularly, Dr. Stephens' testimony at Tr.II 21, Supp. 102 ("it [the VMDA reduction] applies to goods that have been sold, not to goods which are still in the inventory").

c. Contrary to RDS' assertion, under the Commissioner's longstanding interpretation of the prima facie valuation methodology set forth in the RIM Rule, VMDAs are not a proper reduction from the merchant's RIM book inventory values.

In his initial merit brief, the Commissioner emphasized that because VMDAs are not considered by RDS in computing the RIM book values of its inventories and do not qualify as "cash discounts," they do not reduce inventory true value under the prima facie methodology of the Rule. Moreover, Administrator Nolfi clearly testified that the Commissioner always has applied that interpretation of the RIM Rule's prima facie methodology. See T.C. Br. 12-13, 19-21.

In its merit brief, RDS attempts to question the long-standing and uniform nature of the Commissioner's administrative interpretation and practice by complaining that "[n]obody who was involved in the promulgation of the rule appeared or testified." RDS Br. 18. However, what RDS conveniently neglects to note is that the Rule was promulgated in 1948, so that it would have been quite remarkable if the Commissioner were to have presented such testimony. Given Administrator

Nolfi's 25 years of experience, we submit that his testimony concerning the longstanding practice was more than sufficient. Accordingly, the BTA erred by failing to give the Commissioner's longstanding administrative interpretation and practice the great weight it was due. See, e.g., *Charvat v. Dispatch Consumer Servs.*, 95 Ohio St.3d 505, 2002-Ohio-2838, ¶37; *UBS Fin Servs., Inc. v. Levin*, 119 Ohio St.3d 286, 2008-Ohio-3821, T.C. Br. 19.

E. At the BTA, RDS relied on across-the-board, annual national average percentages of its VMDA experience everywhere, rather than adducing actual data for its actual Ohio stores demonstrating the extent, if any, to which it received VMDAs for any of its Ohio inventories for any Ohio store locations. By failing to provide this actual data for its Ohio stores, RDS plainly failed to meet its affirmative burden of showing the extent of any claimed error in the Commissioner's valuations.

Vendor markdown allowances ("VMDAs") are voluntary reductions made by RDS' vendors to the amounts owed to them by RDS when certain kinds or lines of merchandise purchased by RDS from the vendors are not selling for the expected retail price and, thus, must be "marked down" by RDS. See T.C. Br. 6. Whether a particular vendor voluntarily decides to grant RDS a VMDA for a particular kind of merchandise or line of merchandise is a product-specific, circumstances-specific determination by the vendor. The VMDAs, therefore, relate to specific inventory items held at specific store locations.

RDS' claimed VMDA reductions fail, as a matter of law, because RDS ignores the product-specific, circumstances-specific nature of VMDAs. RDS failed miserably to show it received VMDAs relating to any of its Ohio merchandising inventories. At the BTA, RDS failed to show that its vendors granted VMDAs for **any** of RDS' Ohio inventories at any Ohio store locations. It is speculative whether any of the VMDAs that RDS received from vendors nationally during the years at issue related to any Ohio inventories.

Instead, the only evidence that RDS provided to the BTA to support its claimed VMDA reductions was the total annual VMDA figures for its stores throughout the United States, **with no breakdown by state or store location**. RDS then compared the total annual VMDAs to RDS' total merchandise purchases to derive across-the-board percentage deductions. Thus, RDS unreasonably assumes that the VMDAs it received from vendors for its Ohio merchandising inventory for each month of each taxable year were in the exact same percentage-of-purchase amounts as RDS' over-all average VMDA experience nationally.

The Ohio courts and the BTA uniformly have required taxpayers to affirmatively establish claimed reductions through the use of actual pertinent data, rather than broad estimates based on unproven and unreasonable assumptions. *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506, 511-512; *MCI Metro Access Transmission Services, LLC et al. v. Wilkins* (Apr. 13, 2007), 2008-Ohio-5057, Franklin County Ct. of Appeals Nos. 07APH05-0398 and -0399.

In its merit brief, RDS erroneously asserts that these cases are distinguishable because they involved fixed asset valuations, rather than inventory valuations. RDS Br. 19. But this is a distinction without a difference. Under Ohio personal property tax law, all taxable personal property, including merchandising inventory, is subject to taxation by taxing district, based on its actual true value on the applicable listing dates. Whether the property-valuation claim concerns fixed assets, such as machinery and equipment, or merchandising inventories held for sale, the proof standard is the same. Thus, for this final independent reason, the BTA erred as a matter of law in granting RDS its claimed reduction for VMDAs.

CONCLUSION

For all the above reasons, the BTA's decision should be reversed and the Commissioner's final determination upheld.

Respectfully submitted,

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Library of Congress Catalog Number: 98-83073

Printed in the United States of America

ISBN: 0-8318-0791-1

Mark T. Carroll
of the ALI-ABA staff supervised the
production of this book.

ing the benefit of footnotes to supplement their understanding of the relevant events that affect the business enterprise.

The decision whether to include or exclude a piece of information is normally subjective. Inclusion or exclusion depends on whether, if the information were omitted, the financial statements taken as a whole would mislead the user. There are, as will be seen throughout this book, numerous accounting rules that require specific disclosure on a myriad of economic events and probabilities, such as litigation, product liability claims, and so forth. In the final analysis, the preparer should be able to step back and look at the financial statements as a whole and be able to answer "Yes" to the question, "Do these financial statements tell the whole story, fairly?"

§ 3.05(b) Modifying Conventions (Persuasive Constraints)

Generally Accepted Accounting Principles recognize certain modifying conventions, or the persuasive constraints to be considered when preparing financial statements. When considering the qualitative characteristics that make accounting information useful, persuasive constraints may have an overriding affect on whether certain information gets reported. There are four primary persuasive constraints:

(1) The Cost-Benefit Relationship;

(2) Materiality (threshold for recognition);

(3) Industry Practices; and

(4) Conservatism.

§ 3.05(b)(1) Cost-Benefit Relationship

Too often users of financial statements assume that accounting information is free. But providers of such information know quite differently: there is no such thing as a "free lunch." The costs of providing information must be weighed against the benefits of providing it. To respond to all of users' demands for disclosure could result in prohibitively expensive financial statements. For instance, how do we put a value on a stable, mature work force with good morale? To quantify this intangible asset and include it in the financial statements would be too expensive, even though objective measurement standards could be defined.

The FASB has a two-pronged test for determining whether additional disclosures should be made. First, disclosure should not be imposed to benefit a few at the great cost to many. Second, the degree of informational relevancy must be weighed against the cost of providing it.

The difficult issue at hand with the cost-benefit analysis is that the benefits are not always self-evident or measurable until after the fact. The costs of providing information, on the other hand, are typically easier to measure. For example, some costs include the cost of analysis and interpretation, the cost of collection and processing, the cost of disclosing critical information to competitors, the cost of inciting potential litigation, as well as the cost of auditing disclosed information.

§ 3.05(b)(2) Materiality

"The omission or misstatement of an item in a financial report is material if, in light of the surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the omission or misstatement of an item." SFAC No. 2. In other words, information should be provided if it is material.

Materiality points to the financial magnitude, or relative size, of a transaction or set of transactions, as well as the importance of the transaction. Weighing the significance of a particular transaction or the set of transactions primarily depends on the size of the balance sheet and income statement. For example, if a pending lawsuit was estimated to cost the company $10,000, and that the size of the company (that is, the amount of assets owned by the company) was $20,000, then such a settlement could have devastating consequences to the company. On the other hand, if the pending lawsuit was estimated to cost the company $10,000, and the size of the company was $10 million, then the financial significance of paying such a claim would be immaterial and deemed irrelevant for financial reporting purposes. There are no strict arithmetic rules as to when an item is material and when it is not. There are many rules of thumb, such as "one percent of this" and "less than five percent of that" but, like beauty, materiality really comes down to subjective judgment.

Depending on the nature of the transaction, the concept of materiality can be both quantitative and qualitative in nature. For example, if a criminal investigation or proceeding was underway for a violation of a statute, such as the Foreign Corrupt Practices Act, then separate disclosure would be deemed relevant, or material, to the user of such financial information to the degree that the user's decision to extend credit or invest would be affected. Another example would be a transaction that occurred that wasn't an arm's-length transaction, such as a transaction between the president of an enterprise and the enterprise. Such a transaction would suggest a possible conflict of interests, which might require disclosure. Although a transaction of this nature might not have a material impact on the business enterprise, it is not so much the dollar amount that is under scrutiny, but the relationship.

§ 3.05(b)(3) Industry Practices

Another persuasive constraint is industry practices. Certain industries, because of some peculiar feature of their business activity, may require some modification to Generally Accepted Accounting Principles in an effort to fairly and accurately present the financial position and results of operations. For example, we have already noted that one of the broad accounting principles requires assets to be valued at cost. Farmers, in their financial statements, include their crops at market value in their balance sheet. This, on the surface, flies in the face of basic accounting theory. The reason for this practice is that it is too difficult and costly to develop accurate cost figures on individual crops. Another example of a particular type of industry that may vary in its accounting is a public utility. In the financial statements of a public utility, it is quite normal to find the fixed assets, land, property, plant, and equipment at the top of the list of assets rather than at the bottom as is customary (see Chapter 5: The Balance Sheet, for asset classification and order of presentation). The reason for this aberration is that all the other assets are quite small compared to the cost of the fixed assets (consider nuclear generating plants and pipelines), and this arrangement highlights the capital-intensive nature of the business.

§ 3.05(b)(4) Conservatism

Ideally, those who prepare financial statements should make estimates and select accounting policies that neither overstate nor understate an enterprise's income or financial position. But accounting is more of an art than a science, and many financial situations have no "right" answer in terms of an optimal presentation format. A choice must be made among alternatives in uncertain conditions. The concept of conservatism holds that when there is reasonable support for alternative accounting methods or measurement techniques, then the financial statement preparer should select the method that has the least favorable effect on the financial position and results of operations of the enterprise to avoid the possibility of a misleading overstatement.

Conservatism means caution against overstating earnings or financial position. Human nature, the desire to put the best face forward, and self-interest are all powerful motivations that act against conservatism. It is to management's advantage in absentee ownership enterprises to feather its nest so that it demonstrates how well the enterprise has prospered under its control and guidance. Users of financial statements of an enterprise that has the reputation of not being conservative are generally suspicious of the quality of its earnings. Conservative accounting practices are well regarded.

§ 3.06 SUMMARY

In summary, when information is sought for financial reporting purposes, modifying conventions or persuasive constraints are to be considered. Generally Accepted Accounting Principles mandate that persuasive constraints be considered in preparing financial statements. Remember, the accounting rules should be neutral in their application and conservative in stating an enterprise's financial income and position. Moreover, the benefits and relevance of the disclosures should be weighed in relationship to the costs of providing the information. Lastly, industry practices and materiality, or the relative importance of an item should be taken into consideration when business activity accounting differs from GAAP.

Accountants must constantly evaluate the usefulness of information, within the framework of authoritative pronouncements and prescribed standards that specifically dictate how certain transactions shall be reported, keeping in mind that such disclosure may fall subject to the constraints just discussed.

PROGRESSIVE PLASTICS, INC., PLAINTIFF-APPELLANT, vs. RICHARD A. LEVIN, TAX COMMISSIONER, DEFENDANT-APPELLEE.

No. 91614

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2009 Ohio 2033; 2009 Ohio App. LEXIS 1706

April 30, 2009, Released

PRIOR HISTORY: [**1]
Civil Appeal from the Cuyahoga County Court of Common Pleas. Case No. 2006-M-1043.

DISPOSITION: AFFIRMED.

COUNSEL: FOR APPELLANT: Christian M. Bates, Joseph G. Corsaro, Corsaro & Associates Co., L.P.A., Westlake, OH.

FOR APPELLEE: Richard Cordray, Attorney General, Barton A. Hubbard, Damion M. Clifford, Assistant Attorneys General, Columbus, OH.

JUDGES: BEFORE: McMonagle, J., Kilbane, P.J., and Sweeney, J. MARY EILEEN KILBANE, P.J., and JAMES J. SWEENEY, J., CONCUR.

OPINION BY: CHRISTINE T. McMONAGLE

OPINION

JOURNAL ENTRY AND OPINION

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)* and *26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(C)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(C)*. See, also, *S.Ct. Prac.R. II, Section 2(A)(1)*.

CHRISTINE T. McMONAGLE, J.:

[*P1] Plaintiff-appellant, Progressive Plastics, Inc. ("PPI"), appeals from the decision and order of the Board of [**2] Tax Appeals ("BTA") upholding the final determination of the Tax Commissioner of Ohio ("Commissioner"), which increased the book value of PPI's inventory for personal property tax purposes and found that PPI had improperly excluded from its personal property tax return certain extrusion heads and screws used by PPI in its business. We affirm.

[*P2] PPI manufactures and sells plastic bottles, which constitute its inventory. PPI has used the LIFO ("last-in, first-out") method of accounting for valuing its inventory for over 15 years. [1] After reviewing PPI's tax return for the year 2003, Ohio tax agents Richard Shank and Douglas Basista conducted a field audit at PPI. The agents determined that by failing to add the LIFO reserve back into its inventory computation, the LIFO method used by PPI significantly undervalued its inventory. The agents determined that the FIFO method of accounting for inventory more accurately reflected the true value of PPI's inventory and, accordingly, adjusted PPI's inventory valuation by $ 181,510. In addition, the agents determined that certain extrusion heads and screws were not exempt from taxation as "dies" used in the bottle manufacturing process.

1 LIFO assumes [**3] that the last merchandise purchased or manufactured by a merchant is sold by the merchant before he sells the older merchandise in stock. FIFO ("first-in, first-out") assumes that the first inventory purchased or manufactured is the first inventory sold. FIFO generally better reflects the current replacement costs

N.E.2d 514, the appellant argued "that the book value listed on its personal property tax return using the LIFO method of valuing inventories constitutes prima facie evidence of true value which [the Commissioner] must either accept or overcome through the production of evidence to the contrary." *Id. at 57*. Quoting *Youngstown Sheet & Tube Co., supra*, the Supreme Court rejected this argument, stating, "***the taxpayer's book value of its inventory is merely evidence of true value and will be taken as prima facie evidence of true value *only* when the Tax Commissioner has failed to find that such book value is greater or less than true value in money of such property." Id. (Emphasis added.) The Supreme Court found that Champion Spark [**8] Plug's actual inventory practices, as testified to by its treasurer and controller, were actually more consistent with the FIFO method of accounting, as determined by the Commissioner, and therefore affirmed the application of the FIFO method to assess Champion Spark Plug's inventory.

[*P12] PPI argues that *Champion Spark Plug* is distinguishable, however, because that case contained evidence of the taxpayer's actual inventory practices, whereas here, neither the auditors nor the Commissioner cited any evidence specific as to how PPI actually processes its inventory to suggest that LIFO is not an appropriate valuation. PPI further contends that the Department of Taxation and the Commissioner were of the position that, as a matter of law, PPI could not properly value its inventory using the LIFO method. Neither assertion is correct.

[*P13] Admittedly, it appears that the Department and Commissioner are of the opinion that LIFO generally leads to unrealistic valuations of inventory. But

[*P14] the depositions of both agents Shank and Basista indicate that the Department will allow a taxpayer to use LIFO to value its inventory if that method more accurately reflects the inventory's true value. Agent Shank [**9] testified that the "[the Department's] position on the LIFO method is if you can prove that this more accurately reflects the inventory in today's dollars [i.e., its true value] then we will accept it." Agent Basista testified that although LIFO is not the appropriate method of determining true value "in most cases," "you can use it but *** you have to show why LIFO is a more accurate measurement than FIFO or any other measurement." Basista testified further that the value PPI assigned to its inventory was "not automatically" determined to be incorrect merely because PPI was using the LIFO method; rather, as both Shank and Basista testified, PPI's failure to add the LIFO reserve into its inventory valuation caused the amount reported by PPI on its personal property tax return to be less than the true value. Thus, PPI's argument that the Department and the Commissioner had a preconceived notion that PPI could not use LIFO, as a matter of law, is without merit.

[*P15] PPI's argument that the Commissioner made no "finding" that PPI's book value of its inventory was not the true value of such property is similarly without merit, as the Commissioner's "finding" that the FIFO method of valuation [**10] was a better indicator of the value of PPI's inventory than LIFO is manifest in his final determination.

[*P16] The record demonstrates that PPI failed to provide sufficient evidence that LIFO accurately reflected the true value of its inventory. Agent Shank testified that the Department "would consider any evidence that [a taxpayer] would give us" to demonstrate that LIFO is the correct method of inventory valuation, but "there was no evidence presented [by PPI] to show the method that Progressive Plastics was using reflected what the Department requires in inventory dollars." Shank testified that he reviewed an inventory report provided by Brian Gill, PPI's Vice-President of Finance, which included information regarding raw materials, work in progress, and finished goods. In addition, Shank met with Gill. According to Shank, Gill did not provide sufficient explanation regarding why the LIFO method provided the true value of PPI's inventory:

[*P17] "You know, just based on the information that was provided by Mr. Gill and Mr. Gill also gave us a very nice synopsis of LIFO versus FIFO and his [sic], I think he actually explained it very well. I mean, we talked about it, though, and just the fact [**11] that in LIFO dollars in the plastics industry I don't think that fairly represented the inventory that they had on hand in 2002 which would be reported on their 2003 return and he could not come up with a good explanation of why he's not returning the LIFO reserve." Later, Shank testified, "Mr. Gill offered no evidence to support any use of [the LIFO] method."

[*P18] Moreover, the evidence PPI did provide to the Department indicated that FIFO was, in fact, the appropriate method of valuing its inventory. A memo from Adele Noga at PPI to Mark A. Kitka, Esq., dated October 31, 2003 explaining the LIFO process and the purpose of PPI's LIFO calculations was sent by Kitka to agent Basista on November 10, 2003 as part of PPI's explanation of its LIFO reserve calculations. In the memo, Ms. Noga unequivocally stated, "*[e]ven though LIFO is used for balance sheet valuation of inventories, our company uses raw materials and ship[s] finished goods on a first-in, first-out (FIFO) basis. The physical flow through the plant is also first-in, first-out.*" (Emphasis added.) The affidavit of Rome P. Busa, Jr., PPI's chief operating officer and chief financial officer, although more equivocal than Noga's statement, [**12] indicated that PPI's actual

[*P26] PPI contends that *A. Schulman* indicates that because its extrusion heads and screws must be changed for different molds, they are necessarily dies. We are not persuaded.

[*P27] In *A. Schulman*, the Supreme Court focused on whether the barrel and screw devices participated in imposing a shape to the ultimate product, and found that they did not. The same holds true here. The evidence indicated that the extrusion screw receives the resin pellets, transports the pellets into the mold, and controls the flow of melted resin into the mold. The extrusion head melts the resin pellets. Although the extrusion screws [**17] are necessary for the production of the plastic containers, they are not directly involved in forming the containers; it is the mold itself, and not the extrusion screw, which forms the containers. The plastic is shaped into a container in the mold long after it has passed through the extrusion screw. Likewise, although the extrusion heads melt the pellets, they are not directly involved in the formation of the containers.

[*P28] As the BTA stated in its decision affirming the Commissioner's finding that the extrusion heads and screws were not exempt as dies, "[w]hile there may be an additional obligation to change the extrusion heads and screws based upon the makeup of the mixture ultimately forced through, the actual imposing of a shape is done by a mold. The extrusion heads and screws work together to create the usable material necessary to form a mold, but do not participate in the formation process."

[*P29] Appellant's third assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A [**18] certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*

CHRISTINE T. McMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and

JAMES J. SWEENEY, J., CONCUR

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply Brief of Appellant was sent by regular U.S. mail to Mark A. Engel, Bricker & Eckler, 9277 Centre Point Drive, Suite 100, West Chester, Ohio 45069, on this 18th day of August, 2009.

Barton A. Hubbard

BARTON A. HUBBARD
Assistant Attorney General