

ORIGINAL

In the  
**Supreme Court of Ohio**

PROGRESSIVE PLASTICS INC.,

Appellant,

v.

RICHARD A. LEVIN [JOSEPH W. TESTA],  
TAX COMMISSIONER OF OHIO,

Appellee.

: Case No. 2011-1793  
:  
:  
: On Appeal from the  
: Ohio Board of Tax Appeals  
:  
: Board of Tax Appeals  
: Case No. 2008-A-241  
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**MEMORANDUM IN OPPOSITION OF APPELLEE  
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO  
TO APPELLANT'S MOTION FOR THE SUPREME COURT TO HEAR ORAL  
ARGUMENT**

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SUPREME COURT OF OHIO

## MEMORANDUM IN OPPOSITION

This case does not merit this Court's full-panel review. This *ad valorem* Ohio personal property tax case calls for the application of well-settled law to facts that have been reviewed twice by the Tax Commissioner, twice by the BTA, once by the Eighth District Court of Appeals, and found unworthy of discretionary review by this Court. And the Court's resolution of this case will not serve as a guide for courts and taxpayers in the future, because this appeal concerns a practically "dead tax"—phased out wholly for general taxpayers by 2008. Further, the appeal presents a narrow and well-decided issue about the taxpayer's use of a method of inventory valuation ("Last-in-First-Out") that has been repeatedly disfavored by this Court as providing an "unrealistic picture" of inventory value. *R.H. Macy Co., Inc. v. Schneider*, 176 Ohio St. 94, 97 (1964); *Champion Spark Plug Co. v. Lindley*, 6 Ohio St.3d 56, 57 (1983).

This Court declined Progressive Plastics' previous invitation to revisit the same valuation issues raised in this appeal for the tax year immediately prior to this appeal. *Progressive Plastics, Inc. v. Levin*, 123 Ohio St.3d 1408, 2009-Ohio-5031. That case came to this Court on discretionary review of the Eighth District Court of Appeals' opinion, which affirmed the Board of Tax Appeals which, in turn, had affirmed the Tax Commissioner's final determination on Progressive Plastics' inventory valuations. *Progressive Plastics, Inc. v. Levin*, 8th Dist. No. 91614, 2009-Ohio-2033; *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. This Court determined that the case did not merit review under S.Ct.Prac.R. 2.1(3) (requiring a meritorious appeal to present a "question of public or great general interest").

So, having failed to interest this Court in taking its discretionary appeal of the prior year, Progressive Plastics appealed the following years' assessments as of right to this Court under R.C. 5717.04. However, once the case reached this Court it was, by rule, referred to a Master

Commissioner, as are all appeals to this Court from the Board of Tax Appeals. S.Ct. Prac. R. 9.7(A). Cases like this are the reason for the rule—this Court need not expend its time on a case that calls for the straightforward application of settled law and the rehashing of facts already reviewed on multiple occasions. By rule, the case would be heard by the full Court only if the Court, sua sponte, determined that the case warrants such attention. *Id.* The Court did not do so in this case.

Despite the Court’s refusal to accept the prior case on discretionary appeal, and despite the Court’s decision not to affirmatively schedule the case for full Court review, Progressive Plastics urges that the Court must hear its arguments full-panel. Tellingly, however, Progressive Plastics’ motion provides no grounds in support of its insistence. And, indeed, there are none.

First of all, this case is not of great general interest—it will not guide the future course of the law in Ohio, because it concerns a tax that was phased out for general taxpayers as of 2008.<sup>1</sup> Upon review of active personal property tax audits, the Tax Commissioner could not find any other taxpayer that has raised a similar LIFO valuation challenge. With the passing of the statute of limitations for personal property tax general taxpayers, it is highly unlikely that the Tax

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<sup>1</sup> See, e.g., 5711.22(G):

Unless otherwise provided by law, all other personal property used in business that has not been legally regarded as an improvement on land and considered in arriving at the value of the real property assessed for taxation shall be listed and assessed at the following percentages of true value in money:

- (1) For tax year 2005, twenty-five per cent of true value;
- (2) For tax year 2006, eighteen and three-fourths per cent of true value;
- (3) For tax year 2007, twelve and one-half per cent of true value;
- (4) For tax year 2008, six and one-fourth per cent of true value;
- (5) For tax year 2009 and each tax year thereafter, zero per cent of true value

Commissioner will issue any further assessment involving this issue. Thus, the ruling in this case is unlikely to affect any other personal property tax cases, other than Progressive Plastics' own. Moreover, the issues in this case follow a well-travelled road and are firmly-settled by this Court's prior precedent.

In its first proposition of law, Progressive Plastics asserts 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, which Progressive Plastics asserts is "prima facie" evidence of value. But this Court has already repeatedly held that the Tax Commissioner has no such burden. *Champion Spark Plug Co.*, 6 Ohio St.3d at 57; *R.H. Macy Co.*, 176 Ohio St. at 97. 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.*, 6 Ohio St.3d at 57.

The Court held that the taxpayer's method can be used as evidence of true value "only when the Tax Commissioner has failed to find that such book value is greater or less than true value in money of such property." Id., quoting *Youngstown Sheet & Tube Co.*, 44 Ohio St.2d 96 (1975) (emphasis in original). Instead, 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*, 21 Ohio St.3d 66 (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. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511 at ¶ 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. Thus, Progressive Plastics' first proposition of law has already been addressed and decided by this Court.

In its second proposition of law, Progressive Plastics attempts to manufacture a legal issue by misrepresenting the holding of *Olmstead Falls*, 122 Ohio St.3d 134, 2009-Ohio-2461. In *Olmstead Falls*, the Court held that neither the taxpayer nor the Tax Commissioner could use a determination of the value of certain property for one tax year as a binding conclusion of value for tax purposes in subsequent years. *Id.* at ¶ 16. In cases after *Olmstead Falls*, this Court explained that the determination of the value of property is the "ultimate issue" in tax cases and must be made anew for each tax year. See, e.g., *Worthington City Schs. Bd. of Educ. v. Franklin County Bd. of Revision*, 124 Ohio St.3d 27, 2009-Ohio-5932, ¶ 24. In this case, the Tax Commissioner *did* make a new value determination of the taxable value of Progressive Plastics' manufacturing inventory. Progressive Plastics does not dispute this fact. Instead, Progressive Plastics asserts that the Tax Commissioner could not use information obtained in prior years' audits (in conjunction with new information) to conduct a new determination of value for the tax year at issue under the holding of *Olmstead Falls*. This proposition falls flat. As explained above, *Olmstead Falls* stands for no such proposition. Indeed, it could not, given the Tax Commissioner's statutory mandate to examine all evidence that he possesses (R.C. 5711.26) and to inform himself as best he can when the taxpayer fails to provide information in support of its position (R.C. 5703.36). Thus, Progressive Plastics proposition of law never gets off the ground.

Finally, Progressive Plastics challenges the Tax Commissioner's application of the "First-In, First-Out" inventory valuation methodology to determine the true value of its inventory—an issue on which Progressive Plastics *introduced absolutely no evidence*. Indeed, Progressive Plastics offered *no* new evidence in this case of its inventory practices, valuations, or anything

else to show error on the part of the Tax Commissioner. Yet, somehow, Progressive Plastics wishes this Court to engage in a factual review of the correctness of the Tax Commissioner's determination of the appropriateness of his valuation method.

This Court need not travel that same fact-bound road that the Tax Commissioner, the BTA, and Court of Appeals have already traversed. *Progressive Plastics, Inc. v. Levin*, 8th Dist. No. 91614, 2009-Ohio-2033; *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. v. Levin*, BTA No. 2008-A-241, 2011 Ohio Tax LEXIS 1875 (Sept. 20, 2011), Record 27, at 7. As explained in the Tax Commissioner's merit brief, the Tax Commissioner relied on substantive and credible evidence, in the record of this case, to find that the First-In, First-Out inventory valuation method more appropriately reflected the true value of Progressive Plastics' inventory. See Tax Commissioner's Merit Brief at 10-19.

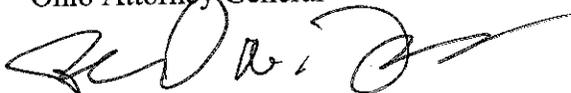
Moreover, the Tax Commissioner's method more accurately reflected Progressive Plastics' actual practices, as held by the BTA and the Court of Appeals. *Progressive Plastics, Inc. v. Levin*, 8th Dist. No. 91614, 2009-Ohio-2033 at ¶ 18-19 ("the evidence PPI did provide to the Department indicated that FIFO was, in fact, the appropriate method of valuing its inventory.") And, perhaps most importantly, the Tax Commissioner's determination that the FIFO method was more appropriate than LIFO follows the precedent of this Court that LIFO is usually not a good indicator of value and does not accord with the best evidence of value—a recent arm's-length sale. See, e.g., *R. H. Macy* at 96; *Grabler Manufacturing Co. v. Kosydar*, 43 Ohio St.2d 75, 78, (1975); *Shiloh Automotive Inc.*, 2008-Ohio-68, at ¶20; *Strongsville Bd. of Educ. v. Cuyahoga County Bd. of Revision*, 112 Ohio St. 3d 309, 2007-Ohio-6, ¶12.

## CONCLUSION

For the foregoing reasons, the Tax Commissioner respectfully submits that this case does not warrant full-Court consideration. Accordingly, Progressive Plastics' motion should be denied.

Respectfully submitted,

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Ohio Attorney General



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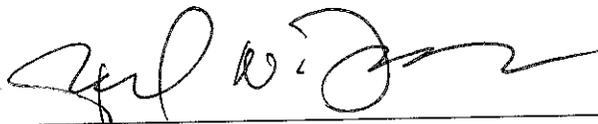
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Tax Commissioner of Ohio

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was mailed to Christian Bates, Corsaro & Associates Company, LPA, 28039 Clemens Road, Westlake, Ohio 44145, counsel for appellant, this 12 day of April, 2012.



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Daniel W. Fausey  
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