

ORIGINAL

IN THE SUPREME COURT OF OHIO
Appeal From the Ohio Board of Tax Appeals

Rich's Department Stores, Inc.	:	
	:	
Appellee,	:	
	:	Case No. 09-437
vs.	:	
	:	
Richard A. Levin	:	
Tax Commissioner of Ohio	:	
	:	
Appellant	:	

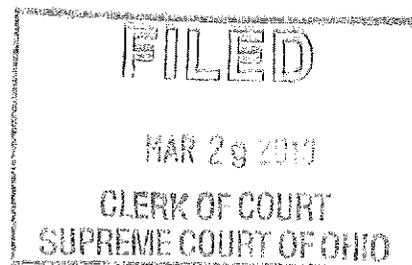
**MOTION FOR RECONSIDERATION AND
MEMORANDUM IN SUPPORT OF APPELLEE
RICH'S DEPARTMENT STORES, INC.**

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MOTION FOR RECONSIDERATION

Pursuant to Rule XI Sec. 2 of the Rules of Practice of the Supreme Court of Ohio, Appellee Rich's Department Stores, Inc. ("Rich's") respectfully requests that the Court reconsider that portion of its decision in this case that determined it would not remand this matter to the Board of Tax Appeals to determine whether Rich's evidence was sufficient to rebut the prima facie validity of the book value as the value of its inventory. Rich's believes that it presented that argument to the Board and to this Court and that the Court should remand this case for a finding on that issue. The attached Memorandum in Support sets forth the bases for this Motion.

MEMORANDUM IN SUPPORT

I. Statement of the Case and Facts

With respect to its 2000-2002 Ohio personal property tax returns, Rich's attempted to reduce the true value of its merchandising inventory with respect to mark down allowances ("MDAs") that it received from its vendors. The Tax Commissioner rejected that position on the basis that O.A.C. 5703-3-17 did not permit a reduction in value associated with MDAs. Rich's appealed that determination to the Board of Tax Appeals ("BTA"). At the Board of Tax Appeals, Rich's claimed that MDAs must be considered in determining the net book value of its inventory. However, it also claimed that in any event, MDAs reduced the price that it paid for its inventory, hence MDAs had to be considered in determining the true value of its inventory.

In its Decision & Order, the BTA agreed with Rich's. It held that MDAs represent a reduction in inventory cost that should be recognized in determining the value of the inventory. *Rich's Department Stores, Inc. v. Wilkins* (Feb. 3, 2009), Ohio BTA No. 2005-T-1609, Slip

Opinion at 8. It also noted that cost is inventory value for tax purposes. It recognized, therefore, that it had to arrive at cost if it were to determine true value. Slip Opinion at 9.

The BTA then went on to dismiss the Tax Commissioner's reliance on the rule, O.A.C. 5703-3-17, on the basis that the phrase "cost as reflected on the books and records of the taxpayer" meant that the Tax Commissioner was required to look beyond the cost of the inventory as reflected on the balance sheet and to consider other evidence in the taxpayer's books and records to determine cost.

The Tax Commissioner appealed to this Court. In its decision, *Rich's Department Stores, Inc. v. Levin*, Slip Opinion No. 2010-Ohio-957, the Court reversed the decision of the BTA. It held that any "cost" factor to which reference was made in the rule "must relate to how the inventory is carried as a value on the books of the company following proper accounting principles and methods." Slip Opinion at ¶17. Thus, for purposes of the rule, it was held to be error for the BTA to consider cost information that was reflected on the income statement, rather than on the balance sheet. Slip Opinion at ¶22.

The Court then considered whether it should remand the case back to the BTA in order to consider whether the evidence presented by Rich's was sufficient to rebut the prima facie standard for true value. It concluded that a remand was not justified in the case because Rich's evidence only related to the cost of the inventory for accounting purposes, and not for purposes of determining value. Slip Opinion at ¶25.

It is on this matter of remanding the case that Rich's seeks this Court's reconsideration of its decision.

II. Argument

Throughout this appeal, Rich's has advanced essentially two positions with respect to MDAs. It argued first that MDAs, which are reflected in the books and records of the taxpayer,

but not on its balance sheet, should be considered in determining the book value of the inventory. At the same time, however, it also argued that because MDAs reduced what it paid to its vendors for its inventory, MDAs must be considered in determining the value of its inventory, apart from any consideration of book value. In the Court's view, the BTA decided the case on the basis of the first issue and the BTA never reached the second issue. For that very reason, Rich's submits that remand to consider the question of whether Rich's rebutted the prima facie standard of book value is the appropriate action to be taken by this Court.

Book value is prima facie evidence of the value of property for property tax purposes. R.C. 5711.18. However, book value is merely prima facie evidence of the value of the property and the Tax Commissioner is under a duty to consider other competent evidence of true value. R.C. 5711.18, R.C. 5711.21. In other words, net book value is the starting point, but is not the ending point, in determining true value for tax purposes. *Youngstown Sheet & Tube Co. v. Kosydar* (1975), 44 Ohio St. 2d 96, 338 N.E.2d 366.

Throughout this appeal, Rich's has taken the position that MDAs reduce the price that it paid for, and thus the cost of, its inventory. Admittedly, much of that argument focused on the duty of the Tax Commissioner to look at additional information in the taxpayer's books and records to determine cost. However, Rich's clearly argued that apart from the book value standard, MDAs must be considered in determining the value of the property because they reduced the price that Rich's paid for the inventory.

Rich's also presented evidence to show that MDAs are a reduction in price, and hence the value, of its inventory. See, for example, the testimony of Ms. Christy Godden at pages 17-18 and 34 of the BTA's hearing transcript, Supp. 9-10, 14. Ms. Laurie Velardi offered similar testimony at page 121 of the hearing transcript, Supp. 36. In fact, the BTA found that MDAs

reduce the price that Rich's paid its vendors for its inventory. *Rich's Department Stores*, BTA Slip Opinion at 8. This holding was made separate from its discussion of the rule, which began on page 10 of its Decision & Order. Interestingly, it is a holding that was not appealed by the Tax Commissioner.

The arguments that were presented to the BTA were also made to this Court in Rich's brief at pages 7 (the Tax Commissioner was required to look beyond balance sheet numbers to determine value) and 9, 11-12 (that true value is the goal, that book value is merely the starting point in the endeavor to determine true value, and that the Tax Commissioner must consider other evidence presented to determine whether the prima facie evidence of book value has been overcome).

The Court chose to not remand the case on this issue, however, stating: "Rich's offers no reason why the evidence that it presented – the testimony and documentation that markdown allowances led to a reduction of cost of goods sold on the profit-and-loss statement – constitutes evidence of value apart from its significance under accounting principles." Slip Opinion at ¶25. Thus, even though it asserts that the BTA never made a finding on this issue, Slip Opinion at ¶24, the Court decided not to remand the issue to allow the BTA to make such a finding on the basis that Rich's failed to present evidence sufficient to overcome the prima facie quality of book value as true value.

It is an oft-stated rule that this Court is not a trier of fact and will neither re-weigh evidence, nor weigh it in the first instance. *Inter-City Foods v. Kosydar* (1972), 30 Ohio St. 2d 159, 283 N.E.2d 161; *Shugarman Surgical Supply, Inc. v. Zaino*, 97 Ohio St 3d 183, 2002-Ohio-5809, 777 N.E. 2d 244. Yet, in this case, after asserting that the BTA failed to address an issue, it went ahead and judged the quality of the evidence presented by Rich's on that very issue. If

the BTA failed to reach that issue and failed to consider whether Rich's evidence was sufficient to rebut the prima facie quality of book value, then it never made a finding with respect to this issue. Since the BTA never made a determination regarding the evidence in that context, this Court has no basis for ascertaining the efficacy of that evidence in the first instance.

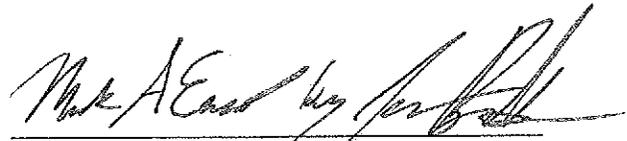
Moreover, whether this case should be remanded is not an issue that the Court had the benefit of argument from either party.

Instead, the Court should remand this matter to the BTA with instructions to consider the evidence that was presented and determine whether it is sufficient to overcome the presumption that book value represents the true value of its inventory.

III. Conclusion

Throughout this controversy, Rich's has claimed that MDAs constitute evidence that must be considered in determining the value of its inventory. It asserted that because information regarding MDAs is found in its books and records, that information must be considered in determining the book value, and hence the true value, of its inventory. In addition, it also claimed that because MDAs impact the price that it paid for its inventory, the MDAs must be considered in determining the true value of the inventory, apart from accounting rules. When this Court determined that the BTA failed to address this second issue, it should have remanded the case to the BTA with instructions to do so.

Respectfully submitted,

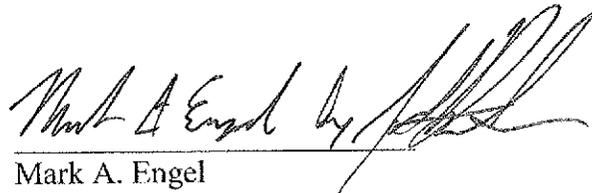


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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Motion for Reconsideration and Memorandum in Support of Appellee Rich's Department Stores, Inc.* was mailed by pre-paid first-class U.S. Mail this 29th day of March 2010 to:

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