ORIGINAL

In the
Supreme Court of Ohio

PROGRESSIVE PLASTICS INC.,	:	Case No. 2011-1793
Appellant,	:	
v.	:	On Appeal from the Ohio Board of Tax Appeals
JOSEPH W. TESTA [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO,	:	Board of Tax Appeals Case No. 2008-A-241
Appellee.	:	

MERIT BRIEF OF APPELLEE
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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 5

Appellee Tax Commissioner's Proposition of Law No. 1: 8

The Tax Commissioner properly determined that Progressive Plastics' book values did not accurately reflect the true value of its manufacturing inventory for purposes of its personal property tax return. 8

Appellee Tax Commissioner's Proposition of Law No. 2: 19

Under R.C. 5703.36 and R.C. 5711.26, the Tax Commissioner properly considers all information available to him when conducting an audit and issuing an assessment, including relevant records pertaining to prior years' audits. 19

Appellee Tax Commissioner's Proposition of Law No. 3: 22

Application of stare decisis provides further support of the BTA's decision affirming the Commissioner's final determination of the true value of the appellant's inventory on the FIFO valuation method. 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

A. Schulman, Inc. v. Levin,
116 Ohio St.3d 105, 2007-Ohio-5585 ..... 1, 9, 11

Ashland County Bd. of Comm'rs v. Ohio Dep't of Taxation,
63 Ohio St.3d 648, 590 N.E.2d 730 (1992) 10

Bd. of Ed. of South-Western City Schools v. Kinney,
24 Ohio St.3d 184, 494 N.E.2d 1109 (1986) 10

Brown v. Levin,
119 Ohio St.3d 335, 2008-Ohio-4081 ..... 24, 25

Columbia Gas Transmission Corp. v. Levin,
117 Ohio St.3d 122, 2008-Ohio-511 ..... 1, 9, 11

Grabler Manufacturing Co. v. Kosydar,
43 Ohio St.2d 75, 330 N.E.2d 924 (1975) 2, 16

Hatchadorian v. Lindley
(1983), 21 Ohio St.3d 66, 488 N.E.2d 145 (1983) 1, 9, 11, 12

Higbee Co. v. Evatt,
140 Ohio St. 325, 43 N.E.2d 273 (1942) 9, 10, 11

Progressive Plastics, Inc. v. Levin,
123 Ohio St.3d 1408, 2009-Ohio-5031 ..... 6, 11, 23, 25

Progressive Plastics, Inc. v. Levin,
8th Dist. No. 91614, 2009-Ohio-2033 ..... passim

R.H. Macy Co., Inc. v. Schneider,
176 Ohio St. 94, 197 N.E.2d 807 (1964) ..... passim

Shiloh Automotive, Inc. v. Levin,
117 Ohio St.3d 4, 2008-Ohio-68 ..... passim

Stanton, Pros. Atty., v. Tax Commission,
114 Ohio St. 658, 151 N.E. 760 (1926) 10

State ex rel. Davis v. Public Emples. Ret. Bd.,
120 Ohio St.3d 386, 2008-Ohio-6254 24

Strongsville Bd. of Educ. v. Cuyahoga County Bd. of Revision,
112 Ohio St.3d 309, 2007-Ohio-6 ..... 3, 16

Worthington City Schs. Bd. of Educ. v. Franklin County Bd. of Revision,
124 Ohio St.3d 27, 2009-Ohio-5932 19

Youngstown Sheet & Tube Co. v. Kosydar,
44 Ohio St.2d 96, 338 N.E.2d 366 (1975) 12, 13

STATUTES

R.C. 5703.36 ..... 3, 19, 20, 22

R.C. 5711.21 ..... 14, 20

R.C. 5711.25 7

R.C. 5711.26 ..... 3, 19, 20, 22

R.C. 5717.04 23

INTRODUCTION

This Court declined Progressive Plastics' previous invitation to revisit the substantive issues in this appeal. For the 2003 tax year (the tax year immediately prior to the 2004 and 2005 tax years at issue in this appeal), the Eight District Court of Appeals had affirmed the Board of Tax Appeal who, in turn, had affirmed the Tax Commissioner's final determination on Progressive Plastics' personal property tax liability. This Court found the case unworthy of review—presenting no "question of public or great general interest." S.Ct. Prac. R. 2.1(3). Yet Progressive Plastics persists in its attempt to have this Court review actions of the Tax Commissioner that repeatedly have been affirmed. For Progressive Plastics, the song remains the same.

First, Progressive Plastics again claims—as it did for tax year 2003—that the Tax Commissioner failed to meet an alleged "burden" to make "findings" sufficient to overcome the taxpayer's own book values of its inventory. But, as the Court of Appeals held and the precedent of this Court confirms, the Tax Commissioner has no such burden and, in fact, made such findings. *Progressive Plastics, Inc. v. Levin*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 15; *Champion Spark Plug Co. v. Lindley*, Ohio St.3d 56, 57, 451 N.E.2d 514 (1983); *R.H. Macy Co., Inc. v. Schneider*, 176 Ohio St. 94, 97, 197 N.E.2d 807 (1964). Once the Tax Commissioner has determined that the taxpayer's books do not accurately reflect the true value of its property, the burden is upon the taxpayer to come forth with evidence to the contrary. *Hatchadorian v. Lindley* (1983), 21 Ohio St.3d 66, 488 N.E.2d 145 (1983), paragraph one of the syllabus; *Shiloh Automotive, Inc. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68 at ¶ 16; and *Columbia Gas Transmission Corp.*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶ 11; *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585 at ¶ 7; *R.H. Macy Co., Inc.*, 176 Ohio St. at 97, 197 N.E.2d 807.

Moreover, it is unsurprising that for the 2004 and 2005 tax years involved in its current appeal the Tax Commissioner rejected Progressive Plastics' method of valuing its property—the Last-In, First-Out ("LIFO") method.[1] The Tax Commissioner had previously rejected the same inventory valuation method, on the same argument and evidence presented by the taxpayer for its 2003 tax year liability, and had been affirmed by the BTA and the Court of Appeals. *Progressive Plastics, Inc. v. Levin*, BTA No. 2006-M-1043, 2008 Ohio Tax LEXIS 884 (May 13, 2008), Record 20, Supp. Statutory Transcript at 924; *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033.

The Tax Commissioner's rejection of the LIFO values reported by Progressive Plastics was appropriate as a matter of law and fact. This Court has repeatedly held that the LIFO method used by Progressive Plastics yields an "unrealistic picture" of true value that "arbitrarily considers that the last merchandise purchased *** is sold before the older merchandise in stock." *R.H. Macy Co., Inc.*, 176 Ohio St. at 97-98, 197 N.E.2d 807; *Champion Spark Plug Co.*, 6 Ohio St.3d at 57-58.

In contrast, the method used by the Tax Commissioner, First-In, First-Out ("FIFO"), hews more closely to the lodestar for property valuation, the principle that a *recent*, arms-length sale is the best evidence of an item's value. *R. H. Macy* at 96; *Grabler Manufacturing Co. v. Kosydar*,

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[1] As explained by the Eighth District Court of Appeals:

> "LIFO ["last-in, first-out"] assumes 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 of the inventory than LIFO because the average inventory values under the FIFO method will be based on the acquisition costs of the most newly acquired inventory, rather than the earliest acquired inventory."

Progressive Plastics, Inc., 8th Dist. No. 91614, 2009-Ohio-2033, ¶ 2, fn 1.

43 Ohio St.2d 75, 78, 330 N.E.2d 924 (1975); *Shiloh Automotive Inc.*, 117 Ohio St.3d 4, 2008-Ohio-68, at ¶20; *Strongsville Bd. of Educ. v. Cuyahoga County Bd. of Revision*, 112 Ohio St.3d 309, 2007-Ohio-6, ¶12. Finally, as the BTA and Court of Appeals held, the taxpayer's actual inventory flows more closely mirror the FIFO valuation method utilized by the Tax Commissioner. *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 18; *Progressive Plastics, Inc. v. Levin*, BTA No. 2008-A-241, 2011 Ohio Tax LEXIS 1875 (Sept. 20, 2011), Record 27, at 7. Progressive Plastics offered no evidence to rebut this fact.

In its second proposition of law, Progressive Plastics takes issue—as it did for tax year 2003—with the method of valuation utilized by the Tax Commissioner, adding the fresh spin that the Tax Commissioner should not have used information obtained in audit of Progressive Plastics' personal property tax return for 2003 as a basis to continue to apply that valuation method. This argument is misbegotten. The Tax Commissioner properly considers information obtained in prior year's audits when carrying out his duties to issue assessments based upon all of the information available to him. Under R.C. 5711.26, the Tax Commissioner must use "all facts or information he possesses" to determine the taxable true value of personal property. And under R.C. 5703.36, the Tax Commissioner must "inform himself as best he can" when the taxpayer refuses to produce the requested records, as Progressive Plastics did.

Furthermore, the line of precedent cited by Progressive Plastics is inapplicable to this case. What *Olmstead Falls* and its progeny have held is that neither the taxpayer nor the Tax Commissioner may carry forward a determination of *value* preclusively from one tax year to the next. *Olmsted Falls Bd. of Educ.*, 2009-Ohio-2461 at ¶ 16. The Commissioner did no such thing. *Olmstead Falls* holding is not implicated in this case, because the Commissioner did not "carry forward" his valuation from the 2003 tax year to the 2004 tax year. Instead, in the face of

Progressive Plastics' refusal to provide records for use by the Tax Commissioner's auditing agents for the 2004 measuring year (Progressive Plastics' fiscal year ending in 2003), the agents relied upon some information obtained during the 2003 audit along with the 2004 and 2005 returns, the agent's own knowledge, rules and guidelines promulgated by the Tax Commissioner, the taxpayer's own statements, and this Court's precedent to arrive at the determination of the true value of Progressive Plastics' manufacturing inventory in 2004 and 2005.

In its final proposition of law, Progressive Plastics asserts that the BTA improperly applied the doctrine of collateral estoppel to its case. However, this contention is unavailing because whether or not the collateral estoppel doctrine properly applies, the doctrine of *stare decisis* plainly does. Progressive Plastics appealed the very same issues and provided no new evidence, nor was there an intervening change in the laws or facts. In fact, the available evidence demonstrates that Progressive Plastics continued to utilize the same inventory valuation methods for the same type of manufacturing inventory. On the two issues presented—whether the Tax Commissioner has a burden to rebut the taxpayer's book values and whether the Tax Commissioner properly determined that the LIFO method did not appropriately value Progressive Plastics' inventory—the BTA correctly determined that the Commissioner's true value computation under the FIFO valuation methodology was reasonable and lawful. If there is error in this case, it is Progressive Plastics'—squandering judicial resources in dogged relitigation of issues that have already been decided conclusively against it.

For the foregoing reasons, the Tax Commissioner respectfully requests that this Court affirm the decision of the BTA.

STATEMENT OF THE CASE AND FACTS

A. The 2003 tax year audit

The Tax Commissioner's auditing agents reviewed Progressive Plastic's Ohio personal property tax return for the 2003 tax year and found that an audit was necessary to determine the true value of Progressive Plastics' manufacturing inventory, consisting of various manufactured plastic products, as set forth in Schedule 3 of the return. See *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033, at ¶ 2. The audit resulted in an increased valuation of Progressive Plastics' manufactured inventory for that year. *Id.*

Progressive Plastics had used a LIFO (Last-In, First-Out) method to value inventory for its 2003 tax return, rather than a FIFO (First-In, First-Out) valuation method. *Id.* The Commissioner's auditors determined that the use of LIFO had resulted in an underreporting of the true value of Progressive Plastics' inventory. *Id.* Accordingly, the auditors recalculated the true value based upon the FIFO (First-In, First-Out) cost.

Following Progressive Plastics' filing of a petition for reassessment, the Tax Commissioner issued a final determination upholding the auditors' findings and affirming the assessment. See the Tax Commissioner's final determination dated June 22, 2006, Record 27, Supp. Statutory Transcript at 1; and *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 3. Progressive Plastics appealed to the Board of Tax Appeals, but waived hearing and did not offer any independent evidence before the Board except for the deposition testimony of two of the Commissioner's auditing agents, and an affidavits from its corporate officer. *Id.* The Board affirmed the Tax Commissioner's determination. *Progressive Plastics, Inc.*, BTA No. 2006-M-1043, 2008 Ohio Tax LEXIS 884, Record 20, Supp. Statutory Transcript at 924.

Progressive Plastics next appealed to the Eighth District Court of Appeals. The Court of Appeals affirmed the Board's decision. See, *Progressive Plastics, Inc.*, 8th Dist. No. 91614,

2009-Ohio-2033. Progressive Plastics filed a jurisdictional memorandum to the Ohio Supreme Court, but this Court declined to take the case. *Progressive Plastics, Inc. v. Levin*, 123 Ohio St.3d 1408, 2009-Ohio-5031.

B. The audit for the 2004-2005 tax years

In the two years following the 2003 tax year audit, Progressive Plastics continued to undervalue its manufacturing inventory using the LIFO method, despite having been admonished by the Tax Commissioner, the BTA, and the Court of Appeals that this method was inappropriate. Accordingly, the Tax Commissioner audited Progressive Plastics again for the 2004 and 2005 tax years. See Record 3, Statutory Transcript at 1, the Tax Commissioner's final determination dated December 26, 2007.

1. Progressive Plastics failed to provide timely records requested by the Tax Commissioner to complete the 2004-2005 tax years audit.

During the audit, the Tax Commissioner's personal property tax audit division informed Progressive Plastics by letter of the 2004 and 2005 audits and requested various records[2] to be produced by December 22, 2005. Record 3, Statutory Transcript at 459. Progressive Plastics requested additional time to comply with the records request. Record 3, Statutory Transcript at 458. The auditor agreed to wait, on the representation that he would receive the documents at a meeting with Progressive Plastics' counsel on February 10, 2006 (a 51-day extension). *Id.*

However, when the Commissioner's auditing agent appeared for the February 10 meeting, he "discovered that [counsel for Progressive Plastics] never had any intention of complying with the auditor's request to examine the taxpayer's records." Record 3, Statutory Transcript at 313. Still, thereafter, the Tax Commissioner patiently continued to provide

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[2] Specifically, the auditor requested: (1) fixed asset records; (2) inventory schedules; (3) documentation to reconcile those records with the general ledger; (4) charts of accounts; and (5) work-papers used in preparing the returns. Record 3, Statutory Transcript at 459.

opportunities for Progressive Plastics to submit the requested records, including: (1) extending the submission close-date for audit materials to March 15, 2006; and (2) further extending the date for Progressive Plastic to respond to the amended preliminary assessment and to provide "new and pertinent information," to June 12, 2006. Record 3, Statutory Transcript at 453, 449-450.

In light of the deadline imposed by R.C. 5711.25 for the Tax Commissioner to issue preliminary amended assessments for the 2004 and 2005 tax years by August 14, 2006, the auditor completed and mailed the preliminary assessment without those records on July 21, 2006.[3] Record 3, Statutory Transcript at 301-305.

Progressive Plastics filed a petition for reassessment on September 19, 2006. Record 3, Statutory Transcript at 289. Still, none of the requested records were sent to the Tax Commissioner with the petition for reassessment. The Tax Commissioner issued his final determination on December 26, 2007. Record 3, Statutory Transcript at 1.

2. The 2004-2005 tax year audit findings and final determination.

The Tax Commissioner's agent conducted the 2004-2005 audits based upon the records, rules, and information available to him. Record 3, Statutory Transcript 311-316 and attachments. The agent determined, and Progressive Plastic concedes, that for Ohio personal

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[3] Following the issuance of the Tax Commissioner's final determination, counsel for Progressive Plastics sent the Tax Commissioner a bundle of records on January 24, 2007 ("the late records"), and attached an original cover letter for the records, dated August 31, 2006. Those records appear in the transcript of this case. See, Record at 3, Statutory Transcript at 5. This 260-page bundle of records does not include an index, a summary, or accompanying explanation of how the records connected to the petition for reassessment.

The late records, even if they had been received by the Commissioner's personnel on August 31, 2006 still would have been too late for the Tax Commissioner to use in issuing his amended assessment certificates for the 2004 tax year. The statute of limitations under R.C. 5711.25 to issue amended preliminary assessments would have expired on August 14, 2006. (R.C. 5711.25 provides: the "amended * * * preliminary assessment certificate * * * shall become final on the second Monday of August of the second year after the filing of a return.")

property tax purposes, it continued to utilize the LIFO method to value its inventory in tax years 2004 and 2005. Record 3, Statutory Transcript 313. The agent concluded that the use of LIFO resulted in the underreporting of the true value of Progressive Plastics' manufacturing inventory in 2004 and 2005 and accordingly the agent re-determined the true value based upon the FIFO valuation method.

The Tax Commissioner's final determination found that the use of LIFO was not appropriate and that FIFO provided a better measure of Progressive Plastics' inventory. Record 3, Statutory Transcript at 1-2. The final determination rejected the claims set forth in Progressive Plastics' petition for reassessment, including issues that Progressive Plastics has not specified in its appeal to this Court.

Progressive Plastics appealed to the BTA. See, Record 3, Statutory Transcript at 539-51, Progressive Plastics' notice of appeal to the BTA. In its de novo appeal, Progressive Plastics submitted no new evidence in support of its position. None. In fact, Progressive Plastics waived hearing and submitted this case without argument. See, *Progressive Plastics, Inc.*, BTA No. 2008-A-241, 2011 Ohio Tax LEXIS 1875, Record 27, at 2, 6. The only evidence before the Board and, consequently, this Court, was the evidence submitted by the Tax Commissioner in support of his final determination.

LAW AND ARGUMENT

Appellee Tax Commissioner's Proposition of Law No. 1:

The Tax Commissioner properly determined that Progressive Plastics' book values did not accurately reflect the true value of its manufacturing inventory for purposes of its personal property tax return.

Progressive Plastics does not challenge the values arrived at by the Tax Commissioner for its 2004 and 2005 manufacturing inventory. Instead, it challenges the Tax Commissioner's method of determining value and his rejection of the method used by Progressive Plastics. In its

brief, Progressive Plastics argues that the Tax Commissioner did not make sufficient "findings" that the taxpayer's method for valuing its inventory was incorrect. Merit Brief of Apt. at 5. Progressive Plastics also asserts that the Tax Commissioner had an alleged "burden" to make such findings to rebut Progressive Plastics' "book values" "throughout the audit and subsequent appeal." Merit Brief of Apt. at 6. These arguments are without merit.

First, in this case, the Tax Commissioner made comprehensive, independent findings at multiple stages of the audit and assessment regarding the valuation of Progressive Plastics' property. Those findings were supported by fact and law. And under well-settled precedent, the Tax Commissioner's valuation findings are presumed to be correct and the party challenging those findings has the affirmative burden of demonstrating that those findings are "clearly unreasonable or unlawful." *Hatchadorian*, 21 Ohio St.3d 66, 488 N.E.2d 145, at paragraph one of the syllabus; *Shiloh Automotive, Inc.*, 117 Ohio St.3d 4, 2008-Ohio-68 at ¶ 16; and *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511 at ¶ 11; *A. Schulman, Inc.*, 116 Ohio St.3d 105, 2007-Ohio-5585 at ¶ 7; *R.H. Macy Co., Inc.*, 176 Ohio St. at 97, 197 N.E.2d 807. This burden applies regardless of whether the Tax Commissioner has affirmatively produced evidence in support of his findings. *Higbee Co.*, 140 Ohio St. at 332, 43 N.E.2d 273.

Progressive Plastics can't flip the script on who bears the burden in this case. Once the Tax Commissioner's auditing agent had issued preliminary audit results finding that Progressive Plastics had improperly valued its inventory, the burden rested squarely upon Progressive Plastics throughout audit, the petition for reassessment, determination thereon, and appeal to demonstrate some error in the Tax Commissioner's finding.

Moreover, as explained below, the Tax Commissioner's insistence that Progressive Plastics report the value of its manufacturing inventory based upon a FIFO method of valuation,

rather than the LIFO method used by Progressive Plastics, was appropriate as a matter of fact and law. The Tax Commissioner's method, FIFO, more nearly resembles Progressive Plastics' actual inventory flows. As a matter of law, the FIFO method used by the Tax Commissioner more closely resembles to the legal benchmark of true value—the principle that a recent, arms-length sale is the best evidence of the current value of property. Furthermore, the LIFO method used by Progressive Plastics has been repeatedly criticized by this Court as in inaccurate method of arriving at true value. See, e.g., *R.H. Macy Co.*, 176 Ohio St. 94, 197 N.E.2d 807; *Champion Spark Plug Co.*, Ohio St.3d at 57, 451 N.E.2d 514.

1. The Tax Commissioner properly found that Progressive Plastics' inventory valuation did not reflect true value.

In discharging his exclusive statutory duty to determine true value, the Commissioner exercises his professional judgment as a "tax expert." *Stanton, Pros. Atty., v. Tax Commission*, 114 Ohio St. 658, 667-668, 151 N.E. 760 (1926); *Higbee Co. v. Evatt*, 140 Ohio St. 325, 332, 43 N.E.2d 273 (1942); *Bd. of Ed. of South-Western City Schools v. Kinney*, 24 Ohio St.3d 184, 186, 494 N.E.2d 1109 (1986); *Ashland County Bd. of Comm'rs v. Ohio Dep't of Taxation*, 63 Ohio St.3d 648, 656, 590 N.E.2d 730 (1992) (the Commissioner's determination of taxable value involves "the highest degree of official judgment and discretion.")

In this case, in the Tax Commissioner's expert judgment, Progressive Plastics had underreported the value of its manufacturing inventory in 2004 and 2005. So, the Tax Commissioner repeatedly made written findings to that effect. The foremost finding is contained in the Tax Commissioner's final determination, which incorporates and affirms his auditing agent's findings that FIFO produced the best measurement of the true value of Progressive Plastics' inventory. Record at 3, Statutory Transcript at 1-4. As the Court of Appeals held, "the Commissioner's 'finding' that the FIFO method of valuation is a better indicator of the value of

[Progressive Plastics'] inventory that LIFO is manifest in his final determination." *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 15. But this wasn't the first such finding made by the Tax Commissioner. On May 12, 2006, the Tax Commissioner sent Progressive Plastics preliminary proposed audit results that found that the use of LIFO was an improper valuation method. Record at 3, Statutory Transcript at 449-50. It was because of this very written letter that Progressive Plastics filed its petition for reassessment. See, e.g. Record 3, Statutory Transcript at 289-92. The auditor's findings couldn't have come as a surprise to Progressive Plastics—the Tax Commissioner made same finding regarding LIFO for valuation of exactly the same type of inventory for a previous tax year, a finding that was affirmed by the BTA, the Court of Appeals, and found not worthy of review by this Court. *Progressive Plastics, Inc.*, BTA No. 2006-M-1043, 2008 Ohio Tax LEXIS 884; *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 18; *Progressive Plastics, Inc.*, 123 Ohio St.3d 1408, 2009-Ohio-5031.

The Tax Commissioner's valuation findings are presumed to be correct and the party challenging those findings has the affirmative burden of demonstrating that those findings are "clearly unreasonable or unlawful." *Hatchadorian v. Lindley*, 21 Ohio St.3d 66, 488 N.E.2d 145 at paragraph one of the syllabus; *Shiloh Automotive, Inc.*, 117 Ohio St.3d 4, 2008-Ohio-68 at ¶ 16; and *Columbia Gas Transmission Corp.*, 117 Ohio St.3d 122, 2008-Ohio-511 at ¶ 11; *A. Schulman, Inc.*, 116 Ohio St.3d 105, 2007-Ohio-5585 at ¶ 7; *R.H. Macy Co., Inc.*, 176 Ohio St. at 97, 197 N.E.2d 807. This burden applies regardless of whether the Tax Commissioner has affirmatively produced evidence in support of his findings. *Higbee Co.*, 140 Ohio St. at 332; 43 N.E.2d 273.

Thus, given the Tax Commissioner's findings, the burden is upon Progressive Plastics to demonstrate the manner and extent to which its use of a LIFO valuation methodology better reflected true value. *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 19. This burden proves fatal for Progressive Plastics' appeal, because the company adduced no evidence before the Board or in the Commissioner's proceedings below to support its use of LIFO. "When no competent and probative evidence is developed before the Board of Tax Appeals to show that the Tax Commissioner's determination of the value of property is factually incorrect, it is error for the board to reverse that determination." *Hatchadorian*, 21 Ohio St.3d 66, 488 N.E.2d 145, at paragraph two of the syllabus.

In order to salvage an argument that LIFO is a better method than FIFO for measuring its inventory's value, Progressive Plastics has (repeatedly) argued that the Tax Commissioner failed to meet an asserted affirmative evidentiary to show that that the taxpayer's book values are not the best measure of true value. Merit Brief of Apt. at 5-6. However, Progressive Plastics misapprehends the law on this issue.

The taxpayer's book values are evidence of true value, but are not the only evidence, and, indeed are often not the best evidence. *Youngstown Sheet & Tube Co. v. Kosydar*, 44 Ohio St.2d 96, 99, 338 N.E.2d 366 (1975). Instead, the Tax Commissioner must arrive at a true value determination in his independent judgment from all of the evidence available to him. The Commissioner, in the exercise of his discretion, may properly apply a valuation methodology to determine the true value of a taxpayer's taxable personal property that differs from the valuation methodology used by the taxpayer, even when the taxpayer's book valuation methodology is in accordance with generally accepted accounting principles. *R.H. Macy Co.*, 176 Ohio St. 94, 197 N.E.2d 807. As explained by the *Youngstown* Court, "[T]he 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 the true value in money of such property." *Youngstown Sheet & Tube Co.*, at paragraph one of the syllabus.

Moreover, the Tax Commissioner need not present evidence to overcome or "rebut" the method used by taxpayer to value its own inventory. In *Champion Spark Plug,* the Supreme Court rejected this exact contention: "Appellant argues 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 Appellee [Tax Commissioner] must either accept or overcome through the production of evidence to the contrary." *Champion Spark Plug Co.*, Ohio St.3d at 57, 451 N.E.2d 514. The Court held that the taxpayer's method is used as prima facie evidence "'*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.*, quoting *Youngstown Sheet & Tube Co.*, (emphasis in original).

As explained, the Tax Commissioner's audit findings inhere in the issuance of the preliminary amended assessment and in the final determination, which rejects Progressive Plastics' objections to the preliminary amended assessments. Thus, the Tax Commissioner made comprehensive, thoroughgoing findings regarding Progressive Plastics' 2004 and 2005 personal property tax liability. Accordingly, the burden shifted to Progressive Plastics to rebut the Tax Commissioner's valuation determination throughout the audit process, the petition for reassessment and determination thereon, and through appeal.

2. The Tax Commissioner's finding that Progressive Plastics underreported the value of its manufacturing inventory is supported by fact and law.

Even if the Tax Commissioner had a "burden" to support his findings before supplanting the taxpayer's book values, as Progressive Plastics contends, the Tax Commissioner would have met that burden in this case. The findings in this case are amply supported by the record and the law.

a. The Tax Commissioner properly determined that FIFO was the appropriate measure of value for Progressive Plastics' inventory based upon competent, probative evidence that is contained in the record of this case.

When determining the value of property, the Tax Commissioner follows the requirements of R.C. 5711.21, and considers "the statements contained in the taxpayer's return and such other rules and evidence as will enable [him] to arrive at such true value."

In this case, the Commissioner's auditor properly compiled the facts necessary to complete the preliminary amended assessments (as affirmed by the Commissioner's final determination) by reviewing Progressive Plastic's 2004 and 2005 tax returns, letters from Progressive Plastics, administrative rules, and the audit paperwork and documents from the 2003 audit. Record 3, Statutory Transcript at 311-15. The auditor confirmed that Progressive Plastics continued to use the LIFO method to calculate its inventory value based upon Progressive Plastics own admissions and the documentation available to him. See Record 3, Statutory Transcript 313-14, 454, 316.

The auditor determined that the use of LIFO was not appropriate for Progressive Plastics' manufacturing inventory based upon the his own knowledge and experience as an auditor, legal precedent, and the established, published audit practices set forth in the Tax Commissioner's Ohio Personal Property Tax Manual. Record 3, Statutory Transcript at 311-15. Additionally, the

auditor had knowledge of Progressive Plastics' particular business practices—practices that Progressive Plastics admits had not changed since the prior audit—and the prior audit's findings and records.[4] See, e.g. Record 3, Statutory Transcript at 5, 312-17; Record 20. Using this knowledge and authority, the auditor determined that current replacement costs for inventory (as reflected by using a FIFO inventory method) better reflect "true value" than do less recent inventory replacement costs (as reflected by using a LIFO inventory method). *Id.*

After the auditor issued the preliminary assessment, Progressive Plastics filed a petition for reassessment, wherein it claimed that the Tax Commissioner should use LIFO rather than FIFO. Record 3, Statutory Transcript 289-106. Yet, it did nothing to support this supposition. It produced no evidence and offered no new reasoning why the same inventory should be valued differently in 2004 and 2005 than it had been in 2003. See *Progressive Plastics, Inc.*, BTA No. 2008-A-241, 2011 Ohio Tax LEXIS 1875, Record 27, at 2, 6. Even in the face of repeated requests, Progressive Plastics refused to provide evidence to support its position. Ironically, Progressive Plastic now claims that the Tax Commissioner failed to meet his burden. But that is not the case. Instead, the Tax Commissioner's finding that Progressive Plastics improperly employed the LIFO method for 2004 and 2005 is supported by competent evidence and inquiry.

Accordingly, the Tax Commissioner affirmed the findings of his auditing agent in the final determination on the petition for reassessment. The final determination incorporates and

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[4] During the 2003 audit, the Tax Commissioner's agents talked to Progressive Plastics employees, and after reviewing Progressive Plastics' financial records and touring its facility, determined that Progressive Plastics was not listing its inventory at its true value for personal property tax purposes. *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 2 and ¶ 16-19, see also the documents contained in the Supp. Statutory Transcript, Record 20 at 1-584. The reports of this audit and records gathered therein were available to the agent who conducted the 2004-2005 audits. Those reports and records are contained in the supplemental statutory transcript certified to the BTA by the Tax Commissioner as a part of the record of the audit and determination on the petition for reassessment. See, Record 20.

adopts the auditor's findings, and is supported by the ample record in this case. Under the well-settled law discussed above, the burden was on Progressive Plastics to rebut the Tax Commissioner's findings.

b. The use of FIFO is appropriate because it accords with the principle that the best evidence of value is a recent, arm's-length sale.

Moreover, the Tax Commissioner's finding that LIFO is an inappropriate valuation method is supported by this Court's precedent. By using the FIFO inventory method, rather than the LIFO method, the Tax Commissioner's findings better reflected the true value of Progressive Plastics' finished good, work-in-progress, and raw material inventories in "current dollars." See Tax Commissioner Agent Richard Shanks' deposition testimony, Record 20, Supp. Statutory Transcript at, e.g., 24, 40, 55 (testifying that use of FIFO, rather than LIFO, better reflects the value of the inventory in "current" dollars). This is so because the average inventory values under the FIFO method are based upon the acquisition costs of the most newly acquired inventories, rather than the earliest acquired ones.

The FIFO valuation method's utilization of the most recent acquisitions of inventory accords with the most bedrock of personal property tax principles. Namely, "the best evidence of true value is a sale between a willing buyer and seller". *Grabler Manufacturing Co.*, 43 Ohio St.2d 75, 78, 330 N.E.2d 924; *Shiloh Automotive Inc.*, 117 Ohio St.3d 4, 2008-Ohio-68, at ¶20; *Strongsville Bd. of Educ.*, 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").

LIFO methodology violates this rule of the best evidence of true value because it determines the true value of current inventories based on the acquisition costs of earlier-acquired

inventories. In fact, the Ohio Supreme Court uniformly has held that the use of LIFO inventory valuations yields an "arbitrary," "unrepresentative," and "unrealistic picture of inventory value." *R.H. Macy Co., Inc.*, 176 Ohio St. at 97, 197 N.E.2d 807 (affirming the BTA's affirmance of the Commissioner's rejection of a retailer's LIFO inventory valuation and upholding the Commissioner's use of the retail inventory method of valuation); and *Champion Spark Plug Co.*, 6 Ohio St.3d at 57-58, 451 N.E.2d 514 (affirming the BTA's affirmance of the Commissioner's rejection of a manufacturer's use of LIFO valuations and upholding the Commissioner's use of FIFO valuations), respectively. It would only be under extraordinary circumstances—not shown to be present here—that LIFO would yield a realistic indicator of true value.

c. The use of FIFO is consistent with Progressive Plastics' actual inventory flows.

Progressive Plastics asserts that it has submitted evidence on how LIFO better represents its inventory's value. See, e.g. Merit Brief of Apt. at 15-16. However, the only evidence in Progressive Plastic's brief are an anecdote about the rotation of milk at grocery stores (p. 15), and one self-serving, inconsistent affidavit from its corporate officer, who did not testify before the BTA (p. 15-16). The affidavit referred to appears in the record of this case at Record 3, Statutory Transcript at 298-99.

In fact, the evidence in the record shows that its inventory flows did not follow a LIFO pattern, but were actually more similar to a FIFO inventory flow, as the Court of Appeals held. *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 18. During the course of the 2003 audit, Progressive Plastics produced a memo explaining that "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." *Id.*, Supp. Statutory Transcript at 519. Progressive Plastics' president reaffirmed that the company may use a first-in-first-out inventory flow, by

stating "employees of PPI may periodically draw upon inventory that are most readily accessible to the employee." *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 18, Record 3, Supp. Statutory Transcript at 262.

Additionally, the Tax Commissioner's agents expressly requested that Progressive Plastics provide any evidence contrary to the FIFO inventory-flow, but Progressive Plastics refused to do so. *Progressive Plastics, Inc.*, BTA No. 2008-A-241, 2011 Ohio Tax LEXIS 1875, Record 27, at 2, 6; Record 20, Supp. Statutory Transcript at 279; Record 3, Statutory Transcript 312-313. Similarly, Progressive Plastics presented no such evidence to the Tax Commissioner during the consideration of its petition for reassessment, and thereafter waived its right to an evidentiary hearing before the Board in 2003 and 2004 and 2005. *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 16; *Progressive Plastics, Inc.*, BTA No. 2008-A-241, 2011 Ohio Tax LEXIS 1875, Record 27, at 2, 6. Accordingly, at no time did Progressive Plastics present any evidence of its actual inventory-flow practices to counter the Tax Commissioner's use of FIFO. Before this Court, Progressive Plastics' anecdotes and inconsistent, self-serving affidavits will not suffice.

Finally, contrary to Progressive Plastics' assertion that a taxpayer cannot use LIFO to value inventory, the evidence establishes that "[the Tax Commissioner'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." *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 14, Record 20, Supp. Statutory Transcript, Shank Depo at 815. The Tax Commissioner will permit the use of LIFO, but a taxpayer must prove that it produces a more accurate measurement. *Id.*

In sum, Progressive Plastics failed to establish the extent, if any, to which its actual inventory experience reflected a LIFO inventory flow. Instead, the evidence established the opposite flow. Progressive Plastics' actual inventory experience was consistent with a FIFO inventory.

Appellee Tax Commissioner's Proposition of Law No. 2:

> *Under R.C. 5703.36 and R.C. 5711.26, the Tax Commissioner properly considers all information available to him when conducting an audit and issuing an assessment, including relevant records pertaining to prior years' audits.*

Progressive Plastics asserts that the Tax Commissioner improperly relied upon "information" obtained in review of the 2003 audit when conducting the 2004-2005 audits. Progressive Plastics states the crux of its argument thusly: "What the Tax Commissioner is attempting to do is conduct a single audit for 2003 and then use the 2003 audit results to assess additional tax liability for 2004." Merit Brief of Apt. at 19. These claims fall flat as a matter of law and as a matter of fact.

First of all, the cases cited by Progressive Plastics do not stand for the proposition that information obtained in prior years' audits cannot be used in subsequent years' audits. The actual holding of those cases is that neither the Tax Commissioner nor taxpayer may carry forward a "determination of value" of property from one tax year to the next. *Olmsted Falls Bd. of Educ.*, 2009-Ohio-2461 at ¶ 16. The issue of value has been described by this Court as the "ultimate issue," and therefore the determination of value in one year cannot be simply carried over to the next. *Worthington City Schs. Bd. of Educ. v. Franklin County Bd. of Revision*, 124 Ohio St.3d 27, 32, 2009-Ohio-5932. This line of precedent does not hold that information obtained by the Tax Commissioner in a prior year's audit may not be used in subsequent years. Thus, Progressive Plastics' own authority fails to support their proposition of law.

Moreover, the *Olmstead Falls* line of precedent is inapposite to the facts of this case. The Tax Commissioner did not "carry forward" a determination of property value from 2003. No value from 2003 was applied preclusively for the tax assessments in 2004 and 2005. As explained above, rather than carrying-forward a property valuation from a prior tax year, the Tax Commissioner completely re-determined Progressive Plastics' property tax liability and performed a de novo computation of the true value of Progressive Plastics' inventory for 2004 and 2005.

When determining the value of property, the Tax Commissioner follows the requirements of R.C. 5711.21, and considers "the statements contained in the taxpayer's return and such other rules and evidence as will enable [him] to arrive at such true value." Contrary to Progressive Plastics' assertion that the Tax Commissioner may not use any information obtained from the 2003 audit for purposes of later assessments, the General Assembly has expressly provided that the Tax Commissioner can—indeed should—consider all of the evidence at his disposal. Under R.C. 5711.26, the Tax Commissioner is charged to utilize "*all* facts or information he possesses" in order to arrive at a final assessment of tax liability for personal property. (Emphasis added). Moreover, R.C. 5703.36 charges the Commissioner to "inform himself as best he can" when, as here, the taxpayer refuses to provide requested records and cooperate with the audit process.

In this case, the Tax Commissioner discharged his duties under R.C. 5711.21 and conducted a thorough and complete audit of Progressive Plastics' tax returns for 2004 and 2005. In conducting the audit, the auditor considered the 2004 and 2005 tax returns, the taxpayer's own statements, rules, and other evidence—including the previous year's audit findings. Record 3, Statutory Transcript 313-14, 454, 316. Thus, the auditor had a substantial base of knowledge for the values that were assigned to Progressive Plastics' inventory. Furthermore, the auditor

determined that the use of LIFO was inappropriate in 2004 and 2005 (as it had been in 2003), based upon the auditor's knowledge of inventory valuation methods, case law authority, and established audit practice as set forth in the Tax Commissioner's Ohio Personal Property Tax Manual. As the BTA held, the lack of a richer picture of Progressive Plastics' inventory and accounting methods for 2004 and 2005 falls squarely on Progressive Plastics—the company had multiple opportunities to submit evidence in support of its book values and accounting methods, and indeed was requested to do so, but chose not to, preferring instead to rely solely on the documentation and audit from 2003. See, *Progressive Plastics, Inc.*, BTA No. 2008-A-241, 2011 Ohio Tax LEXIS 1875, Record 27, at 6.

At the heart of the audit, the Tax Commissioner only needed to determine the amount underreported by Progressive Plastics in 2004 and 2005 because the taxpayer had admitted that it continued to use LIFO and did not aver that its inventory or business practices had changed. So, in order to come up with the true value in dollars and cents of Progressive Plastics' taxable inventory, the Tax Commissioner requested Progressive Plastics "inventory schedules," "chart of accounts," "fixed asset records" and other documents that would enable him to derive the true values that should have been reported on the tax returns. Record 3, Statutory Transcript 459 and 316. However, Progressive Plastics refused to provide the documents, despite repeated requests. *Id.*; *Progressive Plastics, Inc.*, BTA No. 2008-A-241, 2011 Ohio Tax LEXIS 1875, Record 27, at 2, 6. So, the auditor derived the dollar amounts of the underreported amount of inventory by applying a formula to the amounts actually reported on Progressive Plastics' 2004 and 2005. Record 3, Statutory Transcript at 314-316, 449-50.

The auditor started with the amounts reported on the 2004 and 2005 returns as the base numbers that provided the LIFO book values. *Id.* However, in order to reach the FIFO amount

that should have been reported, the auditor needed to add back the LIFO reserves to the LIFO book values reported on the returns. And Progressive Plastics refused to supply worksheets demonstrating the LIFO reserve calculations. *Id.* So, the Tax Commissioner followed the charge of the General Assembly to inform himself as best he could and issue the assessment utilizing all of the information at his disposal. R.C. 5703.36 (the Tax Commissioner shall "inform himself as best he can on the matters necessary to be known in order to discharge his duties."); R.C. 5711.26 ("For the purpose of issuing a final assessment the commissioner may utilize all facts or information he possesses.")

Therefore, in order to approximate the amount underreported for 2004 and 2005, the auditor applied a formula derived from the underreported portion (the LIFO reserves) in Progressive Plastics 2003 tax return. Record 3, Statutory Transcript 315-16. By use of this formula, the auditor was able to calculate a projected LIFO reserve for each tax year and add it to the reported LIFO value, thereby arriving at the taxable inventory value of FIFO for 2004 and 2005. Record 3, Statutory Transcript 316, 328-329, 331-332, 433. With this calculation the auditor was able to complete the brand-new, comprehensive amended preliminary assessment amounts for 2004 and 2005.

Appellee Tax Commissioner's Proposition of Law No. 3:

Application of stare decisis provides further support of the BTA's decision affirming the Commissioner's final determination of the true value of the appellant's inventory on the FIFO valuation method.

Progressive Plastics frames its issues in this appeal as "[1] whether the Tax Commissioner met its [sic] burden with regard to the 2004/2005 audit and [2] whether or not the LIFO method properly valued PPI's inventory for 2004/2005". Merit Brief of Apt. at 24. These questions are framed by Progressive Plastics as relevant—despite being addressed in 2003—because somehow the issues should have changed in 2004 and 2005. However, these two issues ultimately simply

boil down to two questions: whether the Tax Commissioner has a "burden" to meet, and whether LIFO is an appropriate measure of inventory for the type of inventory produced by Progressive Plastics. Progressive Plastics does not argue that the facts are different on these issues for 2004 and 2005. Nor could it—it refused to submit any evidence on these points. Nor does Progressive Plastics argue that the law changed—it hasn't.

Progressive Plastics has already asked the questions in this case and has been rebuked conclusively by the Tax Commissioner (three times), the BTA (twice), and the Eighth District Court of Appeals (once). And contrary to Progressive Plastics' assertion that "this Court has not had the opportunity to review the arguments raised," (Merit Brief of Apt. at 25) this Court had *exactly* the opportunity to review the questions raised, but found the issues not worthy of review. *Progressive Plastics, Inc.*, 123 Ohio St.3d 1408, 2009-Ohio-5031. The opinion of the Eighth District was correct, and the well-settled issues in this case offered this Court no opportunity to resolve a new question of law or a matter of great general interest.

Yet despite this Court's disinclination to hear the issues raised, Progressive Plastics feels that this Court *must* hear the argument, and has therefore cultivated this appeal as a legal stratagem to obtain a direct right to appeal the very issues that this Court declined on discretionary review. For tax year 2003, Progressive Plastics did not obtain the ruling that it had hoped for from the Tax Commissioner, the BTA, and the Court of Appeals. So for tax years 2004 and 2005, it has forced the Tax Commissioner and BTA to re-hear its claims in order to bypass the Court of Appeals and require this Court to review the issues. While R.C. 5717.04 permits a choice of appeal to the Court of Appeals or the Supreme Court from decisions of the BTA, Progressive Plastics has chosen "both." And, it is worthy of note that these self-same issues may be before this Court again—Progressive Plastics has appeals pending for tax years

2006 and 2007 before the BTA, raising exactly the same issues. See, *Progressive Plastics, Inc. v. Testa*, BTA No. 2009-1653 (pending).

Thus, it is unsurprising that the BTA found that Progressive Plastic's claims were barred by its failure to have adduced any new evidence for the 2004 and 2005 tax years than it did for the 2003 tax year, or to advance any new legal arguments. More surprising is that Progressive Plastics refuses to apprehend the power of the consistent and repeated declaration of its rights by every available taxing authority and adjudicatory body.

To be sure, the BTA used the terminology "collateral estoppel," but the Commissioner never relied on that doctrine in this case. Instead, the Commissioner buttressed his factual and legal analysis by asserting that the doctrine of stare decisis is appropriately applied here. This Court's case law confirms the reasonableness of the Commissioner's position. See, e.g., *State ex rel. Davis v. Public Emples. Ret. Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, ¶ 38; and *Brown v. Levin*, 119 Ohio St.3d 335, 2008-Ohio-4081, ¶ 26.

Application of stare decisis is appropriate because all of the issues that Progress Plastics raised in the proceedings below concerning its 2004 and 2005 tax year liability had been previously raised by Progressive Plastics at every level of audit and review for the 2003 tax year. In fact, even its *briefs* were essentially unchanged (except for changing the referenced tax years). As the BTA noted: "Progressive's initial briefs in both the 2003 tax year case and the 2004-2005 tax year case are essentially identical, arguably highlighting the identity of facts, issues and arguments involved in both appeals." *Progressive Plastics, Inc.*, BTA No. 2008-A-241, 2011 Ohio Tax LEXIS 1875, Record 27, at 6, fn. 4. And those issues were roundly rejected by every agency and adjudicatory body involved. See, e.g. *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 15 ("the Commissioner's 'finding' that the FIFO method of

valuation is a better indicator of the value of [Progressive Plastics'] inventory that LIFO is manifest in his final determination."); *Progressive Plastics, Inc.*, BTA No. 2006-M-1043, 2008 Ohio Tax LEXIS 884, at 11, *Progressive Plastics, Inc.*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 18 ("the Commissioner's finding that FIFO more accurately measured the true value of [Progressive Plastics'] inventory than LIFO was adequately supported by the evidence."); *Progressive Plastics, Inc.*, 123 Ohio St.3d 1408, 2009-Ohio-5031.

Thus, the Tax Commissioner requested simply that the BTA apply stare decisis, because the BTA and the Court of Appeals had issued previous decisions on these very same issues and the taxpayer had not presented any evidence of a change in the facts or law. Consistent with this Court's action in *Brown*, the BTA lawfully affirms decisions of the Tax Commissioner—even without a hearing—when prior precedent has decided the issue and the appellant provides no basis in fact or law to distinguish its case from the prior precedent. *Brown*, 119 Ohio St.3d 335, 2008-Ohio-4081, ¶ 26. Still, regardless of the foregoing, this Court need not reach the issue, because the BTA lawfully and appropriately affirmed the Tax Commissioner's determination on independent, substantive grounds.

CONCLUSION

For the above reasons, the Tax Commissioner urges the Court to affirm the decision of the Board of Tax Appeals.

Respectfully submitted,

MICHAEL DEWINE (0009181)
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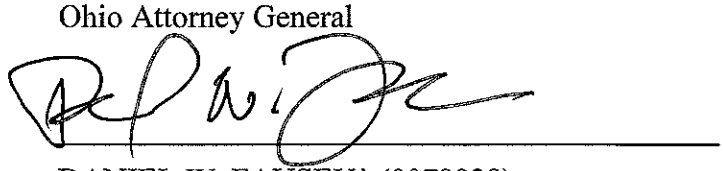

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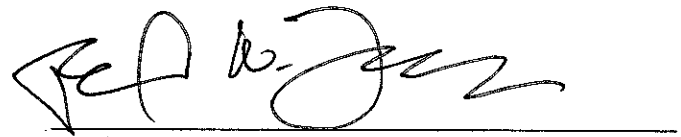
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was mailed to Christian Bates, Corsaro & Associates Company, LPA, 28039 Clemens Road, Westlake, Ohio 44145, counsel for appellant, this 13 day of March, 2012.



Daniel W. Fausey
Assistant Attorney General

In the

Supreme Court of Ohio

PROGRESSIVE PLASTICS INC.,	:	Case No. 2011-1793
Appellant,	:	
v.	:	On Appeal from the Ohio Board of Tax Appeals
JOSEPH W. TESTA [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO,	:	Board of Tax Appeals Case No. 2008-A-241
Appellee.	:	

APPENDIX TO MERIT BRIEF OF APPELLEE JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

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5703.36 Commissioner to obtain information.

If any company, firm, corporation, person, association, partnership, or public utility fails to make out and deliver to the tax commissioner any statement required by law, or to furnish the commissioner with any information requested, the commissioner shall inform himself as best he can on the matters necessary to be known in order to discharge his duties.

Effective Date: 10-01-1953

5711.21 Rules governing assessments.

(A) In assessing taxable property the assessor shall be governed by the rules of assessment prescribed by sections 5711.01 to 5711.36 of the Revised Code. Wherever any taxable property is required to be assessed at its true value in money or at any percentage of true value, the assessor shall be guided by the statements contained in the taxpayer's return and such other rules and evidence as will enable the assessor to arrive at such true value. Wherever the income yield of taxable property is required to be assessed, and the method of determining between income and return or distribution of principal, or that of allocating expenses in determining net income, or that of ascertaining the source from which partial distributions of income have been made is not expressly prescribed by sections 5711.01 to 5711.36 of the Revised Code, the assessor shall be guided by the statements contained in the taxpayer's return and such general rules as the tax commissioner adopts to enable the assessor to make such determination.

(B) For tax years before tax year 2009, the true value of the boilers, machinery, equipment, and any personal property used to generate or distribute the electricity shall be the sum of the following:

(1) The true value of the property as it would be determined under this chapter if none of the electricity were distributed to others multiplied by the per cent of the electricity generated in the preceding calendar year that was used by the person who generated it; plus

(2) The true value of the property that is production equipment as it would be determined for an electric company under section 5727.11 of the Revised Code multiplied by the per cent of the electricity generated in the preceding calendar year that was not used by the person who generated it; plus

(3) The true value of the property that is not production equipment as it would be determined for an electric company under section 5727.11 of the Revised Code multiplied by the per cent of the electricity generated in the preceding calendar year that was not used by the person who generated it.

(C) For tax years before tax year 2009, the true value of personal property leased to a public utility or interexchange telecommunications company as defined in section 5727.01 of the Revised Code and used by the utility or interexchange telecommunications company directly in the rendition of a public utility service as defined in division (P) of section 5739.01 of the Revised Code shall be determined in the same manner that the true value of such property is determined under section 5727.11 of the Revised Code if owned by the public utility or interexchange telecommunications company.

Effective Date: 12-31-1989; 06-30-2005

5711.25 Procedure in dealing with assessment certificates - final certificates.

On or before the second Monday of August, annually, the tax commissioner shall transmit to the county auditor of each county the preliminary assessment certificates pertaining to the auditor's county of taxpayers having taxable property in more than one county. The commissioner shall transmit to the auditor any amended assessment certificate issued by the commissioner, and the auditor shall transmit to the commissioner copies of all amended assessment certificates made and issued by the auditor. Each preliminary assessment certificate, and if amended such preliminary assessment certificate as last amended, shall become final on the second Monday of August of the second year after the filing of a return with the county auditor or after the certification of the preliminary assessment certificate, or sixty days after the certification of an amended assessment certificate which has been issued less than sixty days prior to such second Monday of August; unless prior to the expiration of said period or extended period one of the following occurred:

(A) A final assessment certificate as to the taxpayer represented thereby has been issued pursuant to section 5711.26 of the Revised Code;

(B) Such taxpayer in writing has waived such time limitation and consented to the issuance of the taxpayer's assessment certificate after the expiration of such time limitation, in which case the assessment certificate issued after the expiration of such time limitation, if an amended preliminary assessment certificate, shall become final sixty days after the mailing of the notice of such assessment if no petition for reassessment of the assessment has been filed pursuant to section 5711.31 of the Revised Code;

(C) A petition for reassessment of the assessment represented thereby has been filed pursuant to section 5711.31 of the Revised Code, in which event the filing of such petition shall waive such time limitation and be a consent to the issuance of the petitioner's final assessment certificate at the time, under the circumstances, and by the authority provided by any law relating to further administrative or judicial review of the assessment represented thereby; provided that in the event of the dismissal of such petition by the petitioner, the assessment shall become final as provided in this section as though no petition for reassessment had been filed. This section does not deprive any taxpayer who has not received the notice prescribed by section 5711.31 of the Revised Code at least sixty days prior to the expiration of such period of limitation of the right to file such petition for reassessment. This section shall apply to all assessments made and certified under sections 5711.01 to 5711.36, 5725.08, and 5725.16 of the Revised Code.

The assessment certificates and copies thereof mentioned in this section shall not be open to public inspection.

Effective Date: 09-29-2000

5711.26 Commissioner may make certain final assessments.

Except for taxable property concerning the assessment of which an appeal has been filed under section 5717.02 of the Revised Code, the tax commissioner may, within the time limitation in section 5711.25 of the Revised Code, and shall, upon application filed within such time limitation in accordance with the requirements of this section, finally assess the taxable property required to be returned by any taxpayer, financial institution, dealer in intangibles, or domestic insurance company as to which a preliminary or amended assessment has been made by or certified to a county treasurer or certified to the auditor of state or as to which the preliminary assessment is evidenced by a return filed with a county auditor for any prior year; and the commissioner may finally assess the taxable property of a taxpayer, financial institution, dealer in intangibles, or domestic insurance company who has failed to make a return to a county auditor or to the department of taxation in any such year. Application for final assessment shall be filed with the tax commissioner in person or by certified mail. If the application is filed by certified mail, the date of the United States postmark placed on the sender's receipt by the postal employee to whom the application is presented shall be treated as the date of filing. The application shall have attached thereto and incorporated therein by reference a true copy of the most recent preliminary or amended assessment, whether evidenced by certificate or return, to which correction is sought through the issuance of a final assessment certificate. The application shall also have attached thereto and incorporated therein by reference evidence establishing that the taxes, and any penalties and interest thereon, due on such preliminary or amended assessment have been paid. By filing such application within the time prescribed by section 5711.25 of the Revised Code, the taxpayer has waived such time limitation and consented to the issuance of his assessment certificate after the expiration of such time limitation.

For the purpose of issuing a final assessment the commissioner may utilize all facts or information he possesses, and shall certify in the manner prescribed by law a final assessment certificate in such form as the case may require, giving notice thereof by mail to the taxpayer, financial institution, dealer in intangibles, or domestic insurance company. Such final assessment certificate shall set forth, as to each year covered, the amount of the final assessment as to each class of property and the amount of the corresponding preliminary or last amended assessment. If no preliminary or amended assessment was made, the amount listed in the taxpayer's return for each such class of property shall be shown. If the amount of any final assessment of any such class for any year exceeds the amount of the preliminary or amended assessment of such class for such year, the difference shall be designated a "deficiency," and if no preliminary or amended assessment has been made, each item in the final assessment certificate shall be so designated. If the final assessment of any such class for any such year is less in amount than the preliminary or amended assessment thereof for such year, the difference shall be designated an "excess." The commissioner shall add to each such deficiency assessment the penalty provided by law, computed on the amount of such deficiency.

A copy of the final assessment certificate shall be transmitted to the treasurer of state or the proper county auditor, who shall make any corrections to his records and tax lists and duplicates required in accordance therewith and proceed as prescribed by section 5711.32 or 5725.22 of the Revised Code.

An appeal may be taken from any assessment authorized by this section to the board of tax appeals as provided by section 5717.02 of the Revised Code. When such an appeal is filed and the notice of appeal filed with the commissioner has attached thereto and incorporated therein by reference a true

copy of any assessment authorized by this section as required by section 5717.02 of the Revised Code, the commissioner shall notify the treasurer of state or the auditor and treasurer of each county having any part of such assessment entered on the tax list or duplicate.

Upon the final determination of an appeal which may be taken from an assessment authorized by this section, the commissioner shall notify the treasurer of state or the proper county auditor of such final determination. The notification may be in the form of a corrected assessment certificate. Upon receipt of the notification, the treasurer of state or the county auditor shall make any corrections to his records and tax lists and duplicates required in accordance therewith and proceed as prescribed by section 5711.32 or 5725.22 of the Revised Code.

The assessment certificates mentioned in this section, and the copies thereof, shall not be open to public inspection.

Effective Date: 07-01-1985

5717.04 Appeal from decision of board of tax appeals to supreme court - parties who may appeal - certification.

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be sent, by the director of budget and management if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be sent, or by any other person to whom the board sent the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the tax commissioner or all persons to whom the decision of the board appealed from is required by such section to be sent, other than the appellant, shall be made appellees. Unless

waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

Amended by 128th General Assembly File No. 9, HB 1, § 101.01, eff. 10/16/2009.

Effective Date: 10-05-1987