

ORIGINAL

IN THE SUPREME COURT OF OHIO

WCI STEEL, INC.)	CASE NO.: 2010-1027
)	
Appellant,)	Appeal from the Ohio Board of
)	Tax Appeals
vs.)	
)	
WILLIAM W. WILKINS [RICHARD A.)	Board of Tax Appeals
LEVIN], TAX COMMISSIONER OF OHIO)	Case No. 2005-V-1565
)	
Appellee.)	
)	
)	

REPLY MERIT BRIEF OF APPELLANT WCI STEEL, INC.

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FILED
 DEC 23 2010
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 SUPREME COURT OF OHIO

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SUMMARY OF REPLY ARGUMENT

After trying for over three pages to portray the facts in *Ohio Bell Tel. Co. v. Levin*, 124 Ohio St.3d 211, 2009-Ohio-6189 as identical to the facts of this case, the Tax Commissioner finally addresses his test for the level of detail necessary to confer jurisdiction on the BTA.

Application of this Court's established standard shows that WCI failed to "specify" error in its notice of appeal to the BTA. The BTA dismissed WCI's notice of appeal for failure to "specify error" because WCI failed to make any attempt to explain how the Commissioner erred in general; WCI failed to identify any errors in the Commissioner's application of his prescribed methodology; and WCI failed to identify any valuation methodologies, analysis, or evidence that the Commissioner should have considered or applied as an alternative to his prescribed methodology. The BTA rightfully was compelled to dismiss the notice of appeal, finding it "to be so broad and vague to be insufficient to invoke this board's [the BTA's] jurisdiction." See *WCI Steel, Inc. v. Wilkins [Levin]* (May 18, 2010), BTA Case No. 2005-V-1565 ("BTA Decision and Order") at 6, reproduced in the appendix to WCI's opening merit brief at W.Br.Appx. 5-10.

Merit Brief of Tax Commissioner p. 4.

According to the Tax Commissioner, in addition to specifying that the mechanical application of the 302 tables resulted in an overvaluation of its personal property, WCI to meet "**this Court's established standard**" also had "to identify any valuation methodologies, analysis, or evidence that established that the Commissioner should have considered or applied as an alternative to his prescribed [302] methodology." But there is no statutory requirement that WCI specify evidence **in its notice of appeal** and this Court reaffirmed this principle in *Ohio Bell Tel. Co. v. Levin*, 124 Ohio St 3d 211, 2009-Ohio-6189 at ¶ 30:

"...it is true that an appellant need not specify the evidence on which it intends to rely..."

Perhaps recognizing that his first argument overreaches and is not supported by the text of R.C. 5717.02 or "this Court's established standard", the Tax Commissioner presents his second and alternative reason why the appeal should have been dismissed.

Even if WCI had specified its new valuation challenge in its notice of appeal to the BTA, that challenge properly would be dismissed because WCI failed to present its "replacement cost new" cost-approach methodology and

supporting analysis and evidence in the Commissioner's administrative proceedings. As this Court observed in *Ohio Bell*, "[o]ur cases suggest that such a failure to *present* an issue to the commissioner precludes the BTA from taking jurisdiction over that issue – even if the issue is *specified* in the notice of appeal" (citations omitted).

Brief of Tax Commissioner pp. 4-5.

But again this evidence-based argument is wrong because it misreads the record and is contrary to this Court's decision in *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 2002-Ohio-1488, a case the Tax Commissioner completely overlooks in spite of Appellant's reliance upon the decision in its merit brief.

LAW AND ARGUMENT

I. WCI Specified In Its Notice of Appeal That The 302 Tables Produced An Overvaluation For Its Obsolete Personal Property Of Almost 3 To 4 Times Its Actual True Value. Does WCI's Failure To Also Catalog Its Evidence and Methodology Preclude The BTA From Exercising Jurisdiction To Hear Its Appeal?

The Tax Commissioner makes it appear as if he issued a detailed final determination and carefully explained the evidence supporting his denial of WCI's petition for reassessment. He did not. Rather, he simply assessed, per taxing district, the value of the personal property based upon the 302 table. Yet, the Tax Commissioner asserts, despite his rote reliance upon the assessed 302 values, that WCI must provide a detailed evidentiary rebuttal in its notice of appeal to the BTA. Further, the Tax Commissioner contends that WCI's tying of the amount of the error to Mr. Gentile's \$30,000,000 valuation presentation is not sufficient and that the notice had to also explain the Gentile/Nationwide methodologies. But, in fact, the notice was sufficient since it pointed to the error and placed the Board on notice of WCI's objection to the Commissioner's rigid application of the 302 tables to its obsolete property.

Interestingly, at the BTA evidentiary hearing, the Commissioner's approach was to ignore all appraisals and to try the case based upon accounting methodology.¹ Indeed, the accounting professors relied upon by the Tax Commissioner, and who were belatedly substituted for other accounting experts, never addressed the underlying valuation efforts of Mr. Gentile, Nationwide, or AccuVal, which relied upon the Uniform Standards of Professional Appraisal Practice (USPAP).

This Court has held that notices of appeal cannot be simply generic; *e.g.* the assessment is "against the manifest weight of evidence." But a notice of appeal does not have to incorporate the appellant's complete merit brief with citations to all supporting evidence. Simply put, the Tax Commissioner knew that WCI contended that the 302 table overvalued WCI's obsolete

¹ Hearing Transcript Vol. II, pgs. 6-17 and 63-146.

personal property. This specifies the error, and that is all the General Assembly has required in order to invoke the jurisdiction of the BTA.²

Finally, WCI asserts that the Tax Commissioner's demand for a new interpretation of R.C. 5717.02, that requires identification of alternative valuation methodologies and evidence, defeats established expectations under *stare decisis* and should be rejected. Indeed, WCI's error specifications are similar to those in cases accepted for jurisdiction by the BTA before it misread *Ohio Bell Tel. Co. v. Levin, supra*. For example, in *MCI Metro Access Transmission Services, LLC, and MCI WorldCom Network Services, Inc. v. Wilkins* (April 13, 2007), BTA Case Nos. 2004-K-749 and 2004-K-750 the taxpayer's specification of error in a personal property tax appeal was as follows:

"The Commissioner's final determination[s are] erroneous in [their] entirety for the following reasons:

"The assessment[s], and the final determination[s] affirming [them], erroneously determined that the assets of [MCI] Metro [and MWNS] were not written down pursuant to SFAS No. 144.

"The Commissioner failed to properly apply an alternative valuation methodology in conformance with *Texas Eastern Transmission Corp. v. Tracy* (1997), 78 Ohio St.3d 83.

The Commissioner did not follow the Department's own guidelines as published in its 'Valuation of Public Utility Property' handbook when he blindly followed the prescribed depreciation rates to [MCI] Metro's and [MWNS'] property.

The rate of depreciation as provided by R.C. 5721.11 and as used by the Commissioner should not be used in this case since this is a special and unusual circumstance, and since an unreasonable or unjust result would occur. The depreciation calculated by the Commissioner does not result in an accurate true value of the taxpayer[s'] personal property. The taxpayer[s] [have] presented competent evidence relating to the true value of the property.

"The alternative valuation[s] proposed by [MCI] Metro [and MWNS are] a more accurate gauge of the true value of [their] property than the assessed value based on the historical costs on [their] books."

² R.C. 5717.02 states: "the notice of appeal shall specify the errors therein complained of..."

The Tax Commissioner tacitly conceded this overvaluation notice complied with the taxpayer's duty to specify error and only argued that the BTA should add a common law test to R.C. 5717.02 -- "fraud upon the public" -- and use the new test retrospectively to find no jurisdiction. But the BTA rejected the Commissioner's attempt to add an equitable requirement and stated:

Citing principles of equitable estoppel, the commissioner argues that appellants are "jurisdictionally barred" from achieving the relief requested through their appeals. However, the Tax Commissioner has not identified any failure by appellants to comply with the requirements imposed by R.C. 5717.02 necessary to invoke this board's jurisdiction. In the absence of such demonstration, this board is not predisposed to find jurisdictional deficiencies where none patently exist.³

The notice in MCI where no jurisdictional defect was found is consistent with typical notices in property tax appeals in the real estate tax valuation arena, where taxpayers often assert that the property's value should be substantially lower or should be valued at a specified amount. *See e.g. Crestwood Villa v. Crawford County Board of Revision* (February 16, 2010), BTA Case No. 2007-M-518. (Specifications of error that true value was \$810,000 rather than \$997,630 was sufficient for jurisdiction.)

³ *Id.* at 8 and 9. WCI World Com was appealed to the 10th District Court of Appeals and was again decided on the merits. *MCI Metro Access Transm. Serv. v. Levin*, 2008-Ohio-5057.

II. WCI Changed Appraisers Not Methodology After Its Ownership Changed. The BTA Permitted The Substitute Appraiser To Testify. Does A Ruling On A Witness' Competency Deprive the BTA of Jurisdiction?

A ruling on a witness' competency presumes the court or BTA has already determined its power to hear the case. Stated differently, deciding which witnesses may or may not testify or what evidence is, or is not, relevant does not involve a question of the tribunal's jurisdiction.

Once a proper notice is filed, the BTA has the right and duty to conduct a *de novo* hearing. This includes the right to consider appraisal reports that were not presented to the Commissioner. *Higbee Co. v. Evatt* (1942), 140 Ohio St. 325, 332. Both the Tax Commissioner and the taxpayer may refine their cases and add witnesses supporting their position. Both parties did this at the BTA.

Conducting a *de novo* hearing facilitates the search for truth. The BTA acts within its statutory power when it permits witnesses to testify, irrespective of whether their reports were available before the filing of the notice of appeal.⁴ The BTA may even make further investigations as it deems proper. As this Court stated in *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 16 2002-Ohio-1488:

“The BTA is statutorily authorized to conduct full administrative appeals in which the parties are entitled to produce evidence in addition to that considered by the Tax Commissioner . . . The BTA may investigate to ascertain further facts and make its own findings independent of those of the Tax Commissioner.”

R.C. 5717.02 provides for this *de novo* procedure. It states:

Upon the filing of a notice of appeal, the tax commissioner . . . shall certify to the board a transcript of the record of the proceedings before the commissioner . . . together with all evidence considered by the commissioner . . . in connection therewith . . . The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner . . ., but upon the application of any interested party the board shall order the hearing of additional evidence, and it

⁴ The Board also has the power, for newly identified issues, to remand for further findings by the Tax Commissioner. R.C. 5717.03(G).

may make such investigation concerning the appeal as it considers proper.
(Emphasis added.)

To reiterate, the Board has the power and duty to conduct *de novo* hearings upon request of any interested party. Further, any argument over admissibility of a witness is not a jurisdictional matter but, rather, an evidentiary issue. That is why, if the Board had ruled that the AccuVal expert could not testify, WCI could have presented as a backup witness the appraiser from Nationwide who also did a USPAP analysis.

An intertwined and flawed argument -- that WCI “never presented any economic obsolescence” analysis at the administrative level -- is not only irrelevant in resolving the jurisdictional issue⁵ but also wrong. The very supplement submitted by the Tax Commissioner at pages 21 and 22 reveals that the obsolescence issue was presented to the Tax Commissioner in exhaustive detail.⁶

From the statutory transcript, it is clear that the obsolescence issues, discussed in WCI’s opening merit brief, were indeed submitted at the administrative level. For example, WCI’s inability to produce in a commodity market because of the width of its hot mill is specifically discussed.⁷ Likewise, its inability to produce steel rolls of 1,000 minimum “PIW” is likewise discussed. The fact that WCI’s plant layout created excessive movement of material and that it had no coke facility were also discussed.

Next, the Tax Commissioner contends that WCI presented for the first time a “replacement cost new cost” approach coupled with a “comparative sales” approach for the fungible personal property. In fact, WCI has continually asserted the tri-partite USPAP methodology -- cost, comparison sales and income. Both the Nationwide report presented during the Tax Commissioner’s administrative appeal and AccuVal report presented at the BTA’s

⁵ Merit Brief of Tax Commissioner p. 3.

⁶ See also Reply Appendix reproducing pgs. 656 and 657 of the statutory transcript.

⁷ See WCI 48 inch maximum, whereas the industry standard was 60”.

evidentiary hearing considered anticipated income, sales comparisons, and replacement cost to the extent appropriate.⁸

Although AccuVal started its analysis by computing replacement cost and deducted economic and physical obsolescence for WCI's personal property, it found the sales comparison and income approaches, and particularly the income approach with adjustments, more appropriate in its professional judgment.⁹ Likewise, Nationwide used direct and indirect comparables to establish a value and/or develop economic obsolescence factors for its adjusted cost basis.¹⁰ Most importantly, Nationwide and AccuVal determined the fair market value of the property under the willing buyer / willing seller standard with neither being under any compulsion to sell or buy.¹¹

In summary, both Nationwide and AccuVal used a standard valuation methodology to determine the fair market value of WCI's tangible personal property in continued use. AccuVal's appraisal served as additional evidence of value, which the BTA is allowed to consider consistent with the *de novo* nature of the proceedings. There was not a new objection. Rather, there was simply additional evidence in support of the original over-valuation objection.

The Commissioner's final factual claim that he made "substantial findings regarding the comparative sales study submitted by Mr. Gentile "is also wrong."¹² All the Commissioner did was declare that WCI was a "custom" job shop. But, in fact, WCI was an integrated steel producer just as the other steel producers whose valuations were compared by Mr. Gentile.¹³ As the Commissioner's own audit report indicates, over 1/3 of WCI's production was in the commodity market. Further, as explained in testimony to the BTA, WCI was relegated to short

⁸ Transcript of BTA evidentiary hearing Vol. 1, pg. 169.

⁹ See Exhibit B, pg. 33, Hearing TR pgs. 157, 159 and 170.

¹⁰ See Appellee's supplement pg. 78.

¹¹ See Appellee's supplemental pg. 78 and Appellant's Exhibit B, pg. 1.

¹² Merit brief of Appellee pg. 2.

¹³ See Statutory Transcript 447.

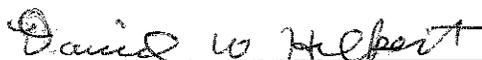
runs in the “custom” market largely because its equipment would not permit it to compete in the basic steel market. That is why the Gentile powerpoint presentation referenced the productivity/cost penalty imposed by WCI’s obsolete personal property.¹⁴

CONCLUSION

WCI complied with its duty to specify error. The Tax Commissioner’s attempt to engraft a new requirement – a duty to specify evidence and methodology – is unsupported by the text of R.C. 5717.02 and is *contrary* to case law. The Commissioner’s argument also represents an indirect and insidious attempt to eliminate the BTA’s power to conduct *de novo* hearings.

The BTA’s decision dismissing WCI’s appeal should be reversed.

Respectfully submitted,



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¹⁴ See Statutory Transcript 657.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ____ day of December, 2010 a true copy of this Reply Merit Brief of Appellant WCI Steel, Inc. was sent by U.S. mail to:

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REPLY APPENDIX

EQUIPMENT ISSUES - WCI vs. COMPETITION

Operating Unit	Quantity			Quality			Capability			Comments
	LTV	Acme	W-P	LTV	Acme	W-P	LTV	Acme	W-P	
Coke Plant	-	-	-	-	-	-	-	-	-	No coke plant - all coke purchased
Blast Furnace	-	+	-	-	NA	-	=	NA	=	1 blast foe - Quality & reliability issues - delayed reline and stove work
BOF Shop	-	=	=	=	=	=	=	=	=	2 vessels capable of meeting production requirements
Continuous Caster	-	=	=	=	-	=	-	-	-	9" thick Twin Stand Caster - 63" max width
Ladle Met Facility	-	=	+	=	=	NA	=	=	NA	LMF capable of meeting production requirements
Vacuum Degasser	-	+	+	-	NA	NA	-	NA	NA	Tank Degasser - Silicon steel only
Hot Mill	-	=	=	-	-	=	-	-	-	6 stand mill - 48" max - Pusher Furnaces - RRM - No coil box
Cold Mill	-	-	=	-	-	=	-	-	-	4 stand tandem mill - 48" max width
Pickers	-	=	=	-	-	=	-	-	-	2 continuous picklers - Use OSP for size/quality limitations
Anneal	-	+	=	+	+	+	=	+	+	HNX + Ebner Hydrogen anneal capability Continuous anneal line - Silicon Steel only
Galvanize Line	-	+	-	-	NA	-	-	NA	-	48" flux type line - HK base product only
Mis	-	=	-	-	-	-	-	-	-	

Appellee's Supp. 21 7.23

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QUALITY & CAPABILITY ISSUES - WCI vs. COMPETITION

Issue	LTV	Acme	W-P	Comments
Coil Weight / PIW	-	-	=	850 max. PIW - industry "standard" is 1000 min. Productivity / cost penalty for customer base
Width	-	-	-	48" max. - Varies by product & gauge Limited ability to supply service center / auto / appliance markets Productivity / cost penalty for customer base on mult slit applications
Gauge Control	-	-	-	Non-competitive gauge / crown capability Extra side scrap or end crops required based on end use - Internal cost penalty Higher TMW (less lineal feet per pound) - cost penalty for customer base Limited ability to participate in restricted gauge markets / applications
Surface Quality	-	=	=	Limited ability to supply service center / auto / appliance markets
Shape	-	-	=	WCI must temper pass shape critical HR applications WCI must tension level (OSP) shape critical CR applications Cost & lead time penalties involved
Internal Cleanliness	+	+	+	WCI has superior internal cleanliness capabilities
Storage Facilities	-	-	-	WCI has limited internal storage facilities of marginal quality Quality costs due to material degradation during extended storage periods Cost penalty for off site storage
Logistics / Layout	=	-	=	Excessive material movement within the plant Quality costs due to excessive transportation / handling

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